STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CALEB EVANS,

Petitioner,

vs. Case No. 22-1393

VITAL SECURITY AND INVESTIGATIONS LLC,

Respondent.
_____/

RECOMMENDED ORDER

On July 8, 2022, Administrative Law Judge Hetal Desai of the Division of Administrative Hearings (DOAH) conducted the final hearing in this matter via Zoom.

APPEARANCES

For Petitioner: Caleb Evans, pro se
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Orlando, Florida 32808

For Respondent: Mark L. Van Valkenburgh, Esquire
Garganese, Weiss, D'Agresta, & Salzman, PA
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STATEMENT OF THE ISSUE

Whether Vital Security and Investigations, LLC (VSI), discriminated against Caleb Evans (Mr. Evans or Petitioner) on the basis of his gender in violation of the Florida Civil Rights Act (FCRA).

PRELIMINARY STATEMENT

On November 1, 2021, Petitioner filed an Employment Complaint of Discrimination (Complaint) with the Florida Commission on Human Relations (FCHR). In the Complaint, Petitioner alleged his supervisor harassed him and other male employees because she disliked men. He also alleged VSI terminated him in August 2021.

On April 8, 2022, FCHR issued a "Notice of Determination: No Reasonable Cause." On May 10, 2022, Petitioner filed a Petition for Relief (Petition) to contest FCHR's determination. FCHR transferred the Petition to DOAH, where it was assigned to the undersigned and noticed for a final hearing.

A Pre-Hearing Conference was held on July 8, 2022, but Petitioner did not attend.

At the final hearing, Petitioner offered his own testimony. After the hearing, Petitioner's Exhibit P2 was admitted into evidence.[1] VSI offered the testimony of Kristin Kurtz, the Director of Finance and Human Resources for VSI; and Leslie Scott, Petitioner's former supervisor. Respondent's Exhibits R5, R6, and R8 were admitted into evidence.

Although a court reporter was present at the hearing, the parties did not order a copy of the transcript. The parties were to file proposed recommended orders on or before August 19, 2022. VSI timely filed its Proposed

[1] During the hearing, Petitioner attempted to show screenshots of text messages and offered them as exhibits. Petitioner was prohibited from introducing any exhibits because he had failed to provide them to the undersigned and did not disclose them to VSI prior to the hearing as required by the Order of Pre-hearing Instructions, issued on June 9, 2022. The undersigned reserved ruling on two of the text messages that Petitioner offered as rebuttal exhibits, which were allowed to be filed with DOAH after the hearing. After review, the undersigned finds Petitioner's Exhibit P1 is inadmissible and deems Exhibit P2 as admitted.

Recommended Order, which has been considered in the preparation of this Recommended Order. Petitioner failed to file a proposed recommended order.

All references to the Florida Statutes and Florida Administrative Code are to the 2021 versions.

FINDINGS OF FACT

1. Petitioner, male, worked for VSI as a security officer for five years until August 25, 2021.

2. VSI is a company that provides security and investigative services to its clients, including homeowners' associations and residential buildings. VSI employs approximately 150 site supervisors and security officers (90 who are male; 60 who are female).

3. Dwayne Williams, male, is an owner of VSI and is involved in hiring, firing, and other major decisions regarding employees.

4. Leslie Scott, female, was a security site supervisor at VSI during the times relevant to these proceedings. Ms. Scott supervised an all-male security team, including Petitioner, at a specific homeowners' association (HOA). Ms. Scott had authority to schedule her subordinates but did not have the authority to hire, fire, or make decisions regarding long-term leave or permanent assignments.

5. When Ms. Scott became Petitioner's supervisor at the HOA site, she replaced Captain Rose, a male supervisor who had a military background and was well regarded by his subordinates. Ms. Scott and Mr. Evans had a conversation about Ms. Scott replacing Captain Rose and gaining the respect of the all-male security team under her supervision. Mr. Evans claims Ms. Scott said "some men may have issues taking directions from a woman." Although it is unclear when this happened and there is a dispute about who started the conversation, Ms. Scott admitted at the hearing that she once told Petitioner that "as a woman" she would have to do more to prove herself.

