STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MANNY ROLON,

Petitioner,

vs. Case No. 14-2522

BRIGHT HOUSE NETWORKS,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, a final hearing in this cause was held by video teleconference between Orlando and Tallahassee, Florida, on July 23, 2014, before the Division of Administrative Hearings by its designated Administrative Law Judge Linzie F. Bogan.

APPEARANCES

For Petitioner: Manny Rolon, pro se
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For Respondent: Lillian C. Moon, Esquire
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STATEMENT OF THE ISSUE

Whether Respondent violated the Florida Civil Rights Act of 1992, as alleged in the Employment Charge of Discrimination filed by Petitioner on November 12, 2013.

PRELIMINARY STATEMENT

Petitioner, Manny Rolon (Petitioner), filed an Employment Charge of Discrimination with the Florida Commission on Human Relations (FCHR), which alleges that his employer, Bright House Networks (Respondent), violated section 760.10, Florida Statutes (2012),[1/] by discriminating against him on the basis of national origin. Respondent terminated Petitioner's employment on or about December 19, 2012.

The allegations were investigated, and on April 21, 2014, FCHR issued its Determination: No Cause. A Petition for Relief was filed by Petitioner on May 27, 2014. On May 28, 2014, FCHR transmitted the case to the Division of Administrative Hearings for an assignment of an administrative law judge to conduct the hearing.

At the hearing, Petitioner testified on his own behalf and offered the testimony of no other witnesses. The following witnesses testified on behalf of Respondent: Brinkley Ruffin, Senior Director of Human Resources; Christopher Kranert, Senior Regional Technical Manager; and Victor Gomez, Technical Supervisor. Petitioner's Exhibits 6 through 13, 17, 19 and 20

were admitted into evidence. Respondent's Exhibits 2 through 4, 9, 11 through 13, 15, 23, 27, 28, 30, 31 and 32 were admitted into evidence.

A Transcript of the final hearing was filed with the Division of Administrative Hearings on August 28, 2014. The parties each submitted a Proposed Recommended Order.

FINDINGS OF FACT

1. On or about November 12, 2007, Respondent hired Petitioner to work as a full-time installation technician. Respondent terminated Petitioner's employment on or about December 19, 2012.

2. Petitioner, who is of Puerto Rican descent, alleges, in his Charge of Discrimination filed on November 12, 2013, the following:

> My termination from Bright House Networks is clearly a pretext. As a benefit of being an employee I received complimentary cable. In June 2012, I relocated and connected the complimentary cable to my new residence. I was never informed upon hire that I could not connect my complimentary cable if I relocated. In November 2012 I advised a manager that my route was too far from my residence and he told me to update my address with the company. Shortly after I did so I was terminated. I feel I was treated adversely as similarly situated employees have relocated and connected their own cable.
>
> Based on the foregoing actions of Bright House Networks described herein, I believe that I have been discriminated against including my unlawful termination, based on

> my national origin in violation of the Florida Civil Rights Act of 1992, [and] Title VII of the Civil Rights Act. Due to my unlawful termination, I have suffered and continue to suffer severe financial and emotional damages.

3. Respondent's policies and procedures provide in part that "[a]ll full and part-time Bright House Networks employees are entitled to free cable television service as long as their home is located within an area served by Bright House Networks." The policies and procedures also provide that "[f]ree cable service is not transferable to another person's residence."

4. Respondent's procedures also provide that "[c]omplimentary service is provided for viewing, monitoring, and product knowledge by the employee at his/her own personal residence [and] [t]his benefit is not in any way transferable to another party or residence."

5. According to Christopher Kranert and Brinkley Ruffin, the intent of the policies and procedures governing free cable television is to allow employees to receive free cable television service at a single residential address. This is a reasonable interpretation by Respondent of its policies and procedures.

6. When initially hired by Respondent, Petitioner resided at 1203 Arrowsmith Avenue, Orlando, Florida (Arrowsmith), and this is the address of record for Petitioner that Respondent maintained in its database of employee addresses. In June 2012

Petitioner moved out of the Arrowsmith property and relocated to 4413 Kirkman Road, Apartment F205 (Kirkman), which is also in Orlando, Florida. Petitioner did not initially inform Respondent that he had moved to the Kirkman address. Both the Arrowsmith and Kirkman addresses are in areas where Respondent provides cable television service.

7 During Petitioner's term of employment, Respondent assigned Petitioner a truck that was equipped with a GPS device which allowed Respondent to approximate the whereabouts of the vehicle at all times.

8. As an efficiency measure, Respondent, at the beginning of each workday, assigns service calls to its individual technicians based on a customer's proximity to the technician's home address of record. In furtherance of this efficiency measure, Petitioner, at the end of each workday, was authorized to drive his assigned vehicle to his home so that the following workday he could leave directly from home and report to his assigned service call(s).

