STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DORINE ALEXANDER,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 02-4524
	)	
BOEHM, BROWN, SEACREST, FISCHER & LEFEVER, P.A.,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

A formal hearing was conducted in this case on March 24, 2003, in Ocala, Florida, before Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Dorine Alexander, pro se
1421 Southwest 27th Avenue
Apartment No. 1807
Ocala, Florida 34474

For Respondent: Randy Fischer, Esquire
Boehm, Brown, Fischer & Harwood, P.A.
Post Office Box 4140
Ocala, Florida 34478

STATEMENT OF THE ISSUE

The issue is whether Respondent committed an unlawful employment practice against Petitioner based on her race in violation of Section 760.10, Florida Statutes.

PRELIMINARY STATEMENT

Petitioner Dorine Alexander (Petitioner) dual-filed a Charge of Discrimination with the United States Equal Employment Opportunity Commission (EEOC) and the Florida Commission on Human Relations (FCHR). It appears that Petitioner filed copies of the charge with FCHR in August 1999, on September 20, 1999, and on November 30, 1999.

The Charge of Discrimination alleged that Respondent Boehm, Brown, Seacrest, Fischer, & Lefever, P.A. (Respondent), had discriminated against Petitioner based on her race.

On or about October 18, 2002, FCHR issued a Notice of Dismissal and Right to Sue based on a determination by the EEOC that it was unable to conclude that the information obtained established a violation of law. The notice gave Petitioner the opportunity to file a Petition for Relief within 35 days.

On November 15, 2002, Petitioner filed a Petition for Relief with FCHR. The petition alleged that Respondent had discriminated against her based on her race. The petition alleged facts suggesting that Respondent had created a hostile work environment, imposed disparate discipline, and terminated Petitioner's employment. FCHR referred the Petition for Relief to the Division of Administrative Hearings on November 19, 2002.

The Division of Administrative Hearings issued an Initial Order on November 19, 2002. Petitioner filed a response to the

order on November 25, 2002. However, an Amended Initial Order was issued on December 31, 2002, because the Respondent's copy of the original order was returned to the Division of Administrative Hearings as "undeliverable." Respondent filed a response to the Amended Initial Order on January 16, 2003.

Administrative Law Judge Barbara Staros issued a Notice of Hearing dated January 28, 2003. The notice scheduled the hearing for March 24, 2003. The Division of Administrative Hearings subsequently transferred the case to the undersigned.

During the hearing, Petitioner testified on her own behalf and offered 11 exhibits, which were accepted into evidence. Respondent presented the testimony of three witnesses and offered 28 exhibits, which were accepted into evidence.

A Transcript of the hearing was filed on April 28, 2003. Respondent timely filed its proposed findings of fact and conclusions of law on May 6, 2003. As of the date of this Recommended Order, Petitioner has not made a post-hearing submission.

FINDINGS OF FACT

1. Petitioner is an African-American female. Respondent initially hired Petitioner through a temporary labor service. Petitioner worked for approximately 60 days as a temporary employee in the position of a medical transcriptionist preparing medical chronologies.

2. At the end of the 60-day period, Respondent decided to eliminate Petitioner's position. Petitioner decided to enhance her career opportunities by applying for a position as a paralegal with Respondent.

3. In a letter dated June 19, 1996, Petitioner expressed her interest in working for Respondent as a full-time employee. According to the letter, Petitioner had worked for over 20 years as a secretary/administrative assistant, including some experience in the areas of management and supervision. The letter, together with Petitioner's resumé, indicated that she had experience as a legal secretary.

4. In a letter dated August 26, 1997, Respondent offered Petitioner a job as a paralegal. Petitioner accepted the offer.

5. Randy Fischer, Esquire, explained the duties of a paralegal to Petitioner and gave her a copy of a paralegal's job description. The duties included, but were not limited to, the following: (a) drafting pleadings and correspondence; (b) drafting discovery requests; (c) organizing files and preparing file indexes; (d) investigating cases; (e) scheduling depositions; (f) attending document productions, exhibit exchanges, and pretrial conferences; and (g) assisting in legal research.

6. Respondent gave Petitioner an employee handbook. The handbook included, among other things, information about

attendance, discipline, and the firm's anti-discrimination policies and procedures. Petitioner also received a paralegal manual and billing guidelines.

7. Respondent's anti-discrimination policy communicated to employees that sexual harassment, racial discrimination, or any other type of discrimination would not be tolerated. Respondent had an "open door" policy by which employees could report discrimination to the office manager or the office-managing partner.

8. At all times material here, Mr. Fischer was the office-managing partner, and Janet Siefert was the office manager. Petitioner never took advantage of the opportunity to report any alleged racial discrimination to anyone on Respondent's staff.

9. From the beginning of her employment as a paralegal, Mr. Fischer communicated to Petitioner that she would be expected to schedule, coordinate, and calendar activities for attorneys. He frequently was critical of Petitioner's performance because she failed to meet these expectations. There is no persuasive evidence that Mr. Fischer's criticisms were racially motivated.

10. Respondent regularly provided written performance evaluations of employees. Petitioner's first review took place in December 1997. The evaluation indicated that Petitioner's

attendance or dependability and teamwork were "highly acceptable." Her performance in oral expression, writing ability, decision-making ability, work product accurateness, and work product volume was "acceptable." Petitioner "needed to improve" in the following areas: (a) knowing subject matter; (b) analyzing problems; (c) obtaining information; (d) meeting deadlines; (e) performing assignments resourcefully and creatively; (f) recording billable time; (g) showing initiative; and (h) following through on assignments. Petitioner's overall rating on the evaluation was "acceptable."

