STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JAMEY M. FAVILLO,

Petitioner,

vs. Case No. 14-0880

REMEDY INTELLIGENCE STAFFING,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, a hearing was held before the Honorable Diane Cleavinger, Administrative Law Judge, Division of Administrative Hearings on October 21, 2014, in Panama City, Florida.

APPEARANCES

For Petitioner: Jamey M. Favillo
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For Respondent: Collin A. Thakkar, Esquire
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STATEMENT OF THE ISSUE

The issue in this proceeding is whether the Respondent committed an unlawful employment practice against Petitioner in violation of the Florida Civil Rights Act.

PRELIMINARY STATEMENT

On September 17, 2013, Petitioner filed a Complaint of Employment Discrimination against Respondent, Remedy Intelligence Staffing (Respondent or Remedy), with the Florida Commission on Human Relations (FCHR). The Complaint alleged that Respondent discriminated against Petitioner on the basis of disability, a minor hand condition, by denying his request for a ten-day light duty assignment with the Respondent's client, Trane, because he was physically incapable of performing his work duties as a Production Technician with the client while recovering from his hand condition. Petitioner also alleged that Remedy subsequently discriminated against him based on his race, Caucasian, by terminating his temporary assignment with Trane.

FCHR investigated the Complaint. On February 7, 2014, it issued a Notice of Determination finding no cause to believe that an unlawful employment practice had occurred. The Notice also advised Petitioner of his right to file a Petition for Relief. On February 24, 2014, Petitioner filed a Petition for Relief with FCHR. Thereafter, the Petition for Relief was forwarded to the Division of Administrative Hearings (DOAH) for formal hearing.

At the hearing, Petitioner testified on his own behalf, but did not offer any exhibits that were admitted into evidence. Respondent presented the testimony of one witness and offered

Respondent's Exhibit Nos. 1-7, 10, 12-15, 17-18, and 20, which were admitted into evidence.

After the hearing, Respondent filed a Proposed Recommended Order on November 17, 2014. Petitioner filed a Proposed Recommended Order on November 18, 2014. Petitioner's Proposed Recommended Order referenced documents and alleged facts based on documents that were not authenticated, introduced, or admitted at hearing. As such, none of the documents or alleged facts based thereon was evidence that could be considered in this matter and were not utilized in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Remedy provides staffing services for temporary employment positions with a variety of independent business clients. The relationship between Remedy and its clients is governed by contracts it has entered into with those clients. Towards that end, Remedy solicits applications and/or maintains an applicant pool of people known as "associates" for temporary work assignment to Remedy's clients. However, Remedy does not operate or manage its clients' business or employment decisions.

2. At the commencement of an associate's staffing relationship with Remedy, all associates are required to review Remedy's policies and procedures, including its Discrimination and Harassment Policy.

3. Under that policy, a Remedy associate who believes he or she has been discriminated against while performing an assignment for a Remedy client is encouraged to notify Remedy of the perceived discrimination. After notification, Remedy investigates and advises the client of its findings.

4. After investigation, if a Remedy associate engaged in misconduct while at a temporary assignment, Remedy is entitled to take disciplinary action against the associate, including removal of the associate from the assignment. However, Remedy cannot take disciplinary action against a direct employee of the client, nor can it require the client to take disciplinary action against the client's direct employee. Similarly, if a client demands that a Remedy associate's assignment be terminated, Remedy has no authority to second-guess that decision or to refuse to terminate the associate's assignment with the client. Importantly, when a Remedy associate's assignment with a client is terminated early by the client, the associate's relationship with Remedy remains in place unless and until either party expressly advises the other that the relationship is being terminated.

5. In this case, Remedy had a contract with Trane, a manufacturer of air conditioning units. Under its contract with Trane, Trane notified Remedy of temporary assignments that needed to be filled at its manufacturing plant in Panama City, Florida.

Upon such notification, Remedy identified qualified associates for Trane's consideration for work at its plant.

