STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RAY NELOMS,

Petitioner,

vs. Case No. 13-1972

CITY OF DELAND,

Respondent.
_____________________________/

RECOMMENDED ORDER

Pursuant to notice, this case was heard on July 18, 2013, in DeLand, Florida, before E. Gary Early, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Ray Neloms, pro se
763 Aurora Street, No. 2
St. Paul, Minnesota 55104

For Respondent: Michael H. Bowling, Esquire
Bell & Roper, P.A.
2707 East Jefferson Street
Orlando, Florida 32803

STATEMENT OF THE ISSUE

Whether the Petitioner was subject to an unlawful employment practice by Respondent, the City of DeLand, on account of his race, or as retaliation for engaging in protected activities in violation of section 760.10, Florida Statutes.

PRELIMINARY STATEMENT

On September 10, 2012, Petitioner, Ray Neloms, filed a complaint of discrimination with the Florida Commission on Human Relations (FCHR) which alleged that Respondent, the City of DeLand (City or Respondent), violated section 760.10, Florida Statutes, by discriminating against him on the basis of his race. The complaint of discrimination also alleged that Petitioner was retaliated against as a result of his successful defense of an unlawful termination that resulted in his reinstatement as an employee of the City.

On April 19, 2013, the FCHR issued a Determination: No Cause and a Notice of Determination: No Cause, by which the FCHR determined that reasonable cause did not exist to believe that an unlawful employment practice occurred. On May 22, 2013, Petitioner filed a Petition for Relief with the FCHR. The Petition was transmitted to the Division of Administrative Hearings to conduct a final hearing.

The final hearing was set for July 18, 2013, and was held as scheduled.

At the final hearing, Petitioner testified on his own behalf, and presented the testimony of George Schmock, a foreman with the City's Utilities Department; Mark Swanson, a Maintenance Worker III with the City's Utilities Department; and Paris Hayden, a foreman with the City's Parks and Recreation

Department. Petitioner's Exhibits A through K were received into evidence. Respondent presented the testimony of Mikel Grimm, a foreman with the City's Utilities Department, and a member of the interview team for the equipment operator position that forms a basis for the complaint of discrimination; Obadiah Henry, a Utility Locator with the City's Utilities Department, and a member of the interview team; Danny Pope, a supervisor with the City, and a member of the interview team; James Ailes, Jr., the City Utilities Director; and Mark Hayward, the City Human Resources Director. Respondent's Exhibits 1-14 were received into evidence.

A one-volume Transcript of the hearing was filed on July 30, 2013. The parties timely filed their post-hearing Proposed Recommended Orders, which have been considered in the preparation of this Recommended Order. References to statutes are to Florida Statutes (2012) unless otherwise noted.

FINDINGS OF FACT

1. Petitioner, who was at all times relevant to this matter an employee of the City, is African-American.

2. Respondent is a Florida municipality established pursuant to Article VIII, § 2(b), Florida Constitution and chapter 166, Florida Statutes. Respondent employs more than 15 full-time employees at any given time.

3. Petitioner was initially employed by the City in April 2010 as a Maintenance Worker II in the Parks and Recreation Department.

4. On February 21, 2012, Petitioner was terminated by the City for failing to report to work for a period of days. He was considered by the City to be a "no call/no show."

5. Petitioner filed a complaint with the federal Department of Labor (DOL), in which he asserted that his absence from work was authorized under the Family Medical Leave Act (FMLA).

6. On April 26, 2012, Petitioner filed a complaint of discrimination with the federal Equal Employment Opportunity Commission (EEOC) alleging that the City's decision to terminate him was based on race and age discrimination. The complaint was transferred to the FCHR for disposition.

7. The DOL determined that Petitioner's absence from work was warranted by application of the FMLA, upon which the DOL and the City reached an agreement to resolve the DOL complaint. On July 9, 2012, as part of the agreement, Petitioner was reinstated as a Maintenance Worker II, with back pay and benefits. When the decision was made to reinstate Petitioner, Petitioner withdrew the FCHR complaint.

8. At the time of Petitioner's reinstatement, the City did not have an opening in its Parks and Recreation Department, his

previous position having been filled. The City did have an opening for a Maintenance Worker II in its Utilities Department.

