

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

THOMAS C. HUGHES,

Petitioner,

vs.

Case No. 17-1336

MICHAEL'S STORE, INC.,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on August 14, 2017, in Orlando, Florida, before Garnett W. Chisenhall, a duly-designated Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner: Thomas C. Hughes, pro se
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Clermont, Florida 34711

For Respondent: Nicholas S. Andrews, Esquire
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101 East Kennedy Boulevard
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STATEMENT OF THE ISSUE

The issue is whether Respondent, Michael's Store, Inc. ("Michael's"), committed an unlawful employment practice against Petitioner ("Mr. Hughes") by discharging him.

PRELIMINARY STATEMENT

Mr. Hughes filed a Charge of Discrimination with the Florida Commission on Human Relations ("the Commission") on August 3, 2016, alleging the following:

I have been discriminated against on the basis of retaliation by my former employer. I began employment with [Michael's] on 4/12/2013, in Management. An employee of Michael's filed a complaint with the Human Resource (HR) department about the Store Manager. After the investigation into the employee's claim, the company decided that the employee would receive the just hours that she deserved and there would be no retaliation against her. After the HR department made this decision, the Store Manager (Amy Wsol) asked me and other Managers that had direct contact with the employee to start documenting all interaction with this employee. In January 2016, I filed a claim with HR about the Store Manager and her actions. My claim was brushed off and nothing but an uncomfortable situation with my District Manager (Dennis Bailey) and I took place. In the conversation with Dennis he made me feel that I had done something wrong by going to HR about this matter. He did not address any of my claims about the Store Manager's actions or the treatment of the employees. He reported to HR that I made the claim to try to force them to promote me. The actions of the Store Manager took a toll on my mental and physical well-being; but this was completely overlooked. HR opened an investigation that resulted in suspension for a week and eventually termination on 7/6/2016.

Michael's filed a written response to the Charge of Discrimination which stated in pertinent part that,

[Mr. Hughes] was an Assistant Manager at Michael's. As a member of management it is incumbent upon him to set the right example for other employees, and to follow Company procedures. [Mr. Hughes] violated Company policies when he released sensitive, employee information to an associate, he engaged in intimidating conduct against one of his co-workers and he lied during an investigation.

Michael's permits employees to view their personnel file at any time. Upon written request, employees may receive a copy of their personnel file at no charge. Personnel files do not contain sensitive information such as HR investigative notes, other employee statements, medical information etc. Those documents are not part of the personnel file and are kept separately in a manner to protect and preserve the sensitive information contained therein. Managers are entrusted with this sensitive information and should not abuse that trust, by divulging sensitive information to others without going through the proper channels. These channels are put in place to protect and preserve employee privacy rights. In this case, an employee requested and received a copy of her personnel file. She then asked [Mr. Hughes] to send her copies of investigative notes and witness statements, that were not part of her personnel file. [Mr. Hughes] sent those documents to the employee. Significantly, the documents he sent included other employees' names and confidential complaints about the employee who was requesting those files.

[Mr. Hughes] then intimidated one of his co-workers into witnessing him take those actions and signing a statement. In so doing, he created an intimidating work environment. See Exhibit A. An investigation into [Mr. Hughes]' actions was launched and [Mr. Hughes] was suspended

with pay, pending the outcome of the entire investigation. During the investigation, [Mr. Hughes] lied and repeatedly claimed he did not send documents that were not part of the personnel file. He was asked more than once, and he lied each time. We know [Mr. Hughes] lied because he later admitted to doing so.

The Commission conducted an investigation and issued a Determination on February 1, 2017, concluding that there was no reasonable cause to believe that an unlawful employment practice had occurred:

[Mr. Hughes] filed a charge of discrimination against [Michael's] alleging that he was subjected to adverse terms and conditions of employment, suspended and discharged in retaliation for engaging in a protected activity. The facts and evidence as set forth in the Investigative Memorandum do not support [Mr. Hughes'] allegation. The evidence in this matter reveals that [Mr. Hughes] was discharged because he did not comply with [Michael's] policy regarding the protection of information in employee personnel files. [Mr. Hughes] was not discharged in retaliation for engaging in a protected activity and he did not provide any credible evidence to prove otherwise. Likewise, [Mr. Hughes] did not provide any credible evidence to prove that he was subjected to adverse terms and conditions of employment.

