STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ROBERT E. PACE, SR.,

Petitioner,

vs. Case No. 18-2697

SADDLE CREEK CORP.,

Respondent.
_____/

RECOMMENDED ORDER

On September 14, 2018, the final hearing in this matter was conducted by Hetal Desai, Administrative Law Judge of the Division of Administrative Hearings, in Lakeland, Florida.

APPEARANCES

For Petitioner: Robert E. Pace, Sr., pro se
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Lakeland, Florida 33805

For Respondent: Helen Price Palladeno, Esquire
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STATEMENT OF THE ISSUE

Whether Petitioner, Robert E. Pace, Sr., was subject to an unlawful employment practice by Respondent, Saddle Creek Corporation (Saddle Creek), based on his race in violation of the

Florida Civil Rights Act (FCRA) when it did not offer him "light duty" work while he was injured.

PRELIMINARY STATEMENT

On June 19, 2017, Petitioner filed an Employment Complaint of Discrimination with the Florida Commission on Human Relations (Commission) alleging the following:

> I am an African American. I was discriminated against because of my race. I began working for Respondent on January 22, 1996. My most recent position title was Forklift Driver. I sustained an injury and my doctor placed me on light duty. On January 24, 2017, Jason Jackson (Manager) would not allow me to return to work while I was on light duty. However, a white employee (Jacob Bigsby) was injured and he was allowed to return to work on light duty. Also Jessica Swinyner (white female) was injured at home and she was allowed to return to work with restrictions.

The Commission issued a "Determination: No Reasonable Cause" on May 15, 2018.

On May 22, 2018, Petitioner filed a Petition for Relief with the Commission to contest the Commission's determination. The next day, the Commission transmitted the Petition to the Division of Administrative Hearings (DOAH), where it was assigned to the undersigned and noticed for a final hearing.

After one continuance, the final hearing was held on September 14, 2018. Petitioner presented the testimony of two Saddle Creek employees, Brenda Ferguson and Jessica Swinyer; and

Exhibits P1 through P3 were admitted into evidence. Respondent called Petitioner as a witness and offered the testimony of two other witnesses: Carol Arkins, the site manager; and Jason Jackson, Petitioner's shift supervisor. Respondent's exhibits R1 through R22 were admitted into evidence.

The parties indicated they would not be ordering a transcript. Therefore, the parties were advised to submit proposed recommended orders to DOAH within ten days, or no later than September 24, 2018. Both parties timely filed post-hearing submittals which were duly considered in preparing this Recommended Order. The rendering of this Recommended Order was delayed because of the unexpected closure of the Division of Administrative Hearings' Tallahassee office from October 9 to October 12, 2018, caused by Hurricane Michael.

Unless otherwise indicated, all statutory references are to the 2017 version of the Florida Statutes.

FINDINGS OF FACT

Parties and Relevant Policies

1. Petitioner is an African-American male, who was a Saddle Creek employee for over 24 years.[1/]

2. Saddle Creek is in the business of warehousing and distributing products and operates a number of worksites, including the Sam's Club Distribution Warehouse (SC Warehouse),

where Petitioner was most recently employed.[2/] Carol Arkins was the manager of the SC Warehouse.

3. Saddle Creek maintains a number of policies in its 2008 employee handbook that are relevant to these proceedings. First, it has an "Equal Opportunity" policy which purports a philosophy of "fair treatment" and states that it "employs, trains, compensates and promotes candidates and associates without regard to race." This policy applies to all aspects of employment, including job benefits.

4. Second, Saddle Creek has an "Injury or Illness" policy, which provides separate procedures and remedies for injuries and illnesses depending on whether they are work-related. For nonwork-related injuries, such as the one suffered by Petitioner, this policy states:

> We will permit associates to work if they have work restrictions for non-work related injuries, personal illnesses or accidents on a case by case basis depending upon the restriction and our ability to accommodate the restrictions. Allowing associates to continue working in jobs that could further injure or hinder improvement in medical conditions is not in the best interest of the associate or the Company. Upon release for full duty from a physician, the associate may resume normal work activities.

5. Saddle Creek also had various types of paid leave that employees could utilize while they were sick or injured. "Vacation leave" could be used for absences with prior approval.

