STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

WILLIAM COLEMAN,

Petitioner,

vs. Case No. 14-1652

DAYTONA BEACH, OCEAN CENTER PARKING GARAGE,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was conducted on May 21, 2014, in Deland, Florida, before W. David Watkins, the duly designated Administrative Law Judge of the Florida Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: William Coleman, pro se
208 Madison Avenue, Apartment 4
Daytona Beach, Florida 32114

For Respondent: Michael G. Moore, Esquire
Volusia County
123 West Indiana Avenue
Deland, Florida 32720

STATEMENT OF THE ISSUES

Two issues are presented for determination in this proceeding. The first is whether Respondent, Volusia County, was Petitioner Coleman's employer. The second issue is whether Respondent otherwise violated the Florida Civil Rights Act of 1992

by unlawfully discriminating against Petitioner on the basis of his gender.

PRELIMINARY STATEMENT

On September 26, 2013, Petitioner filed an Employment Complaint of Discrimination (Complaint) against Daytona Beach, Ocean Center Parking Garage.[1/] The Complaint alleged an unlawful employment practice against Petitioner based on his gender and stated:

> I am a male with parental responsibilities. I believe I was discharged because of my gender. I worked for Respondent as a Temp employee/Parking Lot Attendant beginning on July 28, 2012. On June 28, 2013, I was unable to report to work because I had to take care of my twins due to not being able to get a baby sitter. I was terminated. The reason given was excessive tardiness.

Following its investigation, by Notice dated March 11, 2014, the Florida Commission on Human Relations (FCHR) issued a "Determination: No Cause" (Determination). The Determination was forwarded to Petitioner and to Respondent Volusia County's Human Resources Manager, Tammy King. Thereafter, Petitioner filed a Petition for Relief (Petition) that was date-stamped by the FCHR as being received on April 11, 2014. Succinctly stated, Petitioner, a self-described temporary parking lot attendant, contends that he was fired because he is male.

Respondent asserts that it was not Petitioner's employer, and that Petitioner was a temporary leased employee of his employer,

AUE Staffing Solutions (AUE). Respondent also asserts that Petitioner was properly terminated by his AUE Supervisor for his failure to adhere to AUE employee expectations, and that Petitioner consistently failed to report to work on time and would frequently be a "no-show" without calling in.

Pursuant to notice, the final hearing was held on May 21, 2014, at the Volusia County Courthouse. At the hearing, the parties jointly stipulated to findings of fact 1, 4 through 11, 16, 17, 18 and 20 contained in Joint Exhibit 1, which was admitted into evidence. Where relevant, those stipulations have been incorporated in the Findings of Fact set forth herein.

Petitioner testified on his own behalf and presented no exhibits. Respondent presented the testimony of Tammy King, Human Resources Manager for Volusia County, and Rebecca Pearsall, Petitioner's AUE Supervisor. Respondent also offered its Exhibits 1, 2, 2A, 3, 7, and 8, each of which was admitted into evidence.

A transcript of the final hearing was not ordered by either party. Accordingly, at the conclusion of the hearing, the parties agreed to file their proposed recommended orders within 10 days of the hearing. Thereafter, Respondent timely filed its Proposed Recommended Order on May 23, 2014. Petitioner did not file a proposed recommended order.

Unless otherwise noted, all statutory references are to Florida Statutes (2013).

FINDINGS OF FACT

Based upon the testimony and documentary evidence presented at hearing, the demeanor and credibility of the witnesses, and on the entire record of this proceeding, the following findings of fact are made:

1. Ocean Center Parking Garage is a parking facility owned and operated by Volusia County in Daytona Beach, Florida.

2. Petitioner's employer, AUE Staffing Solutions, and Respondent entered into a services contract for temporary employment and employment leasing services.

3. Respondent has no ownership interest in, or control over, AUE Staffing Solutions.

4. On or about July 19, 2012, AUE hired Petitioner. Upon his hiring, AUE provided Petitioner with a list of employment expectations entitled "Welcome to AUE Staffing Solutions – What is Expected of You as a AUE Staffing Solutions Employee."

