

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ROSA FOSTER,)
)
 Petitioner,)
)
 vs.)
) Case No. 02-3005
 APPLEBEE'S NEIGHBORHOOD)
 BAR & GRILL,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, this cause came on for Administrative Hearing before P. Michael Ruff, duly-designated Administrative Law Judge of the Division of Administrative Hearings, in Pensacola, Florida, on March 6, 2003. The appearances were as follows:

APPEARANCES

For Petitioner: Rosa Foster, pro se
3260 Keating Road
Pensacola, Florida 32504

For Respondent: Erick M. Drlicka, Esquire
Emmanuel, Sheppard & Condon
30 South Spring Street
Pensacola, Florida 32596

STATEMENT OF THE ISSUE

The issues to be resolved in this proceeding concern whether the Petitioner was disparately treated because of her race, with respect to "trainer's pay" and work assignments.

PRELIMINARY STATEMENT

Respondent owns several Applebee's Neighborhood Bar and Grills. Petitioner was employed as a "prep cook" at one of the restaurants in Pensacola, Florida from August 13, 1996 to September 14, 2002. On October 20, 2001, Petitioner filed a charge of race discrimination with the Florida Commission on Human Relations ("Commission") and ultimately filed a Petition for Relief on July 30, 2002, concerning her claim of disparate treatment.

The cause came on for hearing as noticed at which time the Petitioner presented her own testimony. The Petitioner did not call any other witnesses nor did she submit any exhibits. The Respondent called three witnesses: Pat Brown, JoAnn Merlin, and Robert Roberts. The Respondent submitted into evidence exhibits one through three without objection.

Upon conclusion of the proceedings, the parties elected to transcribe the proceedings and to avail themselves of the opportunity to file Proposed Recommended Orders. The Respondent

filed a Proposed Recommended Order which has been considered in the rendition of this Recommended Order.

FINDINGS OF FACT

1. TSSO, Inc., owned an Applebee's Neighborhood Bar & Grill franchise on Bayou Boulevard in Pensacola, Florida. The franchise was acquired by Concord Hospitality, Inc., on December 3, 2001.

2. Applebee restaurants are divided into two areas. There is the front of the restaurant where the bar and dining tables are located, and the back of the restaurant where the kitchen is located.

3. The front of the restaurant is staffed by bartenders, hostesses, and servers who are paid a reduced hourly rate and who depend on tips as part of their compensation.

4. The kitchen is mainly staffed by a midline cook, who basically runs the cooking line; a broil cook, who works the broil area; a fry cook, who works the fry area; prep cooks, who prepare the food on a daily basis; and an expediter, who sets the plates to go out in the front of the restaurant. In addition to their specific duties, the kitchen staff have additional duties. These include cleaning the parking lot, cleaning the freezer, and washing dishes. All kitchen staff share in the additional duties.

5. Unlike the staff in the front of the restaurant, the kitchen staff is paid a regular hourly rate.

6. The kitchen staff is supervised by a kitchen manager. The kitchen manager was responsible for preparing a daily prep list, placing food orders, delegating tasks to kitchen staff, and ensuring that the kitchen employees were doing their tasks.

7. The Petitioner worked as a prep cook in the kitchen from August 13, 1996 to September 14, 2002.

8. During her employment, the Petitioner received at least six raises which included a fifty cent raise on July 17, 1998; a twenty-five cent raise on February 12, 1999; a fifty cent raise on August 27, 1999; a fifty cent raise on December 31, 1999; a fifty cent raise on December 15, 2000; and a twenty-five cent raise on March 9, 2001.

9. The Petitioner, who is black, was one of the highest paid employees out of the fifty employees who worked in the kitchen in 2001. There were five employees who worked in the kitchen that were paid more than the Petitioner. Two of the higher paid employees were black. There were twenty-three white employees in the kitchen who were paid less than the Petitioner.

