STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LEEBERT LAWRENCE,

Petitioner,

vs. Case No. 19-1637

LYNX TRANSPORTATION,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, a final hearing in this cause was held by video teleconference between sites in Altamonte Springs and Tallahassee, Florida, on July 16, 2019, before Linzie F. Bogan, Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Leebert Lawrence, pro se
Apartment 211
7511 Solstice Circle
Orlando, Florida 32821

For Respondent: Cindy Ann Townsend, Esquire
Michael John Roper, Esquire
Bell & Roper, P.A.
2707 East Jefferson Street
Orlando, Florida 32803

STATEMENT OF THE ISSUE

Whether Respondent violated the Florida Civil Rights Act of 1992, as alleged in the Employment Charge of Discrimination filed by Petitioner on March 27, 2018.

PRELIMINARY STATEMENT

Leebert Lawrence (Petitioner) filed an Employment Charge of Discrimination with the Florida Commission on Human Relations (FCHR), which alleges that his former employer, Lynx Transportation (Respondent), violated section 760.10, Florida Statutes (2017), by discriminating against him on the basis of race, national origin, and age. Respondent terminated Petitioner's employment on or about September 15, 2017.

The allegations were investigated, and on February 21, 2019, FCHR issued its Determination: No Reasonable Cause. A Petition for Relief was filed by Petitioner on March 27, 2019. FCHR transmitted the case on March 27, 2019, to the Division of Administrative Hearings for assignment of an administrative law judge to conduct the hearing.

At the hearing, Petitioner testified on his own behalf and offered testimony from the following witnesses: Karamchand Lowhar; Charles Rapier; Wilfredo Acosta; Margaret McCoy; and Maria Colon. Respondent elicited testimony from the witnesses called by Petitioner, and elected not to recall the witnesses during its case-in-chief. Joint Exhibits 1 through 14 were admitted into evidence. Respondent's Exhibits 2 through 11, 22 through 25, and 27 through 34 were admitted into evidence.

A two-volume Transcript of the final hearing was filed with the Division of Administrative Hearings on September 5, 2019.

Petitioner and Respondent each filed a Proposed Recommended Order.

FINDINGS OF FACT

1. On March 27, 2018, Petitioner filed a Charge of Discrimination with FCHR and alleged therein that Respondent committed an unlawful employment practice by discriminating against him on the basis of race, national origin, and age. Petitioner's Charge of Discrimination states, in part, the following:

> During my time with LYNX, I satisfactorily performed the essential job duties of my position. Notwithstanding my performance, I was fired with only two weeks left on my training. I was subjected to discrimination based on my age, race and nationality as further described below.
>
> I believe I was fired because LYNX treated [me] disparately due to my Jamaican nationality and my age of 68 years. They manufactured classes of improper driving which could be disputed by all of the cameras that are on the training buses. They gave me only one week to improve my driving.

2. Petitioner was born in 1949 and was 68 years old when he commenced his employment with Respondent.

3. Petitioner was born and educated in Jamaica and lived in the country for a significant portion of his adult life. Respondent speaks with an unmistakable Caribbean accent. Petitioner's ethnicity and race derive from the African diaspora,

and for purposes of the instant proceeding his race is that of a Black person.

4. On or about June 14, 2017, Respondent extended to Petitioner a conditional offer of employment to work as a full-time bus operator. The terms of Respondent's conditional offer of employment to Petitioner provide, in part, as follows:

> All offers of employment are contingent upon the satisfactory completion of the following: acceptable criminal history background check and motor vehicle record, employment verification and Department of Transportation (DOT) physical examination (that is good for a minimum of one year) including a negative drug screen. All employees must complete a 120-day introductory period. Should the results be unsatisfactory, according to LYNX' standards, your offer of conditional employment with LYNX will be reviewed and may be revoked.

