STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HARRY (HAL) HINGSON,

Petitioner,

vs. Case No. 15-1294

COASTAL PROPERTIES,

Respondent.
_____/

RECOMMENDED ORDER

An administrative hearing was conducted in this case on May 20, 2015, in Tallahassee, Florida before James H. Peterson, III, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Harry (Hal) Hingson, pro se
504 Talquin Avenue
Quincy, Florida 32351

For Respondent: Ginger Barry Boyd, Esquire
Broad and Cassel
4100 Legendary Drive, Suite 280
Destin, Florida 32541

STATEMENT OF THE ISSUE

Whether Respondent, Coastal Properties ("Respondent" or "Coastal Properties"), discriminated against Petitioner, Harry (Hal) Hingson ("Petitioner"), based upon his age and race in

violation of the Florida Civil Rights Act of 1992, sections 760.01-760.11 and 509.092, Florida Statutes.[1/]

PRELIMINARY STATEMENT

On August 29, 2014, Petitioner filed a complaint of discrimination with the Florida Commission on Human Relations ("FCHR" or "Commission"), which was assigned FCHR No. 201401271 ("Discrimination Complaint"). The Discrimination Complaint alleges that Coastal Property discriminated against Petitioner by subjecting him to different terms and conditions and terminating his employment based upon his age and race. After investigation, the Commission's executive director issued a Determination finding that "no reasonable cause exists to believe that an unlawful employment discrimination practice occurred." On February 6, 2015, a notice of the Commission's determination (Notice) was sent to Petitioner which notified Petitioner of his right to file a Petition for Relief for a formal administrative proceeding within 35 days from the date of the Notice. On March 11, 2015, Petitioner timely filed a Petition for Relief with the Commission. The Commission forwarded the Petition for Relief to the Division of Administrative Hearings on March 13, 2015, for the assignment of an administrative law judge to conduct an administrative

hearing. The case was assigned to the undersigned and an administrative hearing was scheduled and heard May 20, 2015.

At the administrative hearing, Petitioner offered the testimony of his supervisor, Clint Creel; testified on his own behalf; and offered a Gadsden County Sheriff's Offense Report as an exhibit which was received into evidence as Petitioner's Exhibit P-1. Respondent offered the testimony of Respondent's President, Dennis Fuller; and Vice-President of Operations, Ray Allen; and offered two exhibits, which were received into evidence as Respondent's Exhibits R-1 and R-2.

The proceedings were recorded and a transcript was ordered. The parties were given 10 days from date of filing the transcript to submit their proposed recommended orders. The one-volume Transcript was filed on June 2, 2015. Respondent timely filed its Proposed Recommended Order, which was considered in the preparation of this Recommended Order. Petitioner did not file a proposed recommended order.

FINDINGS OF FACT

1. Petitioner is a Caucasian male who was 60 years old in May of 2014, when Respondent allegedly discriminated against him by terminating his employment because of his age.

2. Respondent is a management company for third-party owners of apartment communities, home owners associations, and condominium associations.

3. Respondent employed Petitioner as a maintenance worker at the Twin Oaks apartment complex, a 242-unit apartment complex in Tallahassee, Florida.

4. On May 6, 2014, after work, Petitioner and his supervisor, Clint Creel, were involved in a physical altercation off the job site, while fishing together on a boat.

5. After the boat returned to the dock, Petitioner went inside his home. Rather than securing himself in his residence and calling law enforcement, Petitioner retrieved a gun from his residence, exited his residence, and fired the gun multiple times at Mr. Creel. Mr. Creel was struck in the back of the leg by a bullet and received medical treatment for his gunshot wound.

6. Although he was shot, Mr. Creel returned to work the next day.

7. Petitioner did not return to work the day after the incident as he was seeking medical treatment for the injuries he sustained during the physical altercation.

8. Two days after the shooting, Respondent terminated Petitioner's employment.

9. The decision to terminate Petitioner was made by the Respondent's Vice-President, Ray Allen, in consultation with the President, Dennis Fuller, after Mr. Allen spoke to both Mr. Creel, and Petitioner, about the shooting.

10. Respondent presented the undisputed testimony of Mr. Allen and Mr. Ray that Petitioner's employment was terminated to protect the safety of the other employees and the residents at the Twin Oaks property. Mr. Creel expressed concern about his safety to Mr. Allen if he had to continue working with Petitioner. Mr. Allen and Mr. Fuller also were concerned about the safety of Mr. Creel, as well as the other employees and residents, if Petitioner and Mr. Creel continued to work together.

