STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JOSE A. RAMIREZ,

Petitioner,

vs. Case No. 16-5778

GCA SERVICE GROUP,

Respondent.
_____/

RECOMMENDED ORDER

The final hearing in this matter was conducted before J. Bruce Culpepper, Administrative Law Judge of the Division of Administrative Hearings, pursuant to sections 120.569 and 120.57(1), Florida Statutes (2016),[1/] on December 8, 2016, in Orlando, Florida.

APPEARANCES

For Petitioner: Jose Ramirez, pro se
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Orlando, Florida 32822

For Respondent: Grissel T. Seijo, Esquire
Littler Mendelson, PC
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STATEMENT OF THE ISSUE

Whether Petitioner, Jose A. Ramirez, was subject to an unlawful employment practice by Respondent, GCA Service Group,

based on his race, color, or national origin in violation of the Florida Civil Rights Act.

PRELIMINARY STATEMENT

On March 7, 2016, Petitioner filed a Charge of Discrimination with the Florida Commission on Human Relations (the "Commission") alleging that Respondent, GCA Service Group ("GCA"), violated the Florida Civil Rights Act, by discriminating against him based on his race, color, and national origin.

The Commission failed to determine whether there was reasonable cause for Petitioner's complaint within 180 days of the filing of the complaint in accordance with section 760.11(8), Florida Statutes. Therefore, on June 16, 2016, the Commission issued a Notice of Dismissal to allow Petitioner to proceed with an action under section 760.11(4).

Petitioner elected to request an administrative hearing under section 760.11(4)(b). Thereafter, on September 16, 2016, Petitioner filed a Petition for Relief with the Commission alleging a discriminatory employment practice against GCA. On October 5, 2016, the Commission transmitted the Petition to the Division of Administrative Hearings ("DOAH") to conduct a chapter 120 evidentiary hearing.

The final hearing was held on December 8, 2016. At the final hearing, Petitioner testified on his own behalf. Petitioner did not present exhibits or witnesses. GCA presented

the testimony of Jorge Rivera, Reina Bermudez, and Thomas Pugh. GCA Exhibits 1 through 6 were admitted into evidence.

A one-volume Transcript of the final hearing was filed with DOAH on February 23, 2017. At the close of the hearing, the parties were advised of a ten-day timeframe following receipt of the hearing transcript at DOAH to file post-hearing submittals. Following GCA's request, the parties agreed to a deadline for filing post-hearing submissions more than ten days after the filing of the hearing transcript. Petitioner filed a "Summary" statement which was considered in preparing this Recommended Order.

FINDINGS OF FACT

1. Petitioner is a former route driver for GCA. Petitioner began working for GCA in June 2012.

2. Generally, GCA contracts with rental car companies, such as Avis, Budget, and Enterprise, to move and transfer vehicles between rental car facilities and locations.

3. In 2015, Petitioner supported the GCA services contract at the Avis rental car facility at the Orlando International Airport. The Avis-Orlando location employed between 60 to 100 route drivers. The majority of these drivers were Hispanic.

4. On August 15, 2015, Petitioner requested 30 days off from work as personal leave. Petitioner submitted the appropriate Time Off Request Form to his immediate supervisor

seeking a leave of absence from August 16, 2015, through September 15, 2015. Petitioner recorded that the reason for his leave was a personal/family situation.

5. Thomas Pugh, GCA's account manager for the Avis contract, authorized Petitioner's 30-day leave of absence. Mr. Pugh was also responsible for scheduling the route drivers for the Avis-Orlando location. Based on Petitioner's return date of September 15, 2015, Mr. Pugh scheduled Petitioner for work on September 20 through 22, 2015.

6. Petitioner did not return to work on September 20, 2015. Neither did Petitioner report to GCA on September 21 or 22, 2015. No evidence shows that Petitioner attempted to communicate with GCA, Mr. Pugh, or any of his supervisors between September 15 and September 24, 2015 (the date Petitioner was officially terminated).

7. According to GCA company policy, an employee who is a "no call, no show" for three consecutive shifts is automatically terminated. Consequently, when Petitioner failed to report to work on September 20, 21, and 22, 2015, Mr. Pugh determined that Petitioner should be fired. On September 24, 2015, GCA officially terminated Petitioner's employment. The GCA employment document notating Petitioner's termination date records "term because exceeded 30 days."

