STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEMARIO YORKER,

Petitioner,

vs. Case No. 14-2482

GIRARD EQUIPMENT, INC.,

Respondent.
_____/

RECOMMENDED ORDER

This case came before Administrative Law Judge Darren A. Schwartz for final hearing by video teleconference on October 22, 2014, with sites in Port St. Lucie and Tallahassee, Florida.

APPEARANCES

For Petitioner: DeMario Yorker, pro se
4129 37th Drive
Vero Beach, Florida 32967

For Respondent: Jason L. Odom, Esquire
Gould, Cooksey, Fennell, P.A.
979 Beachland Boulevard
Vero Beach, Florida 32963

STATEMENT OF THE ISSUES

Whether Respondent committed the unlawful employment practice alleged in the Charge of Discrimination filed with the Florida Commission on Human Relations ("FCHR"), and if so, what relief should Petitioner be granted.

PRELIMINARY STATEMENT

On December 9, 2013, Petitioner, DeMario Yorker ("Petitioner"), filed a Charge of Discrimination ("Complaint") with FCHR alleging that Respondent, Girard Equipment, Inc. ("Respondent"), terminated him from employment because of his race. Following its investigation of the Complaint, FCHR notified the parties that there was "reasonable cause to believe that an unlawful employment practice occurred."

Petitioner elected to pursue administrative remedies, timely filing a Petition for Relief with FCHR on or about May 22, 2014. On May 22, 2014, FCHR referred the matter to the Division of Administrative Hearings ("DOAH") to assign an Administrative Law Judge to conduct the final hearing. The final hearing initially was set for August 14, 2014. On August 13, 2014, Respondent filed an emergency motion to continue the final hearing. On August 13, 2014, the undersigned entered an Order resetting the final hearing for October 22, 2014.

The final hearing commenced as scheduled on October 22, 2014, with both parties present. At the hearing, Petitioner testified on his own behalf and presented the additional testimony of Antonio Wallace, Marcus Melbourne, Darrall Holloway, and Mike Alvarado. Petitioner offered Respondent's Exhibits 1 and 2, which were received into evidence based on the stipulation of the parties. Respondent presented the testimony of John

Brennan, Timothy Girard, Julie Thompson, and Marcus Melbourne. Respondent did not offer any other exhibits into evidence.

The final hearing Transcript was filed with DOAH on November 7, 2014. The parties timely filed proposed recommended orders, which were given consideration in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Respondent manufactures valves for the safe transportation of hazardous chemicals on tanker-trailers. Respondent is headquartered in the Vero Beach area; specifically, the Gifford community, which is a predominately African-American community. Respondent employs a significant number of employees from the Gifford community.[1/]

2. Petitioner is an African-American male who was employed by Respondent from approximately February 2012 until his termination in September 2013. At the time of his termination, Petitioner was employed by Respondent as an assembly technician. Petitioner was supervised by Darrall Holloway, an African-American male.

3. The incident giving rise to Petitioner's termination involved a physical altercation between two of Respondent's employees, Jormonte Hunter (African-American male) and Mike Alvarado (Hispanic male) on September 25, 2013. The physical

altercation followed approximately two months of arguing between Mr. Hunter and Mr. Alvarado over a female employee of Respondent.

4. Mr. Holloway and his supervisor, John Brennan (Caucasion male), learned of the ongoing dispute between Mr. Hunter and Mr. Alvarado sometime during the afternoon working hours of September 25, 2013.

5. That same afternoon during working hours, Mr. Holloway and Mr. Brennan met with Mr. Hunter and Mr. Alvarado and told them to cease their bickering, and to avoid any future confrontations with each other, on or off company property.

6. That same afternoon during working hours, Mr. Holloway and Mr. Brennan also met with Petitioner and two other African-American male employees (Chris Joseph and Marcus Melbourne).

7. During this meeting, Petitioner, Mr. Joseph and Mr. Melbourne were directed not to allow the situation between Mr. Hunter and Mr. Alvarado to escalate, on or off company property. Petitioner, Mr. Joseph and Mr. Melbourne were further warned that if the situation between Mr. Hunter and Mr. Alvarado escalates, on or off company property, "actions will be taken."

