STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

REGGIE DANCY,

Petitioner,

vs. Case No. 14-3387

PRECISION TUNE AUTO CARE,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, this case was heard on November 12, 2014, by video teleconference at sites in Tallahassee and Pensacola, Florida, before E. Gary Early, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Reggie Dancy, pro se
6881 Twiggs Lane
Pensacola, Florida 32505

For Respondent: Kelly B. Holbrook, Esquire
Broad and Cassel
100 North Tampa Street, Suite 3500
Tampa, Florida 33602

STATEMENT OF THE ISSUE

Whether the Petitioner was subject to an unlawful employment practice by Respondent, Precision Tune Auto Care, on

account of his race, or a result of a sexually abusive work environment in violation of section 760.10, Florida Statutes.

PRELIMINARY STATEMENT

On January 2, 2014, Petitioner, Reggie Dancy (Petitioner), filed an Employment Complaint of Discrimination, dated December 29, 2013, with the Florida Commission on Human Relations (FCHR) in which he alleged that Respondent, Precision Tune Auto Care (Precision or Respondent), violated section 760.10, by discriminating against him on the basis of his race, and by sexual harassment that created a sexually hostile or offensive work environment.

On July 1, 2014, the FCHR issued a Determination: No Cause and a Notice of Determination: No Cause, by which the FCHR determined that reasonable cause did not exist to believe that an unlawful employment practice occurred. On July 21, 2014, Petitioner filed a Petition for Relief with the FCHR. The Petition was transmitted to the Division of Administrative Hearings to conduct a final hearing.

The final hearing was originally set for September 18, 2014. It was twice-continued, re-set for November 12, 2014, and held as scheduled.

At the final hearing, Petitioner testified on his own behalf. Petitioner's Exhibits 1 through 6 were received into evidence. Respondent presented the testimony of Gregory Geiger,

Precision's Assistant District Manager; Michael McCoy, a Precision lead technician; Rio Jones, the receptionist at several Precision facilities, including the 9th Avenue facility at which Petitioner worked; Scott Gerhardt, Precision's part-owner and District Manager; Anthony Hale, who at all times relevant hereto was a Precision technician and former manager; and Krystal Abbott, manager of Precision's 9th Avenue facility. Respondent's Exhibits 1 through 3, and 6 through 16 were received into evidence.

A one-volume Transcript of the hearing was filed on December 4, 2014. The parties timely filed their post-hearing Proposed Recommended Orders, which have been considered in the preparation of this Recommended Order. References to statutes are to Florida Statutes (2014) unless otherwise noted.

FINDINGS OF FACT

1. Petitioner, who was at all times relevant to this matter, an employee of Respondent, is an African-American male.

2. Precision owns and operates five automobile service facilities in northwest Florida. They are generally referred to as the 9th Avenue (Pensacola) facility, the 9-Mile (Pensacola) facility, the Navy Boulevard (Pensacola) facility, the Fort Walton Beach facility, and the Crestview facility. Though there was no direct testimony as to the number of persons employed by Precision, the evidence is persuasive that each facility has a

minimum of 4 to 6 full-time employees. Therefore, there is sufficient competent, substantial evidence to establish that Respondent employs more than 15 full-time employees at any given time.

Petitioner's Hiring

3. On June 14, 2013, Petitioner started work at Respondent's 9th Avenue location in Pensacola, Florida, as a lube-tech.

4. When Petitioner was hired, Ms. Abbott was the manager of the 9th Avenue location, having started in that position in April 2013.

5. Petitioner was not hired by Ms. Abbott. Rather, Mr. Geiger interviewed Petitioner and approved his hiring for the 9th Avenue lube-tech position.

6. Prior to his employment at the 9th Avenue facility, Petitioner worked at Respondent's Navy Boulevard facility. He was there for a single day. The circumstances of his departure were not explained.

7. When Petitioner started work at 9th Avenue, he was provided with employee procedures handbooks issued by Respondent and by Lyons HR, Respondent's payroll management company. Both handbooks contained policies prohibiting sexual harassment, and provided means for reporting complaints. On June 6, 2013,

Petitioner signed written acknowledgement pages for each of the handbooks.