8. At the final hearing, Petitioner testified that on September 24, 2015, he called Reina Bermudez, the assistant to the account manager, to request a ten-day extension of his personal leave.[2/] Petitioner claimed that during that phone call, Ms. Bermudez authorized him to remain on leave until October 15, 2015.

9. Petitioner finally appeared at the Avis-Orlando work site on October 13, 2015. There, he requested to meet with Mr. Pugh and Jorge Rivera, GCA's human resources manager. However, neither Mr. Pugh nor Mr. Rivera were available to see Petitioner.

10. Mr. Rivera called Petitioner the following day. Mr. Rivera testified that Petitioner told him that he had not returned to GCA on September 15, 2015, because he had gone to Cuba to handle family personal issues. When Mr. Rivera responded that GCA would not reconsider its decision to terminate him, Petitioner became upset and threatened to file a discrimination lawsuit against GCA.

11. On March 7, 2016, Petitioner did, in fact, initiate a claim alleging discrimination in violation of the Florida Civil Rights Act ("FCRA"). Petitioner asserts that GCA discriminated against him based on his race, color, and national origin. Petitioner is black and Hispanic. He represents that he is from

Cuba. Petitioner identifies Mr. Pugh as the individual who discriminated against him.

12. At the final hearing, Petitioner asserted that GCA's discrimination actually began in May 2015. That month, GCA significantly reduced his work hours. Petitioner complained that GCA (Mr. Pugh) scheduled more work days for drivers with less seniority that him. Petitioner also claimed that GCA (Mr. Pugh) scheduled non-minority drivers for more work assignments than him. Specifically, Petitioner identified a former co-worker named William Genao, who worked more days than Petitioner.

13. In addition to the scheduling disparity, Petitioner charged GCA with wrongfully denying him leave authorized under the Family and Medical Leave Act ("FMLA"). Petitioner insisted that GCA should have allowed him to take FMLA leave after September 15, 2015.[3/] Petitioner provided the name of Hector Prieto, a white employee, who used FMLA while working for GCA.

14. Petitioner also declared that GCA discouraged him from joining a union. Petitioner stated that GCA issued several memos opposing union membership. In light of this material, Petitioner feared GCA would fire him if he joined the local union. In support of his position, Petitioner identified two non-white co-workers whom Petitioner alleged, GCA fired because they were union delegates.

15. Finally, Petitioner accused GCA of promoting white employees over him. Petitioner identified a co-worker named Samuel Rojas, whom GCA treated differently.[4/]

16. Mr. Pugh testified at the final hearing on behalf of GCA. As the GCA account manager for the Avis/Budget account, Mr. Pugh relayed that he is in charge of GCA's overall operations for the Avis contract at the Orlando International Airport. His responsibilities include scheduling route drivers.

17. Mr. Pugh stated that GCA terminated Petitioner based on "job abandonment." Petitioner did not return to work after his 30 days for personal leave ended on September 15, 2015. Therefore, GCA fired him.

18. Mr. Pugh personally approved Petitioner's leave request on August 15, 2015, and authorized Petitioner to take 30 days of personal leave through September 15, 2015. Mr. Pugh stated that GCA company policy allows the location manager to approve personal leave up to 30 days. Mr. Pugh relayed that he did not speak to Petitioner when he submitted his leave request. Petitioner had already left work by the time Mr. Pugh reviewed his Time Off Request Form. Mr. Pugh was under the impression that Petitioner requested leave so that he could travel to Cuba due to a family situation.

19. Regarding Petitioner's complaint of reduced work hours in May 2015, Mr. Pugh explained that drivers' schedules are based

on customer demand. In May 2015, Avis needed fewer cars moved to and from its airport location. Therefore, the Avis account required less drivers. Consequently, almost every route driver transferring Avis vehicles saw their work days reduced. Mr. Pugh normally tried to schedule drivers to work approximately three days a week. Because of the lower demand in May 2015, Mr. Pugh was forced to cut the drivers' schedules to only two days a week. Mr. Pugh explained that he schedules drivers based on hire date. All the drivers he scheduled in May 2015 had comparable seniority to Petitioner.

20. Jorje Rivera testified regarding GCA's decision to terminate Petitioner. Mr. Rivera explained that GCA allows its employees to take up to 30 days of personal leave (not including FMLA). Mr. Rivera confirmed that Mr. Pugh only had authority to approve leave up to 30 days. GCA upper management approval is required if an employee requests more than 30 days leave.

