STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARLOWE D. ROBINSON,

Petitioner,

vs. Case No. 17-6239

BROWARD COUNTY SCHOOL DISTRICT,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was conducted before Administrative Law Judge Mary Li Creasy, by video teleconference, with locations in Lauderdale Lakes and Tallahassee, Florida, on July 18, 2018.

APPEARANCES

For Petitioner: Marlowe D. Robinson, pro se
4920 Northwest 73rd Avenue
Lauderhill, Florida 33319

For Respondent: Michael L. Elkins, Esquire
Denise Marie Heekin, Esquire
Bryant Miller Olive, P.A.
One Southeast Third Avenue, Suite 2200
Miami, Florida 33131

STATEMENT OF THE ISSUES

Whether Petitioner, Marlowe D. Robinson ("Petitioner"), was unlawfully discriminated against by Respondent, Broward County School District ("BCSD"), his employer, based on his disability and in retaliation for complaining about discrimination, in

violation of chapter 760 of the Florida Statutes, the Florida Civil Rights Act; and, if so, what is the appropriate remedy.

PRELIMINARY STATEMENT

On April 13, 2017, Petitioner filed a charge of discrimination ("Charge") with the Florida Commission on Human Relations ("FCHR"). Petitioner alleged that he was discriminated against on the basis of his handicap and retaliated against for engaging in protected activity (filing internal labor grievances).

On October 10, 2017, the FCHR dismissed the Charge and issued a No Reasonable Cause Determination. On November 14, 2017, Petitioner filed his Petition for Relief and for Administrative Hearing from Florida Commission on Human Relations "No Reasonable Cause" Determination ("Petition"), and the matter was referred to the Division of Administrative Hearings. The matter was originally set for final hearing on January 3, 2018. Several motions for continuance were granted, and the final hearing was held on July 18, 2018.

Petitioner testified on his own behalf. Petitioner's Exhibits 1, 3, and 4 were admitted into evidence. Respondent's Exhibits 4, 5, 7, 8, 12, 20 through 23, 26 through 31, 34, 37 through 40, 42, 44, 46 through 49, 53 through 55, 58, 62, 63, and 67 were admitted into evidence.

The Transcript of the final hearing was filed on September 2, 2018. Respondent requested, and was granted, two extensions of time within which to file a proposed recommended order, which was considered in the preparation of this Recommended Order. Petitioner opted not to file a proposed recommended order.

Except as otherwise indicated, citations to Florida Statutes or rules of the Florida Administrative Code refer to the versions in effect at the time of the alleged violations.

FINDINGS OF FACT

1. Petitioner worked for BCSD for approximately 20 years prior to the termination of his employment on May 8, 2018. Petitioner is a disabled veteran. At the time of his termination, Petitioner was employed as the Head Facility Serviceperson at BCSD's office in the Katherine C. Wright Building ("KCW").

2. On February 5, 2016, Richard Volpi began working at KCW as the Manager of Administrative Support and as Petitioner's immediate supervisor. During Mr. Volpi's third day on the job, Petitioner told him that he was not happy that Mr. Volpi was at KCW and that KCW was "his house." He also told Mr. Volpi that he did not work because he "delegated to his crew."

3. On February 18, 2016, Petitioner filed two internal labor grievances. In the first, he asked to have his job title

changed to "Building Operations Supervisor." In the second grievance, Petitioner alleged that Mr. Volpi and Jeff Moquin, Chief of Staff, created a hostile and unclean work environment.

4. Mr. Volpi processed the grievances by having a meeting with Petitioner on February 25, 2016. Finding no basis for the grievances in the collective bargaining agreement, Mr. Volpi denied them.

5. On October 10, 2016, Mr. Volpi met with Petitioner to discuss a significant pattern of Petitioner coming in late, failing to notify BCSD when arriving late, staying after his scheduled shift to make up time without authorization, failing to call in as required for sick days, and failing to have pre-authorization for using accumulated leave.