Vacation leave accumulates and carries over from year to year. Saddle Creek pays employees for any unused vacation leave at the end of his or her tenure.

6. "Personal time" leave is available for employees to be used at any time for any reason, including illness or injury. Personal time does not carry over and, if not used, expires.

Petitioner's Job Description

7. More than 50 people work on three different shifts at the SC Warehouse. During the relevant time period, Petitioner worked 12-hour shifts, from approximately 5:00 a.m. to 5:00 p.m. on Mondays, Tuesdays, and Wednesdays. Jason Jackson was Petitioner's shift supervisor.

8. At all times relevant to these proceedings, Petitioner held the position of warehouse worker/forklift driver. The written job description for "Warehouse Worker" indicates workers must be able to walk, stand, stoop, climb, and lift materials or equipment in order to perform their job duties. Other warehouse worker positions include quality controller, verifier, dumber, and lead worker. There is crossover of duties among the warehouse workers, but all of these positions require physically intensive work.

9. The forklift operator position requires, among other things, climbing in and out of the forklift machine four times during a shift: the start of the shift (up into the machine);

during the break (up and down); during lunch (up and down); and at the end of the day (down from the machine).

Petitioner's Work Restrictions

10. On Monday, January 23, 2017, Petitioner was in a nonwork-related car accident.

11. Petitioner reported to work the next day, Tuesday, January 24, but worked for only a few hours before clocking out. He was paid with "personal time" leave for 10 hours--the remainder of his January 24 shift.

12. On Wednesday, January 25, Petitioner worked his regular shift; he was not scheduled to work again until Monday, January 30.

13. Meanwhile, on Thursday, January 26, Petitioner obtained a medical note which states, "Robert Pace has been under my care today, 01/26/17, may return to work on Monday, 01/30/17."

14. The next work day, Monday, January 30, Petitioner worked his normal shift.

15. On Tuesday, January 31, Petitioner did not come to work and was paid for 12 hours with vacation leave.

16. On Wednesday, February 1, Petitioner returned to work and provided his supervisor with a form from his medical provider which indicated Petitioner was restricted in the type of work he could perform. Specifically, the work restriction form placed limitations on the following activities until February 14:

a. lifting, pushing or pulling 10 pounds;
b. stooping, bending or climbing; and
c. kneeling or squatting.

Petitioner requested alternative work, such as sweeping or tallying products (verifier), but was told there were no jobs for him to do. He was sent home and paid with personal time leave for 12 hours.

17. Arkins made the decision to send Petitioner home on February 1. She explained she made her decision because there were no "light duty" positions, and there was no other such work in the SC Warehouse that would not violate Petitioner's work restrictions. She noted that of particular concern was the medical restriction that did not allow him to bend or climb, so she believed he would be unable to get in and out of the forklift machine. She also testified all of the other positions required unloading or moving heavy boxes over 10 pounds. Jackson corroborated this testimony.

18. On February 1, Respondent's Human Resources manager sent Petitioner a letter indicating that Saddle Creek had no work within his current work restrictions. Because the restrictions were for more than one week, the letter informed Petitioner of his options regarding Family Medical Leave, short term disability, and how he could use his personal time and/or vacation leave. It also required Petitioner to provide a work release noting any restrictions upon his return. The undersigned

finds there were no "light duty" positions available at the SC Warehouse that would conform to his work restrictions during this time frame.

19. Petitioner was not scheduled to work again until Monday, February 6. On that date he arrived at work with a note from his medical provider dated February 3, indicating Petitioner was released to work with "No restrictions."

20. Petitioner was returned to his regular schedule and worked February 6, 7 and 8; he was allowed to "pick up" an extra shift on Saturday, February 11. In total, Petitioner missed one day of work (February 1) due to his work restrictions.

Alleged Comparators

21. Petitioner alleged in his charge of discrimination and at the hearing that white employees were not sent home or required to take leave when they were injured. Rather, when white employees were injured, they were allowed to perform "light duty" positions. Petitioner identified Jessica Swinyer and Jacob Bigsby as two white employees who were injured, but allowed by Saddle Creek to work in the warehouse, instead of being sent home.

