STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ZORAIDA M. OLIVERA,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 00-4433
	)	
CITY OF HALLANDALE,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

The parties having been provided proper notice, Administrative Law Judge John G. Van Laningham of the Division of Administrative Hearings convened a formal hearing of this matter by video teleconference on April 23, 2001. The parties, counsel, and witnesses appeared in Fort Lauderdale, and the Administrative Law Judge presided in Tallahassee.

APPEARANCES

For Petitioner: Mark J. Berkowitz, Esquire
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For Respondent: Mark A. Goldstein, Esquire
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STATEMENT OF THE ISSUES

The issues in this case are: (1) Whether Petitioner filed her charge of discrimination with the Florida Commission on

Human Relations within 365 days after the alleged discriminatory act; and (2) Whether Respondent unlawfully discriminated against Petitioner in connection with Petitioner's employment by Respondent on the basis of her national origin, gender, or pregnancy.

PRELIMINARY STATEMENT

On May 6, 1996, Petitioner Zoraida Olivera ("Olivera"), a Cuban-American female, filed a charge of discrimination with the Florida Commission on Human Relations ("FCHR") that accused her former employer, Respondent City of Hallandale (the "City"), of having forced her to resign the position of Office Manager, effective April 24, 1995, for unlawful reasons. Specifically, Olivera claimed that the City had terminated her employment, which had begun in March 1993, because of her national origin.

The FCHR investigated Olivera's allegations and, in August and September 2000, issued letters stating that it could find no reasonable cause to believe that an unlawful employment practice had occurred. Thereafter, Olivera timely filed a Petition for Relief with the FCHR contending that the City had discriminated against her on the bases of national origin, gender, and pregnancy. On October 27, 2000, the FCHR transferred the matter to the Division of Administrative Hearings for further proceedings. The City filed an Answer on November 14, 2000, in which it denied having discriminated in any manner against

Olivera. The City also asserted the statute of limitation as an affirmative defense.

At the final hearing on April 23, 2001, Olivera testified on her own behalf and called no other witnesses. The City presented the testimony of Jill Silverboard (formerly known as Jill Scroggs), who is presently the Assistant City Manager for the City of Destin and was, at all times material to this case, the Deputy City Manager for the City of Hallandale; together with that of the following City employees: R.J. Intindola, City Manager; Christy Dominguez, Assistant Director of Growth Management; Baloidi Albornoz, Office Manager; and Dania Melendez, a secretary in the City Manager’s office.

In addition to the testimony of these witnesses, the parties stipulated to the admission in evidence of all exhibits that were disclosed by both sides on their respective pre-hearing exhibit lists and submitted to the administrative law judge. Accordingly, Petitioner's Exhibits 1, 2, 4-6, 8-17, and 20-23 were received into evidence, as were Respondent's Exhibits 1-15.[1]

The final hearing transcript was filed with the Division of Administrative Hearings on May 2, 2001. The City timely filed a Proposed Recommended Order, and the Administrative Law Judge considered this submission carefully in the preparation of this Recommended Order. Olivera's Proposed Recommended Order was

filed late, without leave, after this Recommended Order had been written. Nevertheless, the Administrative Law Judge reviewed Olivera's post-hearing papers and ascertained that no issues of material fact or pertinent points of law had been overlooked.

FINDINGS OF FACT

The evidence presented at final hearing established the facts that follow.

1. Olivera is a Cuban-American female. The City hired her, effective March 8, 1993, to work as a secretary in the City Manager's office. After one week, Olivera was promoted to the position of Office Manager, a more demanding job that entailed much greater responsibilities.

2. The evidence regarding Olivera's performance as Office Manager is in conflict. Her supervisors believed that Olivera was a marginal employee who failed to discharge her duties satisfactorily. The City has placed in evidence a number of contemporaneous memorandums and other documents that memorialize one or another of Olivera's perceived performance deficiencies.

3. In contrast, Olivera believed she was performing well, and that her supervisors' complaints about her were, for the most part, false, exaggerated, or unfair — and worse, a pretext for unlawful discrimination. (Olivera admitted that she had had problems with tardiness during her first year of employment, but all agreed that Olivera had corrected this particular

deficiency.) In short, Olivera perceived that she had been singled out for disproportionately harsh treatment and had been made the scapegoat when others failed to do their jobs.

