STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ALICE BROOKS CESARIN,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 01-4805
	)	
DILLARDS, INC.,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on October 10, 2002, in Orlando, Florida, before T. Kent Wetherell, II, the designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Michael L. Moore, Esquire
Baron and Moore, P.A.
640 North Hillside Avenue
Orlando, Florida 32803

For Respondent: Kevin D. Zwetsch, Esquire
Latesa K. Bailey, Esquire
Fowler, White, Gillen, Boggs,
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STATEMENT OF THE ISSUES

The issues are (1) whether the Petition for Relief filed by Petitioner was timely under Section 760.11(7), Florida Statutes, and (2) whether Respondent engaged in an unlawful employment

practice in violation of the Florida Civil Rights Act of 1992 when it terminated Petitioner's employment as a retail sales associate in May 1998.

PRELIMINARY STATEMENT

On November 9, 1998, Petitioner filed a charge of discrimination with the Florida Commission on Human Relations (Commission) in which she alleged that Respondent discriminated against her based upon her race (African American), sex (female), and retaliation (type unspecified) when it terminated her employment as a retail sales associate at Respondent's Oviedo, Florida, store in May 1998. The Commission staff investigated the charge, and on August 31, 2001, the Executive Director of the Commission issued a "no cause" determination.

An "amended" determination was issued on October 26, 2001. The only material difference between the original and the "amended" determinations is that the original determination was addressed to Petitioner "c/o Anthony Gonzales, Jr., Esquire" and the "amended" determination was addressed directly to Petitioner.

On November 28, 2001, Petitioner filed a Petition for Relief (Petition) with the Commission. The Petition alleged only racial discrimination; it did not allege sexual discrimination or retaliation.

On December 10, 2001, the Commission referred the Petition to the Division of Administrative Hearings (Division) for the assignment of an administrative law judge to conduct a formal hearing on the Petition. The hearing was initially scheduled for March 4, 2002, but was continued three times at the request of the parties to allow them to complete discovery and to discuss the possibility of settlement. The hearing was ultimately held on October 10, 2002.

At the hearing, Petitioner testified in her own behalf, and Petitioner's Exhibit P1 was received into evidence. Respondent presented the testimony of Heidi Jensen, a former assistant sales manager with Respondent and Petitioner's immediate supervisor during her employment. Respondent's Exhibits 1 through 30, and 35 through 37 were received into evidence.

The Transcript of the hearing was filed with the Division on November 18, 2002. Pursuant to Respondent's unopposed request at the conclusion of the hearing, the parties were given 20 days from the date the Transcript was filed to submit their proposed recommended orders (PROs). Subsequently, the deadline for filing the PROs was extended to December 13, 2002. The parties' PROs were timely filed and were given due consideration by the undersigned in preparing this Recommended Order.

FINDINGS OF FACT

Based upon the testimony and evidence received at the hearing, the following findings are made:

A. Parties

1. Petitioner is an African American female. During the period of time at issue in this proceeding (i.e., January through May 1998), Petitioner was 49 years old.

2. Respondent is a retail department store chain with stores located throughout Florida, including a store in Oviedo, Florida. Respondent is an employer subject to the Florida Civil Rights Act of 1992.

B. Petitioner's Employment With Respondent

3. On or about January 30, 1998, Petitioner was hired by Respondent to work as a retail sales associate in Respondent's Oviedo store. She was originally assigned to work in the women's clothing department.

4. Petitioner was interviewed and hired by Heidi Jensen, a white female. Ms. Jensen was the assistant sales manager responsible for the women's clothing department, and was Petitioner's direct supervisor throughout the course of Petitioner's employment.

5. Petitioner was hired as a part-time employee at a rate of $9.00 per hour. As a part-time employee, she worked approximately 20 hours per week. Petitioner's schedule was

flexible; she worked eight hours on some days and four hours or less on others. She was typically scheduled on the closing shift (i.e., nights), rather than the opening shift.