10. Employees could become certified trainers. Trainers provide training and guidance to new employees. In order to become a certified trainer, the employee has to go through a

training process. Employees who become trainers have to be re-certified on an annual basis.

11. Employees who work in the front of the house are offered a dollar an hour raise as an incentive to become a trainer, to make up for the loss in tips they incur when training new employees.

12. Kitchen employees do not receive a dollar an hour increase as an incentive to become a trainer since they are higher paid employees. Kitchen employees who become trainers receive superior schedules, more hours, and the opportunity to advance with the company.

13. Petitioner, JoAnn Merlin (a white female) and Robert Roberts (a white male) were all kitchen employees who became certified trainers. Merlin and Roberts, like the Petitioner, did not receive a dollar an hour increase when they became certified trainers.

14. After receiving her training certificate on October 23, 1999, the Petitioner claims she trained new employees in the prep area. However, there was very little turnover with prep cooks while the Petitioner was employed. Moreover, the Petitioner has no idea how much training she provided to other employees.

15. The Petitioner has no idea how much back pay she claims she is owed.

16. The Petitioner claims that she was assigned duties that white employees were not assigned to do. In particular, she claims that she had to clean the parking lot and the freezer. However, the Petitioner admitted in her testimony that white employees cleaned the parking lot and freezer.

17. Pat Brown, Merlin and Roberts (all white employees) testified that they cleaned the parking lots. Roberts testified that he tried to rotate the responsibility of cleaning the parking lot each morning.

18. Roberts was the one who primarily cleaned the freezer. On some occasions he had whoever was not busy in the kitchen clean the freezer. For example, Mike Valencort, a white employee who worked as a line cook, cleaned the freezer in addition to Roberts.

19. No one was singled out, because of their race, to clean either the parking lot or freezer.

20. The Petitioner cleaned the parking lot maybe five to six times during her employment. The Petitioner only cleaned the freezer two to three times in a three-month span prior to 2000.

21. As kitchen manager, Mr. Roberts was responsible for preparing a daily prep list. The prep list needed to be prepared before the kitchen employees came to work. Roberts would delegate the responsibility to an experienced line cook,

normally Merlin, on Mondays when he was occupied with completing inventory. He delegated to Merlin because she had more experience, knew what menu items were selling, and was trained on all the stations in the kitchen.

22. The Petitioner was not qualified to do the prep list. She had only prep cook experience and did not know what menu items were selling.

CONCLUSIONS OF LAW

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

24. The Petitioner alleges that the Respondent treated her differently than white employees because of her race, with respect to trainer's pay and job assignments, and that the Respondent's actions violated Chapter 760, Florida Statutes, and Title VII. Chapter 760 is patterned after Title VII and is to be construed using federal case law interpreting Title VII. Florida State University v. Sondel, 658 So. 2d 923 (Fla. 1st DCA 1996); Brand v. Florida Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994); and Florida Department of Community Affairs v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991).

25. The Petitioner has the burden of establishing that the Respondent's actions were motivated by a discriminatory purpose, either through direct evidence or circumstantial evidence.

Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L.Ed.2d 207 (1981); St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S. Ct. 2742, 2747, 125 L.Ed.2d 407, 416 (1993).

26. The Petitioner has not presented any direct evidence of discrimination. Accordingly, the Petitioner's claim is analyzed using the "McDonnell framework." McDonnell-Douglas v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed. 2nd 668. Pursuant to McDonnell, Petitioner has the burden of establishing a prima facie case of race discrimination. If the prima facie case is demonstrated, then the Respondent must articulate a legitimate, non-discriminatory reason for its actions. Once the Respondent establishes a legitimate, non-discriminatory reason, then the Petitioner must show that the proffered reason is pretextual. The ultimate burden of persuasion remains at all times with the Petitioner. Texas Department of Community Affairs v. Burdine, supra.; St. Mary's Honor Center v. Hicks, supra.