8. Respondent's employee procedures handbook had been revised in March 2013. The written acknowledgement page signed by Petitioner for Respondent's employee procedures handbook was for an earlier revision. The evidence was persuasive that the page signed by Petitioner was one of a stack "kept in a drawer" for that purpose, a stack that had not been replaced when the handbook was updated. The preponderance of the evidence supports a finding that Petitioner received the employee procedures handbooks issued by Respondent and Lyons HR. In addition, current handbooks were available at each of Respondent's facilities for the employees' use.

9. Petitioner alleged in his Employment Complaint of Discrimination that he was hired at 9th Avenue because it was the only one of Respondent's locations at which African-Americans were employed, which Petitioner attributed to Ms. Abbott's alleged desire "to be with a black guy."[1/] The preponderance of the evidence establishes that Respondent employed African-American workers at its other locations, in positions including those of manager and technician.

10. Lube-techs are employed by Respondent to perform oil changes. As they gain experience, they may be assigned to perform simple maintenance work.

11. Technicians are employed by Respondent to perform a range of automotive repairs. Technicians are required to own a set of mechanics' tools sufficient to perform more complex work, involving mechanical work, repair and replacement of water pumps, power steering pumps and the like.

12. When he was hired as a lube-tech at 9th Avenue, Petitioner had neither the skills nor the tools to perform work as a technician.

13. When he started work, Petitioner was perceived as a very good employee, doing work without being asked, cleaning, and generally doing extra work around the facility. As a result, Petitioner received a raise of 25 cents per hour after six-to-eight weeks on the job.

14. Technician work is desirable because technicians have the ability to earn commissions. Petitioner soon began asking for technician work. His requests were refused. Although Petitioner was allowed to do some extra work, Mr. Geiger believed that he was not ready to be a full-time technician.

15. On August 5, 2013, Morgan Hancock was hired as a technician at 9th Avenue. He had previously been a technician at another Precision facility. Petitioner felt as though he should have been given the opportunity to work as a technician, and there began to be friction between Petitioner and Mr. Hancock.

16. As a result of the perceived slight at his not being promoted to technician, Petitioner began to exhibit a "bad attitude" and his performance began to "slack off." His willingness to do more undesirable tasks that were expected of all employees, including cleaning, deteriorated over the ensuing weeks. He made several requests to transfer to a technician's position at other Precision facilities, discussing the matter with both Ms. Abbott and Mr. Geiger. The dates of the verbal requests are unclear, though it appears that one was made on September 5, 2013, and one was made to Mr. Geiger within two weeks prior to Petitioner's November 20, 2013, termination.

17. The evidence is persuasive that the requests to transfer were denied for a number of non-discriminatory reasons. First, as set forth above, Petitioner did not have sufficient skills or an adequate set of tools to work as a technician. Second, Precision had been cutting back on employees, and there were no positions open at the other facilities for someone of Petitioner's level of skill and experience. Finally, one of Petitioner's requests was for a transfer to the Navy Boulevard facility. Petitioner had previously worked there for a short period, and the manager simply did not want him back. There is no evidence to support a finding that Petitioner's requests for transfer were denied as a result of some racial animus, or as a result of Ms. Abbott's alleged sexual desire for Petitioner.

18. By the time Petitioner was at the end of his 90-day probationary period, his performance was such that he did not receive a discretionary salary increase. The evidence is persuasive that the decision was based on Petitioner's increasingly poor job performance and not, as alleged by Petitioner, retaliation by Ms. Abbott for Petitioner's failure to satisfy her sexual requests.

