

**STATE OF FLORIDA**  
**DIVISION OF ADMINISTRATIVE HEARINGS**

BERNARD MAYBIN,

Petitioner,

vs.

Case No. 20-4880

COMMERCIAL CONCRETE SYSTEM, LLC

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 January 28, 2021, by Zoom video conference.

APPEARANCES

For Petitioner: Bernard Maybin, Pro se  
290 Lowell Avenue  
North Fort Myers, Florida 33917

For Respondent: Peter Shoup  
Commercial Concrete Systems, LLC  
6220 Taylor Road, Suite 101  
Naples, Florida 34109

STATEMENT OF THE ISSUE

Did Respondent, Commercial Concrete Systems, LLC (Commercial Concrete), discriminate against Petitioner, Bernard Maybin, because of his race or color?

PRELIMINARY STATEMENT

On October 23, 2019, Mr. Maybin filed an Employment Complaint of Discrimination with the Florida Commission on Human Relations (Commission). The Complaint alleged that Commercial Concrete paid Mr. Maybin less and denied him paid vacation time on account of his race or color. The Commission investigated the Complaint and determined that there was no reasonable cause to believe that Commercial Concrete had discriminated against Mr. Maybin unlawfully. Mr. Maybin filed a Petition for Relief reiterating his claim that Commercial Concrete discriminated against him because of his race or color. The Petition also alleged that Commercial Concrete retaliated against Mr. Maybin, by discharging him, for complaining of discrimination.<sup>1</sup> The Commission transmitted the matter to the Division to conduct a final hearing on Mr. Maybin's claims.

The undersigned issued an Initial Order directing the parties to provide suggested dates for the hearing, an estimate of the hearing length, and other information. Neither party responded. The undersigned set the hearing to begin January 18, 2021, and later issued an Amended Notice of Hearing setting the hearing for January 28, 2021. The Amended Notice of Hearing required the parties to file and serve copies of all proposed exhibits no later than January 21, 2021, seven days before the hearing. Mr. Maybin timely filed his proposed exhibits. Commercial Concrete did not. An Order of Pre-hearing Instructions required the parties to exchange witness lists and copies of intended exhibits no later than January 21, 2021. Neither party complied with this requirement.

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<sup>1</sup> The retaliation claim is not part of this matter because it was not contained in the Complaint. If it were, the record does not support the claim because Commercial Concrete was not aware of Mr. Maybin's complaints when it discharged him. Therefore, the complaints could not have been the cause for his discharge. *See Murphy v. City of Aventura*, 616 F. Supp. 2d 1267, 1279 (S.D. Fla. 2009); *Webb v. R&B Holding Co.*, 992 F. Supp. 1382, 1389 (S.D. Fla. 1998).

The undersigned also issued a Notice of Telephonic Pre-hearing Conference for January 19, 2021. The undersigned conducted the pre-hearing conference as scheduled. Mr. Maybin participated in the conference. Commercial Concrete did not. During the conference the undersigned reviewed the nature of this legal proceeding and the requirements for it. The review included directing Mr. Maybin to the "Representing Yourself" link on the Division website and advising him that the decision resulting from the hearing would rely only on evidence presented at the hearing. The review included an explanation that a petitioner has the burden of proving his claim by a preponderance of the evidence and that documents or other material submitted to the Commission were not part of the evidence, unless they were offered as exhibits and admitted.

The undersigned conducted the hearing as scheduled. Mr. Maybin testified on his own behalf. Mr. Maybin's Exhibits D, F, G, and H were admitted into evidence. No other exhibits were offered by either party. Peter Shoup testified on behalf of Commercial Concrete.

#### FINDINGS OF FACT

1. Mr. Maybin was an employee of Commercial Concrete in 2019. Mr. Maybin is a dark-skinned African-American. In 2019, Commercial Concrete reprimanded Mr. Maybin for tardiness and absenteeism on January 18, April 15, and August 16, 2019. On November 8, 2019, Commercial Concrete terminated Mr. Maybin for being absent all of the preceding 30 days. This was consistent with its policy of terminating employees who were absent for thirty days without communicating with the company.

