

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ROBERT E. PACE,

Petitioner,

vs.

Case No. 19-1636

SADDLE CREEK CORPORATION,

Respondent.

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RECOMMENDED ORDER

Administrative Law Judge John D. C. Newton, II, of the Division of Administrative Hearings (Division), conducted the final hearing in this case on June 5, 2019, by video teleconference at locations in Lakeland and Tallahassee, Florida.

APPEARANCES

For Petitioner: Robert E. Pace, Sr., pro se
1100 North Davis Avenue
Lakeland, Florida 33805

For Respondent: Caren S. Marlowe, Esquire
Stephanie C. Generotti, Esquire
Ogletree, Deakins, Nash,
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STATEMENT OF THE ISSUE

Did Respondent, Saddle Creek Corporation (Saddle Creek), retaliate against Petitioner, Robert E. Pace, Sr., in violation

of section 760.10(7), Florida Statutes (2018), for filing complaints of discrimination in employment against it?

PRELIMINARY STATEMENT

On April 2, 2018, Mr. Pace filed an Employment Complaint of Discrimination with the Florida Commission on Human Relations (Commission). The complaint alleged that Saddle Creek discharged Mr. Pace in retaliation for his filing two complaints of discrimination in employment on account of race. The Commission investigated the complaint and determined that there was no reasonable cause to believe that Saddle Creek had discharged Mr. Pace unlawfully. Mr. Pace filed a Petition for Relief reiterating his claim that Saddle Creek retaliated against him for complaining of discrimination. On March 27, 2019, the Commission transmitted the matter to the Division to conduct a final hearing on Mr. Pace's claims.

The undersigned conducted the hearing on June 5, 2019. Mr. Pace presented testimony from David Davidson, Ernie Diaz, Brenda Ferguson, Craig Gardner, John Harmon, Dale Harrison, and Ed Marshall. Mr. Pace did not testify on his own behalf or enter any exhibits into evidence.

Saddle Creek presented testimony from Carol Arkins and Mr. Pace. Saddle Creek's Exhibits 1 and 3 through 7 were admitted into evidence.

A transcript of the hearing was filed. The parties timely filed proposed recommended orders. Those proposed orders have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Saddle Creek is a large logistics company that receives, warehouses, and delivers goods for its customers, which include large-scale retailers.

2. Mr. Pace worked at Saddle Creek's Sam's Club Distribution Center for at least 15 years. The center serves approximately 78 Sam's Clubs. Mr. Pace worked in various positions. Mostly he unloaded trucks.

3. In June or July of 2016, Mr. Pace filed two complaints of discrimination in employment on account of race by Saddle Creek.

4. On February 7, 2017, Saddle Creek instituted a new time-keeping and productivity measurement tool called Kronos.

5. In addition to recording employee time, Kronos tracked the task that an employee was performing by using function codes. This required employees to input into Kronos the function code task they were performing and the time that they started and ended the task, in addition to the traditional recording of the workday's start and end time. If an employee started the workday performing one task and switched to a different task later in the day, the system required the employee to record the time one task

ended and the other began. Failure to record the task switch would result in inaccurate productivity measurement for the employee.

6. Along with the Kronos system, Saddle Creek instituted productivity goals. Saddle Creek assigned each position in the warehouse a different production goal. Saddle Creek developed the goals based on the workforce's history of performance and customer expectations. The goals also took into account Saddle Creek's steps to improve efficiencies in each job function. All warehouse employees assigned to jobs with production goals were responsible for meeting 90 percent of their goals, based on their job function or functions.

7. The distribution center operated at a very high volume. Saddle Creek required its employees to stay busy all day. That meant employees had to switch tasks if the task they were working on slowed or stalled for a while.

8. Employees working on the warehouse floor had three tasks. Goods arrived in pallets on trucks. Employees unloaded those pallets. Then an employee had to identify which pallets could be simply labeled and moved to another location for loading onto another truck for delivery to a Sam's Club and which pallets had to be broken down and re-distributed to other pallets, which were then labeled and staged for redistribution to a Sam's Club.

9. For the tasks of unloading, repacking, and loading pallets, Saddle Creek tracked the volume of goods handled with the labels affixed to the pallets. The employee who generated the labels was different from the employees loading, repacking, and unloading pallets, but was a member of the same team. Sometimes labeling backed up, leaving the employees unloading, redistributing, and loading idle. These were times that Saddle Creek expected the employees to switch to another task. To determine productivity, Saddle Creek divided the volume the labels represented by the number of employees on the team logged in for each task for each sector of the warehouse.

10. Each position had a different production goal. Production goals for unloaders were lower than the goals of other positions. This is because the goals account for the characteristics of each role. For employees unloading, those characteristics are a slower pace, the need to rewrap or restack items, and other problems associated with unloading a shipment.

11. When Saddle Creek started using Kronos, it provided employees a one-month acclimation period. During this period, Saddle Creek also provided instructions and coaching on how to operate the Kronos system and to succeed within it. Saddle Creek recorded and reported employees' productivity for February 2017. It did not, however, take any employment actions based upon the productivity reports.

12. In March 2017, Saddle Creek began holding employees accountable for meeting production goals. It maintained records that demonstrated the performance of all employees working on Mr. Pace's shift in 2017. The records demonstrate that Mr. Pace failed to meet his production goals for five months in a row: the February acclimation month and the following four months.

