STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TERRY DOSS,

Petitioner,

vs. Case No. 21-1356

EDEN CABARET,

Respondent.
_____/

RECOMMENDED ORDER

A duly-noticed final hearing was conducted in this matter on July 6, 2021, via Zoom conference, before Suzanne Van Wyk, an Administrative Law Judge with the Division of Administrative Hearings ("Division").

APPEARANCES

For Petitioner: Terry Lynn Doss, pro se
12 Adkinson Drive
Pensacola, Florida 32506

For Respondent: Timothy McEvoy
Eden Cabaret
4001 North Davis Highway
Pensacola, Florida 32503

STATEMENT OF THE ISSUE

Whether Respondent, Eden Cabaret ("Respondent" or "Eden Cabaret"), is liable to Petitioner, Terry Doss ("Petitioner"), for employment discrimination in violation of the Florida Civil Rights Act of 1992, sections 760.01 through 760.11, Florida Statutes (2019).[1]

[1] Except as otherwise noted, all references to the Florida Statutes herein, are to the 2019 version, which was in effect when the actions complained of in Petitioner's Complaint occurred.

PRELIMINARY STATEMENT

On October 20, 2020, Petitioner filed a Complaint of Discrimination ("Complaint") with the Florida Commission on Human Relations ("Commission") alleging that Respondent violated chapter 760, the Florida Civil Rights Act. Petitioner alleged that he became employed by Respondent in May 2019, performed maintenance work for Respondent through August 2019, when he was terminated, and was never paid wages for his work. Petitioner maintains he was Respondent's only black employee and that Respondent paid all its white employees.

On April 16, 2021, the Commission issued a Determination: No Reasonable Cause, and a Notice of Determination: No Reasonable Cause, determining there was no reasonable cause to believe that unlawful discrimination occurred in this matter. On April 19, 2021, Petitioner filed a Petition for Relief ("Petition") with the Commission, which was transmitted to the Division on April 20, 2021, for assignment of an Administrative Law Judge to conduct a final hearing.

The undersigned issued an Initial Order in this case on April 21, 2021, but neither party responded with the requested information. On May 17, 2021, the undersigned unilaterally scheduled the final hearing via Zoom conference for July 6, 2021, and scheduled a pre-hearing conference for May 26, 2021. The parties attended the pre-hearing conference via telephone, during which the undersigned confirmed the parties' availability for the final hearing on July 6, 2021, and explained the process of the final hearing, including the presentation of evidence, the requirement to exchange evidence and disclose witnesses in advance of the final hearing.

The final hearing commenced as scheduled. At the final hearing, Petitioner testified on his own behalf and offered Petitioner's Composite Exhibit 1, which was admitted into evidence.

Respondent presented the testimony of its owner Timothy McEvoy, who testified on behalf of Respondent, but introduced no exhibits into evidence.

The proceedings were recorded, but the parties did not order a transcript. Petitioner timely filed a Proposed Recommended Order ("PRO") on July 15, 2021. Respondent did not file a PRO. The undersigned has considered Petitioner's PRO in preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is a black male who currently resides at 12 Adkinson Drive in Pensacola, Florida. Petitioner holds a certification in heating, ventilation, and air conditioning ("HVAC") repair and maintenance. The evidence is unclear whether Petitioner is a licensed HVAC contractor.

2. Respondent is an entertainment club in Pensacola, Florida, owned by Timothy McEvoy. The evidence is insufficient to establish how many employees are employed by Respondent.

3. Mr. McEvoy came to know Petitioner through Mr. McEvoy's girlfriend, Rachel Johnson, in June 2019.

4. At that time, Petitioner had full-time employment, but needed rental housing and was available for extra part-time work.

5. Mr. McEvoy owned a rental home at 7490 Rolling Hills Road in Pensacola and informed Petitioner that he could rent a room from him there for $150.00 per week. The rental home was partially occupied by Mr. McEvoy's cousin, Kent Leyonmark, but another room was available in the home.

6. Mr. McEvoy took Petitioner to the Rolling Hills property and showed him around. Mr. McEvoy introduced Petitioner to Mr. Leyonmark, suggesting that Petitioner may rent a room there.