5. Among the relevant employment expectations are numbers 4, 12, and 14 which provide:

> 4. Always arrive on time; contact AUE Staffing Solutions immediately if you cannot report to work or are arriving late. Always leave a message on our 24 [h]our answering servicing if you do not personally speak with a Staffing Coordinator.
>
> * * *
>
> 12. Misconduct includes: Failure to follow any of our company procedures, insubordination to supervisors or to office

> personnel, sleeping on the job, horse playing on the job, excessive tardiness and absenteeism, unauthorized use of internet activity, and the use of profanity and/or abusive language on any assignment or to any AUE Staffing Solutions personnel will be grounds for immediate termination.
>
> * * *
>
> 14. If you are a no call/no show, walk off, or do not complete an assignment, we will consider this a QUIT **and you will be paid the minimum wage** for all hours worked for that entire week – no exceptions will be made. (Emphasis in original.)

6. On July 19, 2012, Petitioner acknowledged his acceptance of these employment expectations.

7. Thereafter, on or about July 28, 2012, AUE assigned Petitioner to work as a temporary employee parking lot attendant at the Ocean Center Parking Garage to fulfill the terms of its contract with Respondent.

8. Beginning in February 2013, Petitioner began experiencing absences and tardiness.

9. Petitioner's schedule and time cards for the period February 18, 2013, through June 28, 2013, reflect that Petitioner was late on the following dates:

February 22
March 22
April 2, 7, 11, 14, 28
May 12, 21
June 4, 8, 15, 23

10. Petitioner's schedule and time cards for the period February 18, 2013, through June 28, 2013, also reflect that

Petitioner was a no show on the following dates:

February 16
March 24
June 11
June 28

11. On February 16, 2013, and June 28, 2013, Petitioner was a no show and did not call in to report his absence (no show/no call).

12. Petitioner testified that on June 28, 2013, his immediate supervisor, Rebecca Pearsall, called him at 11:48 a.m. and informed him that he was supposed to be at work. Petitioner disagreed with Ms. Pearsall that he was scheduled to work that day.

13. The AUE work schedule for the week of June 24, 2013 clearly reflects that Petitioner, known as "Willie," was scheduled to work on June 28, 2013 from 8:30am to 5pm.

14. Ms. Pearsall testified that work schedules were always posted in a prominent place near the office the Thursday prior to the start of the following work week, and that copies were made available on a clipboard to employees who needed a copy. Petitioner acknowledged that copies were available and claims to have taken a copy but lost it when it "blew out the window" of his car. Petitioner asserted at hearing that the "lost" version of the schedule did not require him to work on June 28th.

15. Petitioner worked the Saturday, (June 22nd), Sunday (June 23rd), and Tuesday (June 25th) preceding Friday, June 28,

2013, and so would have had notice, opportunity, and responsibility to review the work schedule to understand when he was to report to work that week.

16. Ms. Pearsall's testimony, as corroborated by the AUE work schedule and time card for June 28, 2013, is more credible than Petitioner's assertion that he had a different schedule that "blew out the window" of his car.

17. Ms. Pearsall testified that Petitioner had previously been counseled about the need to report timely and call in when he was not going to be able to report so that the garage could make other arrangements for coverage.

18. During their telephone conversation of June 28, 2013, Ms. Pearsall explained to Petitioner that his services were no longer needed and that he was not to report to the Ocean Center Parking Garage due to his inability to show up to work on time and for not showing up for his shifts without calling. Pearsall terminated Petitioner's employment with AUE Staffing Solutions immediately.

19. Ms. Pearsall is also an AUE Staffing Solutions employee assigned to the Ocean Center Parking Garage. She has worked at Ocean Center Parking Garage for five years. During the course of Petitioner's assignment to Ocean Center Parking Garage (February 2013 through June 28, 2013) the other AUE-assigned employee performing duties similar to Petitioner's was also a

male (Patrick). After Petitioner's termination, Patrick continued working for AUE on assignment to the Ocean Center Parking Garage. As of the hearing, he was still employed by AUE in that capacity.

20. Ms. Pearsall testified that Patrick has not had the same challenges with punctuality and attendance that Petitioner demonstrated.

21. Ms. Pearsall testified that subsequent to Petitioner's termination, AUE filled Petitioner's position with other males.

22. Ms. Pearsall testified that during her five years at the Ocean Center Parking Garage other AUE employees, both males and females, were terminated for similar attendance and tardiness issues as Petitioner.