6. Regardless, at the time, Mr. Evans never reported to anyone at VSI that this conversation was offensive to him or that he believed Ms. Scott did not like male employees.

7. Kristin Kurtz, female, oversees the human resources department for VSI. She testified that VSI distributed an employee handbook to its employees which contained numerous policies and procedures, including those addressing workplace harassment and paid bereavement leave.[2]

8. VSI's bereavement leave policy (the policy) found in the employee handbook states:

> BEREAVEMENT LEAVE
>
> All regular full-time employees are eligible for up to three (3) paid days off if a death in the employee's immediate family occurs to attend the funeral. Commissioned employees will be paid their base pay only for this paid bereavement leave.
>
> An employee's immediate family consists of his/her spouse, parents, stepparents; grandparents, children, stepchildren, siblings, spouse's children, spouse's parents, and spouse's grandparents. An eligible employee may, with his or her Manager's approval, take unused vacation time to attend the funeral of other relatives or friends.

The policy is silent as to whether documentation was necessary to take advantage of the bereavement leave pay or what documents were necessary to obtain such paid leave.

9. At approximately 3:27 a.m., on Saturday, August 14, 2021, Ms. Scott texted Petitioner regarding the schedule for the upcoming week. In response, Petitioner indicated that his father had just passed away and he would need to take a month off work. In that same text thread, Ms. Scott indicated that although she was sympathetic, a month was a long time. She advised

[2] The VSI anti-harassment policy and reporting procedures were not admitted into evidence, nor was there testimony as to what VSI prohibited.

Petitioner to contact Mr. Williams directly regarding the request for extended leave. Mr. Evans agreed to do so.

10. The next day, Mr. Evans asked Ms. Scott whether she would approve a request for a week of leave. Ms. Scott indicated that pursuant to the bereavement policy, VSI would give him three paid days off (Monday through Wednesday) and he might be able to use vacation time after the bereavement leave ended. If he did not make a vacation leave request, he would need to return on Friday. Ms. Scott also referred him to the employee handbook.

11. In this same text conversation, Ms. Scott also indicated Petitioner would need to submit proof of his father's death. It is clear that this is what irritated Mr. Evans the most at the hearing.

12. Mr. Evans did not make a leave request for the Friday shift and never submitted any documents relating to his father's death.

13. Ms. Scott did not schedule Mr. Evans to work his normal shifts the following Monday through Wednesday, August 16 through 18, 2021. VSI provided Petitioner bereavement leave pay for these three days pursuant to the policy.

14. Ms. Scott did not schedule Petitioner to work on Thursday, August 19, 2021. VSI paid him for the Thursday shift using his vacation leave.

15. Because Ms. Scott had not submitted a request to use his vacation leave, Ms. Scott scheduled Petitioner to work on Friday, August 20, 2021. Petitioner did not call to let Ms. Scott know he could not work that day, nor did he show up.

16. Ms. Scott reported Petitioner as a "no call, no show" to VSI.

17. VSI never disciplined Petitioner for failing to show up for the Friday shift. VSI paid Petitioner for this shift using his vacation leave.

18. On August 25, 2021, Mr. Williams contacted Mr. Evans and asked him when he would return to work. Mr. Williams indicated that although Petitioner could utilize his remaining vacation leave, he would need to submit any leave requests through the proper channels.

19. Mr. Evans did not provide Mr. Williams a return date, but rather complained about Ms. Scott's unprofessionalism and alleged she did not like male employees.

20. Mr. Williams agreed to address Mr. Evans' complaints about Ms. Scott with her at a later time, but pressed him regarding a return date. Eventually he responded to Petitioner with the following:

> So are you resigning? Well we value you regardless of your perspective. We will hold your position and when you are ready to return just let me know. Additionally, I will need to know how you would like your vacation handled.

21. Mr. Evans responded that he was not comfortable coming back to work under Ms. Scott's supervision because of the way she handled his request for bereavement leave and that she was unprofessional.