7. The rental arrangement at Rolling Hills did not work out, however, because, as Mr. McEvoy testified, Mr. Leyonmark is a racist and would not allow Petitioner to move into the house.[2]

8. Feeling obliged to Petitioner, Mr. McEvoy suggested Petitioner could rent a room at the five-bedroom home he and Ms. Johnson were then renting.

9. Sometime in early June 2019, Petitioner moved into Mr. McEvoy's rental home, occupying a bedroom with a private bath. No formal rental agreement, written or otherwise, was ever reached.

10. Mr. McEvoy then hired Petitioner to do some HVAC work for him. Petitioner performed a number of jobs for Mr. McEvoy at Marcone Supply, a commercial business located in a building owned by Mr. McEvoy. Petitioner worked on the AC duct system, installed an air return, and completed an insulation job. Petitioner further found an airflow problem at the front of the store and repaired a restriction causing the problem at Marcone Supply. Over the next few weeks, Petitioner performed work for Mr. McEvoy at Eden Cabaret, as well as other rental properties owned by Mr. McEvoy, and at his beach house on Pensacola Beach.

11. No formal employment agreement was reached between the two men. Typically, Petitioner sent a text to Mr. McEvoy informing him that Petitioner was finished with his regular job and asking if Mr. McEvoy needed him for any work.

12. After Petitioner informed Mr. McEvoy that he had worked approximately 20 hours, Mr. McEvoy told Petitioner, "It would be best if you

[2] Mr. McEvoy's testimony is entirely hearsay, but is not being used to prove that Mr. Leyonmark is a racist, and no finding is made in that regard, but is limited to show that, for whatever reason, Petitioner did not take a room at the Rolling Hills property.

keep a sheet with start and stop time and [a] brief description of what you worked on by day."

13. When Petitioner had worked 37 hours, he texted Mr. McEvoy, "Didn't know when you was [sic] going to pay me the hrs. I work [sic]." He also stated, "I also old [sic] y'all some rent."

14. Later, Petitioner sent a text asking Mr. McEvoy, "Did u need money for rent[?]" The evidence does not support a finding that Mr. McEvoy responded to that text message.

15. Mr. McEvoy never paid Petitioner for the hours he worked. Petitioner never paid Mr. McEvoy any rent.

16. In addition to staying at Mr. McEvoy's home rent-free, Petitioner had the use of a car owned by Mr. McEvoy. Petitioner used the car to get to and from work—both his first job and the second part-time work he did for Mr. McEvoy. Mr. McEvoy testified that he allowed Petitioner to use the car because the rental house was not near a public bus route. At Petitioner's prior residence he took the bus to work.

17. Petitioner purchased gas for Mr. McEvoy's car. Petitioner also inquired about buying the car from Mr. McEvoy. But, Petitioner never paid anything to Mr. McEvoy for using the car.

18. In early July, Mr. McEvoy informed Petitioner that the house they were all living in had been put on the market for sale by the owner. Mr. McEvoy and Ms. Johnson, who was pregnant at the time, planned to move before the baby was born. In July, Mr. McEvoy informed Petitioner, "[W]e have committed to be out of here by the end of this month so you should plan accordingly."

19. Petitioner lived with Mr. McEvoy and Ms. Johnson for four to six weeks. During that time period, Petitioner worked a total of 73.5 hours on repairs and maintenance at several properties owned by Mr. McEvoy, including Eden Cabaret.

20. When Petitioner requested, via text message, to be paid for the hours worked, Mr. McEvoy asked Petitioner to call him to discuss the issue. Mr. McEvoy did not contest the number of hours Petitioner worked, but wanted to discuss "where we stand for the work you did vs. the housing and transportation we provided."

21. The two men never discussed the issue face-to-face, and never came to an agreement in a series of text messages either.

22. When asked by the undersigned how Mr. McEvoy's failure to pay him was related to his claim of discrimination, Petitioner explained that he was the only black man that worked for Mr. McEvoy and that Mr. McEvoy paid all his other employees.

