STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

KATRINA SHANNON,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 01-2079
	)	
THE BOWLES GROUP, INC.,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on August 23, 2001, in Pensacola, Florida, before the Division of Administrative Hearings, by its designated Administrative Law Judge, Diane Cleavinger.

APPEARANCES

For Petitioner: Katrina Shannon, pro se
2805 East Strong Street
Pensacola, Florida 32503

For Respondent: Deborah E. Frimmel, Esquire
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STATEMENT OF THE ISSUES

The issues to be resolved in this proceeding are whether Respondent was the employer of Petitioner and whether Petitioner was terminated from her employment with Respondent because of her race.

PRELIMINARY STATEMENT

On September 15, 2000, Petitioner, Katrina Shannon, filed a Charge of Discrimination with the Florida Commission on Human Relations (FCHR). The Charge of Discrimination alleged that Workforce 2000 had terminated Petitioner based on her race. At some point after the filing of the Charge of Discrimination, the Respondent, the Bowles Group, Inc., was substituted for Workforce 2000. It is unclear how this substitution occurred. However, based on the representation of counsel, Workforce 2000 and the Bowles Group are the same entity and the Bowles Group is the legal name for the party to this action.

On February 23, 2001, Petitioner advised FCHR that more than 180 days had elapsed since she filed her Charge of Discrimination, during which time FCHR had not completed its investigation or entered a Notice of Determination in her case. Petitioner further advised FCHR that she wished to withdraw her Charge of Discrimination and file a Petition for Relief to proceed with an administrative hearing in accordance with Section 760.11(4)(b)8., Florida Statutes. Petitioner's request was forwarded to the Division of Administrative Hearings.

At the hearing, Petitioner testified in her own behalf, presented the testimony of two other witnesses and introduced one exhibit. Respondent presented the testimony of three witness and offered seven exhibits into evidence.

After the hearing, Respondent filed a Proposed Recommended Order on October 5, 2001. Petitioner did not file a proposed recommended order.

FINDINGS OF FACT

1. Petitioner is an African-American female.

2. In September 1996, Petitioner began her employment with Herndon Oil as a convenience store cashier. Workforce 2000, also known as the Bowles Group, Inc., is a professional employer organization that provides administrative services to business owners including payroll processing, filing and paying taxes, group benefits administration, and assistance with regulatory compliance. Herndon Oil utilized Workforce 2000 to provide these administrative services. At no time did the Bowles Group make any employment decisions on behalf of Herndon Oil. Likewise, at no time did the Bowles Group employ Petitioner. In fact, Herndon Oil made all decisions with regard to Petitioner's employment and was the actual employer of Petitioner.

3. Herndon Oil operates 68 convenience store locations and 12 fast food locations.

4. Pate Weems has been the President of Herndon Oil for the past six years.

5. Bruce Graham was the District Supervisor responsible for operation of several Herndon Oil convenience store locations in the Pensacola, Florida, area.

6. In September 1996, Petitioner was hired to work as a part-time cashier at the Herndon Oil convenience store location on Pensacola Boulevard in Pensacola, Florida.

7. Petitioner was hired by location manager, John Malette.

8. In 1996, during the first week of her employment, Petitioner overheard an employee from another location make a derogatory racial comment. The employee who made the comment had no authority over her.

9. Petitioner did not complain about the employee's comment and admitted the comment had nothing to do with her claims in this case.

10. In January 1998, Petitioner was promoted to the position of assistant manager.

11. Petitioner's promotion to the position of assistant manager was approved by Pate Weems.

12. In March 1999, a location manager position became available at Herndon Oil's Pensacola Boulevard location.

13. Petitioner never requested a promotion to the position of location manager. However, it was known by the district supervisor that Petitioner was interested in the position. In any event, Petitioner and Belinda K. Ortiz, a white employee, were considered for the position of location manager in March 1999.

14. Ms. Ortiz was chosen for the promotion to location manager at the Pensacola Boulevard store. Ms. Ortiz was chosen because she had prior experience as a manager and had good skills to get along with employees, customers, and vendors. Such communication and interaction skills are a legitimate and reasonable basis on which to make an employment decision. The evidence did not show that Ms. Ortiz was less qualified than Petitioner for the position of location manager.