4. More ominously, Olivera accused the City Manager, R.J. Intindola, of constantly having made racist comments about Blacks and Cubans. She claimed that Mr. Intindola uttered racial slurs with such frequency that the workplace became hostile. Further, Olivera asserted that her complaints about Mr. Intindola's behavior fell on deaf ears.

5. As with the issues pertaining to Olivera's job performance, the evidence regarding Mr. Intindola's conduct is in conflict. Mr. Intindola himself denied having uttered the slurs that Olivera put on his lips, yet he admitted that "one time," in Olivera's presence, he had referred to another employee, Christy Dominguez, as a "crazy Cuban." Mr. Intindola claimed that everyone present knew that he was kidding and laughed at the repartee between him and Ms. Dominguez.

6. No one who testified at hearing corroborated Olivera's account of Mr. Intindola's conduct. Indeed, Ms. Dominguez, who has been employed with the City since May 1974, disclaimed having witnessed any discriminatory behavior in the workplace there, despite having been the subject of the one possibly derogatory comment that Mr. Intindola indisputably made.

7. On or around April 24, 1995, Olivera was asked to resign her employment with the City to avoid being fired, which would be the consequence of her refusal. Faced with this choice, Olivera submitted a letter of resignation dated April 24, 1995. Thereafter, she received severance pay equal to two-months' salary.

8. Some time later, most likely during the first few weeks of March 1996, Olivera filed both a Charge Questionnaire and an Affidavit (collectively, the "Federal Forms") with the United States Equal Employment Opportunity Commission ("EEOC"). In the Federal Forms, Olivera alleged that the City had discriminated against her, primarily on the basis of her national origin.

9. The EEOC notified Olivera by letter dated March 22, 1996, that, because her charge had not been timely filed under Title VII of the Civil Rights Act of 1964, the commission had forwarded the Federal Forms to the FCHR.

10. On May 6, 1996, according to a date stamp on the face of the document, the FCHR received a Charge of Discrimination that appears to have been signed by Olivera on April 14, 1996. In this Charge of Discrimination, Olivera again alleged that the City had discriminated against her on the basis of national origin, in violation of her rights under the Florida Human Rights Act.

Ultimate Factual Determinations

11. The evidence in this record is not sufficient for the trier to ascertain whether, as a matter of objective historical fact, Olivera adequately performed on the job or not. Suffice it say that a preponderance of evidence fails to establish anything except that Olivera, on the one hand, and her supervisors, on the other, sincerely believed the opinions they expressed on this subject.

12. In other words, Olivera honestly believes that she performed competently and was discriminated against. Her supervisors at the City, in turn, honestly believe that Olivera did not measure up to the Office Manager's position and needed to be let go for that legitimate reason and no others.

13. The upshot of this inconclusiveness is that Olivera has failed to demonstrate, by a preponderance of evidence, that the City violated her civil rights. Olivera's conviction that she was the victim of unlawful discrimination, no matter how sincerely and firmly held, is not proof of the fact, at least not without more than the evidence in this record establishes.

14. By the same token, the evidence does not exactly exonerate the City, in the sense of proving that its hands were completely clean or that it acted honorably in respect of Olivera. Rather, more likely than not, Mr. Intindola did on occasion make offhand comments about Cubans at which some

persons could take offense. A preponderance of evidence fails to show, however, that he uttered these remarks with a discriminatory intent; that Olivera (or anyone else) suffered any material harm or humiliation as a result of hearing them; or that he did so with such frequency or in such fashion that his conduct could be called extreme.

15. In sum, while it is fair to infer, and the trier so finds, that Mr. Intindola was not always as sensitive to the feelings of others as, in hindsight, he probably should have been, there is nevertheless insufficient evidence to support a finding that he acted willfully or that Mr. Intindola's occasionally insensitive behavior was so consistently and frequently repeated as to become a condition of Olivera's employment with the City.

16. Likewise, the greater weight of evidence fails to establish that the environment in which Olivera worked was a hostile or abusive one. On this record the trier cannot say that, more likely than not, the workplace was permeated with discriminatory intimidation, insult, and ridicule. Further, the evidence does not establish that Olivera was treated differently than similarly situated employees who were neither Cuban-American, female, nor pregnant.

