STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RYAN POUGH,

Petitioner,

vs. Case No. 16-5042

SOLER AND PALAU USA VENTILATION SYSTEMS, LLC,[1/]

Respondent.
_______________________________/

RECOMMENDED ORDER

A formal hearing was conducted in this case on November 8, 2016, in Jacksonville, Florida, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Ryan Pough, pro se
Apartment No. 1103
11011 Harts Road
Jacksonville, Florida 32218

For Respondent: Michelle Bedoya Barnett, Esquire
David E. Chauncey, Esquire
Alexander DeGance Barnett, P.A.
1500 Riverside Avenue
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STATEMENT OF THE ISSUE

The issue is whether Respondent, Soler and Palau USA Ventilation Systems, LLC ("Soler & Palau"), discriminated

against Petitioner based upon his race or color, in violation of section 760.10, Florida Statutes (2016).[2/]

PRELIMINARY STATEMENT

On or about January 22, 2016, Petitioner, Ryan Pough ("Petitioner"), filed with the Florida Commission on Human Relations ("FCHR") an Employment Charge of Discrimination against Soler & Palau. Petitioner alleged that he had been discriminated against pursuant to chapter 760, Florida Statutes, and Title VII of the Federal Civil Rights Act, based upon race, as follows:

> I am a black male who has been discriminated [against] on the basis of race and color. I began working for Respondent on 7/21/2014 as a Crater. Respondent treats me differently and assigns more work duties to me compared to other co-workers. Employees that are white are favored. I was terminated on 9/18/2015. I firmly believe I have been discriminated against because of my race and color.

The FCHR conducted an investigation of Petitioner's allegations. On July 20, 2016, the FCHR issued a written determination that there was no reasonable cause to believe that an unlawful practice occurred. The FCHR's determination stated as follows, in relevant part:

> The Complainant in this matter filed a charge of discrimination against the Respondent alleging that he was subjected to different terms and conditions and discharged based on race. The facts and evidence as set forth in the Investigative

> Memorandum do not support the Complainant's allegation. The evidence in this matter reveals that the Complainant was terminated for poor performance by making shipping errors. The Complainant was not terminated based on his race and he failed to provide any competent substantial evidence to prove otherwise.

On August 24, 2016, Petitioner timely filed a Petition for Relief with the FCHR. On August 31, 2016, the FCHR referred the case to the Division of Administrative Hearings ("DOAH"). The case was scheduled for hearing on November 3, 2016. On November 2, 2016, Petitioner requested a brief continuance due to a family emergency. The parties agreed to move the hearing forward to November 8, 2016, on which date it was convened and completed.

At the hearing, Petitioner testified on his own behalf and entered Petitioner's Exhibits A through O into evidence. Respondent presented the testimony of Krissy Velleca, human resources and payroll administrator for Soler & Palau; and of Tracy Noble, distribution warehouse manager for Soler & Palau. Respondent's Exhibits 1 through 13 were entered into evidence.

The one-volume Transcript of the hearing was filed at DOAH on November 29, 2016. On December 7, 2016, Respondent filed a motion to extend the time for submitting proposed recommended orders, which was granted by Order dated December 13, 2016. In accordance with the Order granting extension, Respondent timely

filed its Proposed Recommended Order on December 21, 2016. On December 20, 2016, Petitioner filed a five-page handwritten letter addressed to the undersigned, which has been treated without objection as Petitioner's Proposed Recommended Order.

FINDINGS OF FACT

1. Soler & Palau is an employer as that term is defined in section 760.02(7). Soler & Palau is mainly in the business of manufacturing and supplying fans and other recovery ventilators to various industries, including residential, commercial, industrial, and institutional buildings.

2. Petitioner, a black male, was hired at Soler & Palau as a Crater I in the distribution department at the company's B-2 warehouse facility on July 21, 2014. Petitioner was interviewed and hired by Soler & Palau's warehouse distribution manager, Tracy Noble, who is a white female.