15. Bruce Graham made the decision to promote Ms. Ortiz. Pate Weems relied on Mr. Graham's judgment with regard to that decision and approved the Ortiz promotion. Petitioner admitted that Bruce Graham did not discriminate against her based on her race.

16. Petitioner did not receive the promotion in March 1999 because she needed to improve her communication skills and interaction with employees, customers, and vendors. At the time, Herndon Oil wanted Petitioner, who has a very serious and reserved demeanor, to project a friendlier demeanor towards customers and vendors, in particular. Petitioner was told by the district supervisor that if she improved her communication skills and interaction, she would be promoted to a location manager position when the next position became available.

17. Petitioner transferred to the Herndon Oil convenience store located at Mobile Highway in Pensacola, Florida, in March 1999.

18. In June 1999, Petitioner was promoted to the position of location manager at the Mobile Highway convenience store.

19. With input from the district supervisor, Pate Weems approved the decision to promote Petitioner to the location manager position.

20. As a location manager, Petitioner was required to control inventory at her convenience store location. It is the manager's ultimate responsibility to track such inventory. To accomplish inventory control, Herndon Oil requires amounts received to roughly balance with amounts on-hand and amounts sold. To track the inventory, daily counts of cigarettes and weekly counts of beer and fast food should be done by the location manager. Inventory shortages in general groceries are not as controllable by inventory counts. Daily and weekly inventory counts are required to be done by the location manager for any shortage or overage of $200.00 or more in an inventory category. These counts are essential to the location managers' tracking and correcting inventory control problems.

21. Excessive inventory shortages in cigarettes, beer, and fast food indicates that the location manager is not doing the required inventory counts.

22. Sometime after her promotion, Petitioner went on maternity leave. Petitioner returned from maternity leave in December 1999 and continued as location manager at the Mobile Highway location.

23. In January 2000, Petitioner's location was $1,631.00 short in inventory.

24. Bruce Graham spoke with Petitioner regarding this shortage and asked her to do her daily and weekly counts as required.

25. Petitioner did not do her daily and weekly inventory counts as requested.

26. In February 2000, Petitioner's location was $1,758.00 short in inventory.

27. Bruce Graham told the Petitioner once again to do her daily and weekly inventory counts and that future inventory shortages could result in termination of her employment.

28. Petitioner admitted she did not do her daily and weekly counts as requested in February 2000.

29. In March 2000, Petitioner's location was $760.00 over in inventory.

30. Petitioner admitted she did not do her daily and weekly inventory counts in March 2000.

31. The inventory overage at Petitioner's location in March 2000 indicated manipulation of the inventory figures.

Manipulation of inventory figures could include withholding invoices to create the appearance of a more favorable inventory and often occurs at the end of the quarter when bonus calculations for the location managers are completed. March 2000 was the end of the quarter for purposes of calculating location manager bonuses.

32. Petitioner denies that she ever withheld any invoices in order to manipulate inventory. However, Genoa Brown, a cashier who worked in Petitioner's location, testified that Petitioner withheld two beer invoices during an inventory audit at her location. Ms. Brown did not testify when the invoices were withheld. Ms. Brown's testimony is more credible on this point.

33. In April 2000, Petitioner's location was $4,984.00 short in inventory.

34. Bruce Graham allowed Petitioner one week to go through her invoices and recalculate the inventory to determine whether a mistake had been made.

35. Petitioner found minor errors in the inventory results for April 2000. However, even with correction of the minor errors, the April shortage still exceeded $4,900.00.

36. As a result of Petitioner's failure to control inventory at her location and perform her weekly and daily

inventory counts, her employment was terminated on April 14, 2000.

37. With input from Bruce Graham, Pate Weems made the decision to terminate Petitioner's employment.

38. Petitioner believes Pate Weems discriminated against her based on her race because other Caucasian employees were not terminated for inventory shortages.

39. Petitioner claims that Frances Rush, Ronnie Winslow and Elsie Miller are the Caucasian employees who had similar or greater inventory shortages and were not terminated.