6. After the meeting, Mr. Volpi issued a written "Meeting Summary," which included counseling, based on Petitioner having come in late 24 days since August 1, 2016, and only notifying Mr. Volpi's assistant of the tardiness on three of those 24 days. The "Meeting Summary" was not considered discipline and stated, "If for any reason you need to change your shift hours to assist you in getting to work on time, please let me know."

7. On October 19, 2016, Petitioner filed his third internal labor grievance after Mr. Volpi became his supervisor. The third labor grievance made numerous allegations against

Mr. Volpi, including, but not limited to, sexual harassment, unspecified Family and Medical Leave Act ("FMLA") violations, and retaliation for filing prior grievances.

8. On October 26, 2016, Petitioner submitted a request for intermittent leave pursuant to FMLA. The next day, Petitioner was notified that his FMLA leave request was incomplete, and was therefore denied. Petitioner was later granted intermittent FMLA leave with the agreement that he was to provide advance notification of his anticipated absences.

9. On November 9, 2016, Petitioner was notified in writing to appear at Mr. Volpi's office on November 16, 2016, for a pre-disciplinary conference to discuss Petitioner's failure to adhere to the directive of October 10, 2016, to notify Mr. Volpi if he was going to be late, out for the day, or working outside his scheduled hours. The letter specified that Petitioner was late October 11, 13, and 17, 2016, without notifying Mr. Volpi, and that Petitioner was late and worked past his regular scheduled hours on October 21, 25, and November 7, 2016. The letter also specified that Petitioner "called out" (took time off) without notifying Mr. Volpi on October 31 and November 1, 2, 3, 4, and 8, 2016.

10. In response, Petitioner filed a fourth grievance against Mr. Volpi alleging retaliation, bullying, and violations

of the Americans with Disabilities Act ("ADA") and various policies of BCSD.

11. On November 16, 2016, Mr. Volpi memorialized in writing that Petitioner failed to show up for the November 16, 2016, pre-disciplinary meeting. On November 21, 2016, Petitioner was notified in writing that he was to appear at Mr. Volpi's office on November 30, 2016, for a pre-disciplinary meeting to replace the original meeting scheduled for November 16, 2016. Petitioner was not disciplined for not showing up to the November 16, 2016, meeting.

12. The meeting on November 30, 2016, went forward as scheduled and Petitioner was issued a verbal reprimand on December 5, 2016, his first discipline from Mr. Volpi, for Petitioner's ignoring the prior directive to contact his supervisor if he was going to be late, absent, or wanted to work beyond his scheduled shift. He was again reminded that he had to make such notifications and have permission in advance of working hours other than his regular shift.

13. On January 12, 2017, Petitioner was granted a reasonable accommodation pursuant to the ADA. The accommodation granted permitted Petitioner to report to work within one hour of his scheduled work time and leave within one hour of his scheduled end time ("flex time"). Additionally, Petitioner was required to notify his supervisor in advance of using flex time.

Mr. Volpi assisted Petitioner in the accommodation process. Mr. Volpi provided Petitioner the accommodation paperwork and advocated for Petitioner to be granted an accommodation.

14. On January 26, 2017, Petitioner again came in late without providing Mr. Volpi advance notice of intent to use his flex time. On January 27, 2017, Mr. Volpi sent an email to Petitioner reminding Petitioner that he was required to notify him if he is going to be late. This was not considered discipline.

15. On March 21, 2017, Petitioner was notified in writing that he was to appear at Mr. Volpi's office on March 27, 2017, for a pre-disciplinary meeting regarding ongoing excessive tardiness and failure to adhere to his work schedule.

16. On March 23, 2017, Petitioner filed his fifth internal labor grievance, again alleging harassment (among other claims) against Mr. Volpi. On March 28, 2017, Petitioner filed his sixth internal labor grievance, again making harassment allegations against Mr. Volpi.

17. On April 6, 2017, Petitioner was issued a Written Reprimand by Mr. Volpi for his nine days of tardiness in February and March and his failure to notify Mr. Volpi in advance.

