STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DONNA CONWAY,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 01-3384
	)	
VACATION BREAK,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

A formal hearing was conducted in this case on November 5, 2001, in Tallahassee, Florida, before the Division of Administrative Hearings by its designated Administrative Law Judge, Suzanne F. Hood.

APPEARANCES

For Petitioner: Donna Conway, pro se
3156 Mount Zion Road, No. 606
Stockbridge, Georgia 30281

For Respondent: No Appearance

STATEMENT OF THE ISSUE

The issue is whether Respondent committed an unlawful employment act against Petitioner pursuant to Chapter 70 of the Pinellas County Code, as amended, and Title VII of the U.S. Civil Rights Act of 1964, as amended.

PRELIMINARY STATEMENT

On February 9, 1998, Petitioner Donna Conway (Petitioner) filed a Charge of Discrimination (Charge) with the Community Affairs Department, Human Relations Division, of the City of St. Petersburg, Florida (City). Said Charge alleged that Respondent Vacation Break (Respondent) had committed an unlawful employment act against Petitioner pursuant to Chapter 70 of the Pinellas County Code, as amended, and Title VII of the U.S. Civil Rights Act of 1964, as amended. Specifically, the Charge alleged that Respondent engaged in racial discrimination by treating Petitioner in a disparate manner on December 15, 1997, and by unlawfully terminating her employment as a telemarketer on December 17, 1998.

The City notified Respondent about Petitioner's Charge in a letter dated February 17, 1998. This letter invited Respondent to participate in Mediation Early Resolution. Subsequently, the parties agreed not to participate in Mediation Early Resolution.

By letter dated May 27, 1998, the City requested Respondent to file a position statement together with supporting documentation. On June 23, 1998, Respondent submitted a position statement and a copy of its "New Employee Policy and Procedures" manual.

By letter dated April 15, 1999, an investigator for the City advised Petitioner that Respondent had filed an answer to

her complaint. The letter stated Respondent's position as follows:

> Respondent Vacation Break stated that you were let go based on the failure to produce a sufficient number of bookings as defined in your paperwork. Respondent Vacation Break indicated that they hired and trained every single week for the same office because the turn over [sic] was high. With their answer, Respondent Vacation Break enclosed the "New Employee Policy and Procedures" manual signed by you indicating that a minimum of 25 bookings had to be attained each pay period after the 2 week [sic] training period. The rules also indicated, among many other rules, that the employees could only use the approved script provided by the company.

The April 15, 1999, letter requested Petitioner to file a written response to Respondent's position statement if she disagreed with Respondent's answer. The April 15, 1999, letter also requested Petitioner to include in her response any documents and/or signed, notarized witness statements, which supported Petitioner's allegations.

Receiving no written response from Petitioner, the City sent her two additional letters dated June 18, 1999, and June 30, 1999. The letters stated that the City would dismiss Petitioner's case if she did not file a written response as previously requested.

By letters dated July 13, 1999, July 28, 1999, and February 3, 2000, the City requested Respondent to furnish

additional information. Respondent did not submit the information in response to these letters and did not request an extension of time in which to do so.

The City sent Respondent a final letter dated February 15, 2000, via regular and certified mail, requesting additional information. The February 15, 2000, letter stated that if Respondent did not submit the requested information on or before February 25, 2000, the City would process a cause finding based on adverse inference. Respondent failed to submit the information in a timely manner.

The City's Division of Human Relations prepared a Final Investigative Report Memorandum dated February 29, 2000. Said report recommended that the City issue a finding that Reasonable Cause exists to believe that Respondent committed a discriminatory employment practice as alleged in the Charge.

In letters to Petitioner and Respondent dated April 5, 2000, via regular and certified mail, the City determined that reasonable cause existed to believe that Respondent committed a discriminatory practice act as alleged in the Charge. The April 5, 2000, letters enclosed a copy of the Findings of Fact, Analysis, and Conclusions upon which this determination was based. Each letter also enclosed an Invitation to Participate in Conciliation form.

On or about April 15, 2000, Petitioner responded to the City's invitation to participate in conciliation. Petitioner's response indicated that she would engage in conciliation discussions.

Respondent received its certified copy of the City's April 5, 2000, letter on April 11, 2000. Petitioner received her certified copy of the City's April 5, 2000, letter on April 17, 2000.

By letter dated March 21, 2001, the City requested Petitioner to complete an enclosed Conciliation Settlement Proposal form. This letter requested Petitioner to return the form on or before April 2, 2001. In a letter dated June 11, 2001, the City advised Petitioner that if she did not submit the form on or before June 25, 2001, the City would issue a complaint and the matter would be scheduled for a pre-hearing conference.

By letter dated August 17, 2001, the City advised Petitioner that conciliation efforts were unsuccessful. The City enclosed a copy of the Complaint and a Notice of Pre-Hearing Conference with this letter.

