STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

THOMAS E. HALL,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 01-2693
	)	
MEX OF SANTA ROSA, INC.,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to notice, this cause came on for formal hearing before P. Michael Ruff, duly-designated Administrative Law Judge of the Division of Administrative Hearings, on September 27, 2001, in Milton, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Bruce Committe, Esquire
17 South Palafox Place, Suite 322
Pensacola, Florida 32501

For Respondent: Jennifer Byrom, Esquire
Post Office Box 685
Milton, Florida 32572

STATEMENT OF THE ISSUES

The Petitioner has alleged, in essence, that he has been discriminated against because of his race by a racially hostile work environment during his employment with the Respondent and by direct discrimination by being denied employment advancement and by being given more and broader job duties, with no

additional compensation, as compared to less experienced co-workers of other races. Specifically the Petitioner contends a racially hostile work environment caused his constructive termination; that he completed training books which should have advanced him to a higher position; and that less experienced white workers were advanced ahead of him.

PRELIMINARY STATEMENT

The Petitioner filed his charge of discrimination for racial reasons on December 3, 1996. Ultimately a Determination of No Cause was entered by the Florida Commission on Human Relations (Commission) on June 4, 2001. The Petitioner filed his Petition for Relief on July 3, 2001, raising the above-referenced issues.

The cause ultimately was assigned to the Administrative Law Judge and came on for hearing as noticed. The Petitioner presented four witnesses, Thomas Hall, Willie D. Smith, Tonya Mullins and Lori Wilson. Five witnesses were presented by the Respondent: Eileen McRae, John Bond, Dawn Young, Jennifer Day and Dave Carpenter. No exhibits were offered into evidence.

Upon conclusion of the hearing the parties elected to order a transcript of the proceedings and accepted the opportunity to file Proposed Recommended Orders. The Proposed Recommended Orders were timely filed and have been considered in the rendition of this Recommended Order.

FINDINGS OF FACT

1. The Petitioner Thomas Hall, was hired as a crew member by the Respondent Mex of Santa Rosa d/b/a as Taco Bell on March 9, 1996. He began working at a Taco Bell restaurant owned by the Respondent in Milton, Florida. The Petitioner maintains that while he worked at the Taco Bell restaurant he was subjected to racially negative comments concerning his relationship with a white woman, his fiancé, and regarding the fact that they were about to have a child together. He maintained that the racially derogatory comments were made by the General Manager, Dawn Young and the Assistant Manager Eileen McRae. Dawn Young is White. Eileen McRae is Black. The Petitioner maintains that the racially negative comments were so frequent, so hostile and hurtful that he suffered by being employed in a racially hostile environment because of these actions by his superiors in management. He maintains, in effect, that it caused his constructive discharge because he could no longer tolerate the racially derogatory comments concerning him, his fiancé and his family.

2. The Petitioner left his employment after giving two weeks notice on May 29, 1996. Thus, he worked approximately two months and twenty days.

3. The Petitioner maintains that he attempted to complete several employee workbooks and the tests on those workbooks,

which were designed to help employees earn promotions. He maintains that he got no help completing the workbooks while White employees did get help from management in completing the workbooks. He maintains that White employees were promoted sooner than he or Black employees and within their 90-day probation period. He also contends he was given extra job duties which were beyond his job description and for which he was given no extra compensation.

4. The Petitioner's child was born on June 2, 1996, immediately after his leaving employment. The Petitioner had given a two-week notice on May 29, 1996, but the General Manager, Dawn Young, told him that it would not be required that he work out the remainder of his two-week notice, so he quit on May 29, 1996. He left his employment after he had been to a job interview during his employment, on a day when he reported that he was sick as the reason for his absence from his employment. That interview resulted in his getting a job at the "convalescent center" at a higher rate of pay, which was his reason for leaving of his employment at Taco Bell.

5. The Respondent had a consistent policy of requiring all employees to complete a 90-day probationary period when first hired. This policy was applied to all new employees regardless of race and no person of any race hired after the Petitioner was promoted or advanced ahead of the Petitioner. In fact, Josh

Bond, the example that the Petitioner used in his testimony of a White employee, who had allegedly been promoted ahead of him and sooner than he was, did not actually get any promotion (to crew leader) until he had worked for the Respondent for one and one-half years. Josh Bond had to complete several training manuals and request a promotion, which he did not receive initially. Later, he was promoted to shift manager after he had worked for Taco Bell for almost four years. He was employed on January 2, 1996, and thus had worked at Taco Bell about two months before the Petitioner was employed.

6. No employee ever got raises until after the 90-day probationary period elapsed and then an employee would get a standard raise, ten-cents per hour. Later it was fifteen-cents per hour.