23. On September 26, 2013, Petitioner filed an Employment Complaint of Discrimination (Complaint) against Daytona Beach, Ocean Center Parking Garage, but did not otherwise identify either Volusia County or AUE Staffing Solutions as Petitioner's employer.

24. Petitioner's Complaint alleged an unlawful employment practice against him based on his gender and provided in pertinent part:

> I am a male with parental responsibilities. I believe I was discharged because of my gender. I worked for Respondent as a Temp employee/Parking Lot Attendant beginning on July 28, 2012. On June 28, 2013, I was unable to report to work because I had to take care of my twins due to not being able to

> get a baby sitter. I was terminated. The reason given was excessive tardiness.

25. Tammy King, Human Resources Manager for Volusia County, conducted a review and investigation into the circumstances of Petitioner's Complaint. Ms. King responded to FCHR Investigator Jim Barnes by letter dated November 6, 2013, concluding that Petitioner had not been discriminated against on the basis of his gender or any other basis.

26. In his Investigative Memorandum dated April 23, 2014, Investigator Barnes noted that:

> Complainant was offered multiple opportunities to provide a rebuttal but has not responded.
>
> During an introductory telephone call, Complainant provided no additional information relative to his complaint. A telephone message was left on voicemail requesting an interview but Complainant has not responded.
>
> Complainant filed this complaint of discrimination based on his gender. The findings of the investigation do not support the allegation. Complainant alleged that he had been terminated because of his gender, after being told he was terminated for excessive tardiness/absenteeism. Respondent related that Complainant was late for work 13 times and failed to report for work four times in 5 months. After repeated counseling and cautions, Complainant was terminated for tardiness and absenteeism. Complainant provided no evidence of discriminatory animus, and no documentary or testamentary evidence that he was discharged for anything other than the stated reason.

27. Upon completion of its investigation, FCHR issued a "Determination: No Cause" finding "that no reasonable cause

exists to believe that an unlawful employment practice occurred."

28. Petitioner testified that following the termination of his employment with AUE he found employment with Americano Resort as a porter and entertainer.

29. Petitioner testified that he was terminated from his employment with Americano Resort after he was absent on a Monday, following a weekend trip to Georgia. Petitioner failed to report or call in his absence because he was tired and stayed home to take care of his twin infants.

30. At hearing, Petitioner candidly admitted that he had no evidence to suggest that, had he been a female, he would have been treated any differently by AUE.

CONCLUSIONS OF LAW

31. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this cause pursuant to sections 120.569 and 120.57(1), Florida Statutes.

32. Petitioner claims he was discriminated against because of his sex (male), in violation of the Florida Civil Rights Act of 1992 ("FCRA").

33. Section 760.10(1)(a), Florida Statutes, makes it unlawful for an employer to take adverse action against an individual because of the individual's sex. Under the FCRA, an employer commits an unlawful employment practice if it terminates

or retaliates against employees based on their protected status, which in this case, is gender. See § 760.10(1)(a), Fla. Stat.

34. Section 760.11(7) permits a party who receives a no cause determination to request a formal administrative hearing before the Division of Administrative Hearings. "If the administrative law judge finds that a violation of the Florida Civil Rights Act of 1992 has occurred, he or she shall issue an appropriate recommended order to the commission prohibiting the practice and recommending affirmative relief from the effects of the practice, including back pay." Id.

35. Florida's chapter 760 is patterned after Title VII of the Civil Rights Act of 1964, as amended. Consequently, Florida courts look to federal case law when interpreting chapter 760. Valenzuela v. GlobeGround N. Am., LLC., 18 So. 3d 17 (Fla. 3rd DCA 2009).

36. Petitioner claims disparate treatment (as opposed to disparate impact) under the FCRA; in other words, he claims he was treated differently because of his gender. Petitioner has the burden of proving by a preponderance of the evidence that Respondent discriminated against him. See Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981). A party may prove unlawful sex discrimination by direct or circumstantial evidence. Smith v. Fla. Dep't of Corr., Case No. 2:07-cv-631,

(M.D. Fla. May 27, 2009); 2009 U.S. Dist. LEXIS 44885 (M.D. Fla. 2009).

37. Direct evidence is evidence, that, "if believed, proves [the] existence of [a] fact in issue without inference or presumption." Burrell v. Bd. of Tr. of Ga. Military College, 125 F.3d 1390, 1393 (11th Cir. 1997). Direct evidence consists of "only the most blatant remarks, whose intent could be nothing other than to discriminate" on the basis of an impermissible factor. Carter v. City of Miami, 870 F.2d 578, 582 (11th Cir. 1989).