18. On April 7, 2017, Petitioner appealed the Written Reprimand. Petitioner also filed his seventh and eighth

internal labor grievances alleging discrimination on the basis of disability and retaliation.

19. Petitioner filed his Charge with the FCHR on April 13, 2017.

20. Mr. Volpi conducted a first-step grievance hearing on April 27, 2017, and as a result of the discussion with Petitioner, who agreed to notify Mr. Volpi in advance of his inability to arrive at work as scheduled, the April 6, 2017, Written Reprimand was reduced to a verbal warning.

21. The FCHR dismissed Petitioner's Charge with a No Reasonable Cause Determination on October 10, 2017.

22. Between January 1 and February 15, 2018, Petitioner came to work late 14 days without providing prior notice, was absent without leave two days, and worked overtime one day without prior authorization. As a result, BCSD issued a three-day suspension on February 21, 2018. On February 22, 2018, Mr. Volpi met again with Petitioner to go over the expectations and provided a reminder memo not to work unauthorized hours without prior approval.

23. On March 13, 2018, Mr. Volpi asked BCSD to issue a ten-day suspension to Petitioner for his ongoing failure to report to work at assigned times, unauthorized overtime, and absences without leave. In response, Petitioner filed yet

another labor grievance. BCSD approved the ten-day suspension on April 10, 2018.

24. Despite the ADA accommodation, increasing discipline, multiple counseling meetings and reminders, Petitioner continued his pattern of tardiness, unauthorized overtime, and absences. Accordingly, BCSD terminated Petitioner's employment on May 8, 2018. Petitioner's discipline and ultimate termination were not performance based, but rather, related solely to ongoing attendance issues.

CONCLUSIONS OF LAW

25. The Division of Administrative Hearings has jurisdiction over the parties and subject matter in this case. §§ 120.569 and 120.57, Fla. Stat.

26. Section 760.10(1) states that it is an unlawful employment practice for an employer to fail or refuse to hire or otherwise discriminate against an individual on the basis of handicap.

27. Section 760.10(7) prohibits retaliation against those who oppose unlawful discriminatory employment practices.

28. FCHR and Florida courts have determined that federal discrimination laws should be used as guidance when construing provisions of section 760.10. See Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17 (Fla. 3d DCA 2009); Brand v. Fla. Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994).

29. In the instant case, Petitioner alleges that he was unlawfully discriminated against because of his handicap and retaliated against for his grievances.

Establishing Discrimination

30. Discriminatory intent can be established through direct or circumstantial evidence. Schoenfeld v. Babbitt, 168 F.3d 1257, 1266 (11th Cir. 1999). Direct evidence of discrimination is evidence that, if believed, establishes the existence of discriminatory intent behind an employment decision without inference or presumption. Maynard v. Bd. of Regents, 342 F.3d 1281, 1289 (11th Cir. 2003).

31. "Direct evidence is composed of 'only the most blatant remarks, whose intent could be nothing other than to discriminate' on the basis of some impermissible factor." Schoenfeld v. Babbitt, 168 F.3d at 1257, 1266. Petitioner presented no direct evidence of handicap discrimination or retaliation.

32. "[D]irect evidence of intent is often unavailable." Shealy v. City of Albany, Ga., 89 F.3d 804, 806 (11th Cir. 1996). For this reason, those who claim to be victims of intentional discrimination "are permitted to establish their cases through inferential and circumstantial proof." Kline v. Tenn. Valley Auth., 128 F.3d 337, 348 (6th Cir. 1997).

33. Where a complainant attempts to prove intentional discrimination using circumstantial evidence, the shifting burden analysis established by the United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), is applied. Under this well-established model of proof, the complainant bears the initial burden of establishing a prima facie case of discrimination.

34. When the charging party is able to make out a prima facie case, the burden to go forward shifts to the employer to articulate a legitimate, non-discriminatory explanation for the employment action. See Dep't of Corr. v. Chandler, 582 So. 2d 1183 (Fla. 1st DCA 1991)(court discusses shifting burdens of proof in discrimination cases). The employer has the burden of production, not persuasion. Id.; Alexander v. Fulton Cty., Ga., 207 F.3d 1303, 1336 (11th Cir. 2000).

