STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JOHN MERCURIO,

Petitioner,

vs. Case No. 19-5519

IDEAL SECURITY SERVICES, INC.,

Respondent.
_____/

RECOMMENDED ORDER

A formal hearing was conducted in this case on December 6, 2019, in Daytona Beach, Florida, before W. David Watkins, a duly-designated Administrative Law Judge ("ALJ") with the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner: John Mercurio, pro se
1025 1/2 June Terrace
Daytona Beach, Florida 32119

For Respondent: Diane M. Cox
Ideal Security Services, Inc.
211 North Ridgewood Avenue, Suite 203
Daytona Beach, Florida 32114

STATEMENT OF THE ISSUE

The issue is whether Respondent, Ideal Security Services, Inc. ("Respondent or Ideal"), retaliated against Petitioner, John Mercurio ("Petitioner"), for exercising his right to file a

complaint on an alleged unlawful employment practice pursuant to section 760.10, Florida Statutes (2019).[1/]

PRELIMINARY STATEMENT

On April 1, 2019, Petitioner filed an Employment Complaint of Discrimination ("Complaint") with the Florida Commission on Human Relations ("FCHR"). Petitioner alleged that Respondent retaliated against him for speaking out against racially discriminatory behavior.

Upon receipt of the Complaint, FCHR conducted an investigation of the allegations, and on September 25, 2019, issued its determination that no reasonable cause exists to believe that an unlawful practice occurred. Disappointed with the FCHR determination, on October 1, 2019, Petitioner filed the Petition for Relief which is the subject of this proceeding.

FCHR referred the matter to DOAH on October 15, 2019. The case was initially assigned to ALJ G.W. Chisenhall, but on October 22, 2019, was transferred to the undersigned for all further proceedings.

By Notice of Hearing dated November 1, 2019, the matter was scheduled for final hearing in Daytona Beach on December 6, 2019, on which date it was convened and completed. Petitioner testified on his own behalf and entered Petitioner's Exhibits 1 and 2 into evidence. Respondent called Diane M. Cox, Ideal's

Manager and Chief Financial Officer ("CFO") as its sole witness. Respondent's Exhibits 1 through 26 were entered into evidence.

At the conclusion of the final hearing, the parties were apprised of their right to order the transcript of the final hearing (at their own expense) and to file proposed recommended orders. Both parties declined to order the transcript and both stated that they would not be submitting proposed recommended orders.

FINDINGS OF FACT

1. Ideal is an employer as that term is defined in section 760.02(7). While the exact number of employees is not reflected in this record, the evidence established that Ideal employs greater than 15 employees. Ideal provides security officers to different locations for access control and on-site patrol.

2. Petitioner worked for Respondent as a security officer from June 20, 2018, through February 7, 2019.

3. At the time he was hired by Ideal, Petitioner was informed in writing of the company's "Interchange" practice, which provides:

> Although employees generally are hired to work at one specific client location or facility, the company (Ideal Services, Inc.) uses its Guard Force **INTERCHANGEABLY** to meet its needs: In case of cancellation of any accounts, reduction or increase in hours provided, or an employee who may request a transfer.

> Also Ideal Services, Inc. wishes to point out that they **DO NOT** guarantee a full 40 hour work week. Overtime is given to employees depending on where the overtime will occur and the availability of employees to work an assignment. Ideal Services, Inc. wishes to also point out that hourly pay rates will depend on job placement as some client assigned jobs will carry higher pay rates than others.
>
> It is therefore Ideal Services, Inc.'s policy to inform all individuals who are applying for employment that Ideal Services, Inc. **DOES NOT HIRE** for only one site at one set pay rate . . . because both of these are subject to change.

4. On the date he was hired, Petitioner signed a copy of the above policy statement, acknowledging that he had read and understood its contents.

5. Petitioner's first assignment was to provide security at a Krispy Kreme Donuts retail location, an assignment which carried a pay rate of $9.50 per hour.

6. In July 2018, Petitioner was assigned to several other locations, in addition to the Krispy Kreme location. Those new locations were at Daytona Beach Housing Authority apartments, including the Maley, Windsor, and Trails apartment complexes. The public housing assignments carried a pay rate of $8.50 per hour.

7. As of August 2018, Petitioner was no longer assigned to the Krispy Kreme location, but rather was working exclusively at the public housing locations.

8. In December 2018, another Ideal security guard was newly assigned to the same public housing complex as Petitioner. It was clear to Petitioner that this individual was a racist based on his words and actions. While standing next to Petitioner, the new security officer referred to the building residents as "monkeys." It was clear to Petitioner that this remark was made in reference to the African-American residents of the complex.