9. Petitioner noticed, at some point after June 2012, that the locations for his daily work assignments were a significant distance from his Kirkman address. This meant that not only did Petitioner have to wake-up earlier, and drive further, each morning in order to timely arrive for his service calls, but it also meant that he drove further when returning home at the end

of each workday. Petitioner complained to Respondent about the distance that he was travelling to and from his daily service calls.

10. In investigating Petitioner's complaint, Respondent pulled the GPS data log for the truck assigned to Petitioner. The GPS data revealed that at the beginning and end of each workday, the truck was parked at a location other than Petitioner's home address of record (Arrowsmith) and that this apparent anomaly had been happening for a significant period of time. Armed with this information, Respondent sent two of its employees to the Arrowsmith address for the purpose of finding out if cable service remained active. The employees confirmed that cable service for the Arrowsmith address was active and that the service was listed in Petitioner's name.

11. Next, Respondent identified the location where Petitioner's assigned truck was parked at the end of each workday (Kirkman). Respondent sent employees to the Kirkman address and determined that the address was receiving cable television service and that the address was not listed as an active account in Respondent's billing system. Respondent reasonably concluded that Petitioner was receiving unauthorized cable service at the Kirkman address while simultaneously receiving authorized cable service at the Arrowsmith address.

12. Petitioner believes that his actions complied with company policy because, according to Petitioner, the policy authorizes him to activate service when moving to a new address without having to notify Respondent. While Respondent's policies do not prohibit Petitioner from personally connecting cable service at his residence, the policies do prohibit Petitioner from doing so without first notifying Respondent.

13. After consulting with Petitioner's immediate supervisor Victor Gomez and Brinkley Ruffin, Chris Kranert terminated Petitioner's employment with Respondent.

14. Petitioner alleges that Respondent treated him differently from another employee that engaged in the exact same conduct that resulted in Petitioner's termination from employment. Petitioner's only evidence in support of this allegation is a conversation that he overheard between his former supervisor Allen Summers and Bright House employee M.S., who is African-American. According to Petitioner, Allen Summers asked M.S. if he was simultaneously receiving free cable service at more than one address. M.S. answered the question in the affirmative and explained to Allen Summers that he (M.S.) forgot to fill out the paperwork that would have informed Bright House about the transfer of cable service to M.S.'s new address. According to Petitioner, Respondent did not discipline M.S. for his violation of company policy. Petitioner relies on the

conversation between M.S. and Allen Summers to prove that the facts asserted in the conversation are true. The referenced statements attributed to M.S. and Allen Summers are hearsay. Respondent denies having knowledge of any instance where M.S. was allowed to receive free cable service at multiple addresses. Respondent did, however, offer evidence where two former employees were terminated as a result of theft of cable television services.[2/]

15. Petitioner offered no evidence that his national origin played a role in Respondent's decision to terminate his employment.[3/]

CONCLUSIONS OF LAW

16. The Division of Administrative Hearings has jurisdiction over the parties and subject matter in this case. §§ 120.569, 120.57, and 760.11, Fla. Stat. (2014).

17. Section 760.10(1) states that it is an unlawful employment practice for an employer to discharge or otherwise discriminate against an individual on the basis of national origin.

18. FCHR and Florida courts have determined that federal discrimination law should be used as guidance when construing provisions of section 760.10. See Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17, 21 (Fla. 3d DCA 2009); Brand v. Fla. Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994).

19. In the instant case, Petitioner alleges in his Charge of Discrimination that Respondent discriminated against him on the basis of national origin when it "discharged" him from employment.

20. Petitioner's asserted claim of discrimination is one of disparate treatment. The United States Supreme Court has noted that "'[d]isparate treatment . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin." Teamsters v. U.S., 431 U.S. 324, 335, n.15 (1977). Liability in a disparate treatment case "depends on whether the protected trait . . . actually motivated the employer's decision." Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993). "The ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination." Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 153 (2000).

21. Discriminatory intent can be established through direct or circumstantial evidence. 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).

22. "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." Schoenfeld v. Babbitt, supra. Petitioner presented no direct evidence of national origin discrimination.

23. "[D]irect evidence of intent is often unavailable." Shealy v. City of Albany, 89 F.3d 804, 806 (11th Cir. 1996). For this reason, those who claim to be victims of intentional discrimination "are permitted to establish their cases through inferential and circumstantial proof." Kline v. Tennessee Valley Auth., 128 F.3d 337, 348 (6th Cir. 1997).

