STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LABRENTAE B. CLAYBRONE,

Petitioner,

vs. Case No. 16-4118

DAVID COSTA ENTERPRISES, INC., d/b/a McDONALD'S,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case on September 20, 2016, in Destin, Florida, before R. Bruce McKibben, a duly-designated Administrative Law Judge ("ALJ") with the Division of Administrative Hearings ("DOAH"), pursuant to authority set forth in section 120.57(1), Florida Statutes. Unless specifically stated otherwise herein, all references to the Florida Statutes will be to the 2016 codification.

APPEARANCES

For Petitioner: Robert L. Thirston, Esquire
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For Respondent: Dixie Daimwood, Esquire
Paula David Brannon, Esquire
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STATEMENT OF THE ISSUES

Whether Respondent, David Costa Enterprises, Inc., d/b/a McDonald's ("Costa Enterprises"), discriminated against Petitioner, Labrentae B. Claybrone, in violation of the Florida Human Rights Act; and, if so, what penalty should be imposed?

PRELIMINARY STATEMENT

On or about June 30, 2015, Mr. Claybrone filed an Employment Charge of Discrimination with the Florida Commission on Human Relations ("FCHR"). The claim alleged discrimination against Mr. Claybrone by his employer, Costa Enterprises. FCHR issued a Determination: No Reasonable Cause, dated June 16, 2016. Mr. Claybrone then timely filed his Petition for Relief dated July 19, 2016, and it was received by FCHR on July 20, 2016. The Petition was forwarded to the DOAH and assigned to the undersigned ALJ.

When the Petition was filed at DOAH, FCHR noted that Mr. Claybrone was represented by counsel, Robert L. Thirston, Esquire. Mr. Thirston filed a response to the Initial Order on August 4, 2016. Based on Mr. Thirston's response, and receiving no timely response from Costa Enterprises, a final hearing was set for August 31, 2016, one of the dates provided by Mr. Thirston. On August 18, 2016, Costa Enterprises filed a response to the Initial Order and a Joint Motion for Continuance. A telephonic hearing was held on August 22, 2016,

wherein the parties discussed an alternative date for final hearing. An Amended Notice of Hearing was issued, setting the final hearing for September 20, 2016, in Destin, Florida.

On September 14, 2016, Costa Enterprises filed a "Response to Prehearing Stipulation" [sic], indicating that efforts to obtain input from Mr. Thirston in order to formulate a stipulation were unsuccessful. Costa Enterprises submitted its own unilateral statement of the facts and law still at issue. There was no unilateral statement of the law and facts submitted on behalf of Petitioner. On Monday morning, September 19, 2016, Mr. Thirston sent an email to the undersigned's assistant, attaching a motion for continuance. The basis of the motion was that Mr. Thirston allegedly had a hearing in Circuit Court in Bay County on Tuesday, September 20, the date of the final hearing in this matter. Later on September 19, 2016, Mr. Thirston efiled his motion on the DOAH website.[1/] The motion did not state an emergency and did not include any evidence as to the other hearing Mr. Thirston said he was compelled to attend. Mr. Thirston had made some verbal comments about a potential conflict during the prior prehearing conference. However, he made no further mention of the conflict until the eve of final hearing.

The motion for continuance was denied pursuant to Florida Administrative Code Rule 28-106.210, which states: "Except in

cases of emergency, requests for continuance must be made at least five days prior to the date noticed for the hearing." There was no claim of emergency in the motion. Rather, the motion for continuance noted three bases: the alleged Bay County Circuit Court hearing; an assertion that two of his intended witnesses no longer worked for Costa Enterprises; and acknowledgment that Mr. Thirston was late responding to discovery requests from Costa Enterprises.

Mr. Thirston did not appear at the final hearing, nor did he file a motion seeking to withdraw as counsel. Mr. Claybrone represented himself at final hearing and presented his case in proper person.

At the final hearing, Mr. Claybrone testified on his own behalf and did not offer any exhibits into evidence. Costa Enterprises called four witnesses: Kevin McKone, director of operations; Ligaya Mumford, general manager; Ken Hislop, shift manager; and Roza Atanasova, general manager. Costa Enterprises' Exhibits 1 through 4 were admitted into evidence.