9. The Utilities Department opening had been advertised, the interview process for the opening had been completed, and a candidate had been selected. However, as the result of the DOL settlement, Petitioner was selected to fill the position.

10. Petitioner was placed on the mowing crew, and was responsible for keeping areas around the City's lift stations, well houses, and wastewater plant mowed.

11. On July 13, 2012, the City issued a written reprimand to Petitioner. The reprimand related to Petitioner's complaints to the City Utilities Director, Mr. Ailes, regarding Petitioner's assignment to the mowing crew and his supervisory chain-of-command. The memorandum suggested that Petitioner was not "a team player." There was no evidence of further adverse action relating to Petitioner's job performance.

12. After Petitioner settled into the job, he performed well. He was a hard worker, and never had to be coaxed into working. Mr. Swanson described Petitioner as a "go-getter," who came up with more efficient ways of keeping up with the work and making the areas look nice. Mr. Swanson testified that it was good to have a third person on the mowing crew.

13. On or about July 13, 2012, an equipment operator position came open. It was advertised, and applications were accepted. Petitioner submitted an application for the position.

14. Petitioner was selected as one of five applicants to continue with the interview process.[1/] Among the applicants was Jose Alejo. Mr. Alejo is Hispanic. Petitioner and Mr. Alejo were employees of the City, and were considered as "in-house" candidates.

15. The interview team consisted of Mikel Grimm, a foreman with the City's Utilities Department; Obadiah Henry, a Utility Locator with the City's Utilities Department; and Danny Pope, a Supervisor with the City.

16. Mr. Henry had been a foreman with the City's Utilities Department before a voluntary break in service, and had extensive experience as an equipment operator. As a former foreman, Mr. Henry had been on numerous interview committees for positions including equipment operator. He was considered to be the best qualified to serve on the interview committee, even though committee members were typically at the foreman level or higher.

17. Mr. Henry is African-American. Mr. Grimm and Mr. Pope are white.

18. Petitioner had no "issues" with any of the members of the interview team, or with any of the other foremen in the Utilities Department.

19. Petitioner was working on the day that interviews were scheduled. He was taken off of his mower at between 11:00 a.m. and 12:00 p.m. for an interview scheduled for 2:00 p.m.

20. Interviews consisted of a short oral interview, followed by a practical test in which the applicants were tested on a dump truck and a backhoe. The applicants were to drive the dump truck through a sort of "obstacle course" and, using a backhoe, dig a hole to a pre-established specification.

21. The questions asked of each of the applicants during the interviews were identical.

22. The equipment used and the layout of the practical test performed by each of the applicants were identical.

23. Each of the members of the interview team independently prepared his own scoring evaluation, without comparison of notes, numbers, or scores of the other members. After the scoring was completed, the scores were tallied. Mr. Henry was surprised at how even the scores were between the evaluators for each of the applicants.

24. Each of the members of the interview team generally thought Mr. Alejo performed better in the interview. As to the practical test, Mr. Alejo "just proved it on the machine that he

was the better applicant." In short, Mr. Alejo simply dug a better hole. Mr. Henry noted that the decision was based on how the applicant performed on that day. While he acknowledged that Petitioner, or one of the other applicants, may have performed better on another day, "that's what I had to go off of was that day."

25. Mr. Henry testified credibly and convincingly that the interview team made the effort to handle the interviews in a professional and honest way. The interview team was not told by higher-level supervisors or anyone else who should be selected as the leading candidate. His testimony is credited.

26. Mr. Henry testified that if he had seen any evidence of racial bias, he would have reported it. He saw none.

27. The recommendation of the interview team was unanimous that the position of equipment operator should be offered to Mr. Alejo, who scored significantly higher than Petitioner.

28. The City accepted the recommendation of the interview team, and offered the position to Mr. Alejo, who accepted.[2/]

29. The interview process, using standardized questions and procedures, has been the practice of the City for more than six years. The purpose of the interview and practical test process was to make the hiring process more equal, rather than being based on a "gut feeling" or on how someone may have "felt

about the guy." The interview and selection process raises no issue of discriminatory of retaliatory bias in its application.

30. On or about September 14, 2012, Petitioner received an employee performance evaluation that Petitioner described as "a good evaluation."