7. The Petitioner, Mr. Hall, worked on Josh Bond's shift but never told Bond of any problems involving racial discrimination or criticism of his inter-racial relationship.

8. Mr. Bond established that an employee's promotion speed depended on his work habits and the quality of his performance including the completion of the training manuals or workbooks. Even so, no employee got a promotion merely by completing the training manuals and serving a 90-day probationary period. It depended on the employee's performance, as well as completing the training manuals. Mr. Bond also established that the part-

owner of the store, Mr. Carpenter, was at the store one or two hours every day, that he was open to employees talking with him and employees were encouraged to bring their problems to him.

9. Dawn Young worked for Taco Bell for four or five years. She is the daughter of Mr. Carpenter, part-owner of the Respondent corporation at times pertinent hereto. Dawn Young started working as a crew member, received training and did shift work at first. She became a general manager after working for Taco Bell for three years. Shalinda McRae, who is Black, was the Manager who trained Dawn Young as did Shalinda's sister Eileen McRae. When Dawn Young was made Manager of the Milton, Florida store, involved in this case, Eileen McRae was first offered the job as General Manager. She turned it down for family-related reasons. Shalinda McRae, was given the job of General Manager of the Taco Bell store in Pace, Florida, nearby. Dawn Young and Eileen McRae interviewed the Petitioner and decided to hire him when he first came to work. During his tenure, however, they had problems with his being absent from work and not wearing his uniform properly. The testimony of Dawn Young and Eileen McRae establishes that the Petitioner never completed his training manuals; nor did he complete the required 90-day probationary period.

10. Rather, the Petitioner voluntarily left employment to take a job at the local convalescent center, which could pay him

more money than the Respondent could. He never indicated to anyone in management nor to co-worker Bond that he had any racial or other issue upon which he disagreed with the Respondent's management. Neither Dawn Young or Eileen McRae ever heard the Petitioner make any racially-related complaints. The company and that store had a consistent racial and sexual harassment policy which requires that they conduct weekly meetings to discuss such matters and to advise employees of how to avoid them. Racial discrimination was not tolerated at any of the Taco Bell stores owned by the Respondent, including the one where the Petitioner worked. In fact, Mr. Carpenter once fired an employee summarily, on the first offense, for purportedly making a racially derogatory joke.

11. Eileen McRae has worked for Taco Bell for 10 years, seven years as an Assistant Manager or Manager. The Petitioner worked on her shift. She and her sister Shalinda, now the Manager of another store, helped to train the Petitioner. Eileen McRae, like Dawn Young, never heard the Petitioner complain of any racial statements and never heard any racially derogatory comments made concerning who the Petitioner, or any other person, was in a personal relationship with. The Petitioner never complained to her or other supervisors of any racial issues in either a verbal or written complaint. She has never heard anyone, Dawn Young included, speak in a negative way

concerning the Petitioner being involved with a woman of another race or any woman working for the company being involved with a man of another race, nor make disparaging comments concerning the race of any child of such a couple, including the child of the Petitioner.

12. Eileen McRae established that all Black employees are treated with respect at the Taco Bell store and by the Respondent corporation. Ms. McRae knows of no instance concerning any staff member where an issue was raised or derogatory statements made concerning inter-racial dating, inter-racial marriage or people having children of mixed race, during the course of her employment for the Respondent corporation. Eileen McRae's daughter dates a person of another race herself and Eileen McRae testified that as far as she is concerned it is a matter of "to each his own."

13. The testimony of both Josh Bond and Dave Carpenter, the part-owner of the store and the Respondent corporation, established that all employees are required to train in each phase of the employment at a Taco Bell store. This was what the Petitioner was doing during the course of his duties there. He was not merely given extra duties for which he was not compensated; all employees, of all races, have to learn to perform every job at the Taco Bell store, as part of their training preparatory to the possibility of being promoted. In

fact, the 90-day probationary period was considered a 90-day training period in which new crew members would learn every job in the store.

14. Dave Carpenter, the part-owner of the Respondent corporation and the ultimate supervisor of the subject Taco Bell store, is a retired Master Chief in the U.S. Navy. Much of his naval duties involved working in the personnel branch. He thus has extensive experience teaching training courses in race relations. Using this experience, he developed a policy, as a corporate officer of the Respondent, of tolerating no form of racial discrimination at any of the Respondent's stores. He and the corporation had frequent training sessions in racial relations, on almost a weekly basis. He has had no reports from employees, his managers, or through his own observation, of any problem involving racial discrimination or racially-related derogatory comments as alleged, or of any other nature, at the subject Taco Bell store during the Petitioner's tenure there or before or after.