11. Petitioner's Discrimination Complaint alleges that Petitioner was discriminated against based on race and age. In particular, Petitioner alleges that he was discriminated against because he was terminated after the off-the-job altercation, but his younger supervisor was not.

12. The evidence adduced at the final hearing, however, failed to substantiate Petitioner's claim of discrimination.

13. Other than testifying that he at one time, prior to the incident, was told that he was moving slow and at another time was told he was acting feeble, Petitioner did not present any direct or circumstantial evidence sufficient to reasonably suggest that Respondent discriminated against him in employment because of his age. Even if Petitioner had presented evidence sufficient to establish a prima facie case of age

discrimination, Respondent provided a legitimate non-discriminatory reason for terminating Petitioner's employment.

14. Petitioner admitted that Mr. Allen advised him that he was being terminated because he no longer wanted Petitioner and Mr. Creel to work together. Petitioner admitted Mr. Allen told him that he would have continued to employ Petitioner by moving him to another property, but there were no other openings.

15. Respondent's evidence demonstrated that the day after Petitioner was terminated, of its 59 employees, 25 were over the age of 40, 11 were over the age of 50, and one employee was older than Petitioner. The evidence also showed that 54 days after Petitioner was terminated, of Respondent's 64 employees, 25 were over the age of 40, 10 were over the age of 50, and one employee was older than Petitioner.

16. Petitioner failed to establish Respondent's reason for terminating his employment was a pretext for age discrimination.

17. Petitioner's Discrimination Complaint further alleges he was discriminated against based on his race because another employee, a younger African-American, was arrested for DUI but was not terminated. Petitioner presented no evidence at the final hearing to substantiate that allegation, and Petitioner failed to present any evidence whatsoever to show that Respondent discriminated against Petitioner because of his race.

18. In sum, Petitioner failed to show that Respondent discriminated against Petitioner by treating him differently, or terminating his employment because of his race or age.

CONCLUSIONS OF LAW

19. 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, and Florida Administrative Code Rule 60Y-4.016(1).

20. The State of Florida, under the legislative scheme contained in sections 760.01–760.11 and 509.092, Florida Statutes, known as the Florida Civil Rights Act of 1992 (the Act), incorporates and adopts the legal principles and precedents established in the federal anti-discrimination laws specifically set forth under Title VII of the Civil Rights Act of 1964, as amended. 42 U.S.C. § 2000e, et seq.

21. The Florida law prohibiting unlawful employment practices is found in section 760.10. That section prohibits discrimination "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." § 760.10(1)(a), Fla. Stat.

22. Florida courts have held that because the Act is patterned after Title VII of the Civil Rights Act of 1964, as

amended, federal case law dealing with Title VII is applicable. See, e.g., Fla. Dep't of Cmty. Aff. v. Bryant, 586 So. 2d 1205, 1209 (Fla. 1st DCA 1991).

23. As developed in federal cases, a prima facie case of discrimination under Title VII may be established by statistical proof of a pattern of discrimination, or on the basis of direct evidence which, if believed, would prove the existence of discrimination without inference or presumption. Usually, however, direct evidence is lacking and one seeking to prove discrimination must rely on circumstantial evidence of discriminatory intent, using the shifting burden of proof pattern established in McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973). See Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997).

24. Under the shifting burden pattern developed in McDonnell Douglas:

> First, [Petitioner] has the burden of proving a prima facie case of discrimination by a preponderance of the evidence. Second, if [Petitioner] sufficiently establishes a prima facie case, the burden shifts to [Respondent] to "articulate some legitimate, nondiscriminatory reason" for its action. Third, if [Respondent] satisfies this burden, [Petitioner] has the opportunity to prove by a preponderance that the legitimate reasons asserted by [Respondent] are in fact mere pretext.

U.S. Dep't of Hous. & Urban Dev. v. Blackwell, 908 F.2d 864, 870 (11th Cir. 1990) (housing discrimination claim); accord Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17, 22 (Fla. 3d DCA 2009) (gender discrimination claim) ("Under the McDonnell Douglas framework, a plaintiff must first establish, by a preponderance of the evidence, a prima facie case of discrimination.").