22. Petitioner introduced photographs of Swinyer working in the warehouse with a brace on one of her hands. In these photos Swinyer is standing near a calculator holding paperwork. Swinyer testified at the time of the photos she held the position of

verifier at the SC Warehouse. She injured her hand in a nonwork-related injury in May 2017.

23. Swinyer furnished a medical note to Saddle Creek dated May 8, indicating she had "[n]o use of Right Hand until reevaluated. Must wear splint at all times while at work." Swinyer did not return to work until she was released from her work restrictions on May 12, with a medical note stating she "may return to work with no restrictions, but to wear brace for an additional week – 2 weeks."

24. Swinyer did not work her regular shifts between May 8 and May 12. In total she missed three shifts and returned to work on May 15. During this time she was paid using "personal time" leave. When she returned to the SC Warehouse, she performed all of her duties while using a hand brace. Swinyer's testimony was corroborated by Arkins, as well as her time cards.

25. Petitioner believed Swinyer was allowed to perform less arduous tasks than her normal duties while she worked with the brace, but Swinyer testified to the contrary; Swinyer could perform all her duties with a brace. Petitioner admitted he was not privy to Swinyer's medical documentation, nor was he aware that she was on "personal time" leave at the time her work restrictions were in effect. The undersigned finds Swinyer's testimony believable and consistent with the documentation.

26. Petitioner also claimed Bigsby, a forklift operator, was allowed to operate the forklift while he was injured. The evidence established in January 2017, Bigsby suffered an on-the-job injury during an extra shift while he was "throwing cases of writing pads."

27. Bigsby provided Saddle Creek with medical documentation which stated he had an injured groin, but could return to work on January 20, on "Limited duty: No squatting. Minimal bending & climbing. No lifting more than 10 pounds."

28. Bigsby's time card indicates he was placed on "W1," defined as "Workers Comp - Dr. Appt" leave on Friday, January 20; worked his next two shifts on Monday and Tuesday, January 23 and 24; and took a vacation day for his shift scheduled on Wednesday, January 25. Although it is unclear when he returned to work, he presented Saddle Creek with a subsequent note, dated January 27, indicating he had no work restrictions.

29. Jackson confirmed Bigsby made a workers' compensation claim for the groin injury and was on work restrictions. He allowed Bigsby to work on the forklift because Bigsby's restrictions stated he was allowed to perform "minimal" bending and climbing. Jackson believed this allowed Bigsby to climb into and out of the forklift. In contrast, Jackson believed the medical documentation for Petitioner did not allow any bending or

climbing, and, thus, Petitioner was not allowed to get into or out of the forklift.

30. Petitioner admitted he never saw the medical documentation for Bigsby and did not have knowledge of the specific work restrictions imposed on him. Based on the unrebutted evidence, it is clear Bigsby's work restrictions were narrower than Petitioner's, and allowed Bigsby to operate the forklift.

31. As explained below, Petitioner has failed to demonstrate by a preponderance of the evidence that Saddle Creek treated him differently than non-African American employees when it did not allow him to work due to the work restrictions. Accordingly, Petitioner failed to meet his burden of proving Saddle Creek committed an unlawful employment action against him in violation of the FCRA.

CONCLUSIONS OF LAW

32. 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(7), Florida Statutes. See Fla. Admin. Code R. 60Y-4.016; and McElrath v. Burley, 707 So. 2d 836, 841 (Fla. 1st DCA 1998)(finding FCRA on its face satisfies the right to due process by providing for an administrative hearing followed by judicial appellate review).[3/]

33. 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.

34. Because the FCRA is patterned after federal anti-discrimination laws, such as Title VII of the Civil Rights Act of 1964 (Title VII), courts rely on federal Title VII cases when analyzing race discrimination claims brought pursuant to the FCRA. See Ponce v. City of Naples, 2017 U.S. Dist. LEXIS 169635, at *11 (M.D. Fla. Oct. 2017); Harper v. Blockbuster Entm't Corp., 139 F.3d 1385, 1387 (11th Cir. 1998)(finding complaint fails for the same reasons under Title VII and the FCRA); Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17, 21 (Fla. 3d DCA 2009).

35. Petitioner puts forth a "disparate treatment" theory of race discrimination. Specifically, he alleges Saddle Creek violated the FCRA based on his race by providing injured white employees "light duty" work, but denying him the same opportunity when he was injured.

