

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ANDREW MORET,)
)
 Petitioner,)
)
 vs.) Case No. 12-3888
)
 BAKER DISTRIBUTING CO., LLC,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

A formal hearing was conducted in this case on March 5, 2013, in Jacksonville, Florida, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Andrew Guy Moret, pro se
329 Van Gogh Circle
Ponte Vedra, Florida 32081

For Respondent: Patrick G. DeBlasio, Esquire
Theresa M. Vreeland, Esquire
Littler Mendelson, P.C.
Suite 1500
2 South Biscayne Boulevard
Miami, Florida 33131

STATEMENT OF THE ISSUES

The issues are whether Respondent, Baker Distributing Co., LLC ("Baker") committed unlawful employment practices contrary to section 760.10, Florida Statutes (2012),^{1/} by discriminating

against Petitioner based on his race or national origin and/or whether Baker retaliated against Petitioner for complaining of discriminatory conduct by discharging Petitioner from his employment.

PRELIMINARY STATEMENT

On or about January 20, 2012, Petitioner Andrew Guy Moret ("Petitioner") filed with the Florida Commission on Human Relations ("FCHR") a Charge of Discrimination against Baker. 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 am mixed race, Hispanic. I was hired by Respondent as a warehouse man on 08/02/2010. Don Crenshaw was my supervisor and throughout my employment he would make fun of Hispanics accents. This was done over the two-way radios for everyone to hear so there are many witnesses. I complained to him about his discriminatory behavior but it still continued. After my complaint was made, I was given a drug test and told to "pull copper" more than the Respondent's policy of no more than twice a week. After my complaining to Crenshaw he said, "I didn't know you were a 'spic', get back to work." During the time Crenshaw thought I was non-Hispanic he confided in me that he was a neo-Nazi in hiding. In further retaliation, I was terminated. I asked for a Human Resources meeting and instead received immediate termination. I believe I have been discriminated against because of my Hispanic origin, complained about it and then was retaliated against as indicated in violation of Title VII of the Civil Rights Act of 1964, as amended.

I am Hispanic and African American. I was terminated on the same day I asked for a Human Resources meeting to stop Don Crenshaw.

The FCHR investigated Petitioner's Complaint. In a letter dated June 29, 2012, the FCHR issued its determination that there was reasonable cause to believe that an unlawful employment practice occurred.

On July 20, 2012, Petitioner timely filed a Petition for Relief with the FCHR. On December 4, 2012, the FCHR referred the case to the Division of Administrative Hearings ("DOAH"). The case was originally scheduled for hearing on February 5, 2013. One continuance was granted. The hearing was ultimately held on March 5, 2013.

At the hearing, Petitioner testified on his own behalf. Petitioner's Composite Exhibit 1 was admitted into evidence. Respondent presented the testimony of Don Crenshaw, Baker's Jacksonville warehouse manager, and of Colin Dees, Baker's director of distribution. Respondent's Exhibits 1 and 2 and Composite Exhibit 3 were admitted into evidence.^{2/}

The one-volume transcript of the hearing was filed at DOAH on April 3, 2013. Respondent timely filed a Proposed Recommended Order on April 15, 2013. Petitioner had filed a short document styled "Proposed Recommended Order," actually

more in the nature of a closing argument, on March 12, 2013, prior to the filing of the transcript at DOAH. Petitioner filed nothing further after the filing of the transcript.

FINDINGS OF FACT

1. Baker is an employer as that term is defined in subsection 760.02(7), Florida Statutes. Baker markets and distributes air-conditioning, refrigeration and heating equipment, as well as parts and supplies for that equipment.

2. Baker has put in place written policies and procedures that prohibit, among other things, discrimination or harassment on the basis of race, national origin, or any other categories of persons protected by state or federal anti-discrimination laws. At the time of his hiring, Petitioner received a copy of Baker's employee handbook setting forth Baker's anti-discrimination and anti-retaliation policies.

3. Petitioner, who identifies himself as mixed race, Hispanic and African-American, was hired by Baker on August 2, 2010, as a temporary warehouse employee at its Jacksonville distribution facility. Because of the quality of his work, Petitioner was soon thereafter retained as a full-time Baker employee by Don Crenshaw, the warehouse manager of the Jacksonville facility.

4. Petitioner and Mr. Crenshaw became friendly enough to go to lunch together on at least a dozen occasions.

Mr. Crenshaw also helped Petitioner with some personal matters, including helping bail Petitioner out of jail on one occasion and taking him to orthodontist appointments.