13. In February 2017, five employees on Mr. Pace's shift missed their production goals, including Mr. Pace. None of the five was disciplined because February was the acclimation period.

14. Other employees in Mr. Pace's position met their goals. In February, for example Donald Willett, who worked as an unloader with Mr. Pace as part of a three-member team, exceeded his goals despite working fewer hours.

15. One employee can be more productive than another employee in fewer hours by changing job functions during down time.

16. In March 2017, seven employees on Mr. Pace's shift missed their production goals, including Mr. Pace.

17. All of those employees, except those in training, received a document of counseling (DOC), if their productivity was less than 90 percent of their goals.

18. The DOC is the first step of Saddle Creek's progressive discipline policy. The next step in the progression is a written

warning, followed by a final written warning. Termination is the next and final step.

19. Mr. Pace received a DOC on April 5, 2017, for missing his productivity goal in March 2017. All employees who missed their productivity goals in March also received a DOC. Mr. Pace was the only employee on his shift to miss March production goals.

20. Mr. Pace missed his productivity goals in April 2017. He was one of three employees who missed their goals that month.

21. Saddle Creek, following its standard policy, gave Mr. Pace a written warning on May 22, 2019. Saddle Creek also provided Mr. Pace counseling on how to meet productivity goals and cautioned him that further disciplinary sanctions would follow if he did not improve.

22. Mr. Pace missed his May 2017 productivity goals. On June 14, 2017, Saddle Creek gave Mr. Pace a final written warning. This was the standard sanction for a third failure to meet productivity goals. Saddle Creek cautioned Mr. Pace that he would be terminated if he did not meet his productivity goals for June.

23. In June 2017, Mr. Pace and two other employees missed their goals. This was the fourth month in a row, after the February acclimation period, in which Mr. Pace failed to meet his productivity goals.

24. After consulting with the human resources officer, Carol Arkins, Mr. Pace's supervisor decided to terminate Mr. Pace's employment. Her decision was consistent with Saddle Creek's progressive discipline policy. Ms. Arkins did not consider Mr. Pace's past charges of discrimination when making her decision. She based the decision solely on Mr. Pace's failure to meet productivity goals four months in a row.

25. There is no evidence tending to prove that Saddle Creek treated Mr. Pace differently than similarly situated employees. As of July 2017, no other employee had missed production goals as many as three times in a row.

26. Mr. Pace bases his belief that Saddle Creek retaliated against him on the fact that other employees on his team achieved their productivity goals while he did not. But the evidence does not show those employees, although on the same team, were similarly situated. This is because of the fact that employees checked in and out of different task classifications on Kronos during the course of the day. The evidence did not establish that all members of the team were working in the same task classification as Mr. Pace for comparable periods from March through June 2017.

CONCLUSIONS OF LAW

27. Sections 760.11(7), 120.569, and 120.57, Florida Statutes (2018), confer jurisdiction of this matter on the Division.

28. Section 760.10(7), Florida Statutes (2017), makes discrimination against an employee in retaliation for an employee opposing an unlawful employment practice unlawful. Section 760.07, Florida Statutes (2017), creates a cause of action against an employer for an unlawful employment practice. Saddle Creek is an employer, and it employed Mr. Pace. Mr. Pace seeks relief under these provisions of chapter 760.

29. Mr. Pace bears the burden of proving by a preponderance of the evidence that Saddle Creek retaliated against him. § 120.57(1)(j), Fla. Stat. (2018); see also Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981).

30. The court in Blizzard v. Appliance Direct, Inc., 16 So. 3d 922, 926 (Fla. 5th DCA 2009), described the analysis required for a retaliation claim. The opinion says:

To establish a prima facie case of retaliation under section 760.10(7), a plaintiff must demonstrate: (1) that he or she engaged in statutorily protected activity; (2) that he or she suffered adverse employment action; and (3) that the adverse employment action was causally related to the protected activity. See Harper v. Blockbuster Entm't Corp., 139 F.3d 1385 (11th Cir.), cert. denied, 525 U.S. 1000, 119 S. Ct. 509, 142 L. Ed. 2d

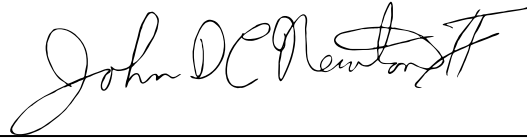
422 (1998). Once the plaintiff makes a prima facie showing, the burden shifts and the defendant must articulate a legitimate, nondiscriminatory reason for the adverse employment action. Wells v. Colorado Dep't of Transp., 325 F.3d 1205, 1212 (10th Cir. 2003). The plaintiff must then respond by demonstrating that defendant's asserted reasons for the adverse action are pretextual. Id.

31. The record establishes that Mr. Pace engaged in statutorily protected activity. The record establishes that Mr. Pace suffered an adverse employment action. The record does not present persuasive evidence, direct or circumstantial, that Mr. Pace's discharge was causally related to his complaints of racial discrimination. The persuasive evidence establishes that Saddle Creek discharged Mr. Pace for failure to meet his productivity goals.

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 of Robert E. Pace in FCHR Case Number 2018-05908.

DONE AND ENTERED this 11th day of July, 2019, in
Tallahassee, Leon County, Florida.



JOHN D. C. NEWTON, II
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of July, 2019.

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.