6. On or about February 8, 2013, Petitioner submitted an application to Remedy, seeking consideration for assignment to an open temporary position with Trane.

7. He was selected by Trane for the position and began working as a Production Technician for Trane on March 4, 2013.

8. In performing the duties and responsibilities of his position as a Production Technician, Petitioner was subject to the supervision of Trane management, including Group Leader, Shirley Gunn, and Operations Leader, Jesse Arnold.

9. On or about May 30, 2013, Petitioner advised Remedy's Staffing Coordinator, Jaime Chapman, that he needed to take medical leave due to a growth on his finger. The growth was unrelated to his employment at Trane. Petitioner was granted leave by Trane.

10. On June 17, 2013, while on medical leave, Petitioner provided a doctor's note to Ms. Chapman, which indicated that Petitioner was capable of returning to work in a light-duty capacity. The note imposed various restrictions on Petitioner's permissible work duties, including, but not limited to, "no machine, manipulator, compressor, wall rear, no lifting above 15 lb."

11. Ms. Chapman passed Petitioner's leave request to Trane. However, Trane's policy did not permit light duty assignments for non-work related injuries or medical issues and the request was denied by Trane. There was no evidence that Trane's policy was based on discrimination or that Remedy had any input or control over Trane's light-duty policy. As such, Petitioner's allegations that denial of such light duty was discriminatory should be dismissed.

12. Ms. Chapman advised Petitioner of Trane's policy on light-duty assignments and explained to him that he must remain on leave until he was medically cleared to return to full work duties.

13. On or about June 27, 2013, Petitioner provided Ms. Chapman with a new doctor's note, stating that Petitioner had undergone surgery for his medical condition, and would be unable to work in any capacity from June 27, 2013, until July 1, 2013. Four days later, on July 1, 2013, Petitioner provided Ms. Chapman with medical clearance to return to full work duties. That same day he returned to his job as a Production Technician at Trane.

14. Clearly, neither the growth on Petitioner's hand nor its subsequent medical treatment significantly impaired a major life activity of Petitioner since he recovered and returned to work. Moreover, there was no evidence that demonstrated Petitioner's medical issue with his hand or treatment thereof

constituted a disability that significantly impaired a major life activity or was seen as such by Respondent or Trane. Given this lack of disability, Petitioner's allegations regarding discrimination based on disability should be dismissed.

15. At 2:00 a.m., on July 2, 2013, Ms. Chapman received an email from Ms. Gunn, the Trane manager with supervisory authority over Petitioner, indicating that during the July 1 night shift, Petitioner and Remedy Associate Tarmecia Jackson, who is Black, were involved in a verbal altercation with Ms. Jackson calling Petitioner an "asshole." In the email, Ms. Gunn requested that Ms. Chapman counsel Petitioner as well as Ms. Jackson regarding the need for each of them to improve their level of professionalism during their co-worker interactions. The evidence demonstrated that the name-calling incident was only a verbal feud between co-workers. There was no evidence that demonstrated such name-calling was discriminatory or had its aegis in discrimination.

16. Ms. Chapman complied with Ms. Gunn's request, and conducted separate counseling sessions with Petitioner and Ms. Jackson. During Ms. Jackson's counseling session, Ms. Chapman advised her that the conduct she exhibited during the July 1, 2013, incident was unacceptable and would not be tolerated going forward. In response, Ms. Jackson apologized for

her conduct and assured Ms. Chapman that she would comply with Trane's conduct requirements going forward.

17. During Petitioner's counseling session, Ms. Chapman advised him that he must refrain from arguing with co-workers at the Trane worksite, and that if he had any additional issues with co-workers, he must report those issues to Remedy. Petitioner accepted Ms. Chapman's counseling, without objection. At no time during the counseling session did Petitioner express a perception that he was being treated unfairly or discriminatorily.