The Complaint dated August 17, 2001, sets forth the jurisdiction and venue, substantive allegations, and a prayer for relief on behalf of Petitioner as the charging party.

The City referred this case to the Division of Administrative Hearings on August 27, 2001. Neither party responded in writing to the Initial Order which was issued on August 28, 2001.

On September 12, 2001, the undersigned issued a Notice of Hearing and Order of Prehearing Instructions. The Notice of Hearing scheduled the formal hearing for November 5, 2001.

Respondent did not make an appearance at the hearing. The efforts of the undersigned's office to call Respondent using the telephone number provided by the City were unsuccessful because the number was no longer in service.

During the hearing, Petitioner testified on her own behalf and offered one composite exhibit, which was accepted into evidence. Petitioner's composite exhibit consists of the City's letters and documents referenced above.

At the conclusion of the hearing, Petitioner was advised that she had the opportunity to order a transcript of the proceeding and to file a proposed recommended order. She was advised that the proposed recommended order would be due on or before November 15, 2001, if a transcript was not filed with the Division of Administrative Hearings.

A transcript of the hearing was not filed with the Division of Administrative Hearings. Petitioner filed a Proposed Recommended Order on November 15, 2001.

FINDINGS OF FACT

1. Petitioner, a black female, is a member of a protected group.

2. Respondent is an employer as defined in the Pinellas County Code, as amended, and Title VII of the Civil Rights Act of 1964, as amended.

3. Respondent hired Petitioner as a telemarketer on December 8, 1997. Petitioner's job required her to call the telephone numbers on a list furnished by Respondent. After making the call, Petitioner was supposed to solicit the booking of vacations in time-share rental units by reading from a script prepared by Respondent. The script included an offer to sell potential customers three vacations in three locations for $69.

4. When Respondent hired Petitioner, she signed a copy of Respondent's "New Employee Policy and Procedures" manual. Petitioner admits that this manual required her to book 25 vacations each pay period after a two-week training period. She also admits that the manual required her to only use the prepared script, including preplanned rebuttals to customer questions when talking over the telephone.

5. Petitioner understood that during the two-week training period, she would be required to book 14 vacations or be terminated. She knew that Respondent's supervisors would monitor her sales calls. Petitioner sold four vacation packages

in her first week at work with no complaints from her supervisors. In fact, one of Respondent's supervisors known as Mike told Petitioner, "You got the juice."

6. On December 15, 1997, Mike monitored one of Petitioner's calls. Petitioner admits that she did not use the scripted rebuttals in answering the customer's questions during the monitored call. Instead, she attempted to answer the customer's questions using her own words. According to Petitioner, she used "baby English" to explain the sales offer in simple terms that the customer could understand.

7. After completing the monitored call on December 15, 1997, Mike told Petitioner to "stick to the shit on the script." Mike admonished Petitioner not to "candy coat it." Petitioner never heard Mike use profanity or curse words with any other employee.

8. Before Petitioner went to work on December 16, 1997, she called a second supervisor known as Kelly. Kelly was the supervisor that originally hired Petitioner. During this call, Petitioner complained about Mike's use of profanity. When Kelly agreed to discuss Petitioner's complaint with Mike, Petitioner said she would talk to Mike herself.

9. Petitioner went to work later on December 16, 1997. When she arrived, Mike confronted Petitioner about her complaint to Kelly. Petitioner advised Mike that she only objected to his

language and hoped he was not mad at her. Mike responded, "I don't get mad, I get even."

10. When Petitioner stood to stretch for the first time on December 16, 1997, Mike instructed her to sit down. Mike told Petitioner that he would get her some more leads.

11. Mike also told Petitioner that she was "not the only telemarketer that had not sold a vacation package but that the other person had sixty years on her." Petitioner was aware that Respondent had fired an older native-American male known as Ray. Respondent hired Ray as a telemarketer after hiring Petitioner.

12. When Petitioner was ready to leave work on December 17, 1997, a third supervisor known as Tom asked to speak to Petitioner. During this conversation, Tom told Petitioner that she was good on the telephone but that Respondent could not afford to keep her employed and had to let her go. Tom referred Petitioner to another company that trained telemarketers to take in-coming calls. Tom gave Petitioner her paycheck, telling her that he was doing her a favor.

13. During Petitioner's employment with Respondent, she was the only black employee. However, apart from describing the older native American as a trainee telemarketer, Petitioner did not present any evidence as to the following: (a) whether there were other telemarketers who were members of an unprotected class; (b) whether Petitioner was replaced by a person outside

the protected class; (c) whether Petitioner was discharged while other telemarketers from an unprotected class were not discharged for failing to follow the script or failing to book more than four vacations during the first ten days of employment; and (d) whether Petitioner was discharged while other telemarketers from an unprotected class with equal or less competence were retained.