27. In order to establish a prima facie case, the Petitioner must prove by a preponderance of the evidence that: (1) she belongs to a protected class; (2) she was subjected to an adverse employment action; (3) the Respondent treated similarly situated employees outside the protected class more favorably; and (4) she was qualified to do the job. Jones v.

Bessemer Carraway Medical Center, 137 F.3d 1306, 1310 (11th Cir. 1998).

28. The Petitioner has failed to establish a prima facie case with respect to the trainer's pay because she has not shown she was subject to an adverse employment action. The evidence clearly demonstrates that kitchen employees did not receive a dollar an hour pay increase for becoming a trainer. It is also undisputed that white kitchen employees who became trainers did not receive trainer's pay, as evidenced by Merlin's and Roberts' testimony.

29. The Petitioner has also failed to establish a prima facie case with respect to trainer's pay because she has not shown similarly situated white employees were treated differently. As noted above, white kitchen employees who became trainers did not receive a pay increase. Employees who worked in front of the restaurant were not similarly situated because they, unlike kitchen employees, were paid reduced hourly rates and depended on tips as part of their compensation.

30. Even if the Petitioner had established a prima facie case, the Respondent has articulated a legitimate, non-discriminatory reason for not giving the Petitioner a pay increase for becoming a trainer. More specifically, trainers who worked in the front of the restaurant were given a dollar increase to compensate them for tips they lost as the result of

time spent training new employees. Furthermore, the kitchen employees were given other incentives for becoming a trainer, such as, better shifts, more hours, and more opportunity for promotion,

31. The Petitioner has failed to come forward with any evidence showing that Respondent's articulated reason is pretextual.

32. The Petitioner has likewise failed to establish a prima facie case of discrimination with respect to job assignments. More specifically, the Petitioner admits that white employees had to clean the parking lot and freezer. It is also undisputed that white employees cleaned the parking lot and the freezer more often than the Petitioner. The Petitioner cleaned the parking lot five to six times over a six year period of employment. The Petitioner cleaned the freezer two to three times in a three-month span prior to 2000.

33. Assuming the Petitioner could establish a prima facie case, the Respondent has articulated a legitimate, non-discriminatory reason for how it assigned these responsibilities. Cleaning the parking lot was done on a rotational basis. Employees who were not busy were selected to clean the freezer on the occasions when Roberts did not do it himself.

34. The Petitioner has failed to come forward with any evidence showing that the Respondent's articulated reasons are pretextual.

35. The Petitioner's claim with respect to the freezer also fails because those incidents occurred more than 365 days prior to filing her charge of discrimination,

36. Finally, the Petitioner has failed to establish a prima facie case of discrimination with respect to preparing the prep list. The evidence shows that the Petitioner was not qualified to do the prep list because of her limited experience.

37. Assuming the Petitioner could establish a prima facie case, the Respondent has articulated a legitimate, non-discriminatory reason for selecting Merlin to do the prep list. Merlin was selected to do the prep list because she had more and broader experience than the Petitioner. More specifically, the Petitioner's experience was limited to the prep area while Merlin was trained on all stations in the kitchen and knew what items were selling.

38. The Petitioner has failed to come forward with any evidence showing that the Respondent's articulated reasons are pretextual.

39. Finally, even if the Petitioner had established a claim of discrimination, she failed to establish her claim for damages. The Petitioner did not present any evidence as to the

amount of damages and, when asked on cross-examination, the Petitioner had no idea as to the amount of any back pay.

RECOMMENDATION

Having considered the foregoing Findings of Fact, Conclusions of Law, the evidence of record, the candor and demeanor of the witnesses, and the pleadings and arguments of the parties, it is, therefore,

RECOMMENDED:

That a Final Order be entered by the Florida Commission on Human Relations dismissing the Petition for Relief in its entirety.

DONE AND ENTERED this 15th day of July, 2003, in Tallahassee, Leon County, Florida.



P. MICHAEL RUFF
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of July, 2003.

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.