18. On July 12, 2013, Ms. Chapman received a second email from Ms. Gunn stating that Petitioner and Ms. Jackson were once again involved in an altercation. However, in the latest instance, Ms. Gunn determined that Petitioner was responsible for instigating the conflict, noting that his conduct had left Ms. Jackson "in tears." The email went on to state that when Ms. Gunn attempted to counsel Petitioner in the wake of the second incident, Petitioner continually interrupted her and refused to allow her to proceed with the counseling.

19. On the morning of July 12, 2013, in addition to reviewing Ms. Gunn's email, Ms. Chapman received a telephone call from Trane's Operations Leader, Mr. Arnold, who advised her of Trane's decision to request the termination of Petitioner's assignment.

20. Prior to the start of Petitioner's shift on July 12, 2013, Ms. Chapman called him and notified him of Trane's decision to end his assignment. The evidence was clear that Remedy did not participate in and was not responsible for Trane's decision to terminate Petitioner's assignment with it. Moreover, the evidence was clear that Remedy did not make any adverse decision regarding Petitioner's employment with Trane.[1/] Remedy simply advised Petitioner of Trane's termination. In fact, in light of Petitioner's continuing status as a Remedy associate, Ms. Chapman advised Petitioner that he should continue to update Remedy regarding his interest and availability for future assignments, and likewise, Remedy would continue to consider him for future assignments with Remedy clients. In essence, Petitioner's status with Remedy did not change. Based on these facts, Petitioner failed to establish that Remedy discriminated against him when it informed him of Trane's decision to terminate his assignment and the allegations in regards thereto should be dismissed.

CONCLUSIONS OF LAW

21. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 & 120.57(1), Fla. Stat. (2014).

22. The Florida Civil Rights Act (FCRA) in Section 760.10, Florida Statutes, states in pertinent part as follows:

> (1) It is an unlawful employment practice for an employer:
>
> (a) To discharge or to fail or refuse to hire an 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.

23. The Florida Civil Rights Act was patterned after Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 et seq. As such, FCHR and Florida courts have determined federal case law interpreting Title VII is applicable to cases arising under FCRA. See Valenzuela v. GlobeGround N. Am., 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). Fla. Dept. of Cmty. Affairs v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991).

24. Under FCRA, Petitioner has the burden to establish by a preponderance of the evidence that he was the subject of discrimination by Respondent. In order to carry his burden of proof, Petitioner can establish a case of discrimination through direct or circumstantial evidence. See Holifield v. Reno, 115 F.3d 1555, 1561-1562 (11th Cir. 1997); 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. Bd. of Regents, 342 F.3d 1281, 1289 (11th Cir. 2003). 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. Evidence that only suggests discrimination, or that is subject to more than one interpretation, is not direct evidence. See Schoenfield, supra and Carter v. Three Springs Residential Treatment, 132 F.3d 635, 462 (11th Cir. 1998). Direct evidence is evidence that, if believed, would prove the existence of discriminatory intent without resort to inference or presumption and must in some way relate to the adverse actions of the employer. Denney v. City of Albany, 247 F.3d 1172, 1182 (11th Cir. 2001); see Jones v. BE&K Eng'g, Inc., 146 Fed. Appx. 356, 358-359 (11th Cir. 2005) ("In order to constitute direct evidence, the evidence must directly relate in time and subject to the adverse employment action at issue."); see also Standard v. A.B.E.L. Servs., Inc., 161 F.3d 1318 (11th Cir. 2002) (concluding that the statement "we'll burn his black a**" was not direct evidence where it was made two-and-a-half years prior to the employee's termination).

25. Herein, Petitioner presented no direct evidence of discriminatory intent on the part of the Respondent. Therefore, Petitioner must establish his case 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); Walker v. Prudential Prop. & Cas. Ins. Co., 286 F.3d 1270, 1274 (11th Cir. 2002).

26. 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). Importantly, 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 Cnty., Ga., 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 Cnty., Ga., supra.

27. 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."). Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 148 (2000).

28. On the other hand, 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, Petitioner alleged that Respondent discriminated against him on the basis of his disability and race in violation of the Florida Civil Rights Act.