Mr. Hughes responded by filing a Petition for Relief with the Commission on February 28, 2017.

On February 28, 2017, the Commission referred this matter to DOAH for a formal administrative hearing.

On April 11, 2017, the undersigned issued an Order scheduling the final hearing to occur by video teleconference at sites in Orlando and Tallahassee, Florida on May 12, 2017. However, on May 4, 2017, counsel for Michael's filed a "Motion for Continuance" asserting that his law firm had been retained by Michael's during the week of May 1, 2017. Counsel for Respondent also noted that he was scheduled to be out of the country from May 10, 2014, through May 14, 2017. Accordingly, counsel for Respondent requested that the final hearing be continued by 30 days.

On May 8, 2017, the undersigned issued an Order granting the Motion for Continuance, canceling the final hearing, and requiring counsel for Michael's to file a status report by May 16, 2017, providing mutual dates of availability in June of 2017, for the final hearing.

On May 17, 2017, counsel for Michael's filed a Status Report stating that the parties were available on June 22, 2017, for the final hearing. Because the undersigned was unavailable that day, an "Order Requiring More Dates of Availability" was issued on May 22, 2017, requiring the parties to provide additional dates of availability in June and July of 2017.

Following a telephonic status conference on June 9, 2017, and receipt of an Updated Status Report on June 15, 2017, the

undersigned issued an Order on June 21, 2017, scheduling the final hearing to occur on August 14, 2017, in Orlando, Florida.

The final hearing was commenced as scheduled on August 14, 2017. During the course of the final hearing, the undersigned accepted documents filed with DOAH on April 24, 2017, as Petitioner's Exhibit 1. The undersigned accepted into evidence documents filed by Michael's on August 9, 2017, as Respondent's Exhibits A through I.

Mr. Hughes testified on his own behalf. Michael's did not call any witnesses.

The Transcript from the final hearing was filed with DOAH on September 18, 2017.

Mr. Hughes filed a letter on September 25, 2017, as his post-hearing submittal. Michael's did not file a post-hearing submittal.

FINDINGS OF FACT

1. Michael's operates a store in Clermont, Florida.
2. During all times relevant to the instant case, Amy Wsol was the manager of the Clermont store. Mr. Hughes was the Clermont store's operations manager and subordinate to Ms. Wsol.
3. Elisa Griffin was a cashier at the Clermont store. In April of 2015,^{1/} Ms. Griffin notified Michael's human resources department that Ms. Wsol was not enforcing or not complying with

Michael's procedures regarding e-mail captures and other cashier practices.^{2/}

4. Michael's conducted an investigation during the summer of 2015 and concluded in August or September of 2015 that no action would be taken.

5. Michael's notified all employees interviewed during the course of the investigation that there would be no retaliation against Ms. Griffin.

6. Nevertheless, immediately after the investigation's conclusion, Ms. Wsol mandated that the other managers in the Clermont store document all of their interactions with Ms. Griffin and place those documents ("the allegedly retaliatory documents") in Ms. Griffin's personnel file.

7. Mr. Hughes had the additional task of using an in-store surveillance system to monitor Ms. Griffin during her shifts.

8. Mr. Hughes felt that Ms. Wsol's orders regarding the monitoring of Ms. Griffin were contrary to Michael's directive that Ms. Griffin was to suffer no retaliation because of the investigation.

9. Mr. Hughes also felt that Ms. Wsol's orders were immoral and unethical.

10. The stress associated with complying with those orders had an adverse effect on Mr. Hughes' health. Mr. Hughes is an insulin dependent diabetic, and his blood sugars became

unmanageable. At one point, his endocrinologist advised him that hospitalization may be necessary if his condition did not improve.

11. In December of 2015 or January of 2016, Mr. Hughes applied for an assistant manager position at a store that Michael's was about to open in Orlando, Florida. While the position in the Orlando store would have been a lateral move for Mr. Hughes, it appealed to him because the Orlando position would be salaried, and Mr. Hughes was an hourly employee at the Clermont store.

12. In January of 2016, Mr. Hughes reported Ms. Wsol's orders regarding the allegedly retaliatory documents to Michael's Human Resources Department. At this time, he also made copies of the documents so that he would have evidence that Ms. Wsol violated the directive that Ms. Griffin was to suffer no retaliation.