6. On February 7, 1998, Petitioner signed a certification indicating that she had read and agreed to abide by Respondent's work rules and policies. Those rules include the following directive, hereafter referred to as "Work Rule 10":

> Associates must exhibit positive behavior toward their job, Management, supervisors, and co-associates in all of their actions and speech. Customers must always be treated courteously. Anything to the contrary will not be tolerated.

7. On February 8, 1998, Petitioner attended a general orientation at which the work rules and policies were discussed. That orientation was also attended by other recently-hired employees, including non-African American employees.

8. Petitioner received additional training from Respondent throughout her employment, including customer service and sales training and direction for handling merchandise returns. That training was also provided to other employees, including non-African American employees.

9. Petitioner never received formal training on how to "open" the store. However, as noted above, Petitioner typically worked during the closing shift rather than the opening shift.

10. Slightly more than a month into her employment, Petitioner's co-workers began complaining about her unprofessional behavior. The complaints alleged that Petitioner yelled at co-workers; that she initiated arguments with co-workers in front of customers regarding who should get credit for the customer's purchases; that she referred to the customers in the woman's department (which caters to larger women) as "fat pigs"; that she stole customers from her co-workers; that she referred to some of her co-workers as "vultures" and others as "bitches" or "wolves," often in front of or within "earshot" of customers; and that she generally upset or harassed co-workers through her attitude and derogatory comments.

11. The complaints came from eight different co-workers, at least one of whom was an African American female. The complaints were made in writing by the co-workers, typically through signed, hand-written statements given to Ms. Jensen or the store manager.

12. Petitioner denied making any of the statements or engaging in any of the conduct alleged in the complaints. In response to the complaints, she took the position that she was being "singled out" by her co-workers because her aggressive tactics made her a more successful salesperson than most of her co-workers. Despite Petitioner's denials, Ms. Jensen determined

that disciplinary action was appropriate based upon her investigation of the complaints.

13. Ms. Jensen gave Petitioner a verbal warning "concerning using a positive attitude towards merchandise and customers" on March 7, 1998, and she gave Petitioner a formal written warning for her lack of positive attitude towards customers and co-workers on March 19, 1998. Both warnings cited Work Rule 10 as having been violated.

14. Despite the warnings, Petitioner's conduct continued to generate complaints from her co-workers. She received another verbal warning from Ms. Jensen on April 17, 1998, and she received a formal written warning from the store manager on April 22, 1998. Again, the warnings cited Work Rule 10 as having been violated.

15. Petitioner continued to deny any wrongdoing. She again claimed that she was being "targeted" by her co-workers because of their "jealousy and envy" over her success as a salesperson.

16. The April 22, 1998, written warning stated that "[i]f there is one more report of negativity or verbal abuse of customers or associates, [Petitioner] will be terminated." It also enumerated Respondent's "expectations" with respect to Petitioner's conduct, including a requirement that Petitioner

"never confront an associate in front of a customer" (emphasis in original).

17. At some point after the April 22, 1998, written warning, Petitioner was transferred from the women's department to the casual department to give her a "clean slate" with her co-workers. Despite the transfer, Petitioner's co-workers continued to complain about her behavior. The complaints were of the same nature as the complaints discussed above, e.g., stealing sales from other co-workers and initiating confrontations with co-workers over customers in the customer's presence.

18. On May 22, 1998, Petitioner and a co-worker, Brenda Ross, "had words" over a customer. When confronted about the incident by Ms. Jensen, Petitioner "was loud and aggressive" towards her. As a result of this incident and the prior warnings, Ms. Jensen recommended that Petitioner's employment be terminated.

19. The store manager accepted Ms. Jensen's recommendation, and, Petitioner was terminated on May 22, 1998. Thus, the term of Petitioner's employment with Respondent was less than four months.

