STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CLIFFORD MCCULLOUGH,

Petitioner,

vs. Case No. 15-5662

NESCO RESOURCES,

Respondent.
_____/

RECOMMENDED ORDER

On April 14, 2016, an administrative hearing in this case was held by video teleconference in Tampa and Tallahassee, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Clifford Alonzo McCullough
Post Office Box 26975
Tampa, Florida 33623

For Respondent: Ignacio J. Garcia, Esquire
Ina F. Crawford, Esquire
Ogletree, Deakins, Nash,
Smoak and Stewart, P.C.
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100 North Tampa Street
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STATEMENT OF THE ISSUE

The issue in the case is whether Clifford McCullough (Petitioner) was the subject of unlawful discrimination by Nesco

Resources (Respondent) in violation of chapter 760, Florida Statutes (2015)[1/].

PRELIMINARY STATEMENT

By Employment Charge of Discrimination filed with the Florida Commission on Human Relations (FCHR) on February 23, 2015, the Petitioner alleged that the Respondent committed unlawful discrimination on the basis of race, color, sex, and/or age.

By Notice of Determination dated August 28, 2015, the FCHR found that there was "no reasonable cause to believe that an unlawful employment practice occurred."

On October 2, 2015, the Petitioner filed a Petition for Relief (Petition) with the FCHR. The FCHR forwarded the Petition to the Division of Administrative Hearings, which scheduled the dispute for hearing. Upon the Respondent's Motion, the hearing was continued and subsequently rescheduled for April 14, 2016.

At the hearing, the Petitioner testified on his own behalf, presented the testimony of one witness, and had Exhibits 1 through 3, 5, 6, 9 through 20, and 22 admitted into evidence. The Respondent presented the testimony of three witnesses, and had Exhibits 1 through 5, 8, 12 through 14, 18, 20, 21, and 24 through 30 admitted into evidence.

A Transcript of the hearing was filed on May 6, 2016. On May 16, 2016, the parties jointly requested that the deadline for filing proposed recommended orders be extended. The deadline was extended to May 27, 2016, and on that date, both parties filed Proposed Recommended Orders that have been reviewed in the preparation of this Order.

FINDINGS OF FACT

1. The Respondent is a company that refers pre-screened job candidates to employers upon request by an employer seeking to fill a specific position.

2. The Petitioner is an African-American male, born in 1959, who sought employment through the Respondent.

3. The Respondent does not make the hiring decision. The actual decision is made by the employer requesting referrals from the Respondent. The Respondent is compensated by the employer if and when the employer hires an applicant referred by the Respondent.

4. On occasion, the Respondent publishes advertisements seeking applications to fill specific positions, such as "forklift drivers." The fact that the Respondent seeks applications for specific positions does not mean that an employer has contacted the Respondent seeking referrals for such positions. The advertisements are used by the Respondent to

create an inventory of applicants who can be referred to employers.

5. On December 20, 2013, the Petitioner submitted a job application to the Respondent seeking a "forklift driver" position. At that time, the Petitioner indicated to the Respondent that he was available to perform "warehouse, packing, production, shipping and receiving tasks."

6. Several weeks prior to the Petitioner's application, the Respondent had referred job candidates to an employer seeking to fill an available forklift driver position. The employer filled the position by hiring an African-American male born in 1961 who was referred to the employer by the Respondent.

7. As of December 20, 2013, the Respondent had no pending employer requests seeking referrals to fill forklift driver positions. The evidence fails to establish that the Respondent had any employer requests at that time which were consistent with the Petitioner's skills.

8. The Respondent's general practice when contacted by a prospective employer is to recommend applicants who have maintained ongoing contact with the Respondent's staff after the submission of an application.

9. There was minimal contact between the Petitioner and the Respondent after the Petitioner submitted his application in December 2013.

10. The Respondent presumes that some people who submit applications subsequently relocate or obtain employment elsewhere. Accordingly, the Respondent requires that previous applicants periodically submit new employment applications so that the Respondent's inventory includes only active job seekers.

11. On April 8, 2014, the Petitioner submitted another application to the Respondent.

12. Also in April 2014, an employer contacted the Respondent to obtain referrals to fill another forklift driving position.

13. The employer filled the position by hiring an African-American male born in 1964, who was referred to the employer by the Respondent.

14. Prior to his referral for the forklift driver position, the successful applicant routinely contacted the Respondent's staff, in person and by telephone, regarding available employment opportunities.