19. On September 26, 2013, at Petitioner's request, Ms. Abbott wrote a letter on Precision letterhead stating that Petitioner had worked for Precision since August 6, 2012. Petitioner had, in fact, started work for Precision in June 2013. Petitioner characterized the letter as evidence of Ms. Abbott's willingness to falsify a document as a means of gaining favor with Petitioner, and as an enticement for Petitioner to provide sexual favors. Ms. Abbott testified, convincingly, that Petitioner asked her to write the letter so he could show one year of Florida residency, and therefore qualify for in-state tuition at George Stone, a technical center in Pensacola, where he wanted to take classes to gain skills to be a technician. She wanted to help him, and so wrote the letter knowing it to be false. Mr. McCoy witnessed Ms. Abbott giving the letter to Petitioner, and testified it was accompanied by no suggestive remarks. Her agreement to write the letter on Petitioner's behalf was ill-advised, and upon its

discovery, she was reprimanded by Mr. Gerhardt. The letter does not, by any means, suggest that Respondent or Ms. Abbott discriminated against Petitioner in any way, or that Ms. Abbott used the letter as an inducement for Petitioner to provide her with sexual favors.

20. On October 7, 2013, Bret Ramsey was hired at 9th Avenue. Mr. Ramsey, who is Caucasian, was a technician who had previously worked at Respondent's Navy Boulevard location. Mr. Ramsey worked at 9th Avenue for two weeks, at which time he transferred back to Navy Boulevard. Mr. Geiger could not remember the reason for Mr. Ramsey's transfer, but assumed that Navy Boulevard was in need of an experienced and qualified technician. As to whether Petitioner would have been a suitable candidate for the transfer, Mr. Gerhardt testified credibly that the manager of the Navy Boulevard location would not accept Petitioner due to his past employment there. Mr. Ramsey's transfer does not support a finding that Respondent discriminated against Petitioner on the basis of his race, or that Ms. Abbott was "keeping" Petitioner at 9th Avenue to satisfy her sexual urges.

21. Respondent required its employees to "clock-out" for their lunch hour and leave the premises. By so doing, it was easier to ensure that work hours were not confused with off-duty

lunch hours and to "keep payroll straight." Respondent's policy was applied evenly to all employees.

22. Ms. Abbott would occasionally buy lunch for all of the employees at 9th Avenue, either when they were busy, or as thanks for their hard work. Petitioner characterized Ms. Abbott's acts of kindness and gratitude towards the employees of 9th Avenue as "buying me expensive lunches" to induce cooperation with her requests for sexual favors, a characterization that finds no evidentiary support.

23. Petitioner testified that Ms. Abbott would come to work drunk. Aside from the fact that Ms. Abbott's state of sobriety, or lack thereof, has no bearing on whether Petitioner was subject to racial discrimination or sexual harassment, the evidence was insufficient to support Petitioner's claim.

24. Petitioner testified that Ms. Abbott cut his hours as retaliation for his failure to submit to her sexual advances. The time records for Petitioner demonstrates that Petitioner worked 40-hours plus overtime on 19 of the 23 weeks that he was employed at 9th Avenue, including five of his last six full weeks of employment. The other four weeks ranged from 35.90 to 38.68 hours per week. Thus, there is nothing to support the assertion that Petitioner's hours were cut for any reason. Petitioner's supposition that Ms. Abbott may have altered his

time records--which records are managed and kept by Lyons HR--is not persuasive.

Petitioner's Termination

25. On November 18, 2013, Ms. Abbott, after having spent the day cleaning the service pits, instructed employees to place all cars needing service on the facility's lift racks, and not over the pits. That day, Petitioner pulled a car into position over a pit. Mr. McCoy advised Petitioner that Ms. Abbott had instructed that all cars were to be put on a rack. Petitioner responded to the effect that if Ms. Abbott wanted the car racked, she could rack it herself, sprinkling his response with some choice profanities. His response was loud enough that Ms. Abbott could overhear it through the window between the shop and the reception area.