3. As a Crater I, Petitioner was responsible for fabricating wooden crates or boxes, using woodworking hand tools and power tools, around the items (mostly industrial fans and accessories) to be shipped. Crater I was the entry level position at Soler & Palau's warehouse. Petitioner was the only Crater I at the B-2 facility, but most, if not all, of the other employees at B-2 had started at the Crater I position and understood its duties and job requirements.

4. Eight employees worked under Ms. Noble at the B-2 facility. Six of those employees were black and two were white.

5. Ms. Noble testified that training as a Crater I normally takes about 90 days, and that Petitioner was fully trained. She testified that, although it is an entry level position, Crater I is very important because Soler & Palau's customers order fans specific to their needs and the crater is responsible for making sure the right fan goes in the crate. Many Soler & Palau customers are restaurants that cannot open if the correct equipment is not in place. Some building codes require specific fans. Each Soler & Palau fan has a specific drive pack that provides the horsepower to move a specific amount of air. Two fans may look the same but have very different capabilities. One fan may meet code for a specific purpose and one may not.

6. It was Petitioner's responsibility to review the orders, which listed everything that should go into the package by part number. Petitioner would pull the corresponding fan, and any accessories (such as a damper or speed controls), and place them on a pallet. Petitioner would then build the crate around the fan. He would weigh the order, record the weight and dimensions of the package, and turn that information over to the shipping clerk, who would print the shipping documents and

labels for Petitioner to affix to the package. Petitioner would place the labels on the fan, again making sure that all numbers matched and that he had the correct fan. Petitioner would then send out the order.

7. On May 19, 2015, nearly 10 months after his hiring, Petitioner pulled and shipped the wrong product to a customer.

8. On June 2, 2015, Petitioner again shipped the wrong product to a customer. The product was needed by another customer immediately. At its own expense, Soler & Palau rushed another order to that customer.

9. As a consequence of his errors, Petitioner received an informal warning from Ms. Noble on June 8, 2015. On the same date, Ms. Noble sent an email to human resources administrator Krissy Velleca (née Carter) requesting that the informal warning be noted in Petitioner's employee file. Ms. Noble wrote that the company was going through a transition to new fans that were very similar to the old ones, and that she counseled Petitioner "to double-check and triple-check himself until the transition is complete." She wrote that Petitioner agreed to watch his work more closely and that she had asked a couple of other employees to check behind him "until we are all used to the changes." Finally, Ms. Noble wrote that she did not want to issue a formal warning to Petitioner because of all the recent

changes and that she would watch Petitioner to make sure the problem did not repeat itself.

10. Ms. Noble testified that she had three different people attempt to retrain Petitioner, out of concern that he was not catching on to the job because of the manner of his original training.

11. On June 19, 2015, Petitioner again made a mistake on an order by placing the wrong part number and wrong order identification on the shipment. Soler & Palau incurred additional freight and expedited UPS charges in correcting Petitioner's mistake. The company also had to deal with a disappointed customer who had been mistakenly informed that their shipment was in transit.

12. On June 22, 2015, Ms. Noble issued a formal written warning to Petitioner for the June 19 incident. The warning statement read as follows:

> This statement will serve as a verbal warning for Poor Workmanship in accordance with Section 3.26 of the Employee Handbook. Gus[3/] is required to always verify that the fan tag matches the order acknowledgement with both the order and part number. Both of these orders were entered 06/19/15 with a "same day" shipping request that did put additional workload and time pressures on the crew, but this is one step that cannot be skipped. In accordance with the company handbook, any future occurrences of this same offense can result in a written warning, (3) days suspension and/or termination.

13. Petitioner signed the statement, acknowledging that he had read and understood the formal written warning.

14. Ms. Noble testified that Petitioner was again provided additional training.

15. On July 20, 2015, Ms. Noble completed Petitioner's annual performance review. She noted that Petitioner needed improvement in the quality of his work and in his knowledge of the technical aspects of his job. She further noted that Petitioner's attendance and punctuality verged on an "unsatisfactory" rating.