15. The evidence fails to establish whether the Respondent was included within the applicants who were referred to the requesting employer.

16. There is no evidence that the Respondent's referral process reflected factors related to any applicant's race, color, sex, or age.

17. The Petitioner has also asserted that his application should have been referred to an employer who, on one occasion, was seeking to fill an available cleaning position. The position was a part-time job paying an hourly wage of $10. The Petitioner had not submitted an application for such a position. Nothing in the information provided by the Petitioner to the Respondent indicated that the Petitioner was interested in such employment.

18. Through the Respondent's referrals, the employer filled the cleaning position by hiring an African-American male.

CONCLUSIONS OF LAW

19. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat. (2015).

20. The Petitioner has alleged that he was subjected to unlawful discrimination by the Respondent on the basis of race, color, sex, and/or age, in violation of chapter 760, Florida Statutes. The Petitioner has the burden of proving by a preponderance of the evidence that the Respondent committed an unlawful employment practice. Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981).

21. Chapter 760, Part I, Florida Statutes, sets forth the Florida Civil Rights Act of 1992 (the "Act"). The Respondent is

an "employer" as defined in subsection 760.02(7). Section 760.10 provides in relevant part as follows:

> (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.

22. Florida courts interpreting the provisions of section 760.10, have held that federal discrimination laws should be used as guidance when construing provisions of the Florida law. See Brand v. Fla. Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994); Fla. Dep't of Cmty. Aff. v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991).

23. The Petitioner has the ultimate burden to establish discrimination either by direct or indirect evidence. Direct evidence is evidence that, if believed, would prove the existence of discrimination without inference or presumption. Carter v. City of Miami, 870 F.2d 578, 581-582 (11th Cir. 1989). Blatant remarks, whose intent could be nothing other than to discriminate, constitute direct evidence of discrimination. See Earley v. Champion Int'l Corp., 907 F.2d 1077, 1081 (11th Cir. 1990). There is no evidence of direct discrimination in this case.

24. When there is no direct evidence of discrimination, the Petitioner may establish unlawful discrimination through the presentation of circumstantial evidence. Such evidence is subject to the analysis set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). Under such analysis, the Petitioner has the initial burden of establishing a prima facie case of unlawful discrimination.

25. If the Petitioner is able to prove a prima facie case by a preponderance of the evidence, the burden shifts to the Respondent to articulate a legitimate, non-discriminatory reason for its actions. Assuming the employer articulates a legitimate, nondiscriminatory reason for the employment decision, the burden then shifts back to the Petitioner who must establish that the reason offered by the employer is not the true reason, but is mere pretext for the decision. The question becomes whether or not the proffered reasons are "a coverup for a . . . discriminatory decision." McDonnell Douglas, 411 U.S. at 805.

26. The ultimate burden of persuading the trier of fact that there was intentional discrimination by the Respondent remains with the Petitioner. Burdine, 450 U.S. at 253. In this case, the burden has not been met.

27. The Petitioner's complaint is essentially founded on the fact that he did not obtain employment through the Respondent after twice submitting an application. The evidence presented in this case is insufficient to meet the burden of establishing a prima facie case of discrimination against the Petitioner based on the Petitioner's race, color, sex, or age.

28. The two forklift driver positions for which evidence was presented were filled by African-American males of the same approximate age as the Petitioner. As to the cleaning position, which was filled by an African-American male of unknown age, the evidence fails to establish that the Petitioner had expressed any interest in such employment, or that he was even qualified for it.

29. Because the failure to establish a prima facie case ends the analysis, the Petitioner's complaint of discrimination must be dismissed.

30. The Petitioner presented evidence related to two additional issues. The Petitioner has alleged that the Respondent violated provisions of section 440.102, Florida Statutes, related to "drug-free workplace program" requirements. The Petitioner has also alleged that the Respondent's drug-testing practices violated the "unreasonable search and seizure" protections set forth in the Fourth Amendment of the Constitution of the United States. Such allegations are outside

the scope of this proceeding, and, accordingly, they are not addressed herein.

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 the Petitioner's complaint of discrimination.

DONE AND ENTERED this 21st day of June, 2016, in Tallahassee, Leon County, Florida.

William F. Quattlebaum

WILLIAM F. QUATTLEBAUM
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of June, 2016.

ENDNOTE

[1/] All statutory references are to Florida Statutes (2015).

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.