20. After she was fired, Petitioner returned to her work station to retrieve her belongings. While doing so, she confronted Ms. Ross and called her a "lying bitch" (according to

Petitioner's own testimony at the hearing) or something similarly derogatory.[1]

21. There are no videotapes of the incidents described above. None of the co-workers who reported the incidents testified at the hearing. Nevertheless, the co-worker's contemporaneous hand-written reports of the incidents which were received into evidence (Respondent's Exhibits 21-30) are found to be credible based upon their general consistency and the corroborating testimony of Ms. Jensen at the hearing. By contrast, Petitioner's testimony regarding the incidents was not credible.

22. There is no credible evidence to support Petitioner's allegations that she was denied the opportunity to file complaints against her co-workers. Nor is there any credible evidence that Petitioner did file complaints (alleging discrimination or anything else) which were ignored by Respondent's management.

23. By all accounts, Petitioner was a good salesperson; her sales per hour were high and, on several occasions, they were the highest in the department where she was working. Ms. Jensen complemented Petitioner on at least one occasion for her high level of sales.

24. Petitioner was also punctual and had a good attendance record. She was on track to receive a pay increase at her next

review. However, as a result of the unprofessional behavior detailed above, she was fired prior that review.

25. Petitioner is currently unemployed. She has not held a job since she was fired by Respondent in May 1998. However, she has only applied for four or five other jobs since that time.

C. Petitioner's Discrimination Claim

26. Petitioner first contacted the Commission regarding her allegation that Respondent discriminated against her on or about June 29, 1998. On that date, she filled out the Commission's "intake questionnaire."

27. On the questionnaire, she indicated that she had sought assistance from attorney Anthony Gonzales, Jr. (Attorney Gonzales) regarding the alleged discrimination by Respondent. Petitioner also listed Attorney Gonzales as her representative on the "intake inquiry form and complaint log" completed on or about July 10, 1998.

28. Petitioner consulted with Attorney Gonzales in April 1998, prior to her termination. Although Petitioner claimed at the hearing that Attorney Gonzales did not agree to represent her beyond the initial consultation, Petitioner provided the Commission a copy of Attorney Gonzales' business card and a copy of the check by which Petitioner paid Attorney Gonzales' consultation fee with the Commission's intake

documents. Based upon those documents, the Commission apparently (and reasonably) assumed that Attorney Gonzales was Petitioner's attorney because it subsequently directed various letters to Petitioner "c/o Anthony Gonzales, Jr., Esq." at Attorney Gonzales' address.

29. Petitioner filed her formal charge of discrimination on November 9, 1998. The charge did not reference Attorney Gonzales. Nevertheless, on December 7, 1998, the Commission sent a letter to Petitioner "c/o Anthony Gonzales, Jr., Esq." at Attorney Gonzales' address confirming receipt of the charge of discrimination.

30. The record does not include any correspondence from Attorney Gonzales to the Commission in response to the December 7, 1998, confirmation letter. However, Attorney Gonzales continued to receive correspondence from the Commission regarding Petitioner's charge of discrimination after that date.

31. On February 2, 1999, the Commission sent a letter to Petitioner "c/o Anthony Gonzales, Esq." at Attorney Gonzales' address indicating that Petitioner's charge of discrimination had been pending for over 180 days and identifying the options available to Petitioner. The letter was accompanied by an "election of rights" form which was to be completed and returned to the Commission.

32. Attorney Gonzales apparently forwarded the form to Petitioner because Petitioner completed and signed the form and returned it to the Commission on June 17, 1999. This strongly suggests that there was an attorney-client relationship between Attorney Gonzales and Petitioner at the time. Indeed, if there was no attorney-client relationship, either Petitioner or Attorney Gonzales would have informed the Commission in connection with the return of the form that Attorney Gonzales was not representing here. However, neither did.

33. The record does not include any additional communications between the Commission and Petitioner and/or Attorney Gonzales between June 1999 and August 2001. Notably absent from the record is any notice to the Commission that Attorney Gonzales was no longer representing Petitioner.