31. During the period of time at issue in this proceeding, Petitioner did not complain to any co-worker or to supervisory staff that he was subject to discriminatory acts as an employee of the City.

32. On May 3, 2013, Petitioner voluntarily resigned from employment with the City. The reason given by Petitioner was that he wanted to return to Minnesota. Petitioner had lived in Minnesota for 30 years, and planned to move back and get a job driving a truck.

33. In his letter of resignation, Petitioner made no mention of any discriminatory or retaliatory act, stating that "[i]t has been a pleasure to work for the City."

34. The City currently employs six equipment operators. Of those, three are Hispanic, two are white, and one is African-American.

Ultimate Findings of Fact

35. The personnel decision to re-hire Petitioner to the position of Maintenance Worker II in the Utilities Department was made because there was an opening in that department. There

was no competent, substantial evidence adduced at the hearing to support a finding that the decision was made due to Petitioner's race, or in retaliation for Petitioner's earlier EEOC complaint.

36. The decision to hire an applicant other than Petitioner for the position of equipment operator was made after a reasonable and fair applicant interview and evaluation process that was done in accordance with the City's established and objective hiring practices.

37. There was no competent, substantial evidence adduced at the hearing that any persons who were not members of the Petitioner's protected class, i.e., African-American, were treated differently from Petitioner, or were not subject to similar personnel policies and practices.

38. There was no competent, substantial evidence adduced at the hearing that the City's decision to hire Mr. Alejo over Petitioner was made in retaliation for Petitioner's earlier EEOC complaint.

CONCLUSIONS OF LAW

39. Sections 120.569 and 120.57(1), Florida Statutes, grant the Division of Administrative Hearings jurisdiction over the subject matter of this proceeding and of the parties.

Discrimination

40. Section 760.10 provides, in pertinent 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.

41. Petitioner maintains that the City discriminated against him on account of his race.

42. Section 760.11(1) provides that "[a]ny person aggrieved by a violation of ss. 760.01-760.10 may file a complaint with the [FCHR] within 365 days of the alleged violation . . . ." Petitioner timely filed his complaint.

43. Section 760.11(7) provides that upon a determination by the FCHR that there is no probable cause to believe that a violation of the Florida Civil Rights Act of 1992 has occurred, "[t]he aggrieved person may request an administrative hearing under ss. 120.569 and 120.57, but any such request must be made within 35 days of the date of determination of reasonable cause. . . ." Following the FCHR determination of no cause, Petitioner timely filed his Petition for Relief requesting this hearing.

44. Chapter 760, Part I, is patterned after Title VII of the Civil Rights Act of 1964, as amended. When "a Florida

statute is modeled after a federal law on the same subject, the Florida statute will take on the same constructions as placed on its federal prototype." Brand v. Florida Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994); see also Valenzuela v. GlobeGround North America, LLC, 18 So. 3d 17 (Fla. 3rd DCA 2009); Fla. State Univ. v. Sondel, 685 So. 2d 923 (Fla. 1st DCA 1996); Fla. Dep't of Cmty. Aff. v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991).

45. Petitioner has the burden of proving by a preponderance of the evidence that the City committed an unlawful employment practice. See St. Louis v. Fla. Int'l Univ., 60 So. 3d 455 (Fla. 3rd DCA 2011); Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981).

46. Employees may prove discrimination by direct, statistical, or circumstantial evidence. Valenzuela v. GlobeGround North America, LLC, 18 So. 3d at 22.

47. Direct evidence is evidence that, if believed, would prove the existence of discriminatory intent without resort to inference or presumption. Denney v. City of Albany, 247 F.3d 1172, 1182 (11th Cir. 2001); Holifield v. Reno, 115 F.3d 1555, 1561 (11th Cir. 1997). Courts have held that "'only the most blatant remarks, whose intent could be nothing other than to discriminate . . .' will constitute direct evidence of

discrimination." Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d 1354, 1358-59 (11th Cir. 1999)(citations omitted).