25. Therefore, in order to prevail in his claim against Respondent, Petitioner must first establish a prima facie case by a preponderance of the evidence. Id.; § 120.57(1)(j), Fla. Stat. ("Findings of fact shall be based upon a preponderance of the evidence, except in penal or licensure proceedings or except as otherwise provided by statute and shall be based exclusively on the evidence of record and on matters officially recognized.").

26. "Demonstrating a prima facie case is not onerous; it requires only that the plaintiff establish facts adequate to permit an inference of discrimination." Holifield, 115 F.3d at 1562; cf., Gross v. Lyons, 763 So. 2d 276, 280 n.1 (Fla. 2000) ("A preponderance of the evidence is 'the greater weight of the evidence,' [citation omitted] or evidence that 'more likely than not' tends to prove a certain proposition.").

27. Petitioner did not present any statistical or direct evidence of discrimination, and otherwise failed to present a

prima facie case of discrimination based on disparate treatment based upon his age or race.

28. In order to establish a prima facie case of discrimination based on disparate treatment, a petitioner must show that: 1) he belongs to a protected class; 2) he was subjected to adverse job action; 3) his employer treated similarly-situated employees outside his classification more favorable; and 4) he was qualified to do the job. Holifield, 115 F.3d at 1562.

29. To demonstrate that similarly-situated employees outside his protected class were treated more favorably, Petitioner must show that a "comparative" employee was "similarly situated in all relevant respects," meaning that an employee outside of Petitioner's protected class was "involved in or accused of the same or similar conduct" and treated in a more favorable way. Id.; see also, Burke-Fowler v. Orange Cnty., 447 F.3d 1319, 1323 (11th Cir. 2006)) (it is required that the quantity and quality of the comparator's conduct be nearly identical).

30. While Petitioner may believe his termination was unfair, Petitioner failed to provide sufficient evidence inferring that discrimination occurred.

31. Petitioner did not present any evidence that similarly-situated employees outside Petitioner's protected class were, or would have been, treated any differently.

32. Petitioner also failed to present evidence showing disparate treatment resulting in his discharge. He did not identify another non-protected class employee engaged in a physical altercation resulting in the shooting of a supervisor who was not terminated, as was Petitioner.

33. When a Petitioner fails to present a prima facie case the inquiry ends and the case should be dismissed. Ratliff v. State, 666 So. 2d 1008, 1013 n.6 (Fla. 1st DCA 1996).

34. Even if Petitioner had established a prima facie case of discriminatory treatment or discharge, Respondent met its burden of demonstrating that it had legitimate, nondiscriminatory reasons for discharging Petitioner.

35. Petitioner offered no proof that Respondent's proffered reason for discharging him was a pretext for unlawful discrimination. In proving that an employer's asserted reason is merely a pretext:

> A plaintiff is not allowed to recast an employer's proffered nondiscriminatory reasons or substitute [her] business judgment for that of the employer. Provided that the proffered reason is one that might motivate a reasonable employer, an employee must meet that reason head on and rebut it, and the employee cannot succeed by simply quarreling with the wisdom of that reason.

Chapman v. AI Transport, 229 F.3d 1012, 1030 (11th Cir. 2000).

36. Petitioner's speculation as to the motives of the Respondent, standing alone, is insufficient to establish a prima facie case of discrimination. See, e.g., Lizardo v. Denny's, Inc., 270 F.3d 94, 104 (2d Cir. 2001) ("Plaintiff's have done little more than cite to their mistreatment and ask the court to conclude that it must have been related to their race. This is not sufficient.").

37. Considering the evidence adduced at the final hearing, it is concluded that Respondent did not violate the Act, and is not liable to Petitioner for discrimination in employment.

RECOMMENDATION

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

RECOMMENDED that the Florida Commission on Human Relations enter a Final Order dismissing Petitioner's Discrimination Complaint and Petition for Relief consistent with the terms of this Recommended Order.

DONE AND ENTERED this 6th day of July, 2015, in Tallahassee, Leon County, Florida.

JAMES H. PETERSON, III
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida32399-3060
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 6th day of July, 2015.

ENDNOTE

[1/] Unless otherwise indicated, all references to the Florida Statutes, Florida Administrative Code, and federal laws are to the current versions which have not substantively changed since the time of the alleged discrimination.

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.