34. On August 31, 2001, the Executive Director of the Commission issued a "no cause" determination on Petitioner's charge of discrimination. On that same date, the Clerk of the Commission sent notice of the determination to Petitioner "c/o Anthony Gonzales, Jr., Esq." at Attorney Gonzales' address. The notice stated that "[c]omplainant may request an administrative hearing by filing a PETITION FOR RELIEF within 35 days of the date of this NOTICE OF DETERMINATION: NO CAUSE" (emphasis supplied and capitalization in original), and further stated

that the claim "will be dismissed" if not filed within that time.

35. Attorney Gonzales contacted Petitioner by telephone after he received the notice of determination. The record does not reflect the date of that contact. However, Petitioner testified at the hearing that Attorney Gonzales informed her during the telephone call that the deadline for requesting a hearing had not yet expired. Accordingly, the contact must have occurred prior to October 5, 2001, which is 35 days after August 31, 2001.

36. Despite the notice from Attorney Gonzales, Petitioner did not immediately file a Petition or contact the Commission.

37. She did not contact the Commission until October 16, 2001. On that date, she spoke with Commission employee Gerardo Rivera and advised Mr. Rivera that Attorney Gonzales was not representing her. Mr. Rivera indicated that the Commission would send an "amended" notice directly to her.

38. An "amended" determination of no cause was issued by the Executive Director of the Commission on October 26, 2001. On that same date, an "amended" notice of determination was mailed to Petitioner.

39. Included with the "amended" notice was a blank petition for relief form. Petitioner completed the form and mailed it to the Commission. The Petition was received by the

Commission on November 28, 2001,[2] which is 33 days after the date of the "amended" determination, but 89 days after the date of the original August 31, 2001 determination.

40. Mr. Rivera's affidavit (Exhibit P1) characterized the mailing of the original determination to Attorney Gonzales as "our [the Commission's] error" and a "mistake." The preponderance of the evidence does not support that characterization.

41. Specifically, the record reflects that it was Petitioner who gave the Commission the impression that Attorney Gonzales was representing her, and neither Petitioner nor Attorney Gonzales did anything to advise the Commission otherwise during the two and one-half years that the Commission investigated Petitioner's charge of discrimination and sent letters to Attorney Gonzales on Petitioner's behalf. Indeed, Petitioner testified at the hearing that the October 16, 2001, conversation with Mr. Rivera was the first (and only) time that she informed the Commission that Attorney Gonzales was not representing her.

CONCLUSIONS OF LAW

A. Jurisdiction

42. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding pursuant to Sections 120.569, 120.57(1), and

760.11(7), Florida Statutes. (All references to Sections and Chapters are to the Florida Statutes (2001)).

B. Timeliness of the Petition for Relief[3]

43. Section 760.11(7) provides:

> If the commission determines that there is not reasonable cause to believe that a violation of the Florida Civil Rights Act of 1992 has occurred, the commission shall dismiss the complaint. The aggrieved person may request an administrative hearing under ss. 120.569 and 120.57, but any such request must be made within 35 days of the date of determination of reasonable cause and any such hearing shall be heard by an administrative law judge and not by the commission or a commissioner. If the aggrieved person does not request an administrative hearing within the 35 days, the claim will be barred.

(emphasis supplied).

44. The language of Section 760.11(7) and the language of the Commission's notice of determination in this case clearly suggest that the 35-day period runs from the date of the determination, not the date that the petitioner receives notice of the determination. But cf. Joshua v. City of Gainesville, 768 So. 2d 432, 438 (Fla. 2000) ("[T]he Legislature chose to make the limitations period [in Section 760.11(8)] contingent on the receipt of a reasonable cause determination.") (emphasis supplied); Henry v. Dept. of Administration, 431 So. 2d 677, 680 (Fla. 1st DCA 1983) ("An agency seeking to establish waiver based on the passage of time following action claimed as final

must show that the party affected by such action has received notice sufficient to commence the running of the time period within which review must be sought."); Irwin v. Department of Veterans Affairs, 498 U.S. 89, 92-93 (1990) (period for filing a claim under federal law counterpart to Chapter 760 runs from receipt of the determination from the Equal Employment Opportunity Commission (EEOC) by the petitioner or his or her attorney, but unlike Section 760.11(7) the federal statute specifically refers to "receipt" of the determination as the triggering event).