22. After the conversation with Petitioner, Mr. Williams told Mr. Evans that he considered his response to be a resignation.

23. Mr. Williams told Ms. Kurtz about Mr. Evans' allegations that Ms. Scott was sexist and unprofessional. As a result, Ms. Kurtz investigated Petitioner's claims and found them baseless.

24. Based on the competent evidence at the hearing, the undersigned finds VSI did not terminate Mr. Evans. Rather, VSI considered Petitioner's refusal to work with Ms. Scott as a resignation, and accepted it.

CONCLUSIONS OF LAW

25. DOAH has jurisdiction over the parties and the subject matter of this cause, pursuant to sections 120.569, 120.57(1), and 760.11(7), Florida Statutes. *See also* Fla. Admin. Code R. 60Y-4.016.

26. Pursuant to section 760.10(1)(a), it is an unlawful employment practice for an employer to "discharge … 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, pregnancy, national origin, age, handicap, or marital status."[3]

27. VSI is an "employer" as defined by the FCRA. § 760.02(7), Fla. Stat.

28. Petitioner must establish a prima facie case by a preponderance of the evidence. *Holifield v. Reno*, 115 F.3d 1555, 1562 (11th Cir. 1997); *see also* § 120.57(1)(j), Fla. Stat. ("Findings of fact shall be based upon a preponderance of the evidence, except in penal or licensure proceedings or except as otherwise provided by statute and shall be based exclusively on the evidence of record and on matters officially recognized."). This simply requires evidence that more likely than not tends to prove a certain proposition.

29. Petitioner can carry this burden by: (1) producing direct evidence of discrimination; or (2) by producing circumstantial evidence sufficient to allow a fact finder to infer discrimination. *Schoenfeld v. Babbitt*, 168 F.3d 1257, 1266 (11th Cir. 1999) (citation omitted). Whether evidence is characterized as "direct" or "circumstantial" substantially affects the allocation of the evidentiary burdens of proof. *Saweress v. Ivey*, 354 F.Supp. 3d 1288, 1301 (M.D. Fla. 2019).

30. Direct evidence is "evidence from which a trier of fact could conclude, based on a preponderance of the evidence, that an adverse employment action was taken" on the basis of a petitioner's protected personal characteristic. *Wright v. Southland Corp.*, 187 F.3d 1287, 1303-04 (11th Cir. 1999) (finding direct evidence of age discrimination where two people involved in the decision to terminate plaintiff made discriminatory comments less than three months prior to plaintiff's termination); *see also Jefferson v. Sewon Am., Inc.*, 891 F.3d 911 (11th Cir. 2018) (testimony that manager said

[3] Florida courts have held that because the FCRA is patterned after Title VII of the Civil Rights Act of 1964, as amended (Title VII), federal case law dealing with Title VII is applicable. *See, e.g., Valenzuela v. GlobeGround N. Am., LLC,* 18 So. 3d 17, 21-22 (Fla. 3d DCA 2009) (gender); *Thompson v. Baptist Hosp. of Miami, Inc.*, 279 F.App'x 884, 888 n.5 (11th Cir. 2008) (race).

he could not offer plaintiff position because a higher-ranked manager said that he wanted a Korean in that position was direct evidence of discrimination based on race).

31. Ms. Scott's statement regarding men not respecting her or that she would have to prove herself "as a woman" is not evidence which leads the undersigned to conclude that Petitioner was treated differently because of his gender. These statements simply do not rise to the level of "direct evidence" of discrimination.

32. Therefore, Mr. Evans must rely on circumstantial evidence of discriminatory intent to prove his discrimination claims using the shifting burden of proof pattern established in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973):

> (1) First, Petitioner has the burden of proving a *prima facie* case of discrimination.
>
> (2) If Petitioner sufficiently establishes a *prima facie* case, the burden shifts to Respondent to "articulate some legitimate, nondiscriminatory reason" for its action.
>
> (3) If Respondent satisfies this burden, Petitioner has the opportunity to prove that the legitimate reasons asserted by Respondent are really a pretext. *See Valenzuela*, 18 So. 3d at 22.