14. Petitioner was never late to work and never called in sick.

CONCLUSIONS OF LAW

15. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. Sections 120.569, 120.57(1), and 120.65(7), Florida Statutes; Chapter 70 of the Pinellas County Code, as amended; and Title VII of the United States Civil Rights Act of 1964, as amended.

16. Chapter 70 of the Pinellas County Code relates in part to discrimination in employment practices. On March 12, 1996, Pinellas County and the City entered into an interlocal agreement. In this agreement, Pinellas County delegated authority for the investigation, processing, conciliation and enforcement of complaints brought under Chapter 70 of the Pinellas County Code to the City for that portion of Pinellas County south of Ulmerton Road. Accordingly, this case was

investigated and processed by the City pursuant to Chapter 15 of the St. Petersburg Municipal Code.

17. Chapter 70 of the Pinellas County Code is substantially equivalent to state and federal laws relating to discriminatory employment practices. See Title VII, United States Civil Rights Act of 1964, as amended, and Chapter 760, Florida Statutes. Therefore, the cases interpreting the state and federal laws are persuasive authority for interpreting Chapter 70 of the Pinellas County Code.

18. Section 70-53 of the Pinellas County Code, as amended, prohibits unlawful discrimination in employment practices. That ordinance provides as follows in relevant part:

> (1) Employers. It is a discriminatory practice for an employer to:
> a. Fail or refuse to hire, discharge or otherwise discriminate against an individual with respect to compensation or the terms, conditions, or privileges of employment because of race, color, religion, national origin, sex, age, marital status, or disability . . . .

19. Petitioner has the initial burden of proving a prima facie case of racial discrimination based on disparate treatment and/or unlawful termination. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089 (1981); McDonnell Douglas v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973). Petitioner has not met her burden in either respect.

20. In Jones v. Gerwens, 874 F.2d 1534, 1540 (11th Cir. 1989), the court stated as follows:

> Accordingly, we hold that, in cases involving alleged racial bias in the application of discipline for violation of work rules, the plaintiff, in addition to being a member of a protected class, must show either (a) that he did not violate the work rule, or (b) that he engaged in misconduct similar to that of a person outside the protected class, and that the disciplinary measures enforced against him were more severe than those enforced against the other persons who engaged in similar misconduct.

21. Petitioner did not prove a prima facie case of racial discrimination based on disparate treatment for the following reasons: (a) She admits that she failed to follow Respondent's rule against adlibbing when talking to customers; and (b) She failed to present evidence that any other similarly situated employee outside the protected class received less severe punishment for engaging in similar misconduct. In fact, Petitioner presented no evidence that any other trainee telemarketer ever failed to follow the script during a monitored call or otherwise.

22. In Anthony T. Lee, et al. v. Russell County Board of Education of Russell County, Alabama, et al., 684 F.2d 769, 773 (11th Cir. 1982), the court stated as follows:

> Focusing first on the race discrimination charge, it is well established that such a claim may be analyzed under the McDonnell

> Douglas structure developed in Title VII suits. The McDonnell Douglas test, as recently explained by the Supreme Court in Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), and as modified by this circuit for application in discharge (as opposed to hiring) cases, is as follows: If plaintiff proves by a preponderance of the evidence that he or she is a member of a protected class, was qualified for the position held, and was discharged and replaced by a person outside of the protected class or was discharged while a person outside of the class with equal or lesser qualifications was retained, then plaintiff has established a "prima facie case" of discrimination.

23. In making her case relating to unlawful termination, Petitioner presented evidence of the following: (a) She was a member of a protected group; (b) She was qualified to work as a telemarketer; and (c) She was terminated. However, Petitioner presented no evidence to show that she was replaced by a person outside of the protected class or was discharged while a person outside of the class with equal or lesser qualifications was retained. The only other employee, trainee or otherwise, that Petitioner testified about was an older native-American male who sold no vacations and was terminated after a few days of employment. Therefore, Petitioner failed to prove a prima facie case of discriminatory discharge under the test set forth in Anthony T. Lee, 684 F.2d at 773.

24. After filing its answer and position statement with the City on or about June 23, 1998, Respondent failed to furnish the City additional information or to make an appearance at the formal hearing on November 5, 2001. However, in light of Petitioner's failure to present a prima facie case of disparate treatment and/or unlawful termination, the undersigned cannot find that Respondent committed unlawful employment practices by adverse inference.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED:

That the City's Human Relations Review Board enter a final order dismissing Petitioner's Complaint.

DONE AND ENTERED this 16th day of November, 2001, in Tallahassee, Leon County, Florida.

SUZANNE F. HOOD
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of November, 2001.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 30 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the Human Relations Officer of the Human Relations Division, Community Affairs Department, City of St. Petersburg.