26. As a result of what Ms. Abbott understandably perceived as insubordination, she prepared a written warning based on the fact that "employee was told multiple times to place vehicles on lifts not over pit [and] refused." She presented the Discipline/Discharge Form to Petitioner, who refused to sign the form to acknowledge receipt. Mr. McCoy was called in to witness that Petitioner refused to sign the warning. Petitioner became argumentative with Ms. Abbott, who then instructed him to go home for the day. Upon leaving the premises, Petitioner "peeled out" of the parking lot, spraying

gravel in the direction of other parked cars. By that time, Ms. Abbott had called Mr. Geiger to discuss the circumstances of the written warning. Mr. Geiger was able to hear the sound of Petitioner's exit from the premises. That act was taken by Mr. Geiger and Ms. Abbott as a second instance of misconduct warranting discipline.

27. Ms. Abbott discussed the situation regarding Petitioner with Mr. Geiger and Mr. Gerhardt. The decision was made by the three of them, based upon that day's behavior and Petitioner's increasingly bad attitude, that Ms. Abbott should terminate Petitioner from employment.

28. November 19, 2013, was a scheduled day off for Petitioner. When Petitioner returned to work on November 20, 2013, he presented Ms. Abbott with a letter in which he requested a transfer to another Precision location. In his letter, he indicated that he had previously discussed a transfer with Ms. Abbott because of "lack of communication, lack of supervision, lack of procedure standards and underlying personality conflicts." No mention was made of any discriminatory or sexually inappropriate actions on the part of Precision or Ms. Abbott. Petitioner requested that Ms. Abbott sign the transfer request to acknowledge receipt, which she did. Her acknowledgement of receipt of the transfer request does not

support a finding that Respondent or Ms. Abbott discriminated against Petitioner.

29. Ms. Abbott advised Petitioner that a transfer was out of the question, and that he was being terminated from employment. Petitioner demanded that she give him a copy of his termination papers. Ms. Abbott advised that he would be faxed his Termination Record by Respondent's human resources department. Petitioner then left the premises. He was subsequently sent a copy of the Termination Record as stated.

Uniform Return

30. When Petitioner left the employ of Respondent, he failed to return the company-issued uniforms, valued at $466.00. On January 6, 2014, after several verbal attempts by Ms. Abbott to recover the uniforms, Mr. Gerhardt sent a certified letter to Petitioner at his address of record. The address to which the letter was mailed, 6881 Twiggs Lane, Pensacola, Florida 32305, is the same address provided to the FCHR by Petitioner in his December 29, 2013 Employment Complaint of Discrimination, and his July 21, 2014 Petition for Relief. Mr. Gerhardt's letter advised Petitioner that if he did not return the uniforms by January 31, 2014, the matter would be turned over to the state attorney.

31. Petitioner did not return the uniforms and, as promised, the matter was turned over to law enforcement.

32. Respondent has taken legal action to recover uniforms from former employees in the past, including Caucasian former employees.

Ultimate Findings of Fact

33. Up to and including the time of his termination, Petitioner did not contact the employee hotline, file a complaint, discuss with co-workers or management, or otherwise claim that he had been the subject of discrimination because of his race, or that Ms. Abbott had acted in a sexually inappropriate way towards him.

34. No witness, other than Petitioner, testified that they ever saw Ms. Abbott dress "provocatively" or in other than standard work attire, ever heard Ms. Abbott tell off-color or racially-charged jokes, or ever heard or observed Ms. Abbott interacting with Petitioner in an inappropriate manner.

35. There was no competent, substantial evidence adduced at the hearing to support a finding that any personnel decisions regarding Petitioner, including those regarding his requests to transfer, his written warning, and his termination, were made due to Petitioner's race, or in furtherance of any effort to sexually harass or obtain sexual favors from Petitioner.

36. There was no competent, substantial evidence adduced at the hearing that any persons who were not members of the Petitioner's protected class, i.e., African-American, were

treated differently from Petitioner, or were not subject to similar personnel policies and practices.

CONCLUSIONS OF LAW

37. Sections 120.569 and 120.57(1), Florida Statutes, grant the Division of Administrative Hearings jurisdiction over the subject matter of this proceeding and of the parties.

Standards and Procedure

38. Section 760.10 provides, in pertinent part:

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

39. Petitioner maintains that Respondent discriminated against him on account of his race and as a pattern of sexual behavior and harassment that resulted in a sexually abusive work environment.