35. The employee must then come forward with specific evidence demonstrating that the reasons given by the employer are a pretext for discrimination. Schoenfeld v. Babbitt, 168 F.3d at 1267. The employee must satisfy this burden by showing directly that a discriminatory reason more likely than not motivated the decision, or indirectly by showing that the proffered reason for the employment decision is not worthy of belief. Dep't of Corr. v. Chandler, 582 So. 2d at 1186;

Alexander v. Fulton Cty., Ga., 207 F.3d at 1303. Petitioner has not met this burden.

36. "Although the intermediate burdens of production shift back and forth, the ultimate burden of persuading the trier of fact that the employer intentionally discriminated against the [Petitioner] remains at all times with the [Petitioner]." EEOC v. Joe's Stone Crabs, Inc., 296 F.3d 1265 (11th Cir. 2002); see also Byrd v. RT Foods, Inc., 948 So. 2d 921, 927 (Fla. 4th DCA 2007)("The ultimate burden of proving intentional discrimination against the plaintiff remains with the plaintiff at all times.").

Proving Handicap[1/] Discrimination

37. Handicap discrimination claims under the Florida Civil Rights Act are analyzed under the same framework as federal ADA disability claims. D'Angelo v. Conagra Foods, Inc., 422 F.3d 1220, 1224 n.2 (11th Cir. 2005).

38. In order to demonstrate a prima facie case, under the ADA, plaintiff must show that: (1) he has a disability; (2) he is a "qualified" individual; and (3) defendant discriminated against him because of his disability. Greenberg v. BellSouth Telecommunications, Inc., 498 F.3d 1258, 1263 (11th Cir. 2007); Ellis v. England, 432 F.3d 1321, 1326 (11th Cir. 2005).

39. The burden then shifts to defendant to articulate a legitimate, non-discriminatory reason for plaintiff's

termination. If defendant is able to do so, the burden then returns to plaintiff, who must show that defendant's reason is unworthy of credence and a mere pretext for discrimination. See Cleveland v. Home Shopping Network, Inc., 369 F.3d 1189, 1193 (11th Cir. 2004).

40. In this case, Petitioner provided no direct evidence of discrimination. Accordingly, the burden-shifting analysis is appropriate. BCSD stipulated that Petitioner is an individual with a handicap. However, Petitioner failed to demonstrate two prongs of the prima facie case--that he was "qualified" for the job and that he was discriminated against "because of" his disability.

41. Although Petitioner was not criticized for job performance, his extensive record of showing up late with no prior notice, absenteeism without leave, and working outside his shift without prior authorization show he was not "qualified."

42. Notably, BCSD worked with Petitioner to provide a reasonable accommodation that should have allowed him the flexibility he needed to come to work as his medical condition allowed. Despite this accommodation and intermittent FMLA leave, Petitioner failed to meet minimum attendance expectations of any reasonable employer.

43. Even assuming arguendo that Petitioner demonstrated all elements of the prima facie case, BCSD offered a legitimate,

non-discriminatory reason for Petitioner's discharge. Petitioner's record of chronic and persistent tardiness, absenteeism, and working unauthorized hours over an extended period of time was unacceptable and became intolerable when it continued despite progressive discipline.

44. Petitioner claims this is a pretext for discrimination. However, Petitioner offered no persuasive evidence of this, and no specific information about the identity of any similarly-situated individuals who violated attendance policies to the same extent and who were not disciplined. Petitioner's speculation and personal belief concerning the motives of BCSD are not sufficient to establish intentional discrimination. See Lizardo v. Denny's, Inc., 270 F.3d 94, 104 (2d Cir. 2001)("[P]laintiffs have done little more than to cite to their mistreatment and ask the court to conclude it must have been related to their race. This is not sufficient.").