21. Ms. Bermudez testified that she recalled receiving a phone call from Petitioner on or about September 24, 2015. She remembered that Petitioner requested an extension of his leave so that he could assist a sick family member. Ms. Bermudez recounted that she advised Petitioner that she did not have the authority to approve his leave extension. Therefore, she told him that she would forward his request up to the appropriate manager.

22. Thereafter, Ms. Bermudez contacted Jackie Rivera in GCA management to relay Petitioner's request to extend his time off. Ms. Rivera, however, informed Ms. Bermudez that Petitioner's leave extension request would not be granted because he had been off the driver schedule for over 28 days. Ms. Bermudez then called Petitioner several times to try and convey the message that GCA did not approve his leave request. However, she could not reach him.

23. Mr. Pugh and Mr. Rivera testified that neither Petitioner's race nor national origin had any bearing on GCA's decision to terminate his employment. GCA's decision was based solely on Petitioner's failure to return to work following his 30-day leave of absence.

24. In response to the testimony from Mr. Pugh and Mr. Rivera, Petitioner denied that he told them he went to Cuba in September or October 2015. Instead, Petitioner produced evidence that he was sworn in as a United States citizen on November 18, 2015.

25. Based on the competent substantial evidence in the record, the preponderance of the evidence does not establish that GCA discriminated against Petitioner based on race, color, or national origin. Accordingly, Petitioner failed to meet his burden of proving that GCA discriminated against him in violation of the FCRA.

CONCLUSIONS OF LAW

26. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this cause pursuant to sections 120.569, 120.57(1), and 760.11(4)(b) and (6), Florida Statutes. See also Fla. Admin. Code R. 60Y-4.016.

27. Petitioner brings this matter alleging that GCA discriminated against him based on his race, color, and national origin in violation of the FCRA. The FCRA protects individuals from discrimination in the workplace. See §§ 760.10 and 760.11, Fla. Stat. Section 760.10 states, in pertinent 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, pregnancy, national origin, age, handicap, or marital status.

28. Section 760.11(8) states that if the Commission "fails to conciliate or determine whether there is reasonable cause on any complaint under this section within 180 days of the filing of the complaint, an aggrieved person may proceed under [section 760.11(4)], as if the commission determined that there was reasonable cause." Section 760.11(4)(b) permits a party, for whom the Commission determines there is reasonable cause to

believe that a discriminatory practice has occurred, to request an administrative hearing before DOAH. Following an administrative hearing, if the Administrative Law Judge ("ALJ") finds that a violation of the FCRA has occurred, the ALJ "shall issue an appropriate recommended order in accordance with chapter 120 prohibiting the practice and providing affirmative relief from the effects of the practice, including back pay." See § 760.11(6), Fla. Stat.

29. The burden of proof in an administrative proceeding, absent a statutory directive to the contrary, is on the party asserting the affirmative of the issue. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981); see also Dep't of Banking & Fin., Div. of Sec. & Investor Prot. v. Osborne Stern & Co., 670 So. 2d 932, 935 (Fla. 1996)("The general rule is that a party asserting the affirmative of an issue has the burden of presenting evidence as to that issue."). The preponderance of the evidence standard is applicable to this matter. See § 120.57(1)(j), Fla. Stat.

30. The FCRA is patterned after Title VII of the Civil Rights Act of 1964, as amended. Accordingly, Florida courts hold that federal decisions construing Title VII are applicable when considering claims under the FCRA. Harper v. Blockbuster Entm't Corp., 139 F.3d 1385, 1387 (11th Cir. 1998); Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17, 21 (Fla. 3d DCA 2009); and

Fla. State Univ. v. Sondel, 685 So. 2d 923, 925 n.1 (Fla. 1st DCA 1996).

31. Discrimination may be proven by direct, statistical, or circumstantial evidence. Valenzuela, 18 So. 3d at 22. Direct evidence is evidence that, if believed, would prove the existence of discriminatory intent behind the employment decision without any inference or presumption. Denney v. City of Albany, 247 F.3d 1172, 1182 (11th Cir. 2001); and Holifield v. Reno, 115 F.3d 1555, 1561 (11th Cir. 1997). Courts have held that "'only the most blatant remarks, whose intent could be nothing other than to discriminate . . .' will constitute direct evidence of discrimination." Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d 1354, 1358-59 (11th Cir. 1999)(citations omitted).

32. Petitioner presented no direct evidence of race, color, or national origin discrimination on the part of GCA. Similarly, the record in this proceeding contains no statistical evidence of discrimination by GCA in its decision affecting Petitioner.