40. Section 760.11(1) provides that "[a]ny person aggrieved by a violation of ss. 760.01-760.10 may file a complaint with the [FCHR] within 365 days of the alleged violation . . . ." Petitioner timely filed his complaint.

41. Section 760.11(7) provides that upon a determination by the FCHR that there is no probable cause to believe that a

violation of the Florida Civil Rights Act of 1992 has occurred, "[t]he aggrieved person may request an administrative hearing under ss. 120.569 and 120.57, but any such request must be made within 35 days of the date of determination of reasonable cause. . . ." Following the FCHR determination of no cause, Petitioner timely filed his Petition for Relief requesting this hearing.

Applicability of Federal Precedent

42. Chapter 760, Part I, is patterned after Title VII of the Civil Rights Act of 1964, as amended. When "a Florida statute 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); see also Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17 (Fla. 3rd DCA 2009); Fla. State Univ. v. Sondel, 685 So. 2d 923 (Fla. 1st DCA 1996); Fla. Dep't of Cmty. Aff. v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991).

Burden of Proof

43. Petitioner has the burden of proving by a preponderance of the evidence that Respondent committed an unlawful employment practice. See St. Louis v. Fla. Int'l Univ., 60 So. 3d 455 (Fla. 3rd DCA 2011); Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981).

44. Employees may prove discrimination by direct, statistical, or circumstantial evidence. Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d at 22.

45. 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). Courts have held that "'only the most blatant remarks, whose intent could be nothing other than to discriminate . . .' will constitute direct evidence of discrimination." Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d 1354, 1358-59 (11th Cir. 1999)(citations omitted).

46. In the absence of any direct or statistical evidence of discriminatory intent, Petitioner must rely on circumstantial evidence of such intent. In McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973), and as refined in Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) and St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993), the United States Supreme Court established the procedure for determining whether employment discrimination has occurred when employees rely upon circumstantial evidence of discriminatory intent.

47. If Petitioner is able to prove his prima facie case by a preponderance of the evidence, the burden shifts to Respondent to articulate a legitimate, non-discriminatory reason for its

employment decision. Texas Dep't of Cmty. Aff. v. Burdine, 450 U.S. at 255; Dep't of Corr. v. Chandler, 582 So. 2d 1183 (Fla. 1st DCA 1991). An employer has the burden of production, not persuasion, to demonstrate to the finder of fact that the decision was non-discriminatory. Dep't of Corr. v. Chandler, supra. This burden of production is "exceedingly light." Holifield v. Reno, 115 F.3d 1555, 1564 (11th Cir. 1997); Turnes v. Amsouth Bank, N.A., 36 F.3d 1057, 1061 (11th Cir. 1994).

48. If the employer produces evidence that the decision was non-discriminatory, 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. at 516-518. In order to satisfy this final step of the process, Petitioner must "show[] 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, 582 So. 2d at 1186 (citing Tex. Dep't of Cmty. Aff. v. Burdine, 450 U.S. at 252-256)). The demonstration of pretext "merges with the plaintiff's ultimate burden of showing that the defendant intentionally discriminated against the plaintiff." (citations omitted) Holifield v. Reno, 115 F.3d at 1565.

49. The law is not concerned with whether an employment decision is fair or reasonable, but only with whether it was

motivated by unlawful discriminatory intent. In a proceeding under the Civil Rights Act, "[w]e are not in the business of adjudging whether employment decisions are prudent or fair. Instead, our sole concern is whether unlawful discriminatory animus motivates a challenged employment decision." Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d at 1361. As set forth by the Eleventh Circuit Court of Appeals, "[t]he 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'ns, 738 F.2d 1181, 1187 (11th Cir. 1984). Moreover, "[t]he employer's stated legitimate reason . . . does not have to be a reason that the judge or jurors would act on or approve." Dep't of Corr. v. Chandler, 582 So. 2d at 1187.

Discrimination on the Basis of Race

50. The record of this proceeding contains no direct evidence of any racial bias on the part of Respondent at any level.

51. Petitioner presented no statistical evidence of racial discrimination by Respondent in its personnel decisions affecting Petitioner.