17. In the final analysis, then, considering the totality of the circumstances, the evidence presented at hearing

demonstrates no more than that the City terminated the employment of an at-will employee for performance-related reasons unrelated to her national origin, gender, or medical condition (pregnancy).

CONCLUSIONS OF LAW

18. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

Statute of Limitation

19. Under Section 760.11(1), Florida Statutes, any person aggrieved by an unlawful employment practice may file a complaint with the FCHR within 365 days after the alleged violation. Failure to do so bars the claim under state law. See Kourtis v. Eastern Airlines, 409 So. 2d 139, 140 (Fla. 4th DCA 1982). The statute directs, further, that "[o]n the same day [a] complaint is filed with the [FCHR], the [FCHR] shall clearly stamp on the face of the complaint the date the complaint was filed with the [FCHR]." See Section 760.11(1), Florida Statutes.[2]

20. Because the latest act of discrimination about which Olivera complains occurred on April 24, 1995, and because her Charge of Discrimination was received by the FCHR on May 6, 1996 — nearly two weeks after the 365-day period had run — there is a serious question whether Olivera's claim is time-barred.

21. The rule that governs complaints alleging violations of Sections 760.01 through 760.10, Florida Statutes, provides that a "complaint may be filed at the office of the [FCHR]. The date of filing shall be the date of actual receipt of the complaint by the Clerk or other agent of the [FCHR]." Rule 60Y-5.001(3), Florida Administrative Code (emphasis added). Thus, Olivera's complaint would have been timely brought if it were received by an agent of the FCHR on or before April 24, 1996.

22. The Federal Forms that Olivera filed with the EEOC before April 24, 1996, complied, in form and content, with the requirements prescribed in Rules 60Y-5.001(5) and 60Y-5.001(6), Florida Administrative Code, for complaints under the Florida Civil Rights Act. Therefore, if the EEOC were an agent of the FCHR for the purpose of receiving complaints brought by persons aggrieved by alleged employment discrimination — which is a question of fact[3] — then Olivera's claim would have been timely filed.[4]

23. At hearing, Olivera argued, as she had previously in opposition to a motion to dismiss, that under a work-sharing agreement between the EEOC and the FCHR, her filing a charge of discrimination with the EEOC constituted filing with the FCHR. Olivera did not attempt at hearing to introduce the work-sharing agreement in evidence, however, so its terms and conditions cannot be considered.[5] Further, Olivera failed to adduce any

other substantial competent evidence upon which a finding of agency might have been made. As a result, there is no factual foundation in this record to support a conclusion that Olivera's complaint was timely filed with the FCHR by virtue of the EEOC's having received the document within the 365-day limitation period.

24. As an additional consideration, the evidence shows that Olivera did not comply strictly with the rule announced in Desai v. Tire Kingdom, Inc., 944 F.Supp. 876 (M.D.Fla. 1996). In that case, the court held that a charge of discrimination filed with the EEOC will be deemed to have been simultaneously filed with the FCHR if the complainant indicates on the filing form that she wants her charge to be dually filed with the state agency. Id. at 880; see also Gillis v. Sports Authority, Inc., 123 F.Supp.2d 611, 615-616 (S.D.Fla. 2000), and 2000 WL 1772520 (S.D.Fla. July 7, 2000)(related subsequent order in Gillis); Dawkins v. Bellsouth Telecommunications, Inc., 53 F.Supp.2d 1356, 1359-60 (M.D.Fla. 1999), aff'd, 247 F.3d 245 (11th Cir. 2001).

25. Olivera did not initially manifest an intent, on the Federal Forms, that her charge be dual-filed with the FCHR. Despite that, however, the EEOC forwarded Olivera's Federal Forms to the FCHR and notified her of that fact by letter dated

March 22, 1996. Therefore, even though the EEOC apparently acted on its own initiative, Olivera did have reason to believe, before time ran out, that her complaint (i.e. the Federal Forms) had been or would be filed with the FCHR. Perhaps within the limitation period, in some manner, she objectively manifested an intent that this dual-filing be accomplished on her behalf.