23. Petitioner did not introduce any evidence of particular individuals employed by Respondent, what type of work they performed, or their rate of pay.

24. Mr. McEvoy claims Petitioner was never Respondent's employee. Rather, Mr. McEvoy testified that he engaged Petitioner, as he does many workers, as an independent contractor to work on any number of properties he owns.

CONCLUSIONS OF LAW

25. The Division has initial jurisdiction over this matter, and the parties thereto, pursuant to section 120.569 and 120.57, Florida Statutes (2021).

26. The Florida Civil Rights Act of 1992 (the "Act") is codified in sections 760.01 through 760.11. When "a Florida statute [such as the Act] is modeled after a federal law on the same subject, the Florida statute will take on the same constructions as placed on its federal prototype, insofar as such interpretation is harmonious with the spirit and policy of the Florida legislation." *Brand v. Fla. Power Corp.*, 633 So. 2d 504, 509 (Fla. 1st DCA 1994). Therefore, the Act should be interpreted, where possible, to conform to

Title VII of the Civil Rights Act of 1964, which contains the principal federal antidiscrimination laws.

27. Section 760.10(1)(a) provides that it is an unlawful employment practice for an employer:

> 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, national origin, age, handicap, or marital status.

28. The Act defines "employer" as "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 person." § 760.02(7), Fla. Stat.

29. Petitioner has the burden of proving that Respondent is an "employer" subject to the Act. *See Dep't. of Banking and Ins. v. Osborne Stern and Co.*, 670 So. 2d 932, 934 (Fla. 1996)(the party asserting the affirmative of an issue has the burden of presenting evidence as to that issue).

30. Based on the foregoing Findings of Fact, there is no competent evidence to support a conclusion that Respondent is an "employer" subject to the Act.

31. Additionally, only an employee may bring a suit under Title VII for redress of an unlawful employment practice. *See Llampallas v. Mini-Circuits, Inc.*, 163 F.3d 1236, 1242 (11th Cir. 1998). As the court explained, without such limitation, "any person could sue an 'employer' under the statute regardless of whether she actually had an employment relationship with that employer." *Id*. at 1243. The scope of the Act is limited to specific employment relationships, just as Title VII is so limited.

32. The concomitant questions, i.e., whether Respondent is an "employer" subject to the Act, and whether Petitioner is Respondent's "employee," bear on subject matter jurisdiction. *Llampallas*, 163 F.3d at 1242; *see also*

Lombardi v. Lady of Am. Franchise Corp., 2002 WL 459717, at *2 (S.D. Fla., Mar. 4, 2002).

33. Because an independent contractor is not an employee, an independent contractor cannot maintain a claim under Title VII—or, correspondingly, under the Act—based on an alleged unlawful employment practice. *See Cobb v. Sun Papers, Inc.*, 673 F.2d 337, 342 (11th Cir. 1982)(affirming dismissal of Title VII action on grounds that plaintiff was an independent contractor); *Perry v. Health Mgmt. Assocs*., 2014 WL 5780514, at *2 (M.D. Fla. Nov. 5, 2014)("The protection against discrimination afforded by Title VII does not extend to independent contractors; thus, a plaintiff must be an employee to bring a Title VII suit.").

34. Mr. McEvoy contends Petitioner performed HVAC maintenance and repairs as an independent contractor. Petitioner has the burden of proving that the relationship he had with Respondent is that of employer-employee. *See Osborne Stern,* 670 So. 2d at 934.

35. In *Cantor v. Cochran*, 184 So. 2d 173, 174-75 (Fla. 1966), the Supreme Court adopted, as the Florida common law test for determining whether an employment relationship exists, the nonexclusive list of factors set forth in Restatement of the Law, Agency (Second) § 220 (Am. Law Inst. 1958), as follows:

> (2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:
>
> (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
>
> (b) whether or not the one employed is engaged in a distinct occupation or business;
>
> (c) the kind of occupation, with reference to whether, in the locality, the work is usually done

> under the direction of the employer or by a specialist without supervision;
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> (d) the skill required in the particular occupation;
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> (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
>
> (f) the length of time for which the person is employed;
>
> (g) the method of payment, whether by the time or by the job;
>
> (h) whether or not the work is a part of the regular business of the employer;
>
> (i) whether or not the parties believe they are creating the relation of master and servant; and
>
> (j) whether the principal is or is not in business.

