STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AARON PITTMAN,

Petitioner,

vs. Case No. 17-5083

SUNLAND CENTER,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, this case was heard on November 16, 2017, in Marianna, Florida, before Administrative Law Judge Suzanne Van Wyk.

APPEARANCES

For Petitioner: LaDray B. Gilbert, Esquire
The Gilbert Firm, P.A.
2913 Optimist Drive
Marianna, Florida 32446

For Respondent: Lisa Marie Kuhlman, Esquire
Agency for Persons with Disabilities
4030 Esplanade Way
Tallahassee, Florida 32399

STATEMENT OF THE ISSUES

Whether Respondent subjected Petitioner to an unlawful employment practice based on Petitioner's race, in violation of section 760.10, Florida Statutes (2016)[1/]; and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On February 17, 2017, Petitioner filed an Employment Complaint of Discrimination with the Florida Commission on Human Relations (Commission), which alleged that Respondent violated section 760.10 by discriminating against him on the basis of his race.

On August 11, 2017, the Commission issued a Determination: No Cause and a Notice of Determination: No Cause, by which the Commission determined that reasonable cause did not exist to believe that an unlawful employment practice occurred. On September 15, 2017, Petitioner filed a Petition for Relief with the Commission, which was transmitted that same date to the Division of Administrative Hearings to conduct a final hearing.

The final hearing was scheduled for November 16, 2017, in Marianna, Florida, and commenced as scheduled.

At the final hearing, Petitioner testified on his own behalf and presented the testimony of Clarence Holden, Sr. Petitioner did not introduce any exhibits in evidence.

Respondent presented the testimony of Amanda Johnson, Raquel Archie, and Amanda Smith. Respondent's Exhibits R1 through R3 were admitted in evidence.

The proceedings were recorded, but no transcript of the proceedings was filed. On February 27, 2018, the undersigned

entered an Order on Post-hearing Filings ordering the parties to file proposed recommended orders on or before March 9, 2018.

On March 7, 2018, Petitioner's counsel filed a Motion to Extend Time for Order on Post-hearing Filings (Motion), which the undersigned denied, without prejudice, solely because counsel did not represent in the Motion whether Respondent opposed the Motion.[2/] Nevertheless, Petitioner did not file an amended motion. Neither party filed a proposed recommended order in this case.

FINDINGS OF FACT

1. Petitioner, Aaron Pittman, a black male, was at all times relevant hereto employed at Sunland Center (Sunland) by the Agency for Persons with Disabilities (APD).

2. Sunland Center is an assisted-living facility operated by APD in Marianna, Florida, serving clients with intellectual and developmental disabilities.

3. Petitioner was first employed at Sunland on August 7, 1987, as a Maintenance Mechanic. Petitioner's full-time job was to maintain wheelchairs for use by residents. According to Petitioner, the work was very steady, with continuous repairs to footrests, wheels, seats, and many other parts of well-used wheelchairs throughout the facility. Petitioner remained in that position for 17 years.

4. In 2007, Petitioner was promoted from Maintenance Mechanic to Electronics Tech II. The duties of the Electronics Tech II include installation of televisions, cleaning fire detection and other safety equipment, conducting fire drills, and repairing all manner of electronics.

5. After Petitioner was promoted to Electronics Tech II, an employee with the last name of Moss was assigned to wheelchair maintenance. Apparently Mr. Moss was not capable of performing the duties of wheelchair maintenance and requested Petitioner's assistance with those duties. Mr. Moss left Sunland sometime in 2010.

6. When Mr. Moss left, John Kramer, Maintenance Supervisor, asked Petitioner to help out "temporarily" with the wheelchair maintenance. Petitioner testified that he agreed to resume wheelchair maintenance "temporarily" because Mr. Kramer was "a nice man and [Petitioner] wanted to help him out."

7. Petitioner first worked overtime on a night shift to complete the wheelchair maintenance work. However, Petitioner did not request prior approval for the overtime and was instructed to take time off to compensate for the overtime.

8. Clarence Holden, Sr., a black male, was employed at Sunland for 40 years. Mr. Holden began in an entry-level position, but was promoted to a supervisory position. Mr. Holden

supervised Petitioner during Mr. Holden's last five years of employment in the position of Telecommunication Specialist.

9. Mr. Holden also supervised Keith Hatcher, the only employee other than Petitioner in the Maintenance Department.

10. Mr. Hatcher retired sometime before Mr. Holden.

11. Mr. Holden retired in 2014, leaving Petitioner as the only employee in the Maintenance Department.

12. Petitioner testified that he "took over [Mr. Holden's] duties" when Mr. Holden retired, but was never compensated for essentially working two jobs.

13. Petitioner never supervised any employees at Sunland. Petitioner did not have any authority to hire or fire other employees or perform evaluations of other employees.

14. After Mr. Holden's retirement, Petitioner asked Allen Ward (whose position in the chain of command was not identified) about applying for the Telecommunication Specialist position. Petitioner was told management was "holding" that position.

15. Petitioner testified that Mr. Ward advertised and filled the position of Telecommunication Specialist "while [Petitioner] was out."