30. In order to establish a prima facie case of disability discrimination under FCRA, Petitioner must show: 1) that he was subject to an adverse employment action; 2) that he was qualified

for the job at the time; 3) that his employer knew at the time of the action that he had a disability; and 4) that the adverse action took place in circumstances raising a reasonable inference that the disability was a determining factor in the decision. Luna v. Walgreen Co., 347 Fed. Appx. 469, 471 (11th Cir. 2009); Nadler v. Harvey, No. 06-12692, 2007 U.S. App. LEXIS 20272, at *14 (11th Cir. 2007).

31. As a first step in any discrimination claim based on disability, Petitioner must establish that he has a disability or that the employer regards him as having a disability. In this case, Petitioner failed to establish that the medical issue related to his finger or the treatment related thereto significantly impaired a major life activity or that his employer regarded his medical condition as a disability. Minor, transitory impairments are not disabilities since they do not significantly impair a person's life activities. See 29 C.F.R. 1630.15(f). In fact, Petitioner recovered from his medical issue, was cleared to return to work without restriction and did so return. Further, there was no evidence that Trane's termination of Petitioner's assignment had any connection to his medical condition, or that the reason given for such termination was a pretext for discrimination.

32. Additionally, even assuming Petitioner established he had a disability, Petitioner must demonstrate that he was

"otherwise qualified" for his job in that he could perform the essential functions of that job with or without reasonable accommodation. Lucas v. W.W. Grainger, Inc., 257 F.3d 1249, 1255-56 (11th Cir. 2001); see also Wood v. Green, 323 F.3d 1309, 1312 (11th Cir. 2003) (a disabled individual is "qualified" under the ADA if he can perform the "essential functions" of his job "with or without a reasonable accommodation"). Furthermore, an accommodation can qualify as "reasonable," and thus be required by the ADA, only if it enables the employee to perform the essential functions of his existing job position. Lucas, 257 F.3d at 1255-56.

33. As such, an employer is not required to accommodate an employee in any manner in which that employee desires and is not required to grant employees preferential treatment. Terrell v. USAir, 132 F.3d 621, 626 (11th Cir. 1998). Thus, the duty to provide a reasonable accommodation "does not require that an employer create a light-duty position or a new permanent position" for an employee. Van v. Miami-Dade Cnty., 509 F. Supp. 2d 1295, 1302 (S.D. Fla. 2007).

34. In this case, Remedy was not required to provide Petitioner a light duty position and did not discriminate against Petitioner based on his disability when he was not provided such a position. Further, Remedy did not regard Petitioner as disabled.

35. Likewise, there was no evidence that demonstrated a connection between Petitioner's medical condition and the termination of his assignment with Trane. Petitioner's assignment with Trane was terminated only after Trane reinstated him pursuant to the belief that his medical condition had been resolved. Given these facts and the lack of any disability or perceived disability, Petitioner's disability-based claim of discrimination should be dismissed.

36. Similarly, Petitioner failed to establish his claim of discrimination based on his race, Caucasian. The only basis for Petitioner's suggestion of race discrimination is the fact that he is Caucasian, while Ms. Jackson is African-American. There was nothing in either of the verbal incidents that indicate race was a factor. Moreover, both employees were treated the same, i.e., counselled, by Remedy.

37. Finally, Petitioner must establish that Remedy was the employer responsible for the alleged adverse employment actions.

38. In Watson v. Adecco Employment Services, Inc., 252 F. Supp. 2d 1347 (M.D. Fla. 2003), former temporary employees sued the employment agency that had contracted with a School Board to provide temporary employees upon request. Id. at 1349. The plaintiffs alleged that they were discriminatorily discharged from the school to which they were assigned, in retaliation for their refusal to wear Santa hats during the Christmas holidays.

Id. at 1349-51. However, the court concluded that even under a broad definition of "employer," the employment agency could not be held liable for the school board's decision to request termination of the plaintiffs' temporary assignments. Id. at 1355.