38. The record in this case did not establish unlawful gender discrimination by direct evidence.

39. To prove unlawful discrimination by circumstantial evidence, a party must establish a prima facie case of discrimination by a preponderance of the evidence. If successful, this creates a presumption of discrimination. Then the burden shifts to the employer to offer a legitimate, non-discriminatory reason for the adverse employment action. If the employer meets that burden, the presumption disappears and the employee must prove that the legitimate reasons were a pretext. Valenzuela v. GlobeGround N. Am., LLC., supra. Facts that are sufficient to establish a prima facie case must be adequate to permit an inference of discrimination. Id.

40. Accordingly, Petitioner must prove discrimination by indirect or circumstantial evidence under the McDonnell Douglas framework. Petitioner must first establish a prima facie case by showing: (1) he is a member of a protected class; (2) he was qualified for the job; (3) he was subjected to an adverse employment action; and (4) other similarly-situated employees, who are not members of the protected group, were treated more favorably than Petitioner. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). "When comparing similarly situated individuals to raise an inference of discriminatory motivation, these individuals must be similarly situated in all relevant respects." Jackson v. BellSouth Telecomm., 372 F.3d 1250, 1273 (11th Cir. 2004).

41. Thus, in order to establish a prima facie case of disparate treatment based on gender, Petitioner must show that Respondent treated similarly-situated female employees differently or less severely. Valdes v. Miami-Dade Coll., 463 Fed. Appx. 843, 845 (11th Cir. 2012); Camara v. Brinker Intern., 161 Fed. Appx. 893 (11th Cir. 2006). See also Longariello v. Sch. Bd. Of Monroe Cnty., Fla., 987 F. Supp. 1440, 1449 (S.D. Fla. 1997) (quoting Coleman v. B-G Maint. Mgmt. of Colo., Inc., 108 F.3d 1199, 1204 (10th Cir.1997)) ("Gender-plus plaintiffs can never be successful if there is no corresponding subclass of members of the opposite gender. Such plaintiffs cannot make the requisite showing that

they were treated differently from similarly-situated members of the opposite gender.").

42. The findings of fact here are not sufficient to establish a prima facie case of discrimination based on gender.

43. There is no question that Petitioner was subject to an adverse employment action. Petitioner was terminated.

44. However, Petitioner failed to prove that similarly situated female employees were treated more favorably or that he was replaced by someone outside of his protected classification. Indeed, there was no mention of any female in a remotely similar position employed by AUE who was treated any differently than was Petitioner. To the contrary, the credible evidence established that female employees of AUE who violated the no call/no show policy were also terminated.

45. Petitioner admitted he had no evidence to suggest that had he been a female he would have been treated differently. Ms. Pearsall testified that other similarly situated male and female employees had been terminated for the same reasons as Petitioner. Further, Ms. Pearsall testified that Petitioner's position had subsequently been filled with males, and another position continued to be filled by "Patrick," also a male.

46. Respondent presented ample evidence to support its position that Petitioner was fired for legitimate, nondiscriminatory reasons. Petitioner had been repeatedly

counseled about his tardiness and absenteeism, and was made aware, in writing, of the serious consequences of failing to report for work without providing advance notice to AUE. The evidence of record does not support Petitioner's theory that he was fired for discriminatory reasons. Indeed, there is no evidence that Petitioner was fired because of his gender. Rather, the greater weight of the evidence established that Petitioner was fired for violating AUE's written policy regarding no calls/no shows.

47. Finally, there was no evidence of any ownership interest on behalf of Respondent Volusia County in AUE Staffing Solutions. Moreover, Petitioner was hired by AUE and was terminated by his AUE Supervisor. There is no evidence that Volusia County exercised any authority over Petitioner.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations dismiss the Petition for Relief from an Unlawful Employment Practice filed against Respondent.

DONE AND ENTERED this 27th day of June, 2014, in Tallahassee, Leon County, Florida.

W. DAVID WATKINS
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of June, 2014

ENDNOTE

[1/] Ocean Center Parking Garage is a parking facility owned and operated by Volusia County in Daytona Beach, 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.