45. The Commission's prior orders also compute the 35-day period from the date of the notice of determination, not the date that Petitioner receives that notice. See, e.g., Debose v. Columbia North Florida Regional Medical Center, FCHR Order No. 01-007 (Feb. 8, 2001) (Order of Remand in DOAH Case No. 00-3426), writ of prohibition denied, 793 So. 2d 931 (Fla. 1st DCA 2001) (table); Garland v. Dept. of State, DOAH Case No. 00-1797, Recommended Order at 3 (July 24, 2000), adopted in toto, FCHR Order No. 01-001 (Feb. 8, 2001). And cf. Ambroise v. O'Donnell's Corp., DOAH Case No. 02-2762 (Sept. 5, 2002).

46. In this case, the Commission's original "no cause" determination was dated August 31, 2001. As a result, the deadline for filing a request for a hearing with the Commission pursuant to Section 760.11(7) was October 5, 2001. However, the

Petition was not received by the Commission until November 28, 2001, which was 89 days after the date of the original determination. Even if the filing date was considered to be the date that the Petition was mailed, see Rule 60Y-4.004(1), Florida Administrative Code; but see Ambroise, Recommended Order at 8-12 (concluding that the Commission's procedural rules have been ineffective since the adoption of the Uniform Rules pursuant to Section 120.54(5)), the Petition was untimely since it was not mailed until November 26, 2001, which is 87 days after the date of the original determination.

47. Despite the language of Section 760.11(7) which states that an untimely claim "will be barred" if not timely filed, the 35-day filing period is not jurisdictional and is subject to equitable tolling. See Irwin, 498 U.S. at 95-96 (1990) (filing period in federal law counterpart to Chapter 760 is not jurisdictional); Donald v. Winn-Dixie Stores, Inc., 19 F.A.L.R. 4357, 4371 (FCHR 1995) (noting that the "period for filing the Petition for Relief is not jurisdictional but is subject to equitable tolling") (citing Clark v. Department of Corrections, 8 F.A.L.R. 679 (FCHR 1985)); Rule 60Y-5.008(2), Florida Administrative Code, (not directly implicated in this case but purporting to authorize the Executive Director of the Commission to extend the deadline for filing a petition for relief "for good cause shown"). But cf. Hernandez v. Transpo Electronics,

Inc., DOAH Case No. 99-3576, Recommended Order, at 15-20 (June 6, 2000) (concluding that the doctrine of equitable tolling is implicated in administrative proceedings only where the state agency's actions or inactions prevent the petitioner from timely asserting his or her rights and the state agency is the adverse party), remanded on other grounds FCHR Order No. 01-055 (Dec. 4, 2001).

48. The doctrine of equitable tolling will excuse a late-filed petition where it is shown that Petitioner was lulled into inaction or has in some extraordinary way been prevented from timely asserting her rights. See generally Machules v. Dept. of Administration, 523 So. 2d 1132, 1134 (Fla. 1988). And see Cann v. Dept. of Children & Family Services, 813 So. 2d 237, 238 (Fla. 2d DCA 2002) (excusable neglect no longer saves an untimely request for an administrative hearing, but doctrine of equitable tolling might).

49. The only potential basis for applying the doctrine of equitable tolling in this case is that the original determination was directed to Attorney Gonzales, not Petitioner. However, Petitioner testified that prior to the expiration of the original 35-day period, Attorney Gonzales informed her of the Commission's determination as well as her deadline for filing a Petition. Thus, to the extent that the Commission was mistaken when it sent the original determination to Attorney

Gonzales (and, as detailed in the Findings of Fact, the preponderance of the evidence suggests that the Commission was not mistaken[4]), that mistake did not prevent Petitioner from timely asserting her rights because Attorney Gonzales informed her of the deadline prior to its expiration.