36. The burden of proof in an administrative proceeding is on Petitioner as the complainant. See 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."). To show a violation of the FCRA, Petitioner must establish, by a preponderance of the evidence, a prima facie case of discrimination. See St. Louis v. Fla. Int'l Univ., 60 So. 3d 455, 458-59 (Fla. 3d DCA 2011)(reversing jury verdict awarding damages on FCRA racial discrimination and retaliation claims where employee failed to show similarly situated employees outside his protected class were treated more favorably). A "prima facie case" means it is legally sufficient to establish a fact or that a violation happened unless disproved.

37. "Preponderance of the evidence" is the "greater weight" of the evidence, or evidence that "more likely than not" tends to prove the fact at issue. This means that if the undersigned found the parties presented equally competent substantial evidence, Petitioner would not have proved his claims by the "greater weight" of the evidence, and would not prevail in this proceeding. See Gross v. Lyons, 763 So. 2d 276, 289 n.1 (Fla. 2000).

38. Courts follow the framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04, 93 S. Ct. 1817,

36 L. Ed. 2d 668 (1973), for establishing an FCRA discrimination claim based on disparate treatment. See, e.g., St. Louis v. Fla. Int'l Univ., 60 So. 3d at 458-59. In this case, the framework involves a three-step process. Petitioner must first establish a prima facie case of race discrimination; if Petitioner does so, a presumption of discrimination arises against Respondent. Then, Respondent has the burden to present a legitimate, non-discriminatory reason for not placing Petitioner on light duty and sending him home until his restrictions were lifted or changed; if Respondent can establish such a reason, Petitioner's presumption of discrimination evaporates. Finally, Petitioner has the burden of proving the reason established by Respondent was a pretext for discrimination. A "pretext" is a reason given in justification for conduct that is not the real reason. McDonnell Douglas Corp., 411 U.S. at 802; Scholz v. RDV Sports, Inc., 710 So. 2d 618, 624 (Fla. 5th DCA 1998)(evaluating a race discrimination claim under FCRA).

39. To meet the first step, Petitioner must show: (1) he belongs to a protected class (race); (2) he was qualified for his position (forklift operator); (3) he was subjected to an adverse employment action (refused "light duty"); and (4) his employer treated similarly situated employees outside of his protected class (Swinyer and Bigsby) 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).

40. There is no dispute Petitioner, as an African-American, was in a protected class. Moreover, Petitioner was qualified for the position of forklift operator when not on his work restrictions. Nonetheless, Petitioner has not shown the third and fourth requirements of a prima facie case.

41. Establishing the third element of an "adverse employment action" is a crucial component in any discrimination claim under the FCRA, because without it, there is no relief. See Davis v. Town of Lake Park, Fla., 245 F.3d 1232, 1235 (11th Cir. 2001) (adverse employment action is required to obtain relief under Title VII's anti-discrimination clause). To show he suffered an "adverse employment action," Petitioner "must show a serious and material change in the terms, conditions, or privileges of employment." Id. at 1239.

42. Not all conduct by an employer that negatively affects an employee constitutes "adverse employment action" under anti-discriminations laws. Id. at 1238. "Trivial harms" and "petty slights" unconnected to any "tangible job consequences," do not constitute an adverse employment action. See Juback v. Michaels Stores, Inc., 143 F. Supp. 3d 1195, 1206 (M.D. Fla. 2015).

43. Additionally, "the employee's subjective view of the significance and adversity of the employer's action is not

controlling; the employment action must be materially adverse as viewed by a reasonable person in the circumstances." Id. at 1239; see also Hyde v. K. B. Home, Inc., 355 F. App'x 266, 268-69 (11th Cir. 2009).

44. Petitioner alleges he was treated less favorably by not being allowed to work "light duty." As an initial matter, Petitioner did not prove there was "light duty" work available. Regardless, although Petitioner was not allowed to work "light duty" on February 1, he was paid for not working with "personal time." This was not leave he accumulated and lost (or for which he would be paid if he did not use it). Rather, it was leave that would have otherwise expired had he not used it. There was no evidence he suffered any humiliation, financial loss, or a decrease in benefits from not being able to work on February 1. Based on the evidence presented, Saddle Creek's failure to allow Petitioner to work "light duty" on February 1, was not an "adverse employment action."