26. While the undersigned might be inclined, if the legal slate were clean, to conclude that a complainant's demonstrable, timely intent to dual-file, rather than merely whether she initially checked a box on a form, should be determinative of whether the charge is deemed dually filed, a rigid rule to the contrary seeming to elevate form over substance, there appears presently to be no law supporting flexibility in this regard. Moreover, in any event, Olivera failed to establish at hearing either that, in March 1996, she affirmatively had expressed an intent that the EEOC file her Federal Forms with the FCHR, or that she had formed — and objectively manifested — this intent at any time prior to the expiration of the one-year limitation period.

27. Thus, Olivera's claim of discrimination against the City, being barred by the statute of limitation, must fail.

The Merits of Olivera's Claim

28. Additionally, and in the alternative, as set forth in the preceding Findings of Fact, the trier has determined as

matter of ultimate fact that Olivera failed to establish by a preponderance of evidence any form of actionable, unlawful discrimination. These factual findings, however, were necessarily informed by the administrative law judge's application of the law. An examination of the pertinent legal principles, therefore, will illuminate the dispositive findings of ultimate fact.

29. It is unlawful for an employer to discharge or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment, based on the employee's race, gender, or national origin. Section 760.10(1)(a), Florida Statutes.

30. Federal discrimination law may properly be used for guidance in evaluating the merits of claims arising under Section 760.10, Florida Statutes. See Brand v. Florida Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994); Florida Dept. of Community Affairs v. Bryant, 586 So. 2d 1205, 1209 (Fla. 1st DCA 1991).

31. In McDonnell Douglas Corp. v. Green, 4ll U.S. 792, 802-03 (1973), the Supreme Court of the United States articulated a burden of proof scheme for cases involving allegations of discrimination under Title VII. That decision is persuasive in this case, as is St. Mary's Honor Center v. Hicks,

509 U.S. 502, 506-07 (1993), in which the Court reiterated and refined the McDonnell Douglas analysis.

32. Pursuant to this analysis, the plaintiff (Petitioner here) has the initial burden of establishing by a preponderance of the evidence a prima facie case of unlawful discrimination. If the plaintiff succeeds in making a prima facie case, then the burden shifts to the defendant (Respondent here) to articulate some legitimate, non-discriminatory reason for its complained-of conduct. If the defendant carries this burden of rebutting the plaintiff's prima facie case, then the plaintiff must demonstrate that the proffered reason was not the true reason but merely a pretext for discrimination. McDonnell Douglas, 411 U.S. at 802-03; Hicks, 509 U.S. at 506-07.

33. In Hicks, the Court stressed that even if the trier of fact were to reject as incredible the reason put forward by the defendant in justification for its actions, the burden nevertheless would remain with the plaintiff to prove the ultimate question whether the defendant intentionally had discriminated against her. Hicks, 509 U.S. at 511. "It is not enough, in other words, to dis believe the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination." Id. at 519.

34. In this case, Olivera failed to establish a prima facie case of unlawful, intentional discrimination.

35. Olivera's claims that she was subjected to a hostile work environment, was constructively discharged, and suffered from disparate treatment are also not supported by either the evidence or the law.

36. A discriminatorily hostile work environment occurs when the workplace is permeated with discriminatory intimidation, ridicule, and insult that are sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment. Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993).

37. The civil rights laws are not intended to serve as a general civility code. Therefore, simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not satisfy the requirement that the alleged harassment, as judged from the perspective of a reasonable person in the plaintiff's position and taking account of all the circumstances, be severe or pervasive to be actionable. Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 80-81 (1998). To be actionable, in short, the conduct complained of must be "extreme." Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998); see also Clark County School District v. Breeden, ___ U.S. ___, 121 S.Ct. 1508, 1510 (2001).

38. Olivera simply failed to prove any conduct that was so severe or pervasive as to create a hostile work environment.

39. To succeed on a claim of constructive discharge, the employee must establish that her working conditions were so intolerable that a reasonable person in the same position would be compelled to resign. Kilgore v. Thompson & Brock Management, Inc., 93 F.3d 752, 754 (11th Cir. 1996).