48. The record of this proceeding contains no direct evidence of any racial bias on the part of the City at any level.

49. Petitioner presented no persuasive statistical evidence of discrimination by the City in its personnel decisions affecting Petitioner. Petitioner submitted a breakdown of all City employees by race and sex. However, such a broadly developed table, that includes positions that are not within the class occupied or sought by Petitioner, and without any testimony to provide some statistical context, does not constitute competent and substantial statistical evidence of racial bias. In the absence of some basis of comparison to measure against the raw numbers, such as the number of interested applicants for various positions, "[s]tatistics without any analytical foundation are 'virtually meaningless.'" Wilson v. B/E Aero., Inc., 376 F.3d 1079, 1089 (11th Cir. 2004) (citing Evans v. McClain of Ga., Inc., 131 F.3d 957, 963 (11th Cir. 1997)). Furthermore, the City's six equipment operator positions are held by three Hispanics, two whites, and one African-American. Such a distribution does not serve as statistical evidence of discrimination.

50. In the absence of any direct or statistical evidence of discriminatory intent, Petitioner must rely on circumstantial evidence of such intent. In McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and as refined in Texas Dep't of Cmty. Aff. v. Burdine, 450 U.S. 248 (1981) and St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993), the United States Supreme Court established the procedure for determining whether employment discrimination has occurred when employees rely upon circumstantial evidence of discriminatory intent.

51. Under McDonnell Douglas, Petitioner has the initial burden of establishing a prima facie case of unlawful discrimination. In the context of a promotional hiring decision, "to establish a prima facie case of discriminatory failure to promote, a plaintiff must prove: (1) that he is a member of a protected class; (2) that he was qualified for and applied for the promotion; (3) that he was rejected; and (4) that other equally or less qualified employees who were not members of the protected class were promoted." Denney v. City of Albany, 247 F.3d 1172, 1183 (11th Cir. 2001) (citing Combs v. Plantation Patterns, 106 F.3d 1519, 1539 n.11 (11th Cir. 1997)).

52. If Petitioner is able to prove his prima facie case by a preponderance of the evidence, the burden shifts to the City to articulate a legitimate, non-discriminatory reason for its employment decision. Texas Dep't of Cmty. Aff. v. Burdine,

450 U.S. at 255; Dep’t of Corr. v. Chandler, 582 So. 2d 1183 (Fla. 1st DCA 1991). An employer has the burden of production, not persuasion, to demonstrate to the finder of fact that the decision was non-discriminatory. Dep’t of Corr. v. Chandler, supra. This burden of production is "exceedingly light." Holifield v. Reno, 115 F.3d 1555, 1564 (11th Cir. 1997); Turnes v. Amsouth Bank, N.A., 36 F.3d 1057, 1061 (11th Cir. 1994).

53. If the employer produces evidence that the decision was non-discriminatory, then the complainant must establish that the proffered reason was not the true reason but merely a pretext for discrimination. St. Mary's Honor Center v. Hicks, 509 U.S. at 516-518. In order to satisfy this final step of the process, Petitioner 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.” Dep’t of Corr. v. Chandler, 582 So. 2d at 1186 (citing Tex. Dep't of Cmty. Aff. v. Burdine, 450 U.S. at 252-256)). The demonstration of pretext “merges with the plaintiff's ultimate burden of showing that the defendant intentionally discriminated against the plaintiff.” (citations omitted) Holifield v. Reno, 115 F.3d at 1565.

54. 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. In a proceeding

under the Civil Rights Act, "[w]e 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 at 1361. As set forth by the Eleventh Circuit Court of Appeals, "[t]he 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). Moreover, "[t]he employer's stated legitimate reason . . . does not have to be a reason that the judge or jurors would act on or approve." Dep't of Corr. v. Chandler, 582 So. 2d at 1187.

Prima Facie Case

55. Petitioner failed to prove a prima facie case that either Petitioner's initial placement as a Maintenance Worker II in the Utilities Department, or the decision to hire Mr. Alejo to fill the equipment operator position were motivated by discriminatory intent based on his race.

56. Petitioner is a member of a protected class.

57. Petitioner established that he was qualified to hold the position of equipment operator. He held a commercial driver's license, and had experience in operating the types of equipment expected for the job.

58. Where Petitioner has failed in the establishment of his prima facie case is his failure to demonstrate that other equally or less qualified employees were subject to personnel decisions that differed from those applied to him, or that he was passed over for the equipment operator position in favor of an applicant who was equally or less qualified than he.