2. During at least some of the days that he was absent, Mr. Maybin was recovering from an automobile accident. He advised Commercial Concrete of the accident. But he did not advise it which days he would be unable to work

due to the accident or request leave. He also did not communicate with Commercial Concrete during the period of absenteeism, beyond advising it of the accident when it first occurred.

3. There is no evidence that any non-African-Americans or light-skinned employees with attendance failings similar to Mr. Maybin's were treated differently than him.

4. There is no evidence of statements by any manager or other employee of Commercial Concrete alluding to Mr. Maybin's race or color.

5. There is no evidence that non-African-American or light-skinned employees were paid more than Mr. Maybin or received vacation pay that he did not, although his petition makes that allegation.

6. When Commercial Concrete discharged Mr. Maybin, it was not aware that he had filed a complaint of discrimination with the Commission.

#### CONCLUSIONS OF LAW

7. Sections 760.11(7), 120.569, and 120.57, Florida Statutes (2020), confer jurisdiction of this matter on the Division.

8. Section 760.10(1)(a), Florida Statutes (2019), makes it unlawful to discriminate against someone in employment because of the individual's race or color.

9. Mr. Maybin brought this charge of discrimination. Consequently, he must prove his claim that Commercial Concrete discriminated against him by a preponderance of the evidence. *See Dep't of Transp. v. J.W.C. Co.*, 396 So. 2d 778 (Fla. 1st DCA 1981). A preponderance of the evidence is evidence which more likely than not tends to prove something. *Gross v. Lyons*, 763 So. 2d 276, 279, n. 1 (Fla. 2000).

10. Mr. Maybin may prove the alleged discrimination by direct or circumstantial evidence. *Valenzuela v. GlobeGround N. Am., LLC*, 18 So. 3d 17 (Fla. 3d DCA 2009).

11. Direct evidence proves the complained of discrimination without need

for interpretation, presumption, or inference. It includes facts such as derogatory statements about an employee explicitly referring to race or specific invocations of racial stereotypes as a basis for an employment decision. If the evidence suggests, but does not prove discriminatory intent, it is circumstantial, not direct. *Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079 (11th Cir. 2004).<sup>2</sup> There is no direct evidence of discrimination against Mr. Maybin in the record.

12. An employee or former employee may also prove discrimination using a "disparate treatment" theory. Here that requires proof that Mr. Maybin belongs to a protected class, that he was qualified to remain employed, and that, despite his qualifications, he was terminated while similarly situated employees were not. *See Fla. Dep't. of Cmty. Aff. v. Bryant*, 586 So. 2d 1205, 1209 (Fla. 1st DCA 1991)(applying the reasoning of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed.2d 668 (1973), in interpreting chapter 760). Mr. Maybin's month of unexcused absences made him unqualified for employment at Commercial Concrete. There is no evidence that non-African-American or light-skinned employees of Commercial Concrete with attendance issues like Mr. Maybin's remained employed. Consequently, the evidence does not support finding discrimination based on a "disparate impact" theory.

13. Mr. Maybin failed to prove the unlawful discrimination that he alleged.

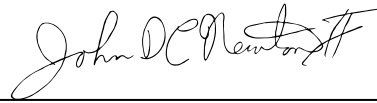
#### RECOMMENDATION

Based on the preceding Findings of Fact and Conclusions of Law, it is recommended that the Florida Commission on Human Relations enter a final order dismissing the Petition for Relief of Petitioner Bernard Maybin.

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<sup>2</sup> Federal case law dealing with Title VII applies when interpreting chapter 760. *School Bd. of Leon Cty. v. Hargis*, 400 So. 2d 103, 108 n. 2 (Fla. 1st DCA 1981).

DONE AND ENTERED this 9th day of February, 2021, in Tallahassee, Leon County, Florida.



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JOHN D. C. NEWTON, II  
Administrative Law Judge  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 9th day February, 2021.

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.