33. In the absence of direct or statistical evidence of discriminatory intent, Petitioner must rely on circumstantial evidence of discrimination to prove his case. For discrimination claims involving circumstantial evidence, Florida courts follow the three-part, burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), and its progeny. See also Valenzuela, 18 So. 3d

at 21-22; and St. Louis v. Fla. Int'l Univ., 60 So. 3d 455, 458 (Fla. 3d DCA 2011).

34. In a race discrimination action, a petitioner bears the initial burden of establishing, by a preponderance of the evidence, a prima facie case of discrimination. To establish a prima facie case, the petitioner must show that: (1) he belongs to a protected class (race, class, or national origin); (2) he was qualified for his position; (3) he was subjected to an adverse employment action; and (4) his employer treated similarly-situated employees outside of his protected class more favorably than he was treated. See McDonnell Douglas, 411 U.S. at 802-04; Burke-Fowler v. Orange Cnty., 447 F.3d 1319, 1323 (11th Cir. 2006).

35. Demonstrating a prima facie case is not difficult, but rather only requires the petitioner "to establish facts adequate to permit an inference of discrimination." Holifield, 115 F.3d at 1562.

36. If the petitioner establishes a prima facie case, he creates a presumption of discrimination. At that point, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for taking the adverse action. See Valenzuela, supra, at 22. The reason for the employer's decision should be clear, reasonably specific, and worthy of credence. See Dep't of Corr. v. Chandler, 582 So. 2d 1183, 1186 (Fla. 1st DCA 1991). The employer has the burden of production, not the

burden of persuasion, to demonstrate to the finder of fact that the decision was non-discriminatory. See Flowers v. Troup Cnty. 803 F.3d 1327, 1336 (11th Cir. 2015). This burden of production is "exceedingly light." Holifield, 115 F.3d at 1564. The employer only needs to produce evidence of a reason for its decision. It is not required to persuade the trier of fact that its decision was actually motivated by the reason given. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (U.S. 1993).

37. If the employer meets its burden, the presumption of discrimination disappears. The burden then shifts back to the petitioner to prove that the employer's proffered reason was not the true reason but merely a "pretext" for discrimination. See Combs v. Plantation Patterns, 106 F.3d 1519, 1538 (11th Cir. 1997); Valenzuela, 18 So. 3d at 25.

38. In order to satisfy this final step of the process, the petitioner must show "directly that a discriminatory reason more likely than not motivated the decision, or indirectly by showing that the proffered reason for the . . . decision is not worthy of belief." Chandler, 582 So. 2d at 1186 (citing Tex. Dep't of Cmty. Aff. v. Burdine, 450 U.S. 248, 252-256 (1981)). The proffered explanation is unworthy of belief if the petitioner demonstrates "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder

could find them unworthy of credence." Combs, 106 F.3d at 1538; see also Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000). The petitioner must prove that the reasons articulated were false and that the discrimination was the real reason for the action. City of Miami v. Hervis, 65 So. 3d 1110, 1117 (Fla. 3d DCA 2011)(citing St. Mary's Honor Ctr., 509 U.S. at 515)("[A] reason cannot be proved to be 'a pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason.").

39. Despite the shifting burdens of proof, "the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." Burdine, 450 U.S. at 253, 101 S. Ct. at 1089, 67 L. Ed. 2d 207; Valenzuela, 18 So. 3d at 22.

40. Applying the burden-shifting analysis to the facts found in this matter, Petitioner did not meet his burden of proving that GCA discriminated against him based on his race, color, or national origin. Petitioner presented sufficient evidence to establish the first three prongs of the prima facie case in that he proved that he belongs to a protected class, was qualified to perform as a route driver, and was subject to an adverse employment action (termination). However, Petitioner

failed to establish that GCA treated similarly situated, non-minority employees differently.

41. In determining whether employees are similarly situated for purposes of establishing a prima facie case, "[w]hen comparing similarly situated individuals to raise an inference of discriminatory motivation, these individuals must be similarly situated in all relevant respects." Jackson v. BellSouth Telecomm., 372 F.3d 1250, 1273 (l1th Cir. 2004). The standard is a "fairly rigorous one." Rioux v. City of Atlanta, 520 F.3d 1269, 1281 (11th Cir. 2008); Holifield, 115 F.3d at 1562. "The quantity and quality of the comparator's misconduct [must] be nearly identical to prevent courts from second-guessing employers' reasonable decisions and confusing apples with oranges." McCann v. Tillman, 526 F.3d 1370, 1373-74 (11th Cir. 2008); see also Nix v. WLCY Radio/Rahall Commc'ns, 738 F.2d 1181, 1185 (11th Cir. 1984)("[T]he misconduct for which [the petitioner] was discharged [must be] nearly identical to that engaged in by an employee outside the protected class whom the employer retained.").