5. The job description for Petitioner's position as a bus operator provides as follows:

> **JOB SUMMARY**:
> - Bus Operators transport passengers by operating any type of motor coach on regularly scheduled links and chartered service, observing all state and municipal traffic laws, observing all safety rules and strictly adhering to time schedules.
>
> **DUTIES**:
> - Performs DOT pre-trip inspections.
> - Answers passenger questions courteously.
> - Calls out stops.
> - Issues slips for fare refunds.
> - Issues and collects transfers.
> - Observes all state and municipal traffic laws.
> - Observes all safety rules.
> - Strictly adheres to time schedules.

- Monitors fare and ticket collection.
- Verifies that appropriate passes are being used.
- Writes daily reports such as transfers collected, coach mileage, special fares and tickets collected, time cards for hours worked and completes memorandum cards.
- Completes trouble card for mechanical difficulties of bus assigned.
- Performs other duties of similar nature as may be required.
- Completes Bus Condition Reports.

REQUIRED KNOWLEDGE, SKILLS AND ABILITIES:

- Skills in customer service.
- Ability to effectively communicate in English, both verbally and in writing.
- Ability to physically sit for extended periods of time.
- Ability to pass a drug screen.
- Must possess a valid Florida Commercial Driver License (CDL), Class A or B with a Passenger endorsement and airbrakes.
- Ability to communicate in English on the work site.
- Ability to maintain DOT physical for one year.

MINIMUM EDUCATION AND EXPERIENCE:

- Must be at least 21 years of age.
- High School diploma or GED required.
- Clean driving record.
- Full-time: Ability to work days, nights, weekends, holidays, split shifts, split days off and any hours assigned.
- Part-time: Ability to work mornings, afternoons and/or weekends. Not allowed to work over 30 hours per week.

This description in no way states or implies that these are the only duties to be performed by the employee occupying this position. Employees will be required to follow any other

> job-related instructions and to perform any other job-related duties requested by their supervisor.

6. Petitioner, as a condition of employment, was required by Respondent to complete an employment application. Petitioner noted on his employment application that he worked as a "Driver Guide" for Holland Alaska Princess for the period March 17, 2016, through May 24, 2016. According to Petitioner, his primary duties with Holland Alaska Princess were driving "tourists to scenic and historical locations in Alaska, USA, Yukon and British Columbia in Canada and informing guests on the highlights and history of each location toured."

7. Other than his employment at Holland Alaska Princess, Petitioner did not list on his LYNX employment application other jobs or experiences which required that he possess a CDL, Class A or B, with a passenger and airbrakes endorsement. According to the "experience questionnaire" completed by Petitioner during his LYNX new employee orientation, Petitioner noted that he had possessed his "CDL with passenger endorsement" for 16 months, and over the "course of [his] CDL career" had only driven an "MCI coach bus" for three months. Although Petitioner met the minimum qualification of possessing a valid CDL with appropriate endorsements, he, nevertheless, had limited practical experience in the operation of buses such as those operated by Respondent.

8. On or about August 23, 2017, Petitioner, after completing the employment related background check and related matters, was hired by Respondent as a full-time bus operator.

9. As a condition of employment, Respondent required Petitioner to attend "LYNX Training University (LTU)." Wilfredo Acosta, for more than seven years, has worked as a training instructor at LTU where he conducts "new operator" training sessions. According to Mr. Acosta, LTU is not a driving school where employees are taught how to drive a bus, but is, instead, an assessment opportunity where LYNX evaluates its new employees to ensure that they have "basic knowledge" regarding the proper way to operate buses utilized by the company.

10. On September 15, 2017, less than a month after being hired, Respondent terminated Petitioner's employment with the company due to "unsatisfactory job performance." Maria Colon, who works as Respondent's manager of organizational development and training, outlined in a memorandum to Petitioner the company's reasons for the employment decision. The memorandum provides as follows:

> On September 8, 2017, you met with the manager and trainer concerning your unsafe driving practices. Your daily student operator evaluation forms were reviewed with you and the following dates were discussed:
>
> 8/28 Right turns too short, jumped a curb and drifted to the right side not maintaining the bus centered.

8/29 Right turns too short, jumped a curb and drifted to the right.

8/31 Right turns too short and jumped curb.

9/7 Right turns too short not using pivot point.

