STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JOHNNY L. TORRENCE,

Petitioner,

vs. Case No. 14-5506

HENDRICK HONDA DAYTONA,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, this case was heard on February 9, 2015, by video teleconference at sites in Tallahassee, Florida, and Daytona Beach, Florida, before E. Gary Early, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Johnny L. Torrence, pro se
237 North Seneca Street
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For Respondent: Leonard T. Hackett, Esquire
Vernis & Bowling of North Florida, P.A.
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STATEMENT OF THE ISSUE

Whether the Petitioner, Johnny L. Torrence, was subject to an unlawful employment practice by Respondent, Hendrick Honda

Daytona, on account of his race or his age in violation of section 760.10, Florida Statutes.

PRELIMINARY STATEMENT

On February 20, 2014, Petitioner filed a complaint of discrimination with the Florida Commission on Human Relations (FCHR) which alleged that Respondent violated section 760.10, Florida Statutes, by discriminating against him on the basis of his race or his age.

On July 28, 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 November 17, 2014, Petitioner filed a Petition for Relief with the FCHR.[1/] The Petition was transmitted to the Division of Administrative Hearings to conduct a final hearing.

The final hearing was set for January 13, 2015, and was convened as scheduled. Due to miscommunication between Respondent and its corporate office, Respondent was unaware that the hearing had been scheduled or that it was being held. As a result, the hearing was rescheduled for February 9, 2015, and was held on that date as scheduled.

At the final hearing, Petitioner testified on his own behalf. Respondent presented the testimony of Ralph Moreford, Respondent's service director; and Dale Lockwood, Respondent's

shop foreman. Respondent's Exhibits 1 and 2 were received into evidence.

No transcript of the hearing was filed. The parties filed Proposed Recommended Orders, which have been considered in the preparation of this Recommended Order. To the extent the proposed orders allege facts that were not the subject of testimony or evidence received during the final hearing, those alleged facts have not been considered. 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 African-American.

2. There was no direct evidence of Petitioner's age. However, Petitioner worked at the automobile dealership currently owned by Respondent since October 1987. During Petitioner's questioning of Mr. Moreford, Petitioner indicated that the two had worked together at the dealership for virtually that entire period, beginning when they were 18 years of age, a statement with which Mr. Moreford appeared to agree. Thus, a reasonable inference can be drawn that Petitioner is more than 40 years of age.

3. Respondent owns and operates an automobile dealership located in Daytona Beach, Florida, having purchased the dealership in September 2011. Respondent is part of a larger

group of dealerships, with its corporate offices, including that of its human resources department, located in Charlotte, North Carolina. Respondent employs more than 15 full-time employees at any given time.

4. Petitioner was initially employed by Respondent in October 1987. He worked as a detailer for some period, and more recently was employed as a lot attendant. His duties were generally to greet customers and take vehicle information, and move vehicles from place to place as needed by sales and maintenance personnel.

5. On May 2, 2013, a customer brought his vehicle to Respondent for maintenance. The customer was a former employee of Respondent, and was known by Petitioner. The customer was initially met by an advisor other than Petitioner. The customer asked that his vehicle mileage be listed on the service ticket as 1,000 miles less than its actual mileage.[2/] Recording a vehicle's mileage as anything other than its actual mileage is contrary to Respondent's policies. Thus, the request was refused.

6. Petitioner was assigned to deliver the customer's vehicle and paperwork to the service lane. After having his request to reduce the vehicle's mileage on the service ticket refused, the customer asked Petitioner to do the same. Petitioner complied with the request, scratched through the

correct mileage written on the service ticket, and wrote in the lower mileage requested by the customer. Upon delivery of the service ticket to the service lane manager, the scratched-through mileage was noticed. Petitioner was asked whether the mileage he had written on the ticket was correct, to which he replied in the affirmative. The vehicle's mileage was subsequently confirmed as being 1,000 miles more than that written by Petitioner.

7. Petitioner was called into a meeting by Respondent's management to explain the situation. Petitioner explained that he only did what the customer wanted him to do -- a variant of "the customer is always right." As a result of his action, Petitioner was given a written reprimand. Based on the testimony of Mr. Moreford, it was determined that the Employee Counseling Report was a business record as defined in section 90.802(6).

8. In late September 2013, a customer brought her vehicle in to Respondent for two new tires. Her old tires were removed and taken to the dealership's holding area, at which all used tires are marked for identification and collected for delivery to a used tire recycling facility. Respondent does not allow employees to take used tires from the holding area.

9. After the customer's new tires were mounted, the customer indicated that she wanted one of her old tires for use

as a spare. An employee was sent to the holding area to retrieve one of the tires. Since the tires are marked, there would have been no mistaking them. After a search, the employee was unable to locate the used tires.