15. In summary, it is not found that any employees of any race were promoted who were less entitled to it than the Petitioner, in terms of tenure, training or performance. It is determined that the Petitioner was not required to do extra duties for which he was not compensated, since all employees were required to be trained and therefore work in all functions

required of any employee at the Taco Bell store. It is also found that the Petitioner was not eligible for promotion because he had not finished his 90-day probationary period and did not finish the training manuals and testing required to be completed.

16. Moreover, it is found that preponderant evidence has not been presented that the purported racially derogatory statements were made concerning the Petitioner his fiancé and their child, or concerning Lori Wilson, who testified for the Petitioner, about her inter-racial relationship and her mixed-race child (Wilson is White).

17. Both the Petitioner and Wilson have litigation pending against the Respondent corporation and it is deemed that their testimony may be colored by that adversarial relationship. The witnesses and testimony presented by the Respondent (Eileen McRae, Dawn Young, Josh Bond and Jennifer Day in particular) are deemed more creditable.

CONCLUSIONS OF LAW

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

19. It is unlawful to discriminate against an employee on the basis of the race of that employee's spouse or fiancé.

Vuyanich v. Republic Nat. Bank, 409 F.Supp. 1083, (1976 DC Tex); Faraca v. Clements, 506 F.2d 956 (CA 5 1975).

20. When an employer causes an employee's working conditions to be so difficult or unpleasant that a reasonable person would feel compelled to resign, in other words when working conditions are objectively intolerable because of aggravating factors, an employee who quits is considered to have been constructively discharged and would be treated as if he were fired. Young v. Southwestern Sav. & Loan Asso., 509 F.2d 140 (CA 5 1975). In order to make a case of unlawful constructive discharge a plaintiff in a job discrimination case must show by a preponderance of the evidence that he or she was forced to quit as a result of intolerable working conditions imposed by the employer, which were motivated by racial or other unlawful bias. Saltzman v. Fullerton Metals Co., 661 F. 2d 647 (CA 7 1981).

21. The general rule is that if the employer deliberately makes an employee's working conditions so intolerable that the employee is forced into involuntary resignation the employer has constructively discharged the employee. To demonstrate constructive discharge, a plaintiff must prove two elements (1) Deliberateness of the employer's actions and (2) intolerability of the working conditions. See Martin v. Cavalier Hotel Corp., 48 F.3d 1343 (CA 4 1995).

22. Race discrimination laws prohibit racial harassment in the form of an employer's failure to maintain a working atmosphere free of unlawful racial or other unlawful discrimination, which is commonly referred to as a "hostile work environment." Two types of harassment are unlawful: (1) Situations in which tangible job benefits are granted or withheld based on submissions to or rejection of unwelcomed requests or conduct, based on a statutorily protected characteristic, such as sex. Tompkins v. Public Serv. Elec. & Gas. Co., 568 F.2d 1044 (CA 3 1977), and (2) Situations in which the working environment is oppressive to members of a protected group because of the actions of co-workers, supervisors or customers, Meritor Sav. Bank. FSB v. Vinson, 477 U.S. 57 (1986).

23. The overwhelming weight of the credible, preponderant evidence shows that there was no hostile work environment at the Respondent's facility where the Petitioner was employed during times pertinent hereto. There were no actions or racially derogatory statements of co-workers or supervisors (or customers) which combined to make a racially oppressive, hostile working environment. There is no evidence of constructive discharge in the manner delineated by the court opinions referenced and discussed above. There is no deliberate action on the part of this employer designed to cause the employee to quit his employment nor were there conditions imposed, including

that of a racially hostile environment, which could be said to have resulted in intolerable working conditions. Moreover, the preponderant evidence of record indicates that it is obvious that the employee, the Petitioner, simply left his employment because he found a better paying job.

24. There is no preponderant, credible evidence to show that the Petitioner was required to do any additional job duties beyond his job description for which he was not compensated. All employees are supposed to learn each function of the Taco Bell store as part of their training. No employees of any race were promoted or given raises ahead of the Petitioner who had been there the same or less time than the Petitioner, or who had performed in a way inferior to the Petitioner. The Petitioner had not completed his training manuals and related testing and had not completed his 90-day probationary period; therefore, he had not even reached the minimum level at which he could be considered for a promotion or a raise. Typically, no employee of any race ever got a promotion as soon as he completed his or her 90-day probationary period in any event. In summary, the witnesses presented by the Respondent were simply more candid and credible and their testimony is accepted over that adduced by the Petitioner. It is determined that the alleged incidents and claim of discrimination in the work place alleged by the Petitioner simply did not occur.

Accordingly, it is, therefore,

RECOMMENDED that a final order be entered by the Florida Commission on Human Relations dismissing the Petition in its entirety.

DONE AND ENTERED this 11th day of February, 2002, in Tallahassee, Leon County, Florida.

P. MICHAEL RUFF
Administrative Law Judge
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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.