52. In order to demonstrate by circumstantial evidence that a disciplinary decision was motivated by racial discrimination, Petitioner must establish the prima facie case

that he "(1) belongs to a protected class; (2) was qualified to do the job; (3) was subjected to an adverse employment action; and (4) the employer treated similarly situated employees outside the class more favorably." Johnson v. Great Expressions Dental Ctrs. of Fla., P.A., 132 So. 3d 1174, 1176 (Fla. 3rd DCA 2014) (citing McDonnell Douglas Corp. v. Green, 411 U.S. at 802).

Prima Facie Case

53. The first three elements of Petitioner's prima facie case have been met. Petitioner proved that, as an African-American, he is a member of a protected class; that he was qualified to hold the job of lube-tech; and that he was subjected to the adverse employment action of termination.

54. Where Petitioner has failed in the establishment of his prima facie case of racial discrimination is his failure to demonstrate that other comparably situated employees were subject to personnel decisions that differed from those applied to him.

55. Petitioner provided no evidence that Respondent acted inconsistently with the manner in which any employee, regardless of race, would have been subject to its practice of transfers to different facilities, taking into account Petitioner's level of skill and experience; that Respondent acted inconsistently with the manner in which any employee, regardless of race, would have

been subject to work performance expectations; or that Respondent treated Petitioner any differently than any other employee, regardless of race, in matters involving insubordination and response to a reprimand.

56. In short, Petitioner failed to prove that his treatment as an employee of Respondent differed in any material way from the treatment afforded other employees, regardless of their race. Therefore, Petitioner failed to prove a prima facie case of discrimination, and his petition for relief should be dismissed.

Legitimate, Non-discriminatory Reason

57. Assuming--for the sake of argument--that Petitioner made a prima facie showing, the burden would shift to Respondent to proffer a legitimate non-discriminatory reason for its action, which at this stage is a burden of production, not a burden of persuasion. Holland v. Washington Homes, Inc., 487 F.3d 208, 214 (4th Cir. 2007).

58. Respondent met its burden by producing credible, clear, and convincing testimony and evidence that Petitioner was terminated from employment in accordance with established disciplinary practices, and for reasons related to his job performance, insubordinate actions, and generally poor attitude.

59. Although Respondent's burden to refute Petitioner's prima facie case was light, the evidence showing the reasons for

its personnel decision to be legitimate and non-discriminatory was substantial.

Pretext

60. Assuming--again, for the sake of argument--that Petitioner made a prima facie showing, then upon Respondent's production of evidence of a legitimate non-discriminatory reason for its action, the burden shifted back to Petitioner to prove by a preponderance of the evidence that Respondent's stated reasons were not its true reasons, but were a pretext for discrimination. To do this, Petitioner would have to "prove '*both* that the reason was false, *and* that discrimination was the real reason' for the challenged conduct." Jiminez v. Mary Washington Coll., 57 F.3d 369, 378 (4th Cir. 1995)(citing St. Mary's Honor Ctr. v. Hicks, 509 U.S. at 515)). (emphasis in original).

61. To show pretext, Petitioner "must be afforded the 'opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.'" Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000) (citations omitted). Petitioner could accomplish this goal "by showing that the employer's proffered explanation is unworthy of credence." Texas Dep't of Cmty. Aff. v. Burdine, 450 U.S. at 256.

62. The record of this proceeding does not support a finding or a conclusion that Respondent's proffered explanation for its personnel decision was false or not worthy of credence, nor does it support an inference that the explanation was pretextual.

Discrimination on the Basis of Sex

63. Florida's Civil Rights Act prohibits sex-based discrimination in two ways: by a tangible adverse employment action; or by creation of a hostile workplace environment caused by sexual harassment that is so severe or pervasive as to alter the terms and conditions of work. Blizzard v. Appliance Direct, Inc., 16 So. 3d 922, 926 (Fla. 5th DCA 2009)(citing Baldwin v. Blue Cross/Blue Shield of Alabama, 480 F.3d 1287 (11th Cir. 2007); and Thornton v. Flavor House Products, Inc., 105 Fair Empl. Prac. Cas. (BNA) 336 (M.D. Ala. 2008)).