8. Nevertheless, Petitioner, Mr. Joseph, Mr. Melbourne, Antonio Wallace (African-American male), and Mr. Hunter left work after 4:00 p.m., on September 25, 2013, and drove to Mr. Alvarado's apartment complex. Petitioner, Mr. Joseph, Mr. Melbourne, Mr. Wallace, and Mr. Hunter went to Mr. Alvarado's

apartment knowing there was going to be a physical altercation between Mr. Alvarado and Mr. Hunter.

9. After arriving at Mr. Alvarado's apartment complex, Petitioner, Mr. Joseph, Mr. Melbourne, Mr. Wallace, and Mr. Hunter exited their vehicles. Mr. Hunter then walked toward Mr. Alvarado's apartment, followed by Petitioner, Mr. Joseph, Mr. Melbourne, and Mr. Wallace.

10. Moments later, Mr. Alvarado opened his apartment door, some words were exchanged between Mr. Alvarado and Mr. Hunter, and the physical altercation ensued.

11. Petitioner and Mr. Wallace instigated and witnessed the physical altercation, and did nothing to try and stop it. Mr. Joseph and Mr. Melbourne also witnessed the physical altercation, and did nothing to try and stop it.

12. The physical altercation between Mr. Hunter and Mr. Alvarado lasted a matter of seconds, resulting in Mr. Hunter slamming Mr. Alvarado's face to the ground, causing Mr. Alvarado to suffer physical injuries to his face. The next day, September 26, 2013, Mr. Alvarado arrived to work with his face badly injured as a result of the altercation.

13. On September 26, 2013, Mr. Holloway, Mr. Brennan, and Mr. Girard, the president of the company, learned of the physical altercation that had occurred between Mr. Alvarado and Mr. Hunter at Mr. Alvarado's apartment complex the day before. Petitioner,

Mr. Joseph, Mr. Melbourne, Mr. Wallace, Mr. Hunter, and Mr. Alvarado were all suspended pending an investigation by Respondent.

14. Over the next few days, Respondent conducted an investigation. Following its investigation, Respondent terminated Petitioner, Mr. Wallace, Mr. Hunter, and Mr. Joseph.

15. Mr. Girard made the ultimate decision to terminate Petitioner, Mr. Wallace, Mr. Hunter, and Mr. Joseph.[2/]

16. Petitioner was terminated because he ignored the prior directives of Mr. Holloway and Mr. Brennan given during the meeting on September 25, 2013; he instigated and witnessed the physical altercation between Mr. Hunter and Mr. Alvarado; and he was employed by Respondent for only one year and eight months prior to his termination, during which his job performance was, at times, below expectations.

17. Mr. Hunter was terminated because he ignored the prior directives of Mr. Holloway and Mr. Brennan given during the meeting of September 25, 2013, and he was directly involved in the physical altercation with Mr. Alvarado.

18. Mr. Wallace was terminated because he instigated and witnessed the physical altercation between Mr. Hunter and Mr. Alvarado, and he was employed by Respondent for only six months prior to his termination.

19. Mr. Joseph was terminated because he ignored the prior directives of Mr. Holloway and Mr. Brennan given during the meeting of September 25, 2013, and he witnessed the physical altercation between Mr. Hunter and Mr. Alvarado.

20. Mr. Alvarado was not terminated because he was the victim of the physical altercation, and the physical altercation occurred at his residence.

21. Mr. Melbourne was not terminated because he did not instigate the physical confrontation between Mr. Hunter and Mr. Alvarado, and he was a long-term and model employee of Respondent prior to the September 25, 2013, incident.[3/]

22. Following his termination, Respondent replaced Petitioner with Shaunte Collins, an African-American male.

23. The persuasive and credible evidence adduced at hearing demonstrates that Petitioner was terminated for legitimate, non-discriminatory reasons having nothing to do with his race. Petitioner's charge of race discrimination is based on speculation and conjecture, and Petitioner failed to prove that Respondent's reasons for his firing are a mere pretext for intentional race discrimination.

CONCLUSIONS OF LAW

24. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes (2014).

25. The Florida Civil Rights Act of 1992 ("FCRA"), chapter 760, Florida Statutes, prohibits discrimination in the workplace. Among other things, the FCRA makes it unlawful for an employer:

> To discharge or to fail or refuse to hire 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.

§ 760.10(1)(a), Fla. Stat.

26. The FCRA, as amended, is patterned after Title VII of the Civil Rights Act of 1964 and 1991 ("Title VII"). Thus, federal decisional authority interpreting Title VII is applicable to cases arising under the FCRA. Johnson v. Great Expressions Dental Ctrs. Of Fla., P.A., 132 So. 3d 1174, 1176 (Fla. 3d DCA 2014).