The parties agreed to order a transcript of the final hearing. The parties were allowed 10 days after filing of the transcript at DOAH to submit their proposed recommended orders, by rule. The Transcript was filed at DOAH on October 4, 2016. Neither party timely filed a proposed recommended order, i.e., on or before October 14, 2016.[2/]

FINDINGS OF FACT

1. Mr. Claybrone is an African-American male, approximately 25 years of age. He resides in Fort Walton Beach, Florida, with his mother. At all times relevant to this proceeding, Mr. Claybrone was working at one or another of the 21 McDonald's restaurants operated by Costa Enterprises.

2. Mr. Claybrone presents as a somewhat effeminate person, with braided, colored hair, earrings, polished fingernails, etc. He admits to being either gay or bisexual despite being married to--but not living with--a woman. In his Petition for Relief filed at FCHR, Mr. Claybrone refers to humiliation being imposed on him due to his "transgender and sexual orientation."

3. In March 2015, Mr. Claybrone was hired as a shift worker at the McDonald's restaurant located inside the WalMart in Destin, Florida (hereinafter the "WalMart McDonald's"). He had been hired by the general manager of that store, Ligaya Mumford. Mr. Claybrone did not at any time discuss his sexual orientation with his employer or other store personnel.

4. On or around April 28, 2015, Mr. Claybrone thought he heard the general manager, Mrs. Mumford, refer to him as "ma'am." He said that Mrs. Mumford also made comments about the way he walked and talked and that he reminded her of a female. Mrs. Mumford, whose testimony under oath at final hearing was entirely credible, denies making any such comments to

Mr. Claybrone. Rather, Mrs. Mumford remembers talking to a young female employee on that day as they stood at the grill in the restaurant. The young lady was very respectful and always called Mrs. Mumford "ma'am," so Mrs. Mumford had responded to the employee in kind, calling her "ma'am" as well. Mrs. Mumford believes Mr. Claybrone mistakenly believed she was referring to him when in fact she was not. As to the other comments Mr. Claybrone testified about, Mrs. Mumford categorically denied making them at all.

5. When Mr. Claybrone went home that night and told his mother what he thought had happened, his mother insisted he complain about the comments. Mr. Claybrone says that his mother immediately called Roza Atanasova, general manager of the WalMart McDonald's and another store known as the Destin McDonald's. By virtue of her position as general manager, Ms. Atanasova was Mrs. Mumford's supervisor. Ellie Montero, shift manager at the Destin McDonald's, later notified Mrs. Mumford that Mr. Claybrone's mother had called Ms. Atanasova with a complaint.

6. Mrs. Mumford attempted to call Mr. Claybrone and sent him texts asking Mr. Claybrone to call her. He intentionally ignored the calls and texts because he did not want to talk to Mrs. Mumford. When Mr. Claybrone came to work for his next

assigned shift, Mrs. Mumford apologized to him for the comment he (thought he) had heard.

7. According to Mrs. Mumford, Mr. Claybrone was a good employee and never gave anyone trouble. He was kind to the customers and worked hard. She had absolutely no problem with Mr. Claybrone being one of her shift workers. Mrs. Mumford is one of Costa Enterprises' most dependable, respected, and admired workers. She has received numerous citations and awards relating to her work ethics and skills. She is known to help employees in need, lending them her car, loaning money, and providing other assistance.

8. Within a week after the misunderstanding with Mrs. Mumford, Mr. Claybrone heard that another co-employee, Ken Hislop, had mentioned to a fellow worker that he (Hislop) was surprised to hear that Mr. Claybrone had a child because Mr. Hislop presumed Mr. Claybrone was gay. Mr. Hislop cannot fully remember making the comment, but he meant nothing negative about Mr. Claybrone, it was just an observation. When he was advised that Mr. Claybrone was offended, Mr. Hislop offered an apology. He did not feel like the apology was accepted by Mr. Claybrone. Mr. Claybrone did not feel like the apology was sincere.