50. Despite the notice from Attorney Gonzales, Petitioner failed to timely file a Petition or contact the Commission prior to the expiration of the deadline. Indeed, Petitioner's own evidence (Exhibit P1) and testimony confirms that she did not contact the Commission regarding Attorney Gonzales' "mistaken" receipt of the original determination until October 16, 2001, which was more than 10 days after the expiration of the original 35-day period.

51. The circumstances of this case are similar to those in Jancyn Manufacturing Corp. v. Dept. of Health, 742 So. 2d 473 (Fla. 1st DCA 1999). In that case, Petitioner, through counsel, obtained an extension of time to file a request for a hearing. Petitioner's counsel subsequently withdrew and, in so doing, informed Petitioner of its deadline for requesting a hearing. Despite that notice, Petitioner failed to timely request a hearing, and the agency subsequently denied Petitioner's untimely request. The First District Court of appeal affirmed. The court held that "[t]he withdrawal of its counsel does not by itself constitute an extraordinary circumstance to require

application of the equitable tolling doctrine" and further noted that the doctrine does not excuse the late filing of a petition which results from a litigant sleeping on its rights. Id. at 476. Accord Irwin, 498 U.S. at 96 (doctrine of equitable tolling not implicated where delay in filing was attributable to the petitioner's attorney being out of the country when his office received the determination letter from the EEOC).

52. The credible evidence in this case demonstrates that Petitioner (like the appellant in Jancyn) slept on her rights after receiving notice from Attorney Gonzales of the Commission's determination and the resulting deadline. In this regard, this case (like Jancyn) simply involves a Petitioner who was aware of, but failed to meet the applicable statutory deadline. And see, e.g., Environmental Resource Associates of Florida, Inc. v. Dept. of General Services, 624 So. 2d 330, 331 (Fla. 1st DCA 1993) ("There is nothing extraordinary in the failure to timely file in this case. Quite to the contrary, the problem in this case is the too ordinary occurrence of a [party] failing to meet a filing deadline.") Accordingly, the doctrine of equitable tolling is not implicated.

53. Because the original 35-day period had expired prior to Petitioner contacting the Commission on October 16, 2001, and because that period was not equitably tolled as a result of the original determination being sent to Attorney Gonzales, the

Commission was without jurisdiction to issue the "amended" determination. See, e.g., Millinger v. Broward County Mental Health Div., 672 So. 2d 24 (Fla. 1996) (agency does not have authority to reissue final order to breath life into an appeal where the notice of appeal of the original final order was untimely). Accordingly, the fact that the Petition was received by the Commission within 35 days of the "amended" determination is of no consequence.

54. In sum, because the Petition was received by the Commission more than 35 days after the original "no cause" determination and because the doctrine of equitable tolling is inapplicable under the circumstances of this case, the Petition is untimely and the claims contained therein are "barred." See Section 760.11(7). Accordingly, the Petition should be dismissed. See Garland, supra; Ambroise, supra.

C. Merits of the Petition for Relief

55. Section 760.10(1)(a) provides that it is an unlawful employment practice for an employer:

> To discharge or to fail 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.

56. This language was patterned after Title VII of the Civil Rights Act of 1964. Therefore, case law construing Title VII is persuasive when construing Section 760.10. See Gray v. Russell Corp., 681 So. 2d 310 (Fla. 1st DCA 1996); Florida Department of Community Affairs v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991).

57. The original charge of discrimination filed by Petitioner with the Commission alleged that she was fired as a result of her race, her sex, and "retaliation." However, the Petition which initiated this proceeding alleged only race discrimination; it did not allege sex discrimination or retaliation. As a result, the hearing was limited to Petitioner's race discrimination claim, as is this Recommended Order.