33. Petitioner claims VSI favored women. To establish a prima facie case of disparate treatment, Mr. Evans must demonstrate he: (1) belongs to a protected class; (2) suffered an adverse employment action; (3) was qualified to do his job; and (4) was treated less favorably than similarly situated employees outside of the protected class. *Alvarez v. Lakeland Area Mass Transit Dist.,* 2020 WL 3473286, at *10 (M.D. Fla. June 25, 2020); *Schultz v. Royal Caribbean Cruises, Ltd.*, 465 F.Supp. 3d 1232, 1268 (S.D. Fla. 2020) (describing disparate treatment as when an "employer simply treats some people less favorably than others because of their race, color, religion, sex, or

national origin. Unlike a disparate impact claim, proof of discriminatory motive is critical.") (Internal citations and quotations omitted).

34. Mr. Evans meets the first requirement regarding sex or gender. He, however, failed to prove the remaining elements.

35. Regarding the second element, Mr. Evans did not establish he suffered any adverse action. He was given paid bereavement leave, never disciplined, and told he could return to work when he was ready. The overwhelming credible evidence indicated that VSI wanted Petitioner to return to work and it would have continued to employ him had he not refused to work with Ms. Scott. As such, he cannot establish the second element of the prima facie case.

36. Next, VSI does not dispute that Mr. Evans was qualified. By all accounts, he was good at his job and VSI wanted him to continue at the jobsite where he was assigned. However, an employee must be willing to work to be qualified. Petitioner's refusal to work with Ms. Scott made him unavailable for work. As such, he has failed to carry his burden regarding this element.

37. To meet the fourth element, Mr. Evans must show VSI treated female employees more favorably than it treated him. *See Woods v. Cent. Fellowship Christian Acad.*, 545 F.App'x 939, 945 (11th Cir. 2013) (employee claiming discrimination must show he is similarly situated in all relevant respects to the comparators given preferential treatment). Mr. Evans had no female coworkers and did not give any examples of preferential treatment by anyone at VSI toward female employees.

38. Although not specifically argued at the hearing, Mr. Evans also claimed in his Complaint and Petition that Ms. Scott "harassed" him. To prove a harassment or "hostile work environment" case under the FCRA, Mr. Evans must show that the matters about which he complains were gender-focused, based, or motivated and that they were severe or pervasive. *See Jones v. UPS Ground Freight*, 683 F.3d 1283, 1297–99 (11th Cir. 2012).

39. Ms. Scott's isolated comments (that men may not like taking supervision from a woman or that she would have to prove herself "as a woman") are not reasonably offensive, severe, or pervasive. Moreover, Ms. Scott's scheduling Petitioner for the Friday shift, requesting documentation regarding his father's death, and reporting him as a "no call, no show" may have been less than sympathetic, but was not motivated by Petitioner's gender. *See generally Ortiz v. Waste Mgmt., Inc. of Fla.*, 808 F. App'x 1010, 1013 (11th Cir. 2020) (noting not every "unreasonable, uncivil, or mean-spirited act" is an "adverse action" covered by the FCRA). Mr. Evans failed to establish that VSI was "permeated with discriminatory intimidation, ridicule, and insult, that [was] sufficiently severe or pervasive to alter the conditions of his employment." *Thomas v. Esterle*, No. 21-10638, 2022 WL 2441562, at *4 (11th Cir. July 5, 2022).

40. Because Petitioner has not established a prima facie case of either disparate treatment or harassment, his gender discrimination claim fails. As such, it is unnecessary to address Petitioner's claim for damages.

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 dismissing Caleb Evans' Petition for Relief.

DONE AND ENTERED this 2nd day of August, 2022, in Tallahassee, Leon County, Florida.

HETAL DESAI
Administrative Law Judge
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Filed with the Clerk of the
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this 2nd day of August, 2022.

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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.