STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TERRY R. DOUGLAS,

Petitioner,

vs. Case No. 14-2524

GULF COAST ENTERPRISE,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on July 25, 2014, in Pensacola, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Terry R. Douglas, pro se
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For Respondent: Breanna H. Young, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether Respondent, Gulf Coast Enterprise (GCE), discriminated against Petitioner, Terry R. Douglas, based on his race--African-American--or his disability--hearing impairment.

PRELIMINARY STATEMENT

Douglas filed a Petition for Relief from an Unlawful Employment Practice with the Florida Commission on Human Relations (FCHR) dated May 21, 2014. FCHR forwarded the Petition to the Division of Administrative Hearings for assignment of an Administrative Law Judge to conduct a formal administrative hearing. Upon notice to all parties, a formal hearing was held at the time, date, and place shown above.

At the final hearing, Douglas appeared on his own behalf. He provided sworn oral testimony and called one additional witness, Cicily Mathis. Douglas did not offer any exhibits into evidence. GCE was represented by counsel and by a corporate representative, Angie Kahiapo, director of employee relations. GCE called four witnesses: Kahiapo; Shelley Prater, employee relations specialist; Paul Markham, assistant building manager; and Alan Harbin, senior employee relations specialist. Exhibits 1, 3, 6, 8-11, 13-17, and 19 offered into evidence by GCE were admitted.

A Transcript of the final hearing was filed at DOAH on August 12, 2014. By rule, the parties had 10 days to submit proposed recommended orders (PROs) to be considered in the preparation of a recommended order. GCE filed its PRO on August 22, 2014; as of the date of this Recommended Order, Douglas had not filed a PRO.

FINDINGS OF FACT

1. Petitioner, Terry R. Douglas (Douglas) is an African-American male. He is hard of hearing and uses hearing aids (when he can afford the batteries) and relies upon interpretive sign language when it is available.[1/]

2. At all times relevant hereto, Douglas worked as a food line server under the employ of GCE, which is a division of Lakeview Center, Inc., an affiliate of Baptist Health Care. The stated purpose of GCE is "to operate a successful business which will provide meaningful employment to persons with disabilities in accordance with the requirements of the AbilityOne Program." AbilityOne is a program that creates jobs and training opportunities for people who are blind or who have other severe disabilities, empowering them to lead more productive and independent lives. GCE is an equal opportunity employer and does not discriminate on the basis of race, color, national origin, religion, gender, age, marital status, disability, or any other category protected by law.

3. Douglas had been previously employed by GCE in 2010 as a custodian but voluntarily resigned to pursue employment elsewhere. He briefly took a job in the Orlando area, then went to Memphis for about one year. When he returned to Pensacola he took a position with GCE commencing May 9, 2013, in the food service division. He was hired to work the night shift, from

7:00 p.m., until approximately 1:30 a.m. As part of being hired anew by GCE, Douglas filled out an "Employee Self-Identification Form" in order to advise GCE of his status within a protected class. Douglas identified himself as an individual with a disability but stated that there were no accommodations which GCE needed to provide in order to improve his ability to perform his job.

4. When Douglas recommenced employment with GCE in May 2013, he went through employee orientation. He received copies of the Employee Handbook and various written policies addressing issues such as discrimination, harassment, drug-free workplace, etc. He was also provided training on the GCE Code of Conduct and Respect in the Workplace policies.

5. Douglas' job entailed preparing and/or serving food at the cafeteria in Building 3900 at the Pensacola Naval Air Station (NAS). He was by all accounts a good employee, a hard worker, and gained the respect of his supervisor, Prospero Pastoral (called "Mr. Pete" by most employees). In fact, when Mr. Pete was going to take an extended vacation to visit his home in the Philippines, Douglas was selected as one of the individuals to take over some of Mr. Pete's duties in his absence. Douglas got along well with his fellow employees and co-workers.

6. Douglas' supervisors were Mr. Pete and Paul Markham, the assistant building manager of Building 3900. Douglas had a good

relationship with Markham when he first started working in food service, but (according to Douglas) they did not get along so well later on. There did not appear to be any overt animosity between the two men during the final hearing.