58. Because Petitioner did not present any credible direct evidence of discrimination by Respondent, Petitioner's claim must be analyzed under the framework established by the United States Supreme Court in McDonnell-Douglass Corporation v. Green, 411 U.S. 792 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). The framework established in those cases was reaffirmed and refined by the Court in St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

59. Petitioner has the burden of establishing by a preponderance of the evidence a prima facie case of unlawful

discrimination. See Hicks, 509 U.S. at 506. In order to establish a prima facie case of wrongful termination, Petitioner must establish that: (1) she is a member of a protected minority, (2) she was qualified for the job from which she was discharged, (3) that she was discharged, and (4) her former position was filled by a non minority or that she was disciplined differently than a similarly-situated employee outside of her protected class. See Jones v. Lumberjack Meats, Inc., 680 F. 2d 98, 101 (11th Cir. 1982); Scholz v. RDV Sports, Inc., 710 So. 2d 618, 623 (Fla. 5th DCA 1998). And cf. Ramos v. Walton County Board of County Commissioners, DOAH Case No. 91-4385, 1992 WL 880766, at *7 (Apr. 24, 1992) ("Petitioner made out a prima facie case of unlawful termination by proof that he belongs to a protected class, and that he lost his job while similarly situated persons not in the protected class kept theirs.").

60. If a prima facie case is established, the burden shifts to Respondent to produce evidence that the adverse employment action was taken for legitimate non-discriminatory reasons. Hicks, 509 U.S. at 506-07. Once a non-discriminatory reason is offered by Respondent, the burden then shifts back to Petitioner to demonstrate that the offered reason is merely a pretext for discrimination, i.e., the reason is false and that the real reason for Respondent's decision to terminate

Petitioner was race. Id. at 507-08, 515-17. In this regard, the ultimate burden of persuasion remains with Petitioner throughout the case to demonstrate a discriminatory motive for the adverse employment action. Id. at 508, 510-11.

61. Petitioner established the first three elements of a prima facie case, i.e., that she is a member of a protected class (African American), that she was qualified for the retail sales associate position, and that she was fired from the position. However, she failed to establish the fourth element, i.e., that she was disciplined differently than a similarly situated non-African American or that her position was filled by a non-African American.

62. There is no evidence that Petitioner's position was filled by a non-African American, nor is there any credible evidence that Respondent did not terminate similarly situated non-African American employees for conduct similar to that engaged in by Petitioner. Indeed, the preponderance of the evidence demonstrates that no other retail sales associate exhibited unprofessional conduct similar to that exhibited by Petitioner. Accordingly, Petitioner failed to establish her prima facie case. See Holifield v. Reno, 115 F. 3d 1555, 1563 (11th Cir. 1997) (affirming summary judgment entered in favor of employer because plaintiff failed to establish that establish that "the non-minority employees with whom he compares his

treatment were similarly situated in all aspects, or that their conduct was of comparable seriousness to the conduct for which he was discharged").

63. Even if Petitioner had established a prima facie case, Respondent met its burden to produce evidence of a legitimate nondiscriminatory reason for the adverse employment action. Specifically, it offered credible evidence showing that Petitioner was fired solely because of her extensive disciplinary history during her four months of employment with Respondent.

64. Respondent also introduced credible evidence showing that Petitioner mischaracterized her educational background on her employment application when she indicated that she has an Associates degree when, in fact, she does not. Respondent argues that by providing incorrect information on her employment application, Petitioner also violated Respondent's Work Rule 5 which prohibits "falsification" and requires "[s]trict honesty . . . in all dealings with or for [Respondent]," thereby providing an independent basis (and another nondiscriminatory reason) for its decision to terminate Respondent. No weight has been given to this post hoc justification because Ms. Jensen confirmed at the hearing that the erroneous information on Petitioner's application played no part in the May 1998 decision to terminate Petitioner's employment.