45. Petitioner failed to demonstrate that he was discriminated on the basis of his handicap with regard to his discipline or his termination.

Proving Retaliation

46. Section 760.10(7) prohibits retaliation in employment as follows:

> (7) 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, 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).

47. The burden of proving retaliation follows the general rules enunciated for proving discrimination. Reed v. A.W. Lawrence & Co., 95 F.3d 1170, 1178 (2d Cir. 1996). As discussed above, Petitioner can meet his burden of proof with either direct or circumstantial evidence.

48. Petitioner did not introduce direct evidence of retaliation in this case. Thus, Petitioner must prove his allegation of retaliation by circumstantial evidence. Circumstantial evidence of retaliation is subject to the burden-shifting framework established in McDonnell Douglas.

49. To establish a prima facie case of retaliation, Petitioner must show: (1) that he was engaged in statutorily-protected expression or conduct; (2) that he suffered an adverse employment action; and (3) that there is some causal relationship between the two events. Holifield v. Reno, 115 F.3d 1555, 1566 (11th Cir. 1997). The protected activity must be the "but for" cause of the adverse action. Univ. of Texas Sw. Med. Ctr. v. Nassar, 570 U.S. 338 (2013). Petitioner must prove that the adverse action would not have occurred in the absence of the protected activity, which is the highest standard of causation.

50. Petitioner alleges he was retaliated against for filing his grievances. Some of those grievances specifically mentioned handicap discrimination. Therefore, these grievances constituted protected activity.

51. Clearly, Petitioner suffered "adverse action" by virtue of his discipline and discharge.

52. However, Petitioner failed to prove any causal connection between the two. The evidence presented shows that Petitioner's labor grievances were timely processed and that BCSD, through Mr. Volpi, repeatedly allowed Petitioner to reschedule and present information at each step.

53. Petitioner began filing internal labor grievances against Mr. Volpi from the moment Mr. Volpi took over as his supervisor. Despite this, Mr. Volpi did not address any potential issues in writing with Petitioner until October 2016; and, even then, he did not issue any discipline against Petitioner. Thus began a pattern where Mr. Volpi would issue Petitioner a notice to discuss potential issues (which was not discipline), and Petitioner would counter with the filing of an internal labor grievance. The evidence shows that it was Petitioner retaliating against Mr. Volpi, not the other way around.

54. Petitioner presented no evidence that his labor grievances were the "but for" cause of any perceived

retaliation. If anything, BCSD was exceptionally patient and accommodating of Petitioner's refusal to abide with reasonable attendance policies and progressive discipline.

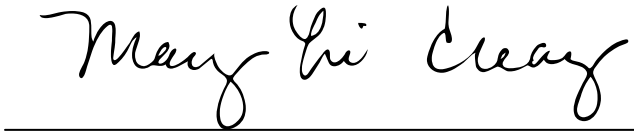
Conclusion

55. Based upon the evidence and testimony offered at hearing, Petitioner failed to establish a prima facie case against BCSD for either handicap discrimination or retaliation for opposing an unlawful employment practice. Therefore, the employment discrimination charge should be dismissed, and none of the damages claimed by Petitioner should be awarded to him.

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 FCHR Petition 201700954.

DONE AND ENTERED this 6th day of December, 2018, in Tallahassee, Leon County, Florida.



MARY LI CREASY
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 6th day of December, 2018.

ENDNOTE

[1/] The Florida Civil Rights Act prohibits discrimination in employment on the basis of "handicap." The ADA prohibits discrimination on the basis of "disability."

COPIES FURNISHED:

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

Michael L. Elkins, Esquire
Denise Marie Heekin, Esquire
Bryant Miller Olive, P.A.
One Southeast Third Avenue, Suite 2200
Miami, Florida 33131
(eServed)

Marlowe Robinson
4920 Northwest 73rd Avenue
Lauderhill, Florida 33319
(eServed)

Cheyanne Costilla, General Counsel
Florida Commission on Human Relations
4075 Esplanade Way, Room 110
Tallahassee, Florida 32399-7020
(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.