59. Petitioner provided no evidence that the City acted inconsistently with the manner in which any person, regardless of race, would have been reinstated to employment. Petitioner was, as required by the resolution of the DOL complaint, placed into a position, identical in title, pay, and benefits. The fact that he was placed in the Utilities Department, rather than in the Parks and Recreation Department, was based exclusively on there being an open Maintenance Worker II position in the Utilities Department.

60. Petitioner provided no evidence that the City acted inconsistently with the manner in which any applicant, regardless of race, would have been hired to fill the position of equipment operator. Mr. Alejo (who is also a member of a protected class) was, on the day of the applicant interviews, the more qualified applicant.

61. In short, Petitioner failed to prove that his treatment as an employee of the City differed in any material way from the treatment afforded other employees, regardless of

their race. Therefore, Petitioner failed to prove a prima facie case of discrimination, and his petition for relief should be dismissed.

Legitimate, Non-discriminatory Reason

62. Assuming -- for the sake of argument -- that Petitioner made a prima facie showing, the burden would shift to the City to proffer a legitimate non-discriminatory reason for its action, which at this stage is a burden of production, not a burden of persuasion. Holland v. Washington Homes, Inc., 487 F.3d 208, 214 (4th Cir. 2007).

63. The City met its burden by producing credible, clear, and convincing testimony and evidence that Petitioner was placed into a position identical in title, pay, and benefits, to that held prior to his earlier wrongful termination. The fact the position was in a different, and potentially less desirable, department was a function of position availability, rather than race.

64. The City met its burden by producing credible, clear, and convincing testimony and evidence that the decision to hire Mr. Alejo to the position of equipment operator was done in accordance with established hiring practices. The process, including the selection of the interview team, was fair and objective. The evidence is convincing that the decision was

based solely on the performance of the applicants in the interview and practical test, and for no other reason.

65. Although the City's burden to refute Petitioner's prima facie case was light, the evidence showing the reasons for its personnel decisions to be legitimate and non-discriminatory was overwhelming.

Pretext

66. Assuming -- again, for the sake of argument -- that Petitioner made a prima facie showing, then upon the City's production of evidence of a legitimate non-discriminatory reason for its action, the burden shifted back to Petitioner to prove by a preponderance of the evidence that the City's stated reasons were not its true reasons, but were a pretext for discrimination. To do this, Petitioner would have to "prove '*both* that the reason was false, *and* that discrimination was the real reason' for the challenged conduct." Jiminez v. Mary Washington Coll., 57 F.3d 369, 378 (4th Cir. 1995) (citing St. Mary's Honor Center v. Hicks, 509 U.S. at 515)). (emphasis in original).

67. To show pretext, Petitioner "must be afforded the 'opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.'" Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000)

(citations omitted). Petitioner could accomplish this goal "by showing that the employer's proffered explanation is unworthy of credence." Texas Dep't of Cmty. Aff. v. Burdine, 450 U.S. at 256.

68. As applied to a hiring decision,

> . . . the case law establishes that a plaintiff cannot prove pretext merely by asserting that he was better qualified. Wilson v. B/E Aerospace, Inc., 376 F.3d 1079, 1090 (11th Cir. 2004); Dancy-Pratt v. Sch. Bd. of Miami Dade Cnty., No. 00-1382, 2001 U.S. Dist. LEXIS 24521, 2001 WL 1922063, *7 (S.D. Fla. Dec. 13, 2001); see also Cofield v. Goldkist, Inc., 267 F.3d 1264, 1269 (11th Cir. 2001) (holding that qualifications must be so superior that a reasonable fact-finder would conclude reason given for hiring another was pretextual); Deines v. Texas Dep't of Protective & Regulatory Servs., 164 F.3d 277, 280-81 (5th Cir. 1999) (holding that "disparities in qualifications must be of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question").

City of Miami v. Hervis, 65 So. 3d 1110, 1120 (Fla. 3d DCA 2011).

69. The evidence demonstrates that, for the specific position being filled, that of equipment operator, Mr. Alejo proved to the interview committee that he was the best-qualified applicant.