42. At the final hearing, Petitioner did not present evidence or testimony identifying a non-minority route driver, "similarly situated in all relevant respects," who was not terminated for failing to report to work following 30 days of leave. Although Petitioner offered the names of several co-

workers who GCA allegedly treated differently, Petitioner did not show that any of these individuals were not fired for "job abandonment" and/or missing three consecutive work shifts. Accordingly, the competent substantial evidence in the record does not support Petitioner's allegation that GCA treated him differently than other similarly situated employees based on his race, color, or national origin. Therefore, Petitioner failed to prove a prima facie case of discrimination by circumstantial evidence.

43. Assuming, arguendo, that Petitioner did establish a prima facie case of discrimination, GCA articulated a legitimate, non-discriminatory reason for terminating Petitioner. GCA's burden to refute Petitioner's prima facie case is light. GCA met this burden by providing credible testimony that its decision to fire Petitioner was based on "job abandonment."

44. Completing the McDonnell Douglas burden-shifting analysis (again, assuming that Petitioner made a prima facie showing of discrimination), Petitioner did not prove, by a preponderance of the evidence, that GCA's stated reasons for terminating him were not its true reasons, but were merely a "pretext" for discrimination. The evidentiary record in this proceeding does not support a finding or conclusion that GCA's proffered explanation for firing Petitioner was false or not worthy of credence. Petitioner indisputably did not appear for

work after his 30 days of personal leave ended on September 15, 2015. Neither did he report to GCA on September 20, 21, or 22, 2015. As credibly represented by Mr. Pugh, GCA company policy was to terminate a "no call, no show" employee who was absent three consecutive work days. Accordingly, the facts found in this matter do not support a finding that GCA's proffered reason for terminating Petitioner's employment was a pretext for discrimination.

45. At the final hearing, Petitioner expressed frustration with GCA's decision to fire him instead of extending his leave by 30 days. It should be noted, however, that in a proceeding under the FCRA, the court is "not in the business of adjudging whether employment decisions are prudent or fair. Instead, [the court's] sole concern is whether unlawful discriminatory animus motivates a challenged employment decision." Damon, 196 F.3d at 1361. Not everything that makes an employee unhappy is an actionable adverse action. Davis v. Town of Lake Park, Fla., 245 F.3d 1232, 1238 (11th Cir. 2001). For example, an employer may fire an employee "for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason." Nix v. WLCY Radio/Rahall Commc'ns, 738 F.2d at 1187. An employee cannot succeed by simply quarreling with the wisdom of the employer's reasons. Chapman v. AI Transp., 229 F.3d 1012 (l1th Cir. 2000); see also Alexander v.

Fulton Cnty., Ga., 207 F.3d 1303, 1341 (11th Cir. 2000)("[I]t is not the court's role to second-guess the wisdom of an employer's decisions as long as the decisions are not racially motivated.").

46. In sum, the evidence on record does not support Petitioner's claim that GCA discriminated against him based on his race, color, or national origin. Further, no credible evidence shows that GCA treated similarly situated non-minority members differently or that GCA's stated reason for terminating Petitioner was a "pretext" for discrimination. Because Petitioner failed to put forth sufficient evidence that GCA had some discriminatory animus motivating its decision, his Petition for Relief must be dismissed.

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 Respondent, GCA Service Group, did not commit any unlawful employment practice against Petitioner and dismissing his Petition for Relief from an unlawful employment practice.

DONE AND ENTERED this 26th day of April, 2017, in Tallahassee, Leon County, Florida.

J. BRUCE CULPEPPER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of April, 2017.

ENDNOTES

[1/] All statutory references are to Florida Statutes (2016), unless otherwise noted.

[2/] The evidence does not indicate whether Petitioner contacted Ms. Bermudez before or after GCA officially terminated Petitioner, or whether Petitioner was aware of GCA's decision at the time of his phone call.

[3/] No evidence indicates that Petitioner requested FMLA leave prior to his termination.

[4/] The parties did not present evidence of Mr. Rojas' race. However, Petitioner stated that Mr. Rojas did not speak English.

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.