

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SELWYN TITUS,

Petitioner,

vs.

Case No. 16-5774

MIAMI-DADE COUNTY,

Respondent.

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RECOMMENDED ORDER

On May 12, 2017, Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings (DOAH), conducted the final hearing by videoconference in Miami and Tallahassee, Florida.

APPEARANCES

For Petitioner: Selwyn Don Titus, pro se
Apartment 601
14030 Biscayne Boulevard
Miami, Florida 33181

For Respondent: William X. Candela, Esquire
Dade County Attorney's Office
111 Northwest 1st Street, Suite 2810
Miami, Florida 33128

STATEMENT OF THE ISSUE

Pursuant to section 760.10(7), Florida Statutes (2015), the issue is whether Respondent has unlawfully discriminated against Petitioner in employment for opposing unlawful employment discrimination.

PRELIMINARY STATEMENT

By Charge of Discrimination filed January 26, 2016, Petitioner alleged that, at all material times, Respondent has employed him as a Heavy Equipment Operator in the Water and Sewer Department. The Charge of Discrimination alleges a series of incidents involving Petitioner's employment that, with one exception, occurred outside of the statute of limitations. The alleged incident within the statute of limitations involved Respondent's denial, in April 2015, of Petitioner's appeal of a reprimand that he had received for causing minor damage to a mailbox while operating a piece of heavy equipment while discharging his duties as a Heavy Equipment Operator.

The alleged retaliation in the form of the denied appeal is clear, but Petitioner's alleged opposition to unlawful employment discrimination committed by Respondent is not. For the most part, based on the Charge of Discrimination, Petitioner's chief problem with Respondent is that, in March 2011 and October 2012, he applied for a promotion to the position of Pipefitter Supervisor--a position that, by rule, allegedly requires a Water Distribution Level III license (License). Although Petitioner allegedly possessed the License, Respondent allegedly denied his applications and instead appointed three other persons to the three openings, even though

none of them possessed a License. Instead, Respondent allegedly reported Petitioner's License in an improper manner to the Florida Department of Environmental Protection. Petitioner allegedly complained of this practice, but Respondent allegedly declined to change the practice, so Petitioner allegedly filed a complaint with the Florida Department of Environmental Protection, allegedly resulting in a fine for Respondent's failure, for over one year, to employ a person with a License as a Pipefitter Supervisor with duties including the responsibility as the lead heavy equipment operator. From this point, the Charge of Discrimination alleges a series of retaliatory acts, but, as noted above, only one falls within the statute of limitations.

On August 18, 2016, the Florida Commission on Human Relations issued a Notice of Dismissal.

On September 16, 2016, Petitioner filed a Petition for Relief concerning the alleged incidents set forth above. In the Petition for Relief, Petitioner alleges that he is a black Seventh-Day Adventist from Trinidad who was 50 and 51 years old when applying for the openings as a Pipefitter Supervisor, and the three persons hired as Pipefitter Supervisors are white Hispanics who are from Cuba, are not Seventh-Day Adventists, and are much younger than Petitioner. In the Petition for Relief, Petitioner alleges that Respondent's failure to promote him to

Pipefitter Supervisor was due to discrimination on the basis of race, religion, national origin, and age.

During a status conference on January 4, 2017, the parties acknowledged that Petitioner had commenced a legal action, on identical grounds, in federal court. The Administrative Law Judge then assigned to the case entered an Order on the same date essentially giving Respondent until the end of the day to file a motion to dismiss and Petitioner until the end of the following day to file a response. On January 4, 2017, Respondent filed a Motion to Dismiss Petition for Lack of Jurisdiction, and, on the following day, Petitioner filed a response in opposition. On January 5, 2017, the Administrative Law Judge entered an Order granting the motion.

On March 30, 2017, the Florida Commission on Human Relations entered an Order Remanding Petition for Relief from an Unlawful Employment Practice, noting that, if a jurisdictional defect exists, it lies in Petitioner's filing of a complaint in federal court after filing the Petition for Relief that commenced the present administrative proceeding. On April 17, 2017, the case was transferred to the undersigned Administrative Law Judge.

At the start of the hearing, Respondent filed a Motion in Limine. The Administrative Law Judge has granted the motion, so

the lone act of alleged retaliation involves an action that occurred in April 2015.

At the final hearing, Petitioner called three witnesses and offered into evidence the following exhibits: Petitioner Exhibits 1, 4-5, 7-9, 11-15, 17, 21, 26, and 30-35. Respondent called no witnesses and offered into evidence no exhibits. All exhibits were admitted except Petitioner Exhibits 7-9, 13-14, and 17, which were proffered.

Respondent filed a highlighted transcript on June 27, 2017, and filed a proposed recommended order on July 5, 2017. Petitioner did not file a proposed recommended order.