45. Nor did Petitioner establish that employees outside his protected class, Bigsby and Swinyer, were similarly situated or treated more favorably. "When 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 (11th Cir. 2004). If this is not the case, "the different

application of workplace rules does not constitute illegal discrimination." Lathem v. Dep't of Child. & Youth Servs., 172 F.3d 786, 793 (11th Cir. 1999). Here, Swinyer was in a position of verifier (not forklift operator) and had a different type of injury. Thus, both her job duties and work restrictions cannot be compared to Petitioner's situation. Bigsby had the same position, but had a different kind of work-related injury and dissimilar work restrictions.

46. Assuming Petitioner could establish the comparability of Bigsby and Swinyer, Petitioner still cannot show preferential treatment. Petitioner observed two white employees working despite their injuries, and he believed he too should also be allowed to work with his injury. What he did not know was these white employees had different work restrictions, and that they also had taken time off during the time they were on work restrictions. Although Petitioner may have validly felt he was being treated differently, in reality all three employees were treated the same; they were allowed to work to the extent their individual work restrictions allowed it. Applying the McDonnell Douglas analysis to this case, Petitioner has not established a prima facie case.

47. Even if Petitioner had presented enough evidence to establish a prima facie case of discrimination, Saddle Creek has the opportunity to establish a nonrace-related reason for its

actions. In evaluating the employer's reason for its actions, the reason 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). 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. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (U.S. 1993).

48. Saddle Creek meets this burden by establishing: (1) it had no "light duty" positions available for Petitioner; and (2) it believed--based on Petitioner's medical documentation--he could not climb in or out of the forklift. It is totally reasonable for an employer to comply with a medical provider's restrictions in order to prevent an employee from further injuring him or herself. The fact Petitioner was allowed to work as soon as this restriction was lifted, further supports Saddle Creek's explanation for its actions.

49. Completing the McDonnell Douglas burden-shifting analysis, Petitioner did not prove that Saddle Creek's stated reasons for denying him "light duty" and requiring him to take leave, were merely "pretexts" for discrimination. The

evidentiary record does not support a finding or conclusion that Saddle Creek' explanations are false or not worthy of credence.

50. As established by the credible testimony of Arkins and Jackson, the employment actions regarding Petitioner, Swinyer, and Bigsby were consistent with each other and compliant with company policy. Conversely, while Petitioner repeatedly asserted that Saddle Creek treated him less favorably than the other employees, the evidence in the record does not establish disparate treatment or that Saddle Creek's actions were in any way based on or influenced by race.

51. Consequently, Petitioner did not meet his ultimate burden of proving, by a preponderance of the evidence, that Saddle Creek's actions were racially discriminatory or in violation of the FCRA. Accordingly, Petitioner's 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 Petitioner, Robert E. Pace, Sr., did not prove that Respondent, Saddle Creek Corp., committed an unlawful employment practice against him; and dismissing his Petition for Relief from an unlawful employment practice.

DONE AND ENTERED this 22nd day of October, 2018, in Tallahassee, Leon County, Florida.

HETAL DESAI
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of October, 2018.

ENDNOTES

[1/] After he filed the Employment Complaint of Discrimination with the Commission relevant to these proceedings, Petitioner ended his employment with Saddle Creek. The parties indicated Petitioner had filed another FCHR Complaint of Discrimination regarding his termination. The undersigned did not allow evidence regarding the circumstances of Petitioner's departure from Saddle Creek at the final hearing.

[2/] At the SC Warehouse, different products arrive in container trucks from a variety of vendors; the containers are unloaded, and the products are repackaged. These repackaged products are placed on pallets and loaded onto trucks for distribution to 44 different Sam's Club locations.

[3/] Section 760.11(7) permits a party for whom the Commission determines that there is not reasonable cause to believe that a violation of the FCRA has occurred to request an administrative hearing. "The aggrieved person may request an administrative hearing under ss. 120.569 and 120.57, but any such request must be made within 35 days of the date of determination of reasonable cause and any such hearing shall be heard by an administrative law judge and not by the commission or a commissioner." § 760.11(7), Fla. Stat.

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.