16. In spite of Petitioner's spotty evaluation, Ms. Noble recommended him for the full three percent raise available to Soler & Palau employees upon their annual reviews. In an email to Ms. Velleca and vice president of operations, Greg Johnson, Ms. Noble explained her rationale as follows:

> Please see attached for Gus' annual review. You may question why I am giving him the full 3% when I didn't give him a great review. All of his attendance issues have stemmed from transportation issues as far as I remember. I know it must be hard to do anything about that situation when he is barely making enough to live on. I'm hoping it will make a difference in what he is able to do to remedy his attendance problems. I don't think there would have been these issues if there were bus service offered here, but that is not currently available. Please let me know if this seems out of line. He is currently at the minimum for his position, so it is not an overly generous move. Please let me know if you

see anything else that needs to be clarified or changed.

17. Mr. Johnson responded, "I am fine with your decision and reasoning."

18. At the hearing, Ms. Noble testified that she knew Petitioner had trouble getting to work. She thought that if he were making enough money to get his truck repaired, his attendance issues would stop and he would feel less stress and make fewer mistakes on the job. Ms. Noble stated that she does not like firing people because it causes disruption to the operation and means that she has to hire and train a new person, who may or may not turn out to be a good employee. She was willing to do everything she could to improve Petitioner's deficiencies because he did a good job most of the time.

19. On September 3, 2015, while Ms. Noble was on vacation, Mr. Johnson discovered that Petitioner had once again shipped the wrong product to a customer. Mr. Johnson sent an email to Ms. Velleca inquiring about Petitioner's hiring date and job responsibilities. He wrote, "I ask because he just made a significant mistake in pulling 2 fans for shipment. I need to dig into how he was trained, are we asking him to do something outside his expected responsibilities, etc."

20. Ms. Velleca testified that she investigated to make sure that Petitioner was on the job when the error occurred and

that a fill-in had not made the mistake. She stated that she and Mr. Johnson did not want to take action against Petitioner if the error was not his fault. She ultimately determined that Petitioner had made the error.

21. Ms. Velleca testified that the B-2 facility had historically been graded as 100 percent efficient and 99 percent error-free by the parent company in Spain. Petitioner's errors were affecting B-2's overall performance. The parent company was starting to notice a falloff in customer orders and the additional freight costs attributable to correcting Petitioner's errors.

22. Upon returning to work, Ms. Noble began her own investigation of the mistake, which involved Petitioner's mixing up two fans for shipment. On the same day, Ms. Noble caught Petitioner making yet another error by placing the wrong tags on a fan. Though she caught this mistake on the warehouse floor before the fan shipped, Ms. Noble decided that Petitioner had made too many mistakes and that he should be terminated from employment with Soler & Palau.

23. On September 18, 2015, Petitioner was called to Ms. Noble's office and provided with a separation notice from Soler & Palau. The stated reason for his discharge was unacceptable performance of his job duties.

24. At the hearing, Petitioner testified that he believed he was fired because he did not volunteer for overtime work. He believed that the errors of which he was accused were the fault of other employees and constituted a pretext for his dismissal.

25. Specifically, Petitioner blamed two delivery truck drivers for the erroneous deliveries. They were Gevon Campbell, who was black, and a white driver whom Petitioner knew only as Mike. Petitioner claimed that these drivers were charged with checking the orders and ensuring that they are correct. Aside from his claim, Petitioner offered no evidence that the delivery drivers were responsible for checking the orders. Ms. Noble persuasively described Petitioner's Crater I job as inclusive of ensuring that the correct items go into the crates.

26. Petitioner also alleged that a wiring technician named Dave Boyin told him that when he worked as a crater, he made many mistakes on the job but was nonetheless promoted to a higher position. Mr. Boyin is white. He did not testify at the hearing.

27. Ms. Noble testified that she promoted Mr. Boyin to wiring technician because he was doing a good job as a crater. She stated that Mr. Boyin made errors during his 90-day training period, as does any trainee, but that he made no mistakes as a crater after his training period was over. Ms. Noble's testimony was persuasive.