13. Mr. Hughes did not have any authorization from Michael's to copy the contents of Ms. Griffin's personnel file.

14. In February of 2016, Mr. Hughes met at the Clermont store with Dennis Bailey, one of Michael's district managers, regarding Mr. Hughes' allegations about Ms. Wsol.

15. Mr. Bailey told Mr. Hughes that his allegations were being investigated.

16. As for his request to be transferred, Mr. Bailey told Mr. Hughes that he would not be forced by a complaint to transfer Mr. Hughes to a different location. While Mr. Bailey did not completely rule out the possibility of transfer, he stated that Mr. Hughes would probably have to accept a demotion and a loss of benefits.

17. In March of 2016, Ms. Wsol went on medical leave, and Mr. Hughes ran the Clermont store until April Skidmore arrived in April of 2016 to serve as acting store manager.

18. At the end of May 2016, Ms. Griffin asked Mr. Hughes how she could obtain a copy of her personnel file. Mr. Hughes told her that she could request a copy from Ms. Skidmore or from Michael's Human Resources Department.

19. On June 14, 2016, Mr. Hughes received a call from Leah Frye, who worked in the Human Resources Department. Ms. Frye asked Mr. Hughes if Ms. Griffin had approached him about obtaining a copy of her personnel file. Mr. Hughes responded affirmatively and relayed that he had instructed Ms. Griffin on how she could obtain a copy of her personnel file.

20. Mr. Hughes did not tell Ms. Frye that he had made a copy of the allegedly retaliatory documents in January of 2016.

21. After Ms. Griffin received a copy of her personnel file, she stated to Mr. Hughes on June 15 or 16, 2016, that certain documents were missing. Ms. Griffin made that statement

because she had expected to see documentation of compliments paid to her by customers. Ms. Griffin was also expecting to see documentation regarding the investigation of Ms. Wsol. However, none of those documents were in her personnel file.

22. Mr. Hughes then examined Ms. Griffin's personnel file, and discovered that the allegedly retaliatory documents were not there.

23. Mr. Hughes then told Ms. Griffin about the missing documents and stated that he would transmit a copy of them to her upon receiving a request from her attorney.

24. Mr. Hughes received such a request on June 17, 2016.

25. At that point, Mr. Hughes elected to make a copy of his own personnel file because he was worried that its contents would be altered in an effort to retaliate against him.

26. Accordingly, Mr. Hughes asked Mary Pearman, one of the other assistant managers at the Clermont store, to watch him copy his personnel file and sign a statement indicating that the documents he copied represented its complete contents.

27. On June 29, 2016, Mr. Hughes received a call from Chad Romoser, the Director of Michael's Human Resources Department. Mr. Romoser asked Mr. Hughes if he had made a copy of his personnel file and if he had asked a coworker to witness him doing so.

28. Mr. Hughes responded affirmatively and stated that he copied the contents of his personnel file because the allegedly retaliatory documents had disappeared from Ms. Griffin's file.

29. Mr. Hughes then asked Mr. Romoser why the allegedly retaliatory documents were not transmitted to Ms. Griffin after she requested a copy of her personnel file. Mr. Romoser responded by stating that Michael's Human Resources Department had no knowledge of the documents.

30. Mr. Hughes then inquired about the status of the investigation pertaining to his report about the allegedly retaliatory documents.

31. Mr. Romoser stated that after Mr. Bailey had met with Mr. Hughes in February of 2016, Mr. Bailey reported that Mr. Hughes was a "whiny individual" attempting to force Michael's to give him a promotion.

32. On June 29, 2016, Michael's initiated an investigation of Mr. Hughes. Mr. Hughes was suspended with pay and required to relinquish his keys to the Clermont store.

33. On July 6, 2016, Michael's discharged Mr. Hughes.

34. Mr. Hughes learned through a telephone conversation with Mr. Romoser that he had been discharged from Michael's for intimidating Ms. Pearman^{3/} and for lying to the Human Resources Department.

35. Mr. Hughes did not learn until filing his Charge of Discrimination with the Commission that Michael's also discharged him for releasing personal and confidential information.

36. Mr. Hughes was a credible witness. The undersigned finds that his testimony reflected his best recollection of the events pertinent to this case.

37. However and as discussed below, even if all of Mr. Hughes' testimony were to be accepted as true, Mr. Hughes has failed to present a prima facie case of retaliation under the Florida Civil Rights Act.