40. Where, as here, a plaintiff has failed to show the severe or pervasive conduct necessary to support a hostile work environment claim, it follows necessarily that her proof falls short of the higher mark for constructive discharge. Brooks v. City of San Mateo, 229 F.3d 917, 930 (9th Cir. 2000). Because Olivera failed to establish that she was subjected to a hostile work environment, her claim that she was constructively discharged also must fail.

41. Finally, Olivera offered no persuasive evidence, either direct or circumstantial, sufficient to demonstrate that the City had a discriminatory intent, thereby dooming her disparate treatment claim. See Denney v. The City of Albany, 247 F.3d 1172, 1182 (11th Cir. 2001).

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the FCHR enter a final order dismissing Olivera's Petition for Relief.

DONE AND ENTERED this 12th day of June, 2001, in Tallahassee, Leon County, Florida.

JOHN G. VAN LANINGHAM
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of June, 2001.

ENDNOTES

[1]/ The Administrative Law Judge had some difficulty matching up the documents that Olivera submitted, which were not marked with identifying numbers prior to being tendered to the undersigned, with the descriptions set forth in Petitioner's Exhibit List. As well, some documents appeared to be missing from the set of Petitioner's Exhibits supplied at the time of hearing. Consequently, the Administrative Law Judge convened a post-hearing telephone conference on June 6, 2001, to notify the parties of these problems. Following that conference call, pursuant to the undersigned's instructions, Olivera submitted several documents (Petitioner's Exhibits 6, 8, 13, and 14) which have been admitted in evidence and considered by the fact-finder. She also withdrew two other exhibits (Petitioner's Exhibits 18 and 19) and informed the undersigned that Petitioner's Exhibits 3 and 7 do not exist as described in Petitioner's Exhibit List.

[2]/ While the requirement that complaints be contemporaneously date-stamped clearly is intended to facilitate the resolution of disputes over timeliness, the statute pointedly does not provide that the FCHR's date stamp conclusively establishes the filing date.

[3]/ The existence of an agency relationship is generally a question of fact to be determined by the trier of fact. See Noel v. North Broward Hospital District, 664 So. 2d 989, 991 (Fla. 4th DCA 1995).

[4]/ The City urged that the decision of the United States District Court in Weaver v. Florida Power & Light, 1996 WL 479117 (S.D.Fla. July 16, 1996), aff'd without op., 124 F.3d 221 (11th Cir. 1997), be followed. That case is factually analogous on the statute of limitation issue but ultimately is unpersuasive because the court failed to account for Rule 60Y-5.001(3), Florida Administrative Code. Instead, in finding that the plaintiff there had failed to exhaust her administrative remedies because she had not timely filed a complaint with the FCHR, the court relied heavily on Rule 60Y-4.004(1), which provides that "'[f]iling' or 'file' with the [FCHR], means actual receipt of a document by the Clerk of the Commission at its office. . . ." Rule 60Y-4.004(1) supported the court's conclusion, but it expressly does not apply to complaints filed pursuant to Section 760.11(1), Florida Statutes. See Rule 60Y-4.001(2), Florida Administrative Code ("This chapter [i.e. Chapter 60Y-4] shall not apply to Complaints. . . .").

Further, in granting the defendant's motion for summary judgment, the court in Weaver found that even if the plaintiff's administrative complaint had been timely filed with the FCHR, summary judgment still would lie because she had failed to show the existence of a genuine fact dispute concerning each element of her state-law sex discrimination claim. Id. at *12-*13. Thus, the Eleventh Circuit's affirmance, without published opinion, does not necessarily constitute approval of the trial court's decision that the plaintiff's administrative complaint was untimely.

[5]/ Olivera attached to her late-filed Proposed Recommended Order a document that purports to be the Worksharing Agreement between the FCHR and the EEOC for fiscal year 1996. At a post-hearing telephone conference on June 6, 2001, see note 1, supra, Olivera suggested that the Administrative Law Judge could take official recognition of the purported contract between the FCHR and the EEOC. Olivera's request, however, was neither timely nor properly made, see 120.569(2)(i), Florida Statutes, and in any event the request is declined because the agreement is not an appropriate subject of official recognition. Accordingly, being outside the evidentiary record, this instrument cannot be the basis of any findings of fact.

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.