9. Dan Montrose, the senior security officer and Petitioner's partner, was also within earshot when the newly assigned officer made the derogatory remark. Petitioner was stunned by the racist comment, especially since Mr. Montrose's wife is an African-American female.

10. Petitioner also testified that on another occasion, the new officer posted a picture of a Caucasian baby on the common area's fridge with an arrow that said, "Dan" on it, as well as a black finger/arm covering the baby's mouth which said, "Dan's wife."

11. While Petitioner's first impulse was to report the above racist incidents to his employer, at the request of Officer Montrose he did not immediately do so. However, while the exact date of the conversation is not of record, sometime in the second or third week of December 2018, Petitioner reported the "monkey remark" to Ideal's Manager and CFO, Diane Cox.

Ms. Cox assured Petitioner that she would discuss the racist comment with the offending security guard.

12. Ms. Cox testified that the offending security guard was given a verbal warning for his inappropriate comment, but was not otherwise disciplined because he had worked for the company for many years without incident.

13. When Ms. Cox spoke with the offending security guard about his inappropriate remark, she did not raise the issue of the racist picture that had been posted on the common area refrigerator. According to the testimony of Ms. Cox, this is because she had not been informed by anyone about the existence of the picture, and first became aware of it when she read Petitioner's Complaint. Ms. Cox testified that had she been informed of the racist picture, disciplinary action would have been taken against the offending employee.

14. Again, while the exact date is not of record, sometime in late December 2018, Petitioner requested a copy of his payroll records from Ms. Cox. While gathering the records for Petitioner, Ms. Cox discovered that Petitioner's rate of pay had erroneously not been reduced from $9.50 per hour to $8.50 per hour when he was transferred from the Krispy Kreme location to the public housing locations. Upon discovering this accounting error, Ms. Cox informed Petitioner that effective immediately his rate of pay while on duty at the public housing locations

would be adjusted to $8.50 per hour, but that Ideal would not be attempting to recoup the overpayments that had been made over the previous months, since the error had been theirs.

15. Respondent offered in evidence payroll records which demonstrated that all Ideal security guards assigned to the public housing locations were paid at the rate of $8.50 per hour.

16. At about the same time as Petitioner's downward rate adjustment, another Ideal security guard requested that he be assigned an additional eight-hour shift in order to bring him to 40 hours per week. In an attempt to accommodate this request, Ms. Cox contacted several of the Ideal security guards, including Petitioner, to inquire as to whether any wished to relinquish an eight-hour shift. Petitioner advised Ms. Cox that he did not want to give up an eight-hour shift, and that request was honored by Ideal.

17. The timing of Petitioner's reporting of the racist remarks to Ms. Cox; Petitioner being informed that his hourly rate was being reduced; and Petitioner being invited to give up a work shift; is unfortunate. Because of the temporal proximity of these events, it is understandable that Petitioner concluded that the reduction in his pay rate and attempted reduction in his assigned hours were in retaliation of his reporting the racist remarks. However, the evidence does not prove a causal

link between Petitioner's complaint and the adverse action he suffered. Rather, the credible testimony of Ms. Cox established legitimate nonretaliatory reasons for how Petitioner was treated, and there is no evidence that the reasons articulated by Ms. Cox were a pretext for retaliation.

18. Petitioner failed to persuasively prove any incidents of retaliation.

CONCLUSIONS OF LAW

19. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

20. The Florida Civil Rights Act of 1992 (the "Florida Civil Rights Act" or the "Act"), chapter 760, prohibits employer retaliation for engaging in protected activity.

21. Section 760.10 states the following, in relevant part:

> (7) It is an unlawful employment practice for an employer, an employment agency, a joint labor-management committee, or a labor organization 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.

22. Respondent is an "employer" as defined in section 760.02(7), which provides the following:

> (7) "Employer" means any person employing 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such a person.

23. Florida courts have determined that federal case law applies to claims arising under the Florida Civil Rights Act, and as such, the United States Supreme Court's model for employment discrimination cases set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), applies to claims arising under section 760.10, absent direct evidence of discrimination or retaliation.[2/] See Harper v. Blockbuster Entm't Corp., 139 F.3d 1385, 1387 (11th Cir. 1998); Paraohao v. Bankers Club, Inc., 225 F. Supp. 2d 1353, 1361 (S.D. Fla. 2002); Fla. State Univ. v. Sondel, 685 So. 2d 923, 925 n.1 (Fla. 1st DCA 1996); Fla. Dep't of Cmty. Aff. v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991).