65. The evidence regarding Petitioner's disciplinary history is more than sufficient to sustain Respondent's burden of production. See Hicks, 509 U.S. at 507, 509-11, 520-25 (it is not necessary that the proffered reasons be true; it is only necessary that the reasons, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action). Moreover, the fact that the same person (Ms. Jensen) hired Petitioner and recommended her firing approximately four months later is further evidence that Petitioner was fired because of her disciplinary history rather than her race. See, e.g., Bradley v. Harcourt, 104 F.3d 267, 270-71 (9th Cir. 1996) ("[W]here the same actor is responsible for the hiring and the firing of a discrimination plaintiff, and both actions occur within a short period of time, a strong inference arises that there was no discriminatory motive."); Equal Employment Opportunity Comm'n v. Our Lady of Resurrection Medical Center, 77 F.3d 145, 151 (7th Cir. 1996) (same).

66. In response, Petitioner failed to introduce any credible evidence that the reasons asserted by Respondent were pretextual. Her testimony that the events alleged in her co-worker's reports which led to the verbal and written warnings did not actually occur was not credible and is contrary to the weight of the evidence.

67. Moreover, even if the events alleged in the reports did not occur, there is absolutely no credible evidence that the co-workers fabricated the reports based upon racial animus or that Respondent acted on those reports for such reasons. Indeed, at least one of the reports against Petitioner was made by an African American female, and the conduct alleged in that report is consistent with the conduct alleged in the other reports. Furthermore, Petitioner consistently claimed in response to the warnings that the reports were fabricated as a result of her co-worker's "envy and jealousy" of her success as a salesperson rather than her race. Cf. Hicks, 509 U.S. at 508 (noting that the district court concluded that the employee proved the existence of a crusade to terminate him, but that he failed to prove that the crusade was racially, rather than personally, motivated).

68. In sum, Petitioner failed to meet her ultimate burden to prove that the reasons proferred by Respondent for her termination were false or pretextual and that that she was actually fired because of her race.

RECOMMENDATION

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

RECOMMENDED that the Florida Commission on Human Relations issue a final order dismissing the Petition for Relief.

DONE AND ENTERED this 31st day of December, 2002, in Tallahassee, Leon County, Florida.

T. KENT WETHERELL, II
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of December, 2002.

ENDNOTES

1/ Ms. Jensen, who accompanied Petitioner to retrieve her belongings, testified at the hearing that Petitioner actually called Ms. Ross a "liar and a fat bitch." Accord Respondent's Exhibit 20, at page 3.

2/ The copy of the Petition included with the Commission's letter referring this case to the Division was not date-stamped, nor was the copy of the Petition introduced at the hearing. However, the mail records attached to Petitioner's response to Respondent's motion to dismiss, filed May 10, 2002, showed that the Petition was sent to the Commission by certified mail on November 26, 2001, and that it was received by the Commission on November 28, 2001. Those dates were treated as supplemental factual allegations (see Order dated May 28, 2002), and they were not disputed at the hearing through any evidence presented by Respondent.

3/ Respondent's motion to dismiss and motion for summary judgment on this ground were denied by Orders dated May 28, 2002, and October 8, 2002, respectively. However, those Orders were based upon the procedural posture of the case and/or state of the record at the time of the motions.

4/ Indeed, it is reasonable to expect that if Attorney Gonzales had not agreed to represent Petitioner in connection with the charge of discrimination that Petitioner filed with the Commission, then he would have communicated that fact to the Commission as soon as he began receiving correspondence from the Commission on Petitioner's behalf. However, he apparently failed to do so and the Commission continued to correspond with him in accordance with its rules for two and one-half years. See Rule 60Y-4.008(2), Florida Administrative Code (attorney of record will "receive pleadings until notice of withdrawal of authorization is filed with the Commission by the represented party or a motion to withdraw has been served on the represented party and approved by the Commission.").

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.