9/8 Unsatisfactory report was given for not slowing down for school zone when yellow light was flashing. Continued to make right turns too short with contact to the curb. Continued to drift to the right and did not maintain proper hand position on steering wheel or use of mirrors.

At that time you stated that you were a driver for a long time and you knew how to drive. I informed you that LYNX' priority is safety and my job was to ensure only those students that demonstrate consistent, safe driving practices would graduate from the LYNX Bus Operator Training Program. You felt the trainers were targeting you and [you believed that] with time you can improve. We agreed to give you until Friday, September 15th to improve your driving. If no improvement was noticed you would be terminated from the program.

On September 15, 2017, you once again met with the manager and trainer to review your progress:

9/13 Unsatisfactory report for improper securing of the bus. Unsatisfactory report for obstructing traffic at an intersection. Continued to make right turns too short and jumped the curb.

9/15 Continued to drift to the right side not maintaining the bus centered. Failed to properly signal when approaching railroad crossing.

Since you have continued to have unsafe driving practices with no signs of improvement, I have decided to terminate you from the LYNX Bus Operator Training Program.

11. During the evaluation period referenced above, Petitioner's driving deficiencies were personally observed by LYNX employees Karamchand Lowhar, Charles Rapier, Wilfredo Acosta, and Margaret McCoy. Each employee credibly testified during the final hearing regarding Petitioner's driving deficiencies, and their testimony is credited.

12. Petitioner contends that he is a bus driver of considerable experience, and the driving deficiencies cited by LYNX employees are exaggerated, fabricated, or both. Petitioner asserts that each of his bus training sessions was video-recorded, and that the most credible evidence of his driving performance lies therein.

13. There is no indication that when Petitioner met to discuss his driving deficiencies with Respondent on or about September 8, 2017, he specifically requested either then, or thereafter, that the video recordings of his driving performance be evaluated and preserved. The evidence establishes Respondent's vehicle video recording system preserves video for 30 days, and after such period, the video recordings are overwritten with new footage.

14. Petitioner's testimony that he has extensive commercial driving experience is undercut by the employment application and experience questionnaire that he completed as part of the pre-employment process. Petitioner admits in both documents that he

has very limited experience with operating a bus. Petitioner, however, in prosecuting the instant action, and in his pre-termination meeting with Ms. Colon on September 15, 2017, represented that he is a bus driver of considerable experience. These inconsistencies are damaging to Petitioner's credibility.

15. Petitioner's credibility also suffers from his factually inaccurate statement regarding when his employment was terminated in relation to the end-point of his 120-day probationary period. Petitioner's Charge of Discrimination states that he "was fired with only two weeks left on [his] training." Petitioner attempts to bolster his claim of discrimination by inferring that for more than three months, he met, or even exceeded, Respondent's performance expectations, and that Respondent's discriminatory animus was only revealed when Respondent, without sufficient justification, terminated his employment as a bus operator.

16. The evidence establishes, however, that Petitioner was hired on or about August 23, 2017, and his employment with LYNX ended approximately three weeks later because of his poor performance during bus operation training sessions. Petitioner's suggestion that he was meeting, or even exceeding, Respondent's performance expectations during his probationary period is not supported by the evidence.

17. Other than Petitioner's testimony, which is not credible, there is no proof, either circumstantial or direct, that Respondent's asserted grounds for terminating Petitioner's employment are merely a pretext for unlawful discrimination.

CONCLUSIONS OF LAW

18. The Division of Administrative Hearings has jurisdiction over the parties and subject matter in this case. §§ 120.569, 120.57, and 760.11, Fla. Stat. (2019).

19. Section 760.10(1) states that it is an unlawful employment practice for an employer to discharge or otherwise discriminate against an individual on the basis of race, national origin, or age.

20. FCHR and Florida courts have determined that federal discrimination law should be used as guidance when construing provisions of section 760.10. 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).

21. In the instant case, Petitioner alleges in his Charge of Discrimination that Respondent discriminated against him on the basis of race, national origin, and age when it discharged him from employment.