40. Petitioner testified she had no documentary evidence that any of the subjects for comparison had inventory shortages similar to hers. Petitioner admitted she has no personal knowledge of the specific amounts of the inventory shortages of Ronnie Winslow or Elsie Miller. Petitioner's witness, John Mallette, admitted he had no personal knowledge of the specific amounts of the inventory shortages of any of the alleged subjects of comparison. He believed the shortages were large and, in some instances, as large or larger than Petitioner's shortages. Such belief is insufficient evidence on which to base a finding of similarity or lack of similarity.

41. Frances Rush was a location manager at the Pensacola Boulevard location from June 1999 until November 2000.

42. Bruce Graham was Ms. Rush's immediate supervisor.

43. Ms. Rush was terminated in November 2000 because of inventory shortages in groceries at her store location.

44. Ms. Rush's inventory shortages were less egregious than Petitioner's because her shortages were in groceries and grocery shortages are not as controllable by inventory count. Additionally, Ms. Rush did her daily and weekly counts as required. Moreover, Ms. Rush never had an inventory shortage as high as the inventory shortage that resulted in Petitioner's termination.

45. Ronnie Winslow was a location manager who was going to be terminated for failure to control inventory.

46. There was no evidence showing Mr. Winslow's inventory control problems were similar to Petitioner's.

47. Mr. Winslow requested and was permitted to remain with the company as a part-time cashier.

48. Petitioner never requested to remain with the company in a lesser position at the time of her termination. Had Petitioner so requested, Pate Weems would have allowed Petitioner to remain with the company in a lesser position.

49. Elsie Miller was a location manager who voluntarily resigned in 1997.

50. An Employee Behavioral Notice issued to Ms. Miller, and the only substantive evidence introduced on this point, provides that her inventory shortages, for which she was

disciplined, ranged between approximately $350.00 to $1,500.00 Ms. Miller never had inventory shortages in the range of the shortages that resulted in Petitioner's termination.

51. Petitioner admitted she has no personal knowledge of the amounts of Ms. Miller's inventory shortages.

52. In July 1997, Ms. Miller was going to be terminated for failure to control inventory. At Ms. Miller's request, she was permitted to resign instead.

53. Petitioner never asked to resign instead of being terminated. Had she so requested, Pate Weems would have permitted Petitioner to resign instead of being terminated.

54. None of the above subjects of comparison cited by Petitioner were comparable to Petitioner's situation. All either were or were going to be terminated for inventory shortages. In fact, eight out of nine Herndon Oil managers terminated in the past two years as a result of inventory shortages were Caucasian.

55. There was no substantive evidence that Petitioner was terminated because of her race. The clear evidence showed that Petitioner's termination resulted from her failure to control inventory and do her inventory counts. Therefore, the Petition for Relief should be dismissed.

CONCLUSIONS OF LAW

56. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. Section 120.57(1), Florida Statutes.

57. Under the provisions of Section 760.10, Florida Statutes, it is an unlawful employment practice for an employer:

> (1)(a) To discharge 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.

58. The Florida Civil Rights Act of 1992, Section 760.11, Florida Statutes, provides that a charge of discrimination must be filed within 365 days of the alleged violation, "naming the employer, employment agency, labor organization, or joint labor-management committee responsible for the violation." (emphasis supplied)

59. FCHR and the Florida courts have determined that federal discrimination law should be used as guidance when construing provisions of Section 760.10, Florida Statutes. See Brand v. Florida Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994); Florida Department of Community Affairs v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991); Cooper v. Lakeland Regional Medical Center, 16 FALR 567 (FCHR 1993).

60. The Supreme Court of the United States established in McDonnell-Douglas Corporation v. Green, 411 U.S. 792 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), the analysis to be used in cases alleging discrimination under Title VII such as the one at bar. This analysis was reiterated and refined in St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

61. Pursuant to this analysis, Petitioner has the burden of establishing by a preponderance of the evidence a prima facie case of unlawful discrimination. If a prima facie case is established, Respondent must articulate some legitimate, non-discriminatory reason for its employment action. If the employer articulates such a reason, the burden of proof then shifts back to Petitioner to demonstrate that the offered reason is merely a pretext for discrimination. As the Supreme Court stated in Hicks, before finding discrimination, "[t]he fact finder must believe the Plaintiff's explanation of intentional discrimination." 509 U.S. at 519.