7. In November 2013, Markham was advised by the kitchen manager that some food items (including several hams) were missing from the kitchen inventory. It was suspected that some night shift employees may have been stealing the food items. Markham was asked to investigate and see if there was any suspicious behavior by any employees.

8. On the evening of November 22, 2013, Markham changed from his work uniform into civilian clothes just prior to midnight. He then drove to a parking lot just behind Building 3900 and sat inside his darkened vehicle. He had driven his wife's car to work that day so that his pickup truck (which employees would recognize) would not alert others to his presence.

9. At around midnight, he saw two employees (Gerry Riddleberger and Andy Bartlett) sitting outside Building 3900 talking. He could see Douglas in the building through the window. A few minutes later, Douglas exited the building carrying a large black garbage bag. Markham got out of his car and walked toward Douglas. As he approached, Markham began to "chat" with Douglas about trivial things. He asked how he was

doing; he asked where Ira (another employee) was; he made small talk.[2/]

10. Finally, Markham asked Douglas what was in the bag. Douglas responded that "these are tough times" and that "I have to take care of my family." He then opened the bag and showed Markham the contents therein. The bag contained numerous bags of potato chips and snacks, some bananas, packets of coffee creamer, and other small items.

11. Markham asked Douglas to hand over the bag and he did so. He then asked Douglas for his badge and access key. When Douglas handed those over, Markham told him to leave the NAS and he would be hearing from the GCE human resources/employee relations department (HR). Douglas left the base and Markham waited around a while to see if any other employees were carrying suspicious items. Not observing any other suspect behavior, Markham concluded his investigation for that evening.

12. The next day, Markham handed over the bag and Douglas' badges to HR. It was determined by HR that Douglas' attempted theft of the property constituted just cause for termination of his employment with GCE. The HR office notified Douglas of the decision to terminate his employment. Douglas thereafter visited the HR office to ask that the decision be reconsidered. Douglas was told that the process for reconsideration was to submit, in

writing, his statement of the reasons and whether there were mitigating factors to be considered.

13. Douglas submitted a four-page request for reconsideration to Kahiapo, director of employee relations, dated December 2, 2013. In the letter, Douglas admitted to the theft but rationalized that other employees were stealing food as well. He said he had seen Markham taking boxes out of storage and putting them in his truck, but did not know what the boxes contained. He said a blonde worker on the food line ate food from the serving line, but had no details about the allegation. He complained that other workers had been caught stealing but had not been terminated from employment. He alleged that a worker (Jeanette) stole a bag of bacon and only got suspended. Markham had no support or independent verification of the allegations.

14. GCE had one of its employee relations specialists, Alan Harbin, review Douglas' reconsideration letter and investigate the allegations found therein. All of the allegations were deemed to be unfounded. There was a worker named Jeanette who had been suspended for eating an egg off the serving line, but this did not comport with Douglas' allegation.

15. When Harbin's findings were reported to HR, Kahiapo notified Douglas via letter dated December 18, 2013, that his request for reconsideration was being denied. The termination of employment letter was not rescinded. The decision by HR was in

large part due to the zero tolerance policy against theft adhered to by GCE. The GCE Employee Handbook contains the following:

> In accordance with the general "at will" nature of employment with GCE, generally, employees may be discharged at any time, and for any reason.
>
> * * *
>
> An employee may be discharged on a first offense and without prior disciplinary action if the violation so warrants.
>
> * * *
>
> Conduct that may result in immediate termination of employment includes, but is not limited to:
>
> * * *
>
> [12] Theft, pilfering, fraud or other forms of dishonesty.

16. It is clear--and Douglas admits--that Douglas was guilty of theft. He attempted to steal a bag of food items from the building in which he worked.

17. During his term of employment, Douglas never made any claim concerning discrimination against him or anyone else due to his race, African-American. He was never mistreated or treated differently than any other employee by his supervisors.

18. Douglas did not have any problem doing his job. His disability, being hard of hearing, did not adversely affect his employment. He never asked for any accommodation to do his job

or suggested to anyone that his disability interfered with his ability to perform his duties.

19. There are simply no facts in this case upon which a claim of discrimination could reasonably be based.

CONCLUSIONS OF LAW

20. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes. Unless otherwise specified herein, all references to Florida Statutes shall be to the 2013 codification.