36. In construing employment discrimination statutes, federal courts apply the "hybrid economic realities test" to determine whether an individual is an employee, rather than an independent contractor. *See Daughtrey v. Honeywell, Inc*., 3 F.3d 1488, 1495 n.13 (11th Cir. 1993); *Cobb*, 673 F.2d at 340-41. Under the hybrid approach, the court looks at the common-law agency test, "tempered by a consideration of the 'economic realities' of the hired party's dependence on the hiring party." *Daughtery*, 3 F.3d at 1495.

37. "In assessing the amount of control an employer exercises over the employee's work duties, courts look not only to the results that are to be achieved, but the 'manner and means by which the work is accomplished.'" *Dahl v. Ameri-Life Health Serv. of Sara-Bay, LLC*, 2006 WL 28894962, at *4 (M.D. Fla. Oct. 10, 2006)(citing *Daughtrey,* 3 F.3d at 1496).

38. Although the relevant evidence was sparse, the following findings are relevant to the amount of control Respondent had over Petitioner's work:

(1) Neither Mr. McEvoy nor Eden Cabaret had a written employment agreement with Petitioner establishing how Eden Cabaret would exercise control over Petitioner's work; (2) Eden Cabaret, is not in the HVAC repair and maintenance business; (3) Petitioner maintains a certification and particular skillset required to perform the work needed by Mr. McEvoy at Eden Cabaret and his other properties; (4) Neither Mr. McEvoy nor Eden Cabaret supplied the tools and instrumentalities for Petitioner's work. Rather, Mr. McEvoy sent Petitioner to various properties owned by him to perform repairs and maintenance; and (5) Mr. McEvoy directed that Petitioner troubleshoot and make repairs to HVAC equipment--he had no control over the means or methods by which Petitioner made repairs or the details of the work to be performed. In addition, much, if not most, of the work performed by Petitioner was for the benefit of Mr. McEvoy's other businesses and properties and not for Eden Cabaret.

39. Petitioner argues Respondent was his "employer" because Mr. McEvoy set the number of hours Petitioner was to work each day. Petitioner highlighted the following text exchange between the two men:

> Mr. McEvoy to Petitioner: "It would be best if you could keep a sheet with start and stop time and a brief description of what you worked on by day. Thanks."
>
> Petitioner to Mr. McEvoy: "K u just want me to work about 5 hours a day rest of the week[?]"
>
> Mr. McEvoy to Petitioner: "That seems reasonable."
>
> Petitioner to Mr. McEvoy: "K"

40. While this exchange proves that Mr. McEvoy agreed that Petitioner should work "about 5 hours a day" that particular week on the particular job at the time, it is insufficient evidence to support a conclusion that Petitioner was Respondent's employee. The overwhelming evidence demonstrates that Petitioner consistently contacted Mr. McEvoy when he got off work from his

regular job and asked if Mr. McEvoy had any work for him. Petitioner conducted said work independently and kept track of the hours he worked on the various jobs.

41. At most, the evidence demonstrates that Petitioner performed odd jobs, as needed, for Mr. McEvoy, in exchange for transportation and a place to live. Petitioner failed to demonstrate by a preponderance of the evidence any employment relationship with Respondent, Eden Cabaret.[3]

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[3] Assuming, arguendo, Petitioner did have an employee relationship with Respondent, he failed to prove that Respondent illegally discriminated against him. Petitioner has the burden of proving, by a preponderance of the evidence, that Respondent committed an unlawful employment practice. *See St. Louis v. Fla. Int'l Univ.*, 60 So. 3d 455 (Fla. 3d DCA 2011); *Fla. Dep't of Transp. v. J.W.C. Co.*, 396 So. 2d 778 (Fla. 1st DCA 1981).