24. Under the McDonnell analysis, in employment retaliation cases, Petitioner has the burden of establishing by a preponderance of evidence a prima facie case of unlawful retaliation. See, e.g., Burlington Northern & Santa Fe Ry. v. White, 548 U.S. 53 (2006). If the prima facie case is established, the burden shifts to the employer to rebut this preliminary showing by producing evidence that the adverse action was taken for some legitimate, non-retaliatory reason. If the employer rebuts the prima facie case, the burden shifts

back to Petitioner to show by a preponderance of evidence that the employer's offered reasons for its adverse employment decision were pretextual. See Texas Dep't of Cmty. Aff. v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981).

25. In order to prove a prima facie case of unlawful employment retaliation under chapter 760, Petitioner must establish that: (1) he engaged in protected activity; (2) he suffered an adverse employment action; and (3) there was a causal relationship between (1) and (2). See Pennington v. City of Huntsville, 261 F.3d 1262, 1266 (11th Cir. 2001).[3/] To establish this causal relationship, Petitioner must prove "that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer." Univ. of Tex. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2533 (2013). This standard has also been called "but-for causation." See, e.g., Frazier-White v. Gee, 818 F.3d 1249, 1258 (11th Cir. 2016).

26. Petitioner established that he engaged in protected activity by reporting racially derogatory remarks made by a fellow employee, and by reporting racially derogatory actions taken by one security officer towards another.

27. Petitioner failed to establish that any of the actions of which he complained was an adverse employment action.

28. Having failed to establish that any retaliation or adverse employment action of any kind occurred, Petitioner has clearly failed to establish the "but-for causation" element of a prima facie case of unlawful employment retaliation under chapter 760.

29. Even if Petitioner had met his burden and established a prima facie case of retaliation, he failed to show that Ideal's legitimate business reasons for its various decisions were false and a pretext for retaliation. To establish pretext, Petitioner must "cast sufficient doubt" on Ideal's proffered nondiscriminatory reasons "to permit a reasonable factfinder to conclude that the [employer's] proffered legitimate reasons were not what actually motivated its conduct." Murphree v. Comm'r, 644 Fed. Appx. 962, 968 (11th Cir. 2016)(quoting Combs v. Plantation Patterns, 106 F.3d 1519, 1538 (11th Cir. 1997)). If the proffered reason is one that might motivate a reasonable employer, "an employee must meet that reason head on and rebut it, and the employee cannot succeed by simply quarreling with the wisdom of that reason." Chapman v. AI Transp., 229 F.3d 1012, 1030 (11th Cir. 2000)(en banc). Pretext must be established with "concrete evidence in the form of specific facts" showing that the proffered reason was pretext; "mere conclusory allegations and assertions" are insufficient. Bryant

v. Jones, 575 F.3d 1281, 1308 (11th Cir. 2009)(quoting Earley v. Champion Int'l Corp., 907 F.2d 1077, 1081 (11th Cir. 1990)).

30. Petitioner failed to provide evidence, aside from his own suspicions, that Ideal's proffered reasons for the supervisory actions taken by Ms. Cox were pretextual or used as a means of surreptitious retaliation against Petitioner. There was no evidence that any of Ms. Cox's supervisory decisions had anything to do with Petitioner's discrimination complaint.

31. In summary, Petitioner failed to establish that Respondent took an adverse employment action against him or that any employment action taken by Ideal was in retaliation for Petitioner's having engaged in protected activities.

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 Ideal Security Services, Inc. did not commit any unlawful employment practices and dismissing the Petition for Relief filed in this case.

DONE AND ENTERED this 16th day of January, 2020, in Tallahassee, Leon County, Florida.

W. DAVID WATKINS
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of January, 2020.

ENDNOTES

[1/] Citations shall be to Florida Statutes (2019) unless otherwise specified. Section 760.10 has been unchanged since 1992, save for a 2015 amendment adding pregnancy to the list of classifications protected from discriminatory employment practices. Ch. 2015-68, § 6, Laws of Fla.

[2/] "Direct evidence is 'evidence, which if believed, proves existence of fact in issue without inference or presumption.'" Rollins v. TechSouth, Inc., 833 F.2d 1525, 1528 n.6 (11th Cir. 1987)(quoting Black's Law Dictionary 413 (5th ed. 1979)). "Only the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of a protected classification, constitute direct evidence." Kilpatrick v. Tyson Foods, Inc., 268 Fed. Appx. 860, 862 (11th Cir. 2008)(citation omitted). Direct testimony that a defendant acted with a retaliatory motive, if credited by the finder of fact, would change the legal standard "dramatically" from the McDonnell test. Bell v. Birmingham Linen Serv., 715 F.2d 1552, 1557 (11th Cir. 1983). Petitioner offered no evidence that would satisfy the stringent standard of direct evidence of retaliation.

[3/] Florida courts have articulated an identical standard:

> 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, 1388 (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.

Blizzard v. Appliance Direct, Inc., 16 So. 3d 922, 926 (Fla. 5th DCA 2009).

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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.