10. Several employees, including Petitioner, were asked if they knew the whereabouts of the used tires. Petitioner admitted that his sister needed better tires on her car, and that he had given the customer's used tires to her. Petitioner was instructed to retrieve the tires and return them so they could be provided to the customer. Petitioner left the premises to retrieve the tires.

11. After having waited a reasonable period of time for Petitioner to return, Respondent was compelled to give the customer a new tire from its inventory for her to use as her spare. After the customer left, Petitioner returned to the dealership with two used tires that were not the ones removed from the customer's vehicle.

12. On or about October 2, 2013, Petitioner was called into a meeting with the service lane manager, Mr. Sandrowicz, along with Dale Lockwood and Ralph Moreford. Mr. Lockwood and Mr. Moreford had worked at the dealership, under its current and prior owners, for most if not all of the years of Petitioner's employment.

13. During the meeting, the attendees discussed the incident with the tires, which was a violation of Respondent's policies. Petitioner stated that a younger Caucasian employee, Brandon Swift, had done the same thing without repercussions. Nonetheless, Mr. Moreford advised Petitioner that he was terminated from employment as a result of the incident. On October 7, 2013, Petitioner was provided with a Separation Report describing the incident and its consequences. Based on the testimony of Mr. Moreford, it was determined that the Separation Report was a business record as defined in section 90.802(6).

14. After the meeting was over, Mr. Swift was asked if he had taken any tires from the used tire holding area. Mr. Swift denied that he had done so. The used tire holding area was searched, and the tires alleged to have been taken by Mr. Swift were located. Petitioner speculated that Mr. Swift may have returned the allegedly purloined tires in time to avoid detection, though there was no support for that supposition. Thus, Mr. Swift is not a useful comparator of any dissimilar disciplinary action based on race or age.

15. Mr. Moreford and Mr. Lockwood testified that Petitioner's race and age had no bearing on the decision to terminate Petitioner. Rather, they testified credibly that the decision was based solely on the fact that Petitioner had

violated company policy after having recently received a written warning for a different violation. Mr. Lockwood knew of no employee other than Petitioner having taken used tires.

16. Petitioner identified no instance of any racially disparaging comments directed at himself or any other employee by anyone affiliated with Respondent. Petitioner identified no instance of any ill-treatment directed at him due to his age.

17. Petitioner identified two instances in addition to that involving Mr. Swift that he believed support his claim of discrimination.

18. For some period of time, "J.D." was Respondent's service manager. Petitioner did not like the way J.D. talked to him. On one occasion, J.D. came to the back of the shop area and said all of the employees gathered there were "ignorant and stupid." The group of employees included three African-Americans and one or two Caucasians. In Petitioner's view, J.D. was generally unpleasant to everyone. Thus, Petitioner's testimony supports a finding that J.D.'s disagreeable nature was visited equally on all subordinate employees regardless of race or age.

19. As a second comparator, Petitioner alleged that Respondent's African-American employees were charged for washing their cars at Respondent's car wash, while Caucasian employees washed their cars, trucks, boats, and motorcycles free of

charge. There was no corroborating evidence for Petitioner's statement and, standing alone, it is insufficient to support a finding that such occurred. Furthermore, the allegation, even if proven, was not so similar to that forming the basis for the adverse employment action as to provide a useful comparison.

20. Petitioner argued that "it wasn't right the way they fired me." He asserted that Respondent should have given him a written warning for the tire incident rather than firing him. While the act of taking two used tires that, but for the customer's request to keep one as a spare, would have been destined for a recycling facility seems a relatively minor infraction, it was nonetheless a violation of Respondent's policies. More to the point, regardless of the severity of the infraction and the perceived fairness of the sanction, Respondent's decision to fire Petitioner was not based on racial animus or age bias.

Ultimate Findings of Fact

21. There was no competent, substantial evidence adduced at the hearing to support a finding that the decision to terminate Petitioner from employment was made due to Petitioner's race or age. Rather, the decision was based on Petitioner's decision to take two tires from Respondent's used tire holding area in violation of Respondent's policies, and his

eventual return to the dealership with two tires that were not those taken.

22. There was no competent, substantial evidence adduced at the hearing that persons who were not African-American or were under the age of 40 were treated differently from Petitioner, or were subject to dissimilar personnel policies and practices.

## CONCLUSIONS OF LAW

23. 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.

### Discrimination

24. 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.

25. Petitioner maintains that Respondent discriminated against him on account of his race and his age.

26. Section 760.11(1) provides, in pertinent part, 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.

27. 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 filed his Petition for Relief requesting this hearing.

28. 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).

29. 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).

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

31. 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).

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

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

34. 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.

35. Under McDonnell Douglas, Petitioner has the initial burden of establishing a prima facie case of unlawful discrimination. To establish a prima facie case of racial discrimination, Petitioner must demonstrate by a preponderance of the evidence that 1) he is a member of a protected class; 2) he was qualified for the position; 3) he was subjected to an adverse employment action; and 4) his employer treated similarly-situated employees outside of his protected class more favorably than he was treated. Burke-Fowler v. Orange Cnty., 447 F.3d 1319, 1323 (11th Cir. 2006).