70. The method by which the position of equipment operator was filled was as objective as most hiring decisions can be.

Since the scores were determined by the impressions and observations of the members of the interview team, it did have a subjective element. That subjective element does not affect the foregoing findings regarding a lack of a discriminatory reason for the City's personnel decisions, since:

> . . . subjective reasons are sufficient, if legitimate. See City of Hollywood v. Hogan, 986 So. 2d 634, 644 (Fla. 4th DCA 2008); Chapman v. AI Transp., 229 F.3d 1012, 1034 (11th Cir. 2000) (finding that "[a] subjective reason is a legally sufficient, legitimate, nondiscriminatory reason if the defendant articulates a clear and reasonably specific factual basis upon which it based its subjective opinion").

City of Miami v. Hervis, 65 So. 3d at 1120.

71. The only evidence of pretext produced by Petitioner consisted of the "not a team player" memorandum in which Petitioner was reprimanded for questioning his work assignment and supervisory chain-of-command. The memorandum itself had no hint of a racial component, but was directed exclusively at issues of performance and compliance with City policy.

72. The record of this proceeding does not support a finding or a conclusion that the City's proffered explanation for its personnel decisions were false or not worthy of credence, nor does it support an inference that the explanation was pretextual.

Retaliation

73. Section 760.10(7) provides, in pertinent part, that:

> (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.

74. "Section 760.10(7), Florida Statutes, is virtually identical to its Federal Title VII counterpart, 42 U.S.C. § 2000e-3(a). The FCRA [Florida Civil Rights Act] is patterned after Title VII; federal case law on Title VII applies to FCRA claims." Hinton v. Supervision Int'l, Inc., 942 So. 2d 986, 989 (Fla. 5th DCA 2006) (citing Guess v. City of Miramar, 889 So. 2d 840, 846, n.2 (Fla. 4th DCA 2005)).

75. In construing 42 U.S.C. § 2000e-3(a), the Eleventh Circuit has held that:

> [t]he statute's participation clause 'protects proceedings and activities which occur in conjunction with or after the filing of a formal charge with the EEOC . . . . The opposition clause, on the other hand, protects activity that occurs before the filing of a formal charge with the EEOC, such as submitting an internal complaint of discrimination to an employer, or informally complaining of discrimination to a supervisor. (citations omitted)

Muhammed v. Audio Visual Servs. Group, 380 Fed. Appx. 864, 872 (11th Cir. 2010).

76. The division of 760.10(7) into the "opposition clause" and the "participation clause" is recognized by Florida state courts. See Blizzard v. Appliance Direct, Inc., 16 So. 3d 922, 925-926 (Fla. 5th DCA 2009). In explaining the difference between the two clauses, the Second District Court of Appeal has held that:

> FCRA's "opposition clause [protects] employees who have opposed unlawful [employment practices]." . . . However, opposition claims usually involve "activities such as 'making complaints to management, writing critical letters to customers, protesting against discrimination by industry or by society in general, and expressing support of coworkers who have filed formal charges.'" . . . Cases involving retaliatory acts committed after the employee has filed a charge with the relevant administrative agency usually arise under the participation clause.

Carter v. Health Mgmt. Assocs., 989 So. 2d 1258, 1263 (Fla. 2nd DCA 2008).

77. "The participation clause includes activity done in connection with proceedings conducted by the federal government and its agencies: an employee has invoked the jurisdiction of the federal government through its agency, the EEOC. And we have held that expansive protection is available for these adjudicative kinds of proceedings run by the government." EEOC v. Total Sys. Servs., 221 F.3d 1171, 1175-1176 (11th Cir. 2000).

78. Petitioner has alleged that the City retaliated against him by placing him in a position in the Utilities Department upon his return to City service, and by hiring Mr. Alejo for the position of equipment operator. Petitioner asserts that the personnel decisions were, at least in part, the result of his previous claim of discrimination filed with the EEOC. Thus, Petitioner's claim falls under the participation clause.

79. The Supreme Court has had recent occasion to address the standard to be applied to retaliation claims. In reviewing the near-identical language of 42 U.S.C. § 2000e-3(a), the Court held that:

> Based on [] textual and structural indications, the Court now concludes as follows: Title VII retaliation claims must be proved according to traditional principles of but-for causation, not the lessened causation test stated in §2000e-2(m). This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.