5. The parties agree that Petitioner's relationship with Mr. Crenshaw and with Baker in general soured in August 2011. Petitioner claims that his problems began when Mr. Crenshaw overheard him speaking Spanish with a fellow employee. Petitioner testified that Mr. Crenshaw made fun of him after learning of his Hispanic heritage and treated him differently than when he believed Petitioner was white.

6. Petitioner testified that he complained to Mr. Crenshaw about making fun of his heritage. Petitioner stated that he was subjected to a "random" drug test two days later. He then noticed that hours were being shaved from his paychecks. Within two months, Petitioner had been fired. Petitioner offered no corroborating evidence to support any of these allegations.

7. Mr. Crenshaw categorically denied Petitioner's allegations and denied that Petitioner had ever complained about any discriminatory comments or actions. Mr. Crenshaw's denials are credited. Mr. Crenshaw stated that Petitioner's attitude changed after management declined his written demand for more money in August 2011. Mr. Crenshaw testified that Petitioner had been a good worker when he started at Baker, but that his attitude changed after his salary demand was rejected.

Mr. Crenshaw noted that Petitioner had become hostile towards him, "slamming my door open in the office wanting to talk about things."

8. Mr. Crenshaw denied Petitioner's claim that his hours were being shaved. Mr. Crenshaw testified that another employee, Robert Robinson, had complained that his time card was two hours short. Mr. Crenshaw pulled the records and found that Baker's administrator had made a mistake on Mr. Robinson's time. Mr. Robinson was given credit for the missing two hours.

9. This incident apparently gave Petitioner the idea that Baker was shaving hours on his time card. Mr. Crenshaw investigated, and made copies of all the time records for Petitioner, but could find no errors on Petitioner's time cards.

10. On October 20, 2011, two Baker employees reported to Mr. Crenshaw that Petitioner had changed the screen saver on a warehouse computer to read, "Baker. Sucks. Balls. Don-Key-Kong Balls." The employees told Mr. Crenshaw that they found the language offensive.

11. Mr. Crenshaw reported the incident to Angelia Hiers, Baker's vice president of human resources, and Colin Dees, Baker's director of distribution. Mr. Crenshaw, Ms. Hiers, and Mr. Dees met with Petitioner to discuss the incident. At the meeting, Petitioner did not deny that he was the author of the offensive language on the warehouse computer.

12. At the hearing, Petitioner admitted that he changed the message on the warehouse computer, but testified that he intended to write the message, "Baker blows away the competition." He stated that the character limit on the screensaver only allowed him to write, "Baker blows away the."

13. Mr. Crenshaw testified that after the employees complained to him, he went down to the warehouse and saw the offending language for himself. The language was as reported by the two employees.

14. Petitioner theorized that these employees must have changed his innocuous message of support for the company to the offensive language after Petitioner left the area. He could offer no evidence to confirm his theory.

15. Petitioner's version of these events is not credible on its face, and is rendered more unlikely by the fact that he did not relate his version during the meeting with Mr. Crenshaw, Ms. Hiers, and Mr. Dees, when doing so might have saved his job.

16. As the head of human resources, Ms. Hiers had the responsibility for Petitioner's discipline. She decided, with the agreement of Mr. Crenshaw and Mr. Dees, that Petitioner's actions constituted a violation of Baker's computer access policy.

17. Baker's computer access policy provided, in relevant part:

Any employee that allows or uses computers at Baker locations for purposes not directly attributed to business is subject to disciplinary action that may include dismissal. Non-business uses include, but are not limited to, playing games, Internet access for other than business reasons, and any display of offensive or pornographic information that may be in violation of the law.

18. Ms. Hiers concluded that Petitioner's use of the warehouse computer was in violation of the quoted policy. Because the warehouse computer was available to and could be seen by any employee working on the warehouse floor, Ms. Hiers also concluded that Petitioner's screensaver message also constituted harassment.

19. Based on Petitioner's actions, Ms. Hiers decided to terminate Petitioner's employment on October 20, 2011, the same day that the incident occurred.

20. Petitioner never complained of discriminatory treatment or harassment to any supervisor at Baker. On this point, Mr. Crenshaw's testimony is credited and Petitioner's testimony is found not to be credible.

21. Petitioner offered no credible evidence disputing the legitimate, non-discriminatory reasons given by Baker for his termination.