36. To establish a prima facie case of age discrimination, Petitioner must demonstrate by a preponderance of the evidence that 1) he is a member of a protected class, i.e., at least forty years of age; 2) he was qualified for the position; 3) he was subjected to an adverse employment action; and 4) his employer treated substantially younger employees more favorably than he was treated. O'Connor v. Consol. Coin Caterers Corp.,

517 U.S. 308 (1996); City of Hollywood v. Hogan, 986 So. 2d 634, 641 (Fla 4th DCA 2008).

37. When determining whether similarly-situated employees have been treated differently in cases of discriminatory discipline, an evaluation must be made that the employees engaged in similar conduct but were disciplined in different ways. In making that determination, "the quantity and quality of the comparator's misconduct [must] be nearly identical to prevent courts from second-guessing employers' reasonable decisions and confusing apples with oranges." Burke-Fowler v. Orange Cnty., 447 F.3d at 1323 (citing Maniccia v. Brown, 171 F.3d 1364, 1368 (11th Cir. 1999)).

38. 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. Tex. 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 at 1564; Turnes v. Amsouth Bank, N.A., 36 F.3d 1057, 1061 (11th Cir. 1994).

39. 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). Petitioner would have to prove not only that the employer's stated reason for the employment decision was false, but also that discrimination was the real reason for the decision. Jiminez v. Mary Washington Coll., 57 F.3d 369, 378 (4th Cir. 1995). The demonstration of pretext "merges with the plaintiff's ultimate burden of showing that the defendant intentionally discriminated against the plaintiff." Holifield v. Reno, 115 F.3d at 1565.

40. 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.

Prima Facie Case

41. Petitioner demonstrated that he is a member of a protected class, that he was qualified to hold his position with Respondent, and that he was subjected to an adverse employment action, i.e., termination from employment.

42. Where Petitioner has failed in the establishment of his prima facie case is his failure to demonstrate that other persons outside of his protected racial classification, or persons who were substantially younger than he were subject to personnel decisions that differed from those applied to him.

43. The only evidence of a similarly-situated employee comparator produced by Petitioner was the allegation that Mr. Swift, a younger Caucasian man, allegedly took used tires from the holding area without adverse consequences. However, the comparison was undermined by evidence that Mr. Swift did not

take any used tires, with the tires allegedly taken having been located in the holding area, where they were supposed to be.

44. In short, Petitioner failed to prove that Respondent's decision to terminate him was the result of any consideration of or discriminatory intent based on race or age, or that his treatment as an employee differed in any material way from the treatment afforded other employees, regardless of their race or their age. Therefore, Petitioner failed to prove a prima facie case of discrimination, and his petition for relief should be dismissed.

Legitimate, Non-discriminatory Reason

45. 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.

46. Respondent met its burden by producing credible evidence that Petitioner was terminated solely on the basis of his having taken two tires from the used tire holding area without permission, and in violation of Respondent's policies prohibiting the same, and for no other reason.

47. Although Respondent's burden to refute Petitioner's prima facie case was light, the evidence showing the reason for its personnel decision to be legitimate and non-discriminatory was substantial.

Pretext

48. 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.

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

Conclusion

50. Respondent put forth persuasive evidence that Petitioner was terminated from employment as a result of his violation of Respondent's policy against taking property, regardless of its intrinsic value, and not as a result of race or retaliation.

51. 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 208, 220 (11th Cir. 2007). Because Petitioner failed to put

forth sufficient evidence that Respondent had some discriminatory reason for its personnel decision, 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, Hendrick Honda Daytona, did not commit any unlawful employment practice as to Petitioner, Johnny L. Torrence, and dismissing the Petition for Relief filed in FCHR No. 2014-00303.

DONE AND ENTERED this 26th day of February, 2015, in Tallahassee, Leon County, Florida.

E. GARY EARLY
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of February, 2015.

## ENDNOTES

[1/] The period of time between the issuance of the Determination: No Cause and the Notice of Determination: No Cause, and the

filing of the Petition for Relief was not explained. Though it facially appears that the Petition was filed more than 35 days from the date of the FCHR action, there was no evidence to suggest that a timely request for extension of time or other acceptable means of enlarging the time to file a Petition had not been filed. The FCHR forwarded the Petition to the Division for assignment of an Administrative Law Judge in the normal course, and no motion to dismiss the Petition as untimely was filed. Thus, the Petition is accepted.

[2/] The customer's vehicle had over 138,000 miles on its odometer, and the request was to reduce the recorded mileage by 1,000 miles. How such a seemingly inconsequential change would benefit the customer was not explained. There was, however, no dispute that the request was made by the customer and carried out by Petitioner.

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.