Univ. of Tex. Southwestern Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2533 (2013).

80. As with the analysis of whether status-based discrimination has occurred, employees may prove discrimination as a result of retaliation by direct, statistical, or

circumstantial evidence. Valenzuela v. GlobeGround North America, LLC., 18 So. 3d at 22.

81. Petitioner presented no direct or statistical evidence of retaliation resulting from his previous complaint of discrimination related to his unlawful termination for issues pertaining to his absences from work in January and February of 2012.

82. In order to establish a circumstantial prima facie case of retaliation, the Petitioner "must show: (1) that he engaged in statutorily-protected expression; (2) that he suffered an adverse employment action; and (3) there is some causal relationship between the two events." (citations omitted) Holifield v. Reno, 115 F.3d 1555, 1566 (11th Cir. 1997); see also Muhammed v. Audio Visual Servs. Group, 380 Fed. Appx. 864, 872 (11th Cir. 2010); Tipton v. Canadian Imperial Bank, 872 F.2d 1491 (11th Cir. 1989).

83. Petitioner did not meet his burden to establish a prima facie case of discrimination based on retaliation.

84. The evidence demonstrates that the City complied with the resolution of Petitioner's earlier complaints, including those to the EEOC, by placing Petitioner in a position with the same title, pay, and benefits. The specific position was the result of an opening in the Utilities Department that would allow his return without displacement of other employees.

Petitioner performed well in that position, and his satisfactory performance was recognized in his employee evaluation.

85. Petitioner's claim of retaliation is also based upon the City's decision to hire Mr. Alejo to the position of equipment operator instead of Petitioner. The evidence is overwhelming that the hiring decision was made fairly and impartially by a qualified and experienced team of unbiased evaluators, and in accordance with established City hiring practices and procedures.

86. Using the applicable objective standard, it is concluded that no reasonable person would be deterred from making or supporting a charge of discrimination as a result of being subjected to a personnel practices that are the same as that applied to other applicants, regardless of their race or previous employment history. Burlington Northern & Santa Fe Ry. v. White, 548 U.S. 53, 68-69 (2006). Thus, Petitioner's allegations in this case are not cognizable under section 760.10(7). See Mildred M. Price v. Escambia Co. Sch. Dist., Case No. 03-4709 (Fla. DOAH June 1, 2004; FCHR Sept. 22, 2004).

87. In short, Petitioner did not prove by a preponderance of the evidence that the City discriminated against him as retaliation for his participation in any proceeding regarding an unlawful employment practice.

Conclusion

88. The City put forth persuasive evidence that Petitioner was rehired by the City in conformance with the resolution of his wrongful termination matter with the DOL, and that his specific placement was the result of the availability of an open position, not as a result of race or retaliation.

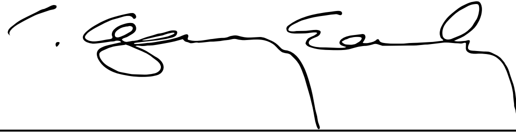
89. The City put forth persuasive evidence that Petitioner was not hired to the position of equipment operator because another applicant scored higher during the interview and practical test that was used to evaluate the applicants.

90. Section 760.10 is designed to eliminate workplace discrimination, but it is "not designed to strip employers of discretion when making legitimate, necessary personnel decisions." See Holland v. Washington Homes, Inc., 487 F.3d at 220. Because Petitioner failed to put forth any credible evidence that the City had some discriminatory reason for its personnel decisions, his petition must 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 finding that Respondent, the City of DeLand, did not commit any unlawful employment practice as to Petitioner, Ray Neloms, and dismissing the Petition for Relief filed in FCHR No. 2012-02720.

DONE AND ENTERED this 28th day of August, 2013, in Tallahassee, Leon County, Florida.



E. GARY EARLY
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of August, 2013.

ENDNOTES

1/ The evidence suggests that only four of the applicants actually participated in the interview process.

2/ Petitioner asserted that after Mr. Alejo was hired, he ran the jet truck into an overhang, damaging the vehicle. The incident was not disputed, but has no relevance to whether the decision to hire Mr. Alejo was the result of some racial animus or retaliatory intent against Petitioner.

COPIES FURNISHED:

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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.