24. Where a complainant attempts to prove intentional discrimination using circumstantial evidence, the shifting burden analysis established by the U.S. 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 charging party bears the initial burden of establishing a prima facie case of discrimination. When the charging party, i.e., Petitioner, is able to establish a prima facie case, the burden to go forward 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)(court discusses shifting burdens of proof in discrimination cases). The employer has the burden of production, not persuasion, and need only present evidence that the decision was non-discriminatory. Id.; Alexander v. Fulton Cnty., 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 a pretext for discrimination. Schoenfeld v. Babbitt, supra, at 1267. The employee must satisfy this burden of demonstrating pretext by showing 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, supra, at 1186; Alexander v. Fulton Cnty., supra.

25. "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.").

26. To establish a prima facie case of discriminatory discharge, a Petitioner must show that: (1) he is a member of a protected class; (2) he was discharged from employment; (3) his employer treated similarly situated employees, outside of his protected class, more favorably than he was treated; and (4) he was qualified to do the job. See McDonnell, supra; Burke-Fowler v. Orange Cnty., 447 F.3d 1319, 1323 (11th Cir. 2006); Knight v. Baptist Hosp. of Miami, Inc., 330 F.3d 1313, 1316 (11th Cir. 2003).

27. There is no dispute in the instant proceeding that Petitioner is a member of a protected class, that he was discharged from employment, and that he was otherwise qualified to do the job.

28. As for the issue of whether similarly situated employees outside of Petitioner's protected class were treated more favorably, Petitioner must prove that the employees that he compares himself to are "similarly situated in all relevant respects . . . [and in making this determination,] it is necessary to consider whether the employees are involved in or accused of the same or similar conduct and are disciplined in different ways." Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997).

29. Once the matter has, as in the instant case, been fully tried, "it is no longer relevant whether the plaintiff actually

established a prima facie case [and] . . . the only relevant inquiry is the ultimate, factual issue of intentional discrimination." Green v. Sch. Bd. of Hillsborough Cnty., 25 F.3d 974, 978 (11th Cir. 1994)(citing U.S. Postal Serv. Bd. of Governors. v. Aikens, 460 U.S. 711, 714-15 (1983)). However, the issue of whether a Petitioner "actually established a prima facie case is relevant . . . in the sense that a prima facie case constitutes some circumstantial evidence of intentional discrimination." Green, 25 F.3d at 978.

30. Petitioner failed to show that he and M.S., the employee to whom Petitioner compares himself, are similarly situated. Petitioner's hearsay testimony about a conversation that he overheard regarding the alleged status of M.S.'s cable service is not sufficient to establish that M.S. is an appropriate comparator for purposes of Petitioner's claim. Section 120.57(1)(c), Florida Statutes (2014), makes clear that hearsay evidence "may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." Petitioner has not cited any exception to the hearsay rule that would allow for the consideration of the hearsay testimony regarding M.S.'s cable service. Accordingly, Petitioner has failed to offer sufficient proof establishing that a similarly situated employee outside of

Petitioner's protected class was treated more favorably by Respondent.

31. Notwithstanding Petitioner's failure to offer either direct or circumstantial evidence of discrimination, Respondent, nevertheless, offered a legitimate, non-discriminatory explanation for the termination of Petitioner's employment, to wit: that Petitioner was terminated because he was simultaneously receiving complimentary cable service at two addresses in violation of company policy. Petitioner argues that his alleged violation of Respondent's company policy is pre-textual because employee M.S. was treated more favorably under similar circumstances. As previously explained, there is no evidence that M.S. was treated more favorably by Respondent than was Petitioner.

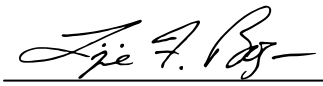
32. Having considered all of the evidence of record, it is not reasonable to infer that Petitioner was the victim of unlawful discrimination. Accordingly, Petitioner has failed to satisfy his burden of proof in this matter.

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 finding that Respondent, Bright House Networks, did not commit an unlawful employment practice as

alleged by Petitioner, Manny Rolon, and denying Petitioner's Charge of Discrimination.

DONE AND ENTERED this 22nd day of September, 2014, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of September, 2014.

ENDNOTES

[1/] All subsequent references to Florida Statutes will be to 2012, unless otherwise indicated.

[2/] Former Bright House employee A.B. was terminated when Respondent discovered that he had complimentary active cable service at more than one address. Additionally, former Bright House employee E.M. was terminated for unauthorized use of company equipment when Respondent discovered that company test equipment assigned to E.M. was used to download several pay-per-view movies.

[3/] Victor Gomez, who was Petitioner's immediate supervisor when Petitioner's employment was terminated, identifies his national origin as Columbia, South America. Petitioner implies in the Charge of Discrimination that Petitioner's national origin was a factor in Victor Gomez's decision to support the termination of Petitioner's employment. On cross-examination, however, Petitioner admitted that Mr. Gomez could have been motivated to recommend termination of Petitioner's employment for any number of reasons, including the way Petitioner "smells," "the way

[Petitioner] walks," or because Petitioner told Mr. Gomez to "leave me alone, I'm on lunch."

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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.