CONCLUSIONS OF LAW

38. DOAH has jurisdiction over the parties and the subject matter of this proceeding pursuant to sections 120.569 and 120.57, Florida Statutes (2015),^{4/} and Florida Administrative Code Rule 60Y-4.016(1).

39. The State of Florida, under the legislative scheme contained in sections 760.01-760.11, Florida Statutes, known as the Florida Civil Rights Act of 1992 ("the FCRA"), incorporates and adopts the legal principles and precedents established in the federal anti-discrimination laws specifically set forth under Title VII of the Civil Rights Act of 1964, as amended. 42 U.S.C. § 2000e, et. seq.

40. Section 760.10 prohibits discrimination "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." § 760.10(1)(a), Fla. Stat.

41. Florida courts have determined that federal discrimination law should be used as guidance when construing the FCRA. See Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17, 21 (Fla. 3d DCA 2009); Brand v. Fla. Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994).

42. Mr. Hughes has the burden of proving by a preponderance of the evidence that Michael's committed an unlawful employment practice. See EEOC v. Joe's Stone Crabs, Inc., 296 F.3d 1265, 1273 (11th Cir. 2002) (noting that a claimant bears the ultimate burden of persuading the trier of fact that the employer intentionally discriminated against the employees); § 120.57(1)(j), Fla. Stat.

43. Section 760.10(7) provides, in pertinent part that

[i]t is an unlawful employment practice for an employer, an employment agency, a joint labor-management committee, or a labor organization to discriminate against any person because that person has opposed any practice which is an unlawful employment practice under this section, or because that person has made a charge, testified, assisted, or participated in any manner in

an investigation, proceeding, or hearing under this section.

(emphasis added).

44. An employee can establish that he suffered retaliation under the FCRA by proving that: (1) he engaged in an activity protected by the FCRA; (2) he suffered an adverse employment action; and that (3) there was a causal connection between the protected activity and the adverse employment action.

Pennington v. City of Huntsville, 261 F.3d 1262, 1266 (11th Cir. 2001); Russell v. KSL Hotel Corp., 887 So. 2d 372, 379 (Fla. 3d DCA 2004).

45. Mr. Hughes clearly suffered an adverse employment action when Michael's discharged him. Therefore, the analysis turns to whether he opposed a practice that was unlawful under the FCRA and whether there was a causal connection between any protected activity and the discharge.

46. Mr. Hughes implicitly asserts that Ms. Wsol's order regarding the allegedly retaliatory documents was unlawful under the FCRA and that his report in January of 2016 to Michael's Human Resources Department was a protected activity under the FCRA. However, even if Mr. Hughes' allegations are accepted as true, he has failed to satisfy the first element of a retaliation claim under the FCRA.

47. As noted above, section 760.10(7) prohibits an employer from discriminating "against any person because that person has opposed any practice which is an unlawful employment practice under this section." (emphasis added). Section 760.10(1)(a), Florida Statutes, prohibits discriminatory acts based on one's "race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status."

48. In the instant case, Ms. Wsol may have violated one of Michael's policies or directives by ordering the assistant managers to document their interactions with Ms. Griffith. However, there is no allegation that Ms. Wsol's order was motivated by any intent to discriminate against Ms. Griffin based on the latter's race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status.

49. As a result, Mr. Hughes has not demonstrated that he opposed an action that was unlawful under section 760.10. See Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 262 (1st Cir. 1999) (concluding that there was no protected activity where plaintiff complained of supervisor's treatment but never stated a belief that it violated Title VII or any other law); Gleason v. Mesirow Fin., 118 F.3d 1134, 1147 (7th Cir. 1997) (granting summary judgment and finding that general complaints absent specific allegations of sexual harassment do not constitute protected activity); Barber v. CSX Distrib.

Servs., 68 F.3d 694, 702 (3d Cir. 1995) (letter to HR complaining about unfair treatment but not specifically complaining about discrimination is not protected activity). See also Conrad v. Bd. of Johnson Cnty. Comm'rs, 237 F.Supp.2d 1204, 1243-44 (D. Kan. 2002) (granting summary judgment and finding that where an employee complained regarding employer's accusations of erratic behavior and fitness for duty evaluation but never complained of ADA violation or disability discrimination, she did not engage in protected opposition and cannot have held a reasonable belief that her complaints were protected by the ADA).