62. In Hicks, the Court stressed that even if the fact finder does not believe the proffered reason given by the employer, the burden at all times remains with Petitioner to demonstrate intentional discrimination. Id.

63. In order to establish a prima facie case, Petitioner must establish that:

(a) She is a member of a protected group;
(b) She is qualified for the position;
(c) She was subject to an adverse employment decision;
(d) She was treated less favorably than similarly-situated persons outside the protected class; and
(e) There is a causal connection between (a) and (c).

Canino v. EEOC, 707 F.2d 468, 32 FEP Cases 139 (11th Cir. 1983); Smith v. Georgia, 684 F.2d 729, 29 FEP Cases 1134 (11th Cir. 1982); Lee v. Russell County Board of Education, 684 F.2d 769, 29 FEP Cases 1508 (11th Cir. 1982), appeal after remand, 744 F.2d 768, 36 FEP Cases 22 (11th Cir. 1984).

64. If Petitioner fails to establish a prima facie case of race discrimination, judgment must be entered in favor of Respondent. Bell v. Desoto Memorial Hospital, Inc., 842 F.Supp. 494 (M.D. Fla. 1994).

65. As indicated earlier, if a prima facie case is established, a presumption of discrimination arises and the burden shifts to Respondent to advance a legitimate, non-discriminatory reason for the action taken against Petitioner. However, Respondent does not have the ultimate burden of persuasion but merely an intermediate burden of production. Once this non-discriminatory reason is offered by Respondent, the burden shifts back to Petitioner. Petitioner must then demonstrate that the offered reason was merely a pretext for discrimination.

66. In the instant case, Petitioner alleges that she was terminated because of racial discrimination. Thus, Petitioner must prove, by a preponderance of the evidence, that Respondent acted with discriminatory intent. Case law recognizes two ways in which Petitioner can establish intentional discrimination. First, discriminatory intent can be established through the presentation of direct evidence. See Early v. Champion International Corporation, 907 F.2d 1081 (11th Cir. 1990). Second, in the absence of direct evidence of discriminatory intent, intentional discrimination can be proven through the introduction of circumstantial evidence.

67. In this case, Petitioner's race is African-American and as such, she belongs to a protected class. Petitioner was terminated from her job with Herndon Oil. The termination constitutes an adverse employment action. However, the evidence did not show that Petitioner was terminated because of her race. Petitioner did not establish that similarly situated non-minority employees were treated more favorably.

68. The burden is on Petitioner and not on Respondent to introduce admissible evidence that her conduct was similar in nature to other employees outside her protected classification and that the other employees were treated more favorably. Jones v. Gerwens, 874 F.2d 1534, 1541 (11th Cir. 1989). In order to establish that employees are similarly situated,

Petitioner must show she and comparable employees are similarly situated in all respects, including dealing with the same supervisor, having been subject to the same standards and that Petitioner engaged in approximately the same conduct as the other employees. See Gray v. Russell Corporation, 681 So. 2d 310, 312, 313 (Fla. 1st DCA 1996); Jones 137 F.3d at 1311-13.

69. Petitioner alleges that three other employees were similarly situated and not terminated for excessive inventory shortages. However, the evidence presented at hearing does not show that these employees were similarly situated. Therefore, Petitioner has not established a prima facie case of race discrimination.

70. Indeed, the evidence adduced during the hearing established that Caucasian managers with inventory control problems similar to Petitioner's were also terminated. In fact, out of the nine managers terminated for inventory control problems for the relevant time period, eight were Caucasian.

71. Moreover, even if Petitioner provided sufficient proof to establish a prima facie case of race discrimination, Respondent articulated a credible, non-discriminatory basis for Petitioner's termination.

72. Finally, in this case, the evidence was clear that the Bowles Group, Inc., did not employ Petitioner. Herndon Oil was the employer responsible for any employment decision regarding

Petitioner. Therefore, since the Respondent is not the employer responsible for Petitioner's termination, the Petition for Relief should be dismissed.

RECOMMENDATION

Based upon the 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.

DONE AND ENTERED this 25th day of October, 2001, in Tallahassee, Leon County, Florida.

DIANE CLEAVINGER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of October, 2001.

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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.