21. The Florida Civil Rights Act of 1992 (the "Act") is codified in sections 760.01-760.11, Florida Statutes. The Act's general purpose is "to secure for all individuals within the state freedom from discrimination because of race, color, religion, sex, national origin, age, handicap, or marital status and thereby to protect their interest in personal dignity, to make available to the state their full productive capacities, to secure the state against domestic strife and unrest, to preserve the public safety, health, and general welfare, and to promote the interests, rights, and privileges of individuals within the state." § 760.01, Fla. Stat. When "a Florida statute [such as the Act] 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. Fla. Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994). Therefore, the FCRA should be interpreted, where possible, to conform to Title VII of the Civil Rights Act of 1964, which contains the principal federal anti-discrimination laws.

22. Section 760.10, provides, in relevant part:

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

23. 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. Denney v. City of Albany, 247 F.3d 1172, 1182 (11th Cir. 2001); Holifield v. Reno, 115 F.3d 1555, 1561 (11th Cir. 1997). But courts have held that "only the most blatant remarks, whose intent could be nothing other than to discriminate" satisfy this definition. Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d 1354, 1358-59 (11th Cir. 1999) (internal quotations omitted), cert. denied, 529 U.S. 1109 (2000).

24. In the absence of direct evidence, the law permits an inference of discriminatory intent, if complainants can produce sufficient circumstantial evidence of discriminatory animus, such as proof that the charged party treated persons outside of the protected class (who were otherwise similarly situated) more favorably than the complainant was treated. Such circumstantial evidence constitutes a prima facie case.

25. In McDonnell Douglas Corporation v. Green, 411 U.S. 792, 802-803 (1973), the U.S. Supreme Court explained that the complainant has the initial burden of establishing by a preponderance of the evidence a prima facie case of unlawful discrimination. Failure to establish a prima facie case of discrimination ends the inquiry. See Ratliff v. State, 666 So. 2d 1008, 1012 n.6 (Fla. 1st DCA 1996), aff'd, 679 So. 2d 1183 (Fla. 1996). If, however, the complainant succeeds in making a prima facie case, then the burden shifts to the accused employer to articulate a legitimate, non-discriminatory reason for its complained-of conduct. This intermediate burden of production, not persuasion, is "exceedingly light." Turnes v. Amsouth Bank, N.A., 36 F.3d 1057, 1061 (11th Cir. 1994). If the employer carries this burden, then the complainant must establish that the proffered reason was not the true reason but merely a pretext for discrimination. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 516-518 (1993). At all times, the "ultimate burden of persuading

the trier of fact that the [charged party] intentionally discriminated against" him remains with the complainant. Silvera v. Orange Co. Sch. Bd., 244 F.3d 1253, 1258 (11th Cir. 2001).

26. To establish a prima facie case of employment discrimination in the present matter, Douglas is required to show that he "(1) is a member of a protected class; (2) was qualified for the position; (3) was subject to an adverse employment action; and (4) was replaced by someone outside the protected class, or, in the case of disparate treatment, shows that other similarly situated employees were treated more favorably." Taylor v. On Tap Unlimited, Inc., 282 Fed. Appx. 801, 803 (11th Cir. 2008).

27. There is no dispute that Douglas belongs to a protected class due both to his race and his disability. As such, Douglas satisfied the first prong of a prima facie case of employment discrimination.

28. As to the second prong, there is no dispute that Douglas had the skills necessary to perform his duties and did an admirable job.

29. The termination of his employment constitutes an adverse employment action, so Douglas satisfies the third prong as well.

30. Finally, with respect to the fourth prong, Douglas provided no competent evidence that he was treated any

differently than other similarly situated workers. His allegations concerning other employees failed to establish that they were similarly situated. His allegations were also completely hearsay in nature, with no corroborating evidence to substantiate his claims.

31. Based upon these facts, Douglas failed to establish a prima facie case of employment discrimination, and the burden of production never shifted to GCE to articulate a legitimate, non-discriminatory reason for the termination of employment.