50. Moreover, there is not enough evidence to find a causal connection between Mr. Hughes' report and his discharge from Michael's.

51. In order to demonstrate a causal connection, a petitioner must show that "the decision-makers were aware of the protected conduct and that there was a close temporal proximity between this awareness and the adverse employment action." Singh v. Green Thumb Landscaping, Inc., 390 F.Supp.2d 1129, 1139-40 (N.D. Fla. 2005).

52. "If there is a substantial delay between the protected expression and the adverse action in the absence of other evidence tending to show causation, the complaint of retaliation

fails as a matter of law.” Higdon v. Jackson, 393 F.3d 1211, 1220 (11th Cir. 2004).

53. Because approximately six months passed between Mr. Hughes’ report to the Human Resources Department and his discharge, the undersigned cannot find that there was a causal connection between the two events. See Clark Cnty. Sch. Dist. v. Breeden, 532 U.S. 268, 273, 121 S.Ct. 1508, 149 L.Ed.2d 509 (2011) (citing with approval decisions in which a three to four month period between the activity and the adverse action did not show a causal connection).

54. Moreover, there was no testimony from Mr. Hughes that he experienced any sort of retaliatory conduct during the six months prior to his discharge.

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 dismissing Thomas C. Hughes’ Petition for Relief from an unlawful employment practice.^{5/}

DONE AND ENTERED this 19th day of October, 2017, in
Tallahassee, Leon County, Florida.

Garnett Chisenhall

G. W. CHISENHALL
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of October, 2017.

ENDNOTES

^{1/} Upon reading the Transcript from the final hearing, the undersigned concluded that there was confusion among the hearing participants regarding the years when certain events occurred. The undersigned finds that the dates set forth herein are accurate descriptions of when the events in question occurred.

^{2/} As the name implies, "e-mail captures" occur when a cashier requests a customer's e-mail address.

^{3/} Mr. Hughes allegedly used coercive tactics to force Ms. Pearman to witness him copy the contents of his personnel file and to sign a statement that the copied documents were the complete contents of that file. The undersigned finds Mr. Hughes' denial of utilizing coercive tactics to be credible.

In addition, Mr. Hughes allegedly intimidated Ms. Pearman during his suspension by contacting her via text message and asking her to call him when she had a moment. Mr. Hughes sent that message in order to inquire about the status of his time entries. As found above, Mr. Hughes had been suspended with pay during the course of Michael's investigation. Mr. Hughes attempted to contact Ms. Pearman because Ms. Skidmore had made two errors regarding other employees' time records, and those

errors resulted in them not being paid for the time period in question. Because Mr. Hughes could not afford to go without pay, he contacted Ms. Pearman in an attempt to ensure that his time records were accurate. After a full day passed with Ms. Pearman not responding to Mr. Hughes' text, Mr. Hughes contacted another assistant manager at the Clermont store and asked her to verify the accuracy of his time records. The undersigned also finds Mr. Hughes' denial of this allegation of intimidation to be credible.

^{4/} All statutory references will be to the 2015 version of the Florida Statutes.

^{5/} The undersigned's recommendation should not be mistaken for a determination that Michael's was justified in discharging Mr. Hughes. While Mr. Hughes' allegations do not amount to a prima facie case of retaliation under the FCRA, Mr. Hughes alleged that he copied documentation pertaining to Ms. Griffin in order to substantiate and/or counter a practice (i.e., the allegedly retaliatory documents) that he considered unethical. He copied his own personnel file because he feared that Michael's would retaliate against him.

While the undersigned did not have the benefit of Ms. Pearman's testimony, Mr. Hughes did not appear to be the type of person who would bully or intimidate a co-worker.

The limited testimony during the final hearing leaves the undersigned with doubts as to whether discharge of Mr. Hughes was the appropriate course of action. However, the undersigned is not in a position to second-guess that decision given the lack of a prima facie case of retaliation under the FCRA. See generally Chapman v. Al Transp., 229 F.3d 1012, 1030 (11th Cir. 2000) (noting that an employer's decision "may seem to some to be bad business judgment and to others to be good business judgment, but federal courts do not sit to second-guess the business judgment of employers. Stated somewhat differently, a plaintiff may not establish an employer's proffered reason as pretextual merely by questioning the wisdom of the employer's reason, at least not where . . . the reason is one that might motivate a reasonable employer.").

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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.