16. Petitioner admitted that the position of Safety Specialist[3/] was eventually advertised, and that Petitioner did not apply for the position.

17. Amanda Johnson, former Employee Relations Specialist at Sunland, met with Petitioner sometime in 2012 regarding his complaint about working two positions without additional compensation.

18. In June 2013, Petitioner received a ten-percent salary increase "for additional duties and responsibilities for maintaining resident wheelchairs and electric/mechanical hospital beds."

19. Petitioner seeks back pay for performing duties of two positions beginning in 2010.

20. Petitioner separately complains that he was subject to harassment based on his race and Respondent failed to do anything about it.

21. Petitioner testified that there used to be an employee who used the "N word," and under a previous administration the supervisor would "take care of it," but that under the current administration "nothing happens."

22. Petitioner indicated that other employees used to "make postings about lynching." Petitioner did not identify any specifics of those incidents--when they occurred, who made the posting, or whether there were consequences to those employees.

23. Petitioner complained that a fellow employee once wrote "Trump" on a dirty work truck. However, when the incident was reported, the manager washed the truck.

24. Petitioner complained that white employees sit around and talk with each other for extended periods without any consequence, but that if he sits to talk with a fellow employee for 15 minutes "people complain."

25. Petitioner has never been disciplined by Respondent.

26. Respondent is managed by a black Superintendent and black Deputy Superintendent. Sunland employs a number of black mid-level managers and supervisors.

CONCLUSIONS OF LAW

27. The Division has jurisdiction over the subject matter and parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2017).

28. Petitioner has the burden of proving by a preponderance of the evidence that Respondent committed an unlawful employment practice. See § 120.57(1)(j), Fla. Stat.

29. The Florida Civil Rights Act of 1992 (the "Act"), makes it unlawful for an employer to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of the individual's race or national origin. § 760.10(1)(a), Fla. Stat.

30. The Act is patterned after Title VII of the Civil Rights Act of 1964, as amended. Thus, case law construing Title VII is persuasive when construing the Act. See, e.g.,

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

31. Petitioner can meet his burden of proof with either direct or circumstantial evidence. Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d 1354 (11th Cir. 1999), cert. den. 529 U.S. 1109 (2000). Direct evidence must evince discrimination without the need for inference of presumption. Standard v. A.B.E.L Servs., Inc., 161 F.3d 1318, 1330 (11th Cir. 1998).

32. Direct evidence is evidence that, if believed, would prove the existence of discriminatory intent without resort to inference or presumption. Denny v. City of Albany, 247 F.3d 1172, 1182 (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, 196 F.3d at 1358-59 (citations omitted). Further, the Eleventh Circuit has defined direct evidence of discrimination as evidence which reflects "a discriminatory or retaliatory attitude correlating to the discrimination or retaliation complained of by the employee." Id. at 1358.

33. Petitioner identified no direct evidence of discrimination on behalf of Sunland or its managers. While Petitioner did identify some blatant remarks by coworkers, the

record shows that management addressed the issues. A manager washed the truck with "Trump" written on it. The supervisor "took care of" coworkers who used the "N word."

34. Although Petitioner testified that more recently "nothing happens" when a coworker uses the "N word," that is insufficient to ascribe a discriminatory attitude to the employer. That testimony does not overcome the facts demonstrating Respondent's non-discriminatory attitude. Respondent promoted Petitioner, as well as his supervisor, Mr. Holden, during their careers with Respondent. Further, Respondent's upper-level managers and some mid-level managers are black.

35. Because Petitioner's direct evidence was insufficient to establish unlawful discrimination, Petitioner must prove his allegations by circumstantial evidence. Circumstantial evidence of discrimination is subject to the burden-shifting framework established in McDonnell Douglas Corporation v. Green, 411 U.S. 792, 802 (1973).

36. To prove unlawful discrimination by circumstantial evidence, a party must establish a prima facie case of discrimination by a preponderance of the evidence. If successful, this creates a presumption of discrimination. Then the burden shifts to the employer to offer a legitimate, non-discriminatory reason for the adverse employment action. If the

employer meets that burden, the presumption disappears and the employee must prove that the legitimate reasons were a pretext. Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17 (Fla. 3d DCA 2009). Facts that are sufficient to establish a prima facie case must be adequate to permit an inference of discrimination. Id.

37. Petitioner must first establish a prima facie case by showing: (1) he is a member of a protected class; (2) he was qualified for the position held; (3) he was subjected to an adverse employment action; and (4) other similarly-situated employees, who are not members of the protected group, were treated more favorably than Petitioner. See McDonnell Douglas, 411 U.S. at 802.

38. The Findings of Fact here are not sufficient to establish a prima facie case of discrimination based on race. Petitioner did establish the first two elements: he is a member of a protected class--African American--and was qualified for the position of Electronic Tech II. However, Petitioner did not establish the third element--that he suffered an adverse employment action.