39. In support of its decision, the court stated that "a temporary employment agency exercising no control over Plaintiff's responsibilities or duties once on assignment cannot be considered the Title VII employer of the temporary employees." Id. at 1356. Nothing in the Adecco record reflected that the school and the employment agency co-determined the essential terms and conditions of plaintiffs' employment at the school. The court held that the mere fact that the agency issued the plaintiffs their paychecks was not sufficient, alone, to confer Title VII employer status for the actions of another agency that the employment agency did not control. Id.

40. In addition to the above, the court in Adecco denied liability on the basis that the plaintiffs could not show that the employment agency took any adverse employment action against them, or that it improperly failed to take corrective measures, that were within its control, in order to stop the alleged discrimination. Id. at 1357. The mere conveyance of a client's wish to remove an employee did not constitute an adverse action by the employment agency. Id. Further, although Adecco was

apparently aware that the plaintiffs objected to wearing Santa hats, there was no corrective action that it could have taken in response to the alleged discrimination, other than to remove them from their assignments since the employment agency had no legal authority to force another private company not to discriminate or run its business in a certain manner. Id. at 1358.

41. Similarly, in Neal v. Manpower International, Inc., 2001 U.S. Dist. LEXIS 25805, at *24 (N.D. Fla. 2001), the court addressed whether a temporary staffing agency could be liable for sexual harassment under FCRA. Manpower, a staffing agency, provided temporary employees to Wayne-Dalton, Corp. Id. at *3. Manpower recruited and interviewed applicants for positions in the Wayne-Dalton plant; maintained an office at the plant; and had on-site supervisors who interacted with Wayne-Dalton supervisors to identify open positions, and carried out counseling and termination meetings. Id. at *3-4. In addition, Manpower was responsible for paying the temporary employees; provided rules, such as an anti-sexual harassment policy, to temporary employees; investigated personnel complaints made by the temporary employees whom it assigned to Wayne-Dalton; and reported its investigative findings to Wayne-Dalton. Id. at *5. On the other hand, Manpower did not have decision-making authority over Wayne-Dalton personnel decisions, including those

involving temporary employees; and did not exercise any control over Wayne-Dalton employees. Id. at *4.

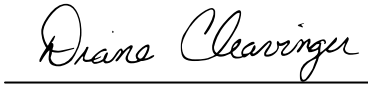
42. As in Adecco, the court in Neil examined the claims of discrimination against the staffing company according to a two-part inquiry: (1) whether the temporary staffing company was an "employer"; and (2) whether there was a basis for holding it liable as an employer. Id. at *24. The court found that, given Manpower was not involved in Wayne-Dalton operations and had no control over Wayne-Dalton employees, it could not be held responsible for the decisions or conduct of Wayne-Dalton employees. Id.

43. As in the cases above, Remedy placed Petitioner at the Trane worksite, counseled him regarding Trane policies that impacted his temporary assignment, and complied with Trane's decision to have him removed from his assignment. Remedy did not create the policy denying light duty assignments to Remedy Associates with non-work-related injuries, and did not make the decision to terminate Petitioner's assignment. On the contrary, it was Trane that made those decisions, and Remedy had no authority to overrule or circumvent them. Therefore, there is no basis for holding Remedy liable for Trane's policies and decisions and the Petition for Relief should be dismissed. See also Llampallas v. Mini-Circuits Lab, Inc., 163 F.3d 1236, (11th Cir. 1998).

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations enter an Order dismissing the Petition for Relief.

DONE AND ENTERED this 31st day of December, 2014, in Tallahassee, Leon County, Florida.



DIANE CLEAVINGER
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Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of December, 2014.

ENDNOTE

[1/] Petitioner, at the Final Hearing and in his responses to FCHR's investigative questionnaire, referred to Ms. Jackson as a "buttkisser" and that he was terminated because he was not inclined to seek favor from his supervisors.

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.