22. Petitioner offered no credible evidence that Baker's stated reasons for his termination were a pretext for race discrimination or national origin discrimination.

23. Evidence presented at the hearing indicated that Baker enforces its harassment policies without reference to an employee's race or national origin. Baker discharged a white male employee due to a complaint of harassment filed by Petitioner. Petitioner alleged that the employee had touched him while reaching for a radio on a table. Ms. Hiers investigated the incident and terminated the white male employee.

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

25. Petitioner offered no credible evidence that his dismissal from employment was in retaliation for any complaint of discriminatory employment practices that he made while an employee of Baker.

CONCLUSIONS OF LAW

26. 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.

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

28. 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.

* * *

(7) It is an unlawful employment practice for an employer... to discriminate against any person because that person has opposed any practice which is an unlawful employment practice under this section, or because that person has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section.

29. Baker 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.

30. 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, Florida Statutes. 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).

31. 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).

32. 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) Baker 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 Services Corp., 144 F.3d 1438, 1441 (11th Cir. 1998); McKenzie v. EAP Mgmt., 40 F. Supp. 2d 1369, 1374-75 (S.D. Fla. 1999).

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

34. Petitioner asserted that he is a member of a protected group, in that he is of Hispanic and African-American ancestry. Baker offered no basis for doubting Petitioner's assertion on this point. Petitioner was subject to an adverse employment action in that he was terminated from his position as a warehouse employee with Baker. Petitioner was qualified to perform the job of warehouse employee. The evidence established that Petitioner's job performance had been generally satisfactory prior to August 2011, and then deteriorated somewhat between August and October 2011, after Petitioner was turned down for a pay increase.

35. 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)^{3/}.

36. Petitioner presented insufficient credible evidence that his race or national origin played any role in the business decisions made by Baker. He presented no evidence that any similarly situated employee was treated any better than was Petitioner. In fact, the evidence established that Baker discharged a white male employee on a harassment claim made by

Petitioner, indicating that Baker enforced its employment policies without reference to race or national origin.

37. Petitioner claimed that he himself was treated in disparate fashion, in that Mr. Crehshaw treated him well when he believed that Petitioner was white but ridiculed him after learning Petitioner was Hispanic. Petitioner's testimony as to the behavior of Mr. Crenshaw was not credible enough to be believed in the absence of any corroborating evidence. Having failed to establish the disparate treatment element, Petitioner has not established a prima facie case of employment discrimination.

38. Even if Petitioner had met the burden, Baker presented evidence of legitimate, non-discriminatory reasons for Petitioner's termination. Baker's written policies forbid harassment and set forth specific criteria governing employees' use of company computers. Petitioner was aware of these policies and was aware that violation of them was cause for termination. Petitioner's gratuitous act of crude disparagement of the name of his employer, placed on a computer screensaver that could be read by any fellow employee on the warehouse floor, was certainly in violation of Baker's written policies and provided ample cause for his dismissal. Petitioner's race or national origin had nothing to do with Baker's decision to terminate his employment.

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 Baker Distributing Co., LLC, did not commit any unlawful employment practices and dismissing the Petition for Relief filed in this case.

DONE AND ENTERED this 24th day of May, 2013, in Tallahassee, Leon County, Florida.



LAWRENCE P. STEVENSON
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of May, 2013.

ENDNOTES

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

^{2/} Respondent's Composite Exhibit 3 was filed electronically at DOAH prior to the hearing. No hard copy of the exhibit was produced at the hearing, and the undersigned determined that it

would be a waste of state resources to print a hard copy of this 111 page document to travel with the file. Respondent's Composite Exhibit 3 may be viewed at:
http://www.doah.state.fl.us/DocDoc/2012/003888/12003888_0_02262013_05595818_e.pdf.

^{3/} The Eleventh Circuit has questioned the "nearly identical" standard enunciated in Maniccia, but has in recent years 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.

COPIES FURNISHED:

Denise Crawford, Agency Clerk
Florida Commission on Human Relations
Suite 100
2009 Apalachee Parkway
Tallahassee, Florida 32301

Andrew Guy Moret
329 Van Gogh Circle
Ponte Vedra, Florida 32081

Theresa M. Vreeland, Esquire
Littler Mendelson, PC
Suite 1500
2 South Biscayne Boulevard
Miami, Florida 33131

Cheyenne Costilla, Interim General Counsel
Florida Commission on Human Relations
Suite 100
2009 Apalachee Parkway
Tallahassee, Florida 32301

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.