39. "Not all conduct by an employer negatively affecting an employee constitutes adverse employment action." Davis v. Town of Lake Park, Fla., 245 F.3d 1232, 1238 (11th Cir. 2001) (Plaintiff, who received one oral reprimand, one written reprimand, the withholding of a bank key, and a restriction on

cashing non account-holder checks, did not suffer an adverse employment action). "The asserted impact cannot be speculative and must at least have a tangible adverse effect on the plaintiff's employment." Id. at 1239. An employee is required to show a "serious and material change in the terms, conditions, or privileges of employment." Id.

40. Petitioner was not disciplined, demoted, dismissed, transferred, or otherwise subjected to any action with a tangible adverse effect on his employment. Despite his complaints, Petitioner was not denied a promotion or the chance to apply for the position of Safety Specialist. Petitioner was asked to take on additional responsibilities, and was ultimately compensated for performing those additional duties.

41. Respondent may have taken advantage of Petitioner, who is a simple person and was obviously a good worker. The record does not support a finding that the employer was motivated by race in making the decision to give Petitioner additional job responsibilities.

Hostile Work Environment Claim

42. To state a Title VII claim of a hostile work environment based on race, a plaintiff must demonstrate that his or her "workplace [was] permeated with discriminatory intimidation, ridicule, and insult" that was "'sufficiently severe or pervasive to alter the conditions of [the] employment

and create an abusive working environment.'" Budik v. Howard Univ. Hosp., 986 F. Supp. 2d 1, 7 (D.C. Cir. 2013) (citing Harris v. Forklift Sys., 510 U.S. 17 (1993)).

43. To satisfy this requirement, Petitioner must show that: (1) he is a member of a protected class; (2) he was subject to harassment; (3) the harassment was based on his protected status; (4) the harassment affected a term, condition, or privilege of his employment; and (5) the employer knew or should have known of the harassment, but failed to take any action to prevent the harassment. Jones v. Billington, 12 F. Supp. 2d 1, 11 (D.D.C. 1997), aff'd, No. 98-5014, 1998 U.S. App. LEXIS 15459 (D.C. Cir. June 30, 1998).

44. Petitioner is a black male, thus, a member of a protected class.

45. In evaluating Petitioner's allegation that he was subject to harassment, "the court looks to the totality of the circumstances, including the frequency of the discriminatory conduct, its severity, its offensiveness, and whether it interferes with an employee's work performance." Baloch v. Kempthorne, 550 F.3d 1191, 1201 (D.C. Cir. 2008) (citing Faragher v. Boca Raton, 524 U.S. 775, 787-88 (1998)). "Except in extreme circumstances, courts have refused to hold that one incident is so severe to constitute a hostile work environment. Even a few isolated incidents of offensive conduct do not amount to

actionable harassment." Stewart v. Evans, 275 F.3d 1126, 1134 (D.C. Cir. 2002) (citations omitted).

46. The incidents were related to Petitioner's protected status and were clearly offensive.

47. The record does not support a finding that the incidents were so pervasive or severe to interfere with Petitioner's work performance. Petitioner's testimony related the "Trump" incident and use of the "N word" by coworkers, generally, as well as "postings" about lynching, during his more than 30-year career with Sunland. Petitioner was unable to relate the dates or time period, the frequency, or the severity of the incidents.

48. Even if Petitioner's testimony related severe and pervasive harassment, Petitioner failed to establish the last element: that Respondent knew or should have known about the harassment but failed to take any action to prevent it. Petitioner's testimony established that Sunland management washed the truck with the allegedly offensive comment and managers did, at least during some time period, "take care of" use of the "N word" by coworkers.

49. Petitioner failed to prove that Sunland unlawfully discriminated against him on the basis of his race.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations dismiss the Petition for Relief from an Unlawful Employment Practice filed by Petitioner against Respondent in Case No. 201700575.

DONE AND ENTERED this 30th day of March, 2018, in Tallahassee, Leon County, Florida.

SUZANNE VAN WYK
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of March, 2018.

ENDNOTES

[1/] Except as otherwise noted herein, all references to the Florida Statutes are to the 2016 version, which was in effect when Petitioner's Complaint of Discrimination was filed.

[2/] As required by Florida Administrative Code Rule 28-106.204(3).

[3/] Apparently Mr. Holden's position was reclassified and advertised as a "Safety Specialist," rather than "Telecommunication Specialist."

COPIES FURNISHED:

Rockal Archie
Agency for Person with Disability
Room 225B
4030 Esplanade Way
Tallahassee, Florida 32399

Tammy S. Barton, Agency Clerk
Florida Commission on Human Relations
Room 110
4075 Esplanade Way
Tallahassee, Florida 32399-7020
(eServed)

LaDray B. Gilbert, Esquire
The Gilbert Firm, P.A.
2913 Optimist Drive
Marianna, Florida 32446
(eServed)

Lisa Marie Kuhlman, Esquire
Agency for Persons with Disabilities
4030 Esplanade Way
Tallahassee, Florida 32399
(eServed)

James C. Davis, Esquire
The Gilbert Firm, P.A.
2913 Optimist Drive
Marianna, Florida 32448

Cheyanne Costilla, General Counsel
Florida Commission on Human Relations
4075 Esplanade Way, Room 110
Tallahassee, Florida 32399
(eServed)

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.