27. Complainants alleging unlawful discrimination may prove their case using direct evidence of discriminatory intent. 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 action against the complainant. Denney v. City of Albany, 247 F.3d 1172, 1182 (11th Cir. 2001). "[O]nly the most blatant remarks, whose intent could mean nothing other than to discriminate on the basis of some impermissible factor constitute direct evidence of discrimination." Wilson v. B/E Aerospace, Inc., 376 F.3d 1079,

1086 (11th Cir. 2004); See, e.g., E.E.O.C. v. Alton Packaging Corp., 901 F.2d 920, 923 (11th Cir. 1990)(holding that general manager's statement that "if it was his company he wouldn't hire any black people," constitutes direct evidence).

28. When no direct evidence of race discrimination exists, the employee may attempt to establish a case circumstantially through the burden-shifting framework articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973). The McDonnell Douglas framework provides an allocation of the burden of production and an order for the presentation of proof in disparate treatment discrimination cases. Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 142 (2000).

29. First, under the McDonnell Douglas framework, Petitioner must establish a prima facie case of discrimination. Id. To establish a prima facie case of race discrimination through circumstantial evidence, Petitioner must show that he: (1) belongs to a protected class; (2) he was qualified to do the job; (3) he was subjected to an adverse employment action; and (4) he was replaced by an employee outside of his protected class or the employer treated similarly-situated employees outside the class more favorably. Johnson, 132 So. 3d at 1176; Burke-Fowler v. Orange County, 447 F.3d 1319, 1323 (11th Cir. 2006); Maynard v. Bd. of Regents, 342 F.3d 1281, 1289 (11th Cir. 2003). Failure to establish a prima facie case of discrimination ends the

inquiry. Kidd v. Mando Am. Corp., 731 F.3d 1196, 1202 (11th Cir. 2013).

30. As to the fourth prong of the prima facie case, an adequate comparator must be "similarly situated" in all relevant respects. Johnson, 132 So. 3d at 1176; Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17, 23 (Fla. 3d DCA 2009). To determine whether employees are similarly situated, courts evaluate whether the employees are involved in or accused of the same conduct or similar conduct and are disciplined in different ways. Burke-Fowler, 447 F.3d at 1323. In making this determination, courts "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." Id. quoting Maniccia v. Brown, 171 F.3d 1364, 1368 (11th Cir. 1999).

31. When the charging party, i.e., Petitioner, is able to establish 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. Importantly, the employer has the burden of production, not persuasion, and need only present the fact-finder with evidence that the decision was non-discriminatory. This intermediate burden is "exceedingly light." Vessels v. Atlanta Indep. Sch. Sys., 408 F.3d 763, 769-70 (11th Cir. 2005).

32. Should the employer meet this burden, the presumption of discrimination created by the employee's prima facie case drops from the case. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142-43 (2000). At this juncture, the employee must then establish that the proffered reasons were not the true reason for the employment decision, but rather a mere pretext for intentional race discrimination. Kidd, 731 F.3d at 1202.

33. In this regard, Petitioner must demonstrate "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its actions that a reasonable factfinder could find them unworthy of credence." Combs v. Plantation Patterns, Meadowcraft, Inc., 106 F.3d 1519, 1538 (11th Cir. 1997).

34. "Courts do not sit as a super-personnel department that reexamines an entity's business decisions." Davis v. Town of Lake Park, Florida, 245 F.3d 1232, 1244 (11th Cir. 2001). Whether an employment decision was prudent or fair is irrelevant because an employer "may fire [Petitioner] 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 racially discriminatory reason. Nix v. WLCY Radio/Rahall Commc'ns, 738 F.2d 1181, 1187 (11th Cir. 1984). Petitioner "is not allowed to recast an employer's proffered nondiscriminatory reasons or substitute his business judgment for that of the employer."

Chapman v. AI Transport, et al., 229 F.3d 1012, 1030 (11th Cir. 2000). Provided that the proffered reasons are ones that might motivate a reasonable employer, an employee must meet those reasons head on and rebut them, and the employee cannot succeed by simply quarrelling with the wisdom of those reasons. Id. Importantly, the ultimate burden of persuading the trier of fact that an employer intentionally discriminated against the employee based on race remains at all times with the employee. Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981); Bush v. Barnett Bank, 916 F. Supp. 1244, 1252 (M.D. Fla. 1996).