32. Nonetheless, GCE offered its legitimate reasons for terminating the employment action it took against Douglas. He was fired for stealing food. Even Douglas admitted that he was guilty of stealing the food and that it was wrong to do so. It is also clear that the GCE Employee Handbook lists theft as a basis for terminating an employee's employment.

33. Though not necessary or relevant due to the foregoing, Douglas then attempted to prove that GCE's stated basis for terminating Douglas' employment was mere pretext. He attempted to prove that others similarly situated had been treated differently. His hearsay evidence failed to substantiate any such claim. Hearsay cannot be used as the sole basis for a finding of fact, unless the hearsay would be admissible over objection in civil actions; such hearsay can only be used to

supplement or explain admissible evidence. § 120.57(1)(c), Fla. Stat.; Fla. Admin. Code R. 28-106.213(3).

34. Even if hearsay evidence could be used to support findings of fact, Douglas failed to prove that any other employees were "similarly situated." In order to prove they were, Douglas would have to show that the employees are "similarly situated in all relevant respects," including that they were "involved in or accused of the same or similar conduct" as Douglas for which they were treated more favorably. Holifield v. Reno, 115 F.3d 1555, at 1562. Douglas claimed that a woman had stolen bacon and only been suspended. He said a man had stolen a pie but had not been fired. He said Markham put boxes in his truck but was not penalized. None of these allegations would have established that the employees were "similarly situated," even if they had been proven by competent evidence.

35. Douglas failed to meet his burden of proving a prima facie case of discrimination based on his race or disability. That failure ends the inquiry. See Ratliff v. State, 666 So. 2nd 1008, 1012 n.6 (Fla. 1st DCA) (citing Arnold v. Burger Queen Systems, 509 So. 2d 958 (Fla. 2d DCA 1987)), aff'd, 679 So. 2d 1183 (Fla. 1996).

36. Even if Douglas had established a prima facie case, GCE met its burden of articulating legitimate reasons for terminating

Douglas' employment with the company that had nothing to do with race or handicap.

37. Further, Douglas could have been terminated for any reason or no reason at all under the GCE policies in existence. An "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'n, 738 F.2d 1181, 1187 (11th Cir. 1984).

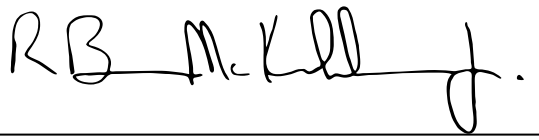
38. Douglas appears to be a nice, sincere young man and has shown remorse for attempting to steal food from his employer. He understands the wrong he committed, but wishes he could have a chance to redeem himself. That request is between Douglas and GCE. In the present case, under the facts presented, there is no basis for finding that GCE discriminated against Douglas in any fashion.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that a final order be entered by the Florida Commission on Human Relations, upholding its determination that no cause exists for a finding of discrimination against Petitioner, Terry R. Douglas, by Respondent, Gulf Coast Enterprise.

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



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Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of August, 2014.

ENDNOTES

[1/] Prior to the final hearing in this matter, Douglas requested that a sign interpreter be provided at final hearing to insure that he could "hear" everything said. An interpreter was located by DOAH and contracted to appear. On the evening prior to final hearing, the interpreter notified DOAH that he would not be able to attend the hearing until 11:30 a.m. (the hearing was scheduled to begin at 9:00 a.m. CDT). On the morning of the final hearing, the interpreter notified DOAH that he would not be able to attend the final hearing at all. Upon Douglas' arrival, and in the presence of counsel for Respondent, the ALJ explained the situation to Douglas. After a brief conversation wherein Douglas appeared able to comprehend and respond to the ALJ, it was decided to attempt to conduct the hearing without use of the interpreter. The hearing room was quite small and all parties were within six feet of each other. The hearing was commenced and the ALJ found that Douglas was able to follow the testimony and statements of counsel without difficulty.

[2/] Douglas claims that the inquiry about Ira was discriminatory because Ira was African-American. Thus, reasoned Douglas, Markham was only concerned with possible theft by non-Caucasian workers. But as Markham explained, he asked about Ira because the only other employees were already sitting outside and there was no

reason to inquire about their whereabouts. Douglas' allegation of discrimination is not convincing or based on any supportive facts.

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.