FINDINGS OF FACT

1. Petitioner is black and originally from Trinidad. He appears to be at least 50 years of age. Petitioner failed to prove that he is a Seventh-Day Adventist, but this omission is immaterial for the reasons set forth below.

2. At all material times, Respondent has employed Petitioner as a Heavy Equipment Operator. Several years ago, after, on three occasions, Respondent declined to promote Petitioner to Pipefitter Supervisor. Petitioner complained to Respondent and later to the Florida Department of Environmental Regulation that Respondent had hired for this position three persons who lacked a Water Distribution Level III license and instead improperly used Petitioner's license to satisfy a

requirement of the agency for the employment of a person holding such a license. It may be inferred that Respondent did not welcome these complaints, regardless of their merits.

3. Petitioner's proof as to his attempts to secure a position as a Pipefitter Supervisor is sketchy, but, regardless of any evidentiary shortcomings, it appears that, at the time, he opposed Respondent's actions, not as actions of unlawful employment discrimination, but as a violation of an agency rule and improper use of Petitioner's license.

4. The sole potentially retaliatory act identified by Petitioner occurred, several years later, when, in April 2015, Respondent refused to sustain Petitioner's appeal of a reprimand that he received for causing \$25 worth of damage to a third party's mailbox while operating heavy equipment within the scope of his duties as a Heavy Equipment Operator. However, the evidence fails to prove that the refusal to sustain the appeal was retaliatory.

5. Petitioner did not deny that his operation of heavy equipment damaged the mailbox. Although \$25 is a modest amount of damage, heavy equipment is inherently dangerous and its negligent operation may require punishment, even when the damage is slight, in order to deter future negligence that might result in more serious damage or loss of life. Petitioner unpersuasively links the denied appeal of the ensuing reprimand

to his job-related complaints several years earlier. Even if Petitioner had established that these complaints constituted opposition to unlawful employment discrimination, which he did not, Petitioner cannot link the evidently reasonable punishment of a reprimand for negligent operation of heavy equipment, years later, to Respondent's decisions not to promote him to Pipefitter Supervisor.

6. As it is, Petitioner proved only that he is a member of several protected classes; several years ago, he complained that Respondent hired unqualified persons as Pipefitter Supervisors and used Petitioner's license to satisfy a state agency's rule; several years later, while operating heavy equipment for Respondent, Petitioner damaged a mailbox; and, as a consequence, Respondent reprimanded Petitioner and denied his appeal of the reprimand.

CONCLUSIONS OF LAW

7. DOAH has jurisdiction of the subject matter. §§ 120.569, 120.57(1), and 760.11(7), Fla. Stat. (2015). In general, the Florida Commission on Human Relations acquires jurisdiction over alleged violations that occurred within 365 days of the date of the filing of the complaint of discrimination. § 760.11(1).

8. Section 760.10(7) provides:

It is an unlawful employment practice for an employer . . . to discriminate against any person because that person has opposed any practice which is an unlawful employment practice under this section

9. Section 760.10(1)(a) and (b) provides that it is an unlawful employment practice for an employer, on the ground of race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status, to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment or to limit, segregate, or classify employees in any way that would deprive or tend to deprive any individual of employment opportunities or adversely affect any individual's status as an employee.

10. A prima facie showing of unlawful retaliation requires proof of three elements: 1) the petitioner was engaged in statutorily protected activity; 2) the petitioner suffered adverse employment action; and 3) the adverse employment action was causally related to the protected activity. Blizzard v. Appliance Direct, Inc., 16 So. 3d 922, 926 (Fla. 5th DCA 2009). If the petitioner proves a prima facie case, the burden shifts to the respondent to show a legitimate, nondiscriminatory reason for the adverse employment action. Upon such a showing, the petitioner must respond by showing that the respondent's reason was pretextual. Id.

11. As noted above, Petitioner's proof fails to satisfy the first and third elements. Years ago, when he complained of Respondent's failure to promote him, hiring of three persons lacking the required license, and improper use of Petitioner's license, Petitioner was not engaged in protected activity because the proof does not establish that Respondent's actions had anything to do with Petitioner's race, national origin, age, or religion. Years later, after Respondent damaged a mailbox while operating heavy equipment, the proof does not establish that Respondent's decision not to set aside the ensuing reprimand was in retaliation for his earlier complaints, even if they had been statutorily protected, which they were not. At least as persuasive as Petitioner's unproved, more elaborate theory is the simpler explanation that Petitioner received a reprimand for damaging a mailbox while operating heavy equipment, and Respondent declined to sustain Petitioner's appeal of the reprimand.

RECOMMENDATION

It is

RECOMMENDED that the Florida Commission on Human Relations enter a final order dismissing the Petition for Relief filed on September 16, 2016.

DONE AND ENTERED this 25th day of July, 2017, in
Tallahassee, Leon County, Florida.



Robert E. Meale
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 25th day of July, 2017.

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.