Petitioner can meet his burden of proof with either direct or circumstantial evidence. *See Valenzuela v. GlobeGround N. Am., LLC*, 18 So. 3d 17 (Fla. 3d DCA 2009). Direct evidence is evidence that, if believed, would prove the existence of discrimination without the need for inference or presumption. *See Maynard v. Bd. of Regents*, 342 F.3d 1281, 1289 (11th Cir. 2003). "Only the most blatant remarks, whose intent could be nothing other than to discriminate will constitute direct evidence of discrimination." *Damon v. Fleming Supermarkets of Fla.*, 196 F.3d 1354, 1358-59 (11th Cir. 1996). "[D]irect evidence of intent is often unavailable." *Shealy v. City of Albany, Ga.*, 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).

Petitioner proved that he did not take a room at the Rolling Hills property on the (unproven) allegation that Mr. McEvoy's brother was a racist. However, Petitioner has not charged Mr. McEvoy with discrimination in the provision of housing. He has charged Eden Cabaret, an entertainment venue, with employment discrimination.

Because Petitioner introduced no direct evidence of unlawful employment discrimination, Petitioner must prove his allegations by circumstantial evidence. Circumstantial evidence of discrimination is subject to the burden-shifting framework established in *McDonnell Douglas Corporation v. Green,* 411 U.S. 792, 802 (1973). Under this well-established model of proof, the complainant bears the initial burden of establishing a prima facie case of discrimination.

If the charging party is able to make out a prima facie case, the burden shifts to the employer to offer a legitimate, non-discriminatory reason for the adverse employment action. *See Dep't of Corr. v. Chandler*, 582 So. 2d 1183 (Fla. 1st DCA 1991). If the employer meets that burden, the presumption disappears and the employee must prove that the legitimate reasons were a pretext. *See Valenzuela*, 18 So. 3d at 17. Facts that are sufficient to establish a prima facie case must be adequate to permit an inference of discrimination. *Id.*

Section 760.10 provides, "It is an unlawful employment practice for an employer … to discriminate against an individual with respect to compensation … because of such individual's race[.]" § 760.10(1)(a), Fla. Stat. To establish a prima facie case of unlawful discrimination based on his race, Petitioner must show that: (1) he is a member of a

42. Based on the foregoing, the Division is without jurisdiction in this case and it should be dismissed for lack of jurisdiction.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law herein, the undersigned RECOMMENDS that the Commission issue a final order finding that Petitioner, Terry Doss, failed to prove that Respondent, Eden Cabaret was his employer, and dismiss Petition for Relief No. 2021-26984.

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protected class; (2) he was qualified for the position held: (3) he was subjected to an adverse employment action; and (4) other similarly-situated employees, who are not members of the protected group, were treated more favorably than Petitioner. *See McDonnell-Douglas*, 411 U.S. at 802.

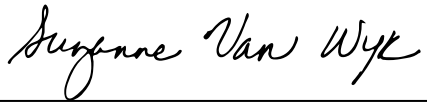
Petitioner met the first two elements: he is a member of a protected class; and is qualified to work in maintenance of HVAC systems. However, Petitioner is unable to prove the third element, that he suffered an adverse employment action. The evidence was persuasive, and is accepted, that Petitioner was compensated for the work he performed in the form of lodging and transportation, and not monetarily.

Assuming, arguendo, Petitioner was subjected to an adverse employment action, he failed to prove the fourth element, that similarly-situated employees, who are not members of the protected class, were treated more favorably. For purposes of proving disparate treatment, a comparator must be similar to Petitioner in "all material respects." *See Lewis v. City of Union City, Georgia*, 918 F.3d 1213, 1217 (11th Cir. 2019). Similarity among comparators is required for the comparisons to be meaningful.

Petitioner testified generally that other white employees were paid by Mr. McEvoy for their work. However, he did not introduce any specific comparators who were similarly-situated. Petitioner did not introduce evidence of the treatment of any non-black workers who had the use of rooms at Mr. McEvoy's rental home or use of Mr. McEvoy's personal vehicle.

Petitioner failed to prove discrimination in compensation based on his race.

DONE AND ENTERED this 29th day of July, 2021, in Tallahassee, Leon County, Florida.



SUZANNE VAN WYK
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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of July, 2021.

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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.