22. Petitioner's asserted claim of discrimination is one of disparate treatment. The United States Supreme Court has noted that "[d]isparate treatment . . . is the most easily understood

type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin." Teamsters v. U.S., 431 U.S. 324, 335 n.15 (1977). The theory of disparate treatment has also been recognized as a basis for recovery in age discrimination cases. Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 141 (2000).

23. Liability in a disparate treatment case "depends on whether the protected trait . . . actually motivated the employer's decision." Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993). "The ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination." Reeves, 530 U.S. at 153.

24. 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).

25. "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 1266. Petitioner presented no direct evidence of race, national origin, or age-based discrimination.

26. "[D]irect evidence of intent is often unavailable." Shealy v. City of Albany, 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).

27. Where a complainant attempts to prove intentional discrimination using circumstantial evidence, the shifting burden analysis established by the U.S. Supreme Court in McDonnell Douglas 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 charging party bears the initial burden of establishing a prima facie case of discrimination. When the charging party, i.e., Petitioner, is able to establish 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, and need only present evidence that the decision was non-

discriminatory. Id.; Alexander v. Fulton Cnty., 207 F.3d 1303 (11th Cir. 2000). 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 of demonstrating pretext by directly showing 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 Cnty., 207 F.3d 1303.

28. "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, 1273 (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.").

29. To establish a prima facie case of discriminatory discharge, a Petitioner must show that: (1) he is a member of a protected class (or age group); (2) he was discharged from employment; (3) his employer treated similarly situated

employees, outside of his protected class (or age group), more favorably than he was treated; and (4) he was qualified to do the job. See McDonnell, 411 U.S. 792; Burke-Fowler v. Orange Cnty., 447 F.3d 1319, 1323 (11th Cir. 2006); Knight v. Baptist Hosp. of Miami, Inc., 330 F.3d 1313, 1316 (11th Cir. 2003).

30. Once the matter has, as in the instant case, been fully tried, "it is no longer relevant whether the plaintiff actually established a prima facie case [and] . . . the only relevant inquiry is the ultimate, factual issue of intentional discrimination." Green v. Sch. Bd. of Hillsborough Cnty., 25 F.3d 974, 978 (11th Cir. 1994)(citing U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714-15 (1983)). However, the issue of whether a Petitioner "actually established a prima facie case is relevant . . . in the sense that a prima facie case constitutes some circumstantial evidence of intentional discrimination." Green, 25 F.3d at 978.

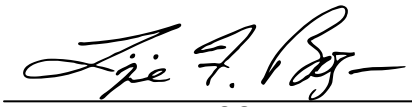
31. The evidence establishes that when Respondent terminated Petitioner's employment, Petitioner was a member of a protected class/group based on his age, national origin, and race. The evidence also establishes that Petitioner met the minimum qualifications to be hired for the position of bus operator, and that Respondent terminated him from the said position.

32. Respondent has a legitimate business interest in ensuring that its buses are operated in a safe and efficient manner. The evidence establishes that while Petitioner met the minimum qualifications necessary to be hired by Respondent, he ultimately proved himself unqualified because he failed to meet Respondent's reasonable expectations and safety requirements for the position of bus operator. Petitioner failed to prove that the reasons given by Respondent for terminating his employment were a pretext for unlawful discrimination, and therefore, Petitioner failed to satisfy his burden of proving that he was the victim of unlawful discrimination.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations enter a final order finding that Respondent, LYNX Transportation, did not commit an unlawful employment practice as alleged by Petitioner, Leebert Lawrence, and denying Petitioner's Charge of Discrimination.

DONE AND ENTERED this 4th day of October, 2019, in Tallahassee, Leon County, Florida.



LINZIE F. BOGAN
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 4th day of October, 2019.

COPIES FURNISHED:

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

Leebert Lawrence
Apartment 211
7511 Solstice Circle
Orlando, Florida 32821
(eServed)

Cindy Ann Townsend, Esquire
Bell & Roper, P.A.
2707 East Jefferson Street
Orlando, Florida 32803
(eServed)

Michael John Roper, Esquire
Bell & Roper, P.A.
2707 East Jefferson Street
Orlando, Florida 32803
(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.