9. Mr. Claybrone said that he was uncomfortable working with Mrs. Mumford and Mr. Hislop after the alleged slurs. At

some point, it was mutually agreed by Mr. Claybrone and Costa Enterprises that Mr. Claybrone would be transferred to a different store, the Destin McDonald's. Mr. Claybrone was transferred to the Destin McDonald's and was, at first, a dependable worker. Then he began to be tardy and to miss his shifts, even though the Destin McDonald's was closer to his home than the WalMart McDonald's had been. After a while, Mr. Claybrone's supervisor reduced his weekly hours in an effort to motivate him to do better about his attendance. Mr. Claybrone took offense to the reduction in hours and, after clocking in one day, immediately clocked out, left the store as he cursed loudly, and did not return. Mr. Claybrone effectively abandoned his position.

10. Meanwhile, Mr. Claybrone filed a complaint with the Florida Commission on Human Relations, which ultimately led to the instant action at DOAH. Mr. Claybrone admitted that the alleged discriminatory events all transpired within a few days, no longer than a week in duration.

CONCLUSIONS OF LAW

11. The Division of Administrative Hearings has jurisdiction over the parties and to the subject matter of this proceeding, pursuant to sections 120.569 and 120.57(1), Florida Statutes.

12. The general rule is that the party asserting the affirmative of an issue has the burden of presenting evidence as to that issue. Dep't of Banking & Fin., Div. of Sec. & Inv. Prot. v. Osborne Stern & Co., 670 So. 2d 932, 933 (Fla. 1996), citing Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981). According to section 120.57(1)(j), "Findings of fact shall be based upon a preponderance of the evidence . . . except as otherwise provided by statute, and shall be based exclusively on the evidence of record and on matters officially recognized." In this case, Mr. Claybrone has the burden of proving, by a preponderance of the evidence that he was discriminated against in his workplace.

13. The Florida Civil Rights Act of 1992 (the "Act" or "FCRA") is codified in sections 760.01 through 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 FCRA] 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.

14. Section 760.10 provides, in relevant part:

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

15. Costa Enterprises is an employer pursuant to section 760.02(7). Mr. Claybrone is an employee as defined in 42 U.S.C. § 12111(4).

16. 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).

17. Mr. Claybrone failed to produce direct evidence of discrimination on the part of Costa Enterprises. 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.

18. 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 Cnty. Sch. Bd., 244 F.3d 1253, 1258 (11th Cir. 2001).

19. To establish a prima facie case of discrimination in the present matter, Mr. Claybrone is required to show that he: "(1) is a member of a protected class; (2) was qualified for the position at issue; (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).

20. Mr. Claybrone fails to satisfy all but one of the criteria. He was "qualified for the position at issue," as confirmed by his employer. However, Mr. Claybrone does not

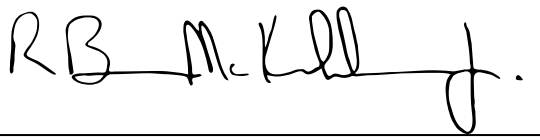
establish that he is a member of a protected class. He did not prove that any adverse employment action was taken. He did not show that other similarly situated employees were treated more favorably.

21. In short, Mr. Claybrone did not meet his initial burden of proof in this case and his complaint must be dismissed.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered finding that Costa Enterprises, Inc., d/b/a McDonald's, did not discriminate against Labrentae B. Claybrone.

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



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Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of October, 2016.

ENDNOTES

[1/] Mr. Thirston asserts that he attempted to efile his motion on Friday, September 23, 2016, but the "system was down." It is true that there were problems with the efile system at DOAH on that date. Even so, the motion would not have been timely filed.

[2/] On October 14, 2016, Mr. Thirston efiled a document at DOAH purporting to be a Motion for Enlargement of Time. The document was actually a pleading from a Circuit Court case unrelated to the instant matter. On October 18, 2016, after receiving a call from the Clerk at DOAH, Mr. Thirston efiled a legitimate Motion for Enlargement of Time, seeking until October 28, 2016, to file his proposed recommended order (PRO). In his motion, Mr. Thirston mentioned that Respondent had filed its PRO on October 11, 2016, but there is no such document on the DOAH docket. On October 18, 2016, Respondent emailed its PRO to the undersigned's assistant, along with a "confirmation" page allegedly showing that it had been filed on October 11, 2016. The DOAH Clerk again determined that there had not been such a filing at DOAH in this case on that date. As a result of the foregoing, neither party's PRO was considered by the Administrative Law Judge in the preparation of this Recommended Order.

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.