28. At the hearing, Petitioner's testimony was mostly directed toward making a case of wrongful termination, not racial discrimination. At the conclusion of Petitioner's testimony, the undersigned counseled Petitioner that the jurisdiction of this tribunal was limited to his discrimination claim. In response, Petitioner stated, "I don't think it was race. I don't really think it was race, you know what I'm saying?" Petitioner continued to insist that he was fired for refusing to work overtime. Even if Petitioner's insistence on this point were credited, it would not establish that he had been discriminated against because of his race or color.[4/]

29. Petitioner offered no credible evidence that Soler & Palau discriminated against him because of his race or color in violation of section 760.10.

CONCLUSIONS OF LAW

30. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

31. The Florida Civil Rights Act of 1992 (the "Florida Civil Rights Act" or the "Act"), chapter 760, Florida Statutes, prohibits discrimination in the workplace.

32. Section 760.10 states the following, in relevant 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.

33. Soler & Palau is an "employer" as defined in section 760.02(7), Florida Statutes, which provides the following:

> (7) "Employer" means any person employing 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such a person.

34. Florida courts have determined that federal case law applies to claims arising under the Florida Civil Rights Act, and as such, the United States Supreme Court's model for employment discrimination cases set forth in McDonnell Douglas Corporation v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), applies to claims arising under section 760.10, absent direct evidence of discrimination.[5/] See Harper v. Blockbuster Entm't Corp., 139 F.3d 1385, 1387 (11th Cir. 1998); Paraohao v. Bankers Club, Inc., 225 F. Supp. 2d 1353, 1361 (S.D. Fla. 2002); Fla. State Univ. v. Sondel, 685 So. 2d 923, 925 n.1 (Fla. 1st DCA 1996); Fla. Dep't of Comm. Aff. v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991).

35. Under the McDonnell analysis, in employment discrimination cases, Petitioner has the burden of establishing

by a preponderance of evidence a prima facie case of unlawful discrimination. If the prima facie case is established, the burden shifts to the employer to rebut this preliminary showing by producing evidence that the adverse action was taken for some legitimate, non-discriminatory reason. If the employer rebuts the prima facie case, the burden shifts back to Petitioner to show by a preponderance of evidence that the employer's offered reasons for its adverse employment decision were pretextual. See Texas Dep't of Comm. Aff. v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981).

36. In order to prove a prima facie case of unlawful employment discrimination under chapter 760, Petitioner must establish that: (1) he is a member of the protected group; (2) he was subject to adverse employment action; (3) Soler & Palau treated similarly situated employees outside of his protected classifications more favorably; and (4) Petitioner was qualified to do the job and/or was performing his job at a level that met the employer's legitimate expectations. See, e.g., Jiles v. United Parcel Serv., Inc., 360 Fed. Appx. 61, 64 (11th Cir. 2010); Burke-Fowler v. Orange Cnty., 447 F.3d 1319, 1323 (11th Cir. 2006); Knight v. Baptist Hosp. of Miami, Inc., 330 F.3d 1313, 1316 (11th Cir. 2003); Williams v. Vitro Serv. Corp., 144 F.3d 1438, 1441 (11th Cir. 1998); McKenzie v. EAP Mgmt. Corp., 40 F. Supp. 2d 1369, 1374-75 (S.D. Fla. 1999).

37. Petitioner has failed to prove a prima facie case of unlawful employment discrimination.

38. Petitioner established that he is a member of a protected group, in that he is a black male. Petitioner established that he was subject to an adverse employment action, in that he was dismissed from his position as a Crater I after holding the job for more than one year.

39. However, no evidence supports an inference that Petitioner was discriminated against based upon his race or color. Petitioner offered no persuasive evidence to establish that any similarly situated employee was treated differently by Soler & Palau.[6/] While Petitioner was qualified to do the job of Crater I, and at times performed adequately, he was ultimately fired for failing to perform the job at a level that met Soler & Palau's legitimate expectations.

40. Even if Petitioner had provided sufficient evidence that there was an adverse employment action, Soler & Palau presented plentiful evidence of legitimate, non-discriminatory reasons for Petitioner's termination. Petitioner's multiple errors on the job cost the company money out-of-pocket to correct, as well as a loss of customer goodwill and possible future business. Petitioner's immediate employer, the B-2 warehouse facility, suffered intra-company damage in terms of its lowered efficiency rating. Petitioner's supervisor,

Ms. Noble, showed great forbearance with Petitioner, giving him a raise that was not strictly merited and continuing to work with him through his mistakes until the company could no longer be expected to bear the cost of carrying Petitioner as an employee. At the hearing, Petitioner himself conceded that his firing was not based on his race or color.