64. In an action based on sexual harassment "a plaintiff may establish a violation of Title VII by proving that the harassment either was directly linked to the grant or denial of an economic *quid pro quo* or created a hostile work environment." Farley v. American Cast Iron Pipe Co., 115 F.3d 1548, 1551-1552 (11th Cir. 1997) (citing Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986)).

65. In order to establish a claim based on sexual harassment by his supervisor, Ms. Abbott, Petitioner was

required to show: (1) that he is a member of a protected group; (2) that he was subjected to unwelcome sexual harassment, such as sexual advances, requests for sexual favors, and other conduct of a sexual nature; (3) that the harassment was based on the sex of the employee; (4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and (5) that there is a basis for holding the employer liable. Blizzard v. Appliance Direct, Inc., 16 So. 3d at 927 (citing Mendoza v. Borden, Inc., 195 F.3d 1238 (11th Cir. 1999; and Speedway Superamerica, L.L.C. v. Dupont, 933 So. 2d 75 (Fla. 5th DCA 2006)).

66. Petitioner is a member of a protected class, since the term "sex" in section 760.10 is a general term that in everyday usage can mean either male or female. See Gen. Dynamics Land Sys. v. Cline, 540 U.S. 581, 597-598 (2004); Oncale v. Sundowner Offshore Servs., 523 U.S. 75 (1988).

67. Petitioner failed to produce any persuasive evidence to support a prima facie case that he was subjected to unwelcome sexual advances or harassment by Ms. Abbott. No co-workers observed any sexually oriented conduct on the part of Ms. Abbott directed towards Petitioner or anyone else. There was no support from any employee that Ms. Abbott dressed provocatively around him, which would have been readily

observable had it occurred. Petitioner failed to prove that Ms. Abbott sought to entice him by purchasing "expensive lunches," rather the evidence establishes that she bought lunches for all employees when warranted by their work performance and schedules. Petitioner never mentioned or complained to co-workers or management about any sexual misconduct by Ms. Abbott until well after his termination for cause. In short, there is not a shred of corroborative evidence to support Petitioner's after-the-fact claims of sexual impropriety.

68. Petitioner failed to prove that his treatment as an employee of Respondent differed in any material way from the treatment afforded other employees. Furthermore, Petitioner failed to prove that he was exposed to or the subject of any unwelcome sexual harassment, such as sexual advances, requests for sexual favors, or other conduct of a sexual nature. Therefore, Petitioner failed to meet his burden of proof that he was the subject of sex-based discrimination, and his petition for relief should be dismissed.

Conclusion

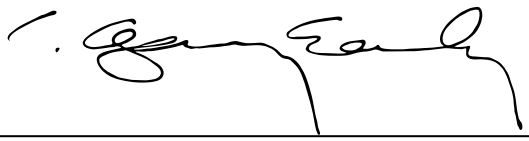
69. Respondent put forth persuasive evidence that Petitioner was terminated from employment for reasons unrelated to Petitioner's race, and unrelated to Petitioner's failure to submit to Ms. Abbott's allegedly carnal desires.

70. Section 760.10 is designed to eliminate workplace discrimination, but it is "not designed to strip employers of discretion when making legitimate, necessary personnel decisions." See Holland v. Washington Homes, Inc., 487 F.3d at 220. Because Petitioner failed to put forth any credible evidence that Respondent had some discriminatory reason for its personnel decisions, his petition must be dismissed.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations issue a final order finding that Respondent, Precision Tune Auto Care, did not commit any unlawful employment practice as to Petitioner, Reggie Dancy, and dismissing the Petition for Relief filed in FCHR No. 2014-0068.

DONE AND ENTERED this 29th day of December, 2014, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of December, 2014.

ENDNOTE

[1/] Ms. Abbott had previously been married to an African-American man, with whom she had a bi-racial child.

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.