35. Turning to the instant case, Petitioner presented no direct evidence of discriminatory intent by Respondent.

36. Petitioner established the first three elements of a prima facie case based on circumstantial evidence. However, he failed to establish the fourth prong--that he was replaced by a person outside of his protected class or that the employer treated similarly-situated employees outside his protected class more favorably. First, Petitioner was replaced by an African-American male. Second, Mr. Melbourne, who was not terminated, is in the same protected class as Petitioner (African-American); therefore, Petitioner is unable to demonstrate that Mr. Melbourne is a comparator who is outside of his protected class.

37. Furthermore, Mr. Alvarado, although outside Petitioner's protected class, is not similarly situated to

Petitioner. Mr. Alvarado's and Petitioner's conduct is significantly dissimilar. Petitioner instigated and witnessed the physical altercation. Despite being directed otherwise, Petitioner also went to Mr. Alvarado's place of residence on September 25, 2013, looking for a fight. The physical confrontation between Mr. Alvarado and Mr. Hunter occurred at Mr. Alvarado's place of residence, and Mr. Alvarado was the victim. Accordingly, Petitioner failed to establish a prima facie case under the McDonnell Douglas framework.

38. Having failed to establish a prima facie case, the inquiry need not go further and the petition should be dismissed. However, even if Petitioner had met his initial burden of establishing a prima facie case, and the burden had shifted to Respondent to articulate a legitimate, nondiscriminatory reason for the termination, Respondent successfully met its burden at the hearing, which Petitioner failed to prove was a mere pretext for intentional race discrimination. The persuasive and credible evidence adduced at hearing showed that Petitioner was terminated because he instigated the physical confrontation between Mr. Hunter and Mr. Alvarado and witnessed the altercation despite being warned not to allow the situation to escalate. Moreover, he was employed by Respondent for only one year and eight months prior to his termination, during which his job performance was,

at times, below expectations. Accordingly, the Petition for Relief should be dismissed.[4/]

RECOMMENDATION

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

DONE AND ENTERED this 17th day of December, 2014, in Tallahassee, Leon County, Florida.

DARREN A. SCHWARTZ
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of December, 2014.

ENDNOTES

[1/] Respondent employs approximately 51 employees. Twenty-one employees are Caucasian, twenty employees are African-American, and ten employees are Hispanic.

[2/] Notably, Mr. Girard also made the ultimate decision to hire these persons, knowing of their race at the time they were hired.

[3/] Mr. Melbourne was hired by Respondent in June 2011.

[4/] Notably, this case was not resolved summarily pre-hearing, but was fully tried before the undersigned. Where an 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); see also Walker v. Mortham, 158 F.3d 1177, 1183, n.12 (11th Cir. 1998)(noting that "a factfinder cannot infer intentional discrimination solely from establishment of the prima facie case. . . . [H]owever, that the same evidence that is used to establish the prima facie case may also cast doubt on the employer's proffered legitimate, non-discriminatory basis for its decision. Thus, in some cases, the [Petitioner], in order to prove intentional discrimination, will not need to produce any more evidence than what was required to establish the prima facie case.").

Moreover, in Johnson v. Great Expressions Dental Centers of Florida, P.A., 132 So. 3d 1174, 1177 (Fla. 3d DCA 2014), the court acknowledged that some recent federal court decisions, including the Eleventh Circuit, in Smith v. Lockheed-Martin Corp., 644 F.3d 1321, 1328 (11th Cir. 2011), have recognized an alternative means of establishing a prima facie case through circumstantial evidence absent a sufficient comparator, where the employee nevertheless presents a "convincing mosaic of circumstantial evidence." The Johnson court stated, however, that whether the "convincing mosaic test is a viable alternative to the four prong *McDonnell Douglas* test appears to be an unsettled question of federal law." Id. Moreover, the Johnson court noted that the test has been applied by the Eleventh Circuit under differing circumstances.

After recognizing that no Florida court has adopted or even mentioned the "convincing mosaic" standard, the Johnson court indicated that it "need not decide whether to adopt the convincing mosaic test because Johnson clearly fails under the convincing mosaic standard as well as the traditional *McDonnell Douglas* framework." Id. As in Johnson, the undersigned need not decide whether to adopt the convincing mosaic standard because Petitioner clearly fails under the convincing mosaic standard as well as the traditional McDonnell Douglas framework.

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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.