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 Soler and Palau USA Ventilation Systems, LLC, did not commit any unlawful employment practices and dismissing the Petition for Relief filed in this case.

DONE AND ENTERED this 21st day of March, 2017, in Tallahassee, Leon County, Florida.

LAWRENCE P. STEVENSON
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of March, 2017.

<u>ENDNOTES</u>

[1/] The style of the case has been amended to reflect Respondent's full name.

[2/] Citations shall be to Florida Statutes (2016) unless otherwise specified. Section 760.10 has been unchanged since 1992, save for a 2015 amendment adding pregnancy to the list of classifications protected from discriminatory employment practices. Ch. 2015-68, § 6, Laws of Fla.

[3/] On the job, Petitioner went by his middle name, Gus (presumably short for Augustus).

[4/] On this point, Petitioner testified that he was not present when Ms. Noble asked his shift to work overtime for a week. Petitioner left at his regular time of 3:30 p.m., though he noticed the other employees were staying. He appears to have taken offense at not having been asked in person by Ms. Noble to work overtime and so continued going home each day at his regular time, even though he knew the company wanted him to stay over. There was no element of racial discrimination involved in a blanket request to all employees to work overtime.

[5/] "Direct evidence is 'evidence, which if believed, proves existence of fact in issue without inference or presumption.'" <u>Rollins v. TechSouth, Inc.</u>, 833 F.2d 1525, 1528 n.6 (11th Cir. 1987) (<u>quoting</u> <u>Black's Law Dictionary</u> 413 (5th ed. 1979)). In <u>Carter v. City of Miami</u>, 870 F.2d 578, 582 (11th Cir. 1989), the court stated:

> This Court has held that not every comment concerning a person's age presents direct evidence of discrimination. [<u>Young v. Gen. Foods Corp.</u> 840 F.2d 825, 829 (11th Cir. 1988)]. The <u>Young</u> Court made clear that remarks merely referring to characteristics associated with increasing age, or facially neutral comments from which a plaintiff has inferred discriminatory intent, are not directly probative of discrimination. <u>Id.</u> Rather, courts have found only the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of age, to constitute direct evidence of discrimination.

Petitioner offered no evidence that would satisfy the stringent standard of direct evidence of discrimination.

[6/] As to the question of disparate treatment, the applicable standard was set forth in Maniccia v. Brown, 171 F.3d 1364, 1368-1369 (11th Cir. 1999):

> "In determining whether employees are similarly situated for purposes of establishing a prima facie case, it is necessary to consider whether the employees are involved in or accused of the same or similar conduct and are disciplined in different ways." Jones v. Bessemer Carraway Med. Ctr., 137 F.3d 1306, 1311 (11th Cir.), opinion modified by 151 F.3d 1321 (1998) (quoting Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997)). "The most important factors in the disciplinary context are the nature of the offenses committed and the nature of the punishments imposed." Id. (internal quotations and citations omitted). We require that the quantity and quality of the comparator's misconduct be nearly identical to prevent courts from second-guessing employers' reasonable decisions and confusing apples with oranges. See Dartmouth Review v. Dartmouth College, 889 F.2d 13, 19 (1st Cir.1989) ("Exact correlation is neither likely nor necessary, but the cases must be fair congeners. In other words, apples should be compared to apples."). (Emphasis added).

The Eleventh Circuit has questioned the "nearly identical" standard enunciated in Maniccia, but has in recent years reaffirmed its adherence to it. See, e.g., Brown v. Jacobs Eng’g, Inc., 572 Fed. Appx. 750, 751 (11th Cir. 2014); Escarra v. Regions Bank, 353 Fed. Appx. 401, 404 (11th Cir. 2009); Burke-Fowler, 447 F.3d at 1323 n.2.

In any event, Petitioner in the instant case failed to provide any persuasive evidence to establish disparate treatment.

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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.