11. During the evaluation, Mr. Fischer counseled Petitioner about her job deficiencies. He particularly discussed Petitioner's need to follow appropriate guidelines for billing. This was important because Respondent routinely had to reduce Petitioner's excessive billing time in some areas. There is no persuasive evidence that Petitioner was singled out in terms of having billing time entries removed from the timesheets.

12. In February 1998, Petitioner began having problems with her attendance and low work productivity. A written disciplinary action dated February 11, 1998, outlined the following deficiencies: (a) inattention to detail in handling files by failing to schedule the continuation of a deposition; (b) poor performance in handling the Angela Davis file;

(c) leaving the building during work hours without proper authorization; (d) being late for work on numerous occasions; and (e) taking numerous personal absences.

13. Regarding the Angela Davis file, Petitioner's failure to follow instructions adversely affected Mr. Fischer's handling of the file. Mr. Fischer became angry because it took Petitioner two hours to drive from Ocala, Florida, to Gainesville, Florida, with only a portion of the Angela Davis file that he had requested. However, there is no evidence that Mr. Fischer's anger was racially motivated.

14. Petitioner admits that she occasionally left the building during her work breaks to go to the bank or for other personal reasons instead of spending that time in the employees' break room. She asserts that she did not know she had to have permission to do so and that she had to sign in and out. According to Petitioner, other employees were allowed these privileges without being reprimanded. Petitioner's testimony in this regard is not credible.

15. Petitioner admitted during the hearing that her attendance record was problematic due to personal problems. On at least one occasion, Mr. Fischer agreed to let Petitioner make up some of the time she had lost. There is no persuasive evidence that Respondent's attendance policy was applied more rigidly to Petitioner than to any other employee.

16. More importantly, Petitioner admitted that she was not qualified to perform all of the duties of a paralegal when she accepted the position. It is clear that she had difficulty learning "on-the-job."

17. On February 20, 1998, Mr. Fischer wrote Petitioner and another paralegal a note regarding the importance of pulling a file together and following directions. Mr. Fischer had gone to mediation without the necessary file documents because Petitioner and her co-worker had not followed his directions.

18. On March 12, 1998, Mr. Fischer reminded Petitioner and another paralegal about the importance of providing him with daily timesheets in a timely manner. Petitioner and her co-worker were at least a week behind in providing him with their timesheets.

19. On March 26, 1998, Petitioner used the firm's copy machine and other supplies for personal reasons.

20. On April 8, 1998, Petitioner was late to work due to a flat tire.

21. In May 1998, Petitioner requested a more flexible work schedule so that she could attend class in Orlando, Florida, one afternoon each week. Mr. Fischer responded that her billing hours were already low and that she was routinely late to work. However, Mr. Fischer agreed to give her the time off for a 30-day period if she documented her time at the office, improved

her productivity, and billed a minimum of 25 billed hours per week.

22. In June 1998, Mr. Fischer had to remind Petitioner again about the importance of keeping calendars for the attorneys. Because Petitioner failed to follow instructions, no attorney from Respondent's office attended a scene viewing.

23. In July 1998, Mr. Fischer sent Petitioner an e-mail message criticizing her for not properly issuing a subpoena and deposition notice. When he realized that Petitioner was not at fault, he promptly apologized in a subsequent message.

24. On August 18 and 19, 1998, Petitioner received two personal facsimile transmissions at the office.

25. On August 25, 1998, Mr. Fischer gave Petitioner a written disciplinary action and placed her on probationary status. The discipline was based on the following reasons: (a) Petitioner had been out of the office for various personal reasons 31 times in the last 90 days; (b) Petitioner had provided Respondent with inaccurate or incomplete reasons for those absences; (c) Petitioner's productivity was below office standards; (d) Petitioner had failed to properly schedule activities and calendar events for an attorney; (e) Petitioner had failed to follow repeated instructions in relation to file handling, scheduling depositions, and scheduling meetings; (f) Petitioner had used firm time to receive and review personal

facsimile transmissions, to discuss personal information, and to participate in personal telephone calls; and (g) Petitioner had inappropriately used firm resources.

26. On September 16, 1998, Mr. Fischer gave Petitioner another written disciplinary action. The memorandum outlined continued problems with Petitioner's performance. One example of Petitioner's poor performance involved her failure to properly arrange for a deposition. Other examples involved excessive billing for making summaries of records; the lack of time billed for other case activities, such as setting and noticing depositions and hearings; failure to resolve unpaid costs on a case; and modification of timesheets after they had been edited. The September 16, 1998, disciplinary action also reviewed continued problems with Petitioner's attendance and attitude.

27. Respondent's paralegals are required to bill 100-105 hours per month. Some examples of Petitioner's billing hours are as follows: (a) March 1998, 97.3 hours; (b) April 1998, 58.9 hours; (c) May 1998, 74.3 hours; and (d) June 1998, 69.7 hours.

28. Respondent fired Petitioner on September 25, 1998. Her termination was based on cumulative reasons, including low productivity, failure to be attentive to detail in the handling of files, and frequent absences and tardiness.

29. During the time that Petitioner worked for Respondent, Mr. Fischer fired Robin Carr, a white female, for similar reasons that Petitioner was terminated: excessive absences, inappropriate use of personal time in the office, and excessive personal telephone calls. Mr. Fischer also fired Art Monig, a white male, for low work productivity. Ms. Carr and Mr. Monig both worked as paralegals.

30. Petitioner testified that, on one occasion, Ms. Carr and other employees were in the employees' break room discussing the turnover of staff in the office. Petitioner testified that Ms. Carr made the statement that Petitioner did not have to worry about losing her job because she was a "token." In the Petition for Relief, Petitioner alleges that Ms. Seifert made this comment.

31. Ms. Carr did not testify at the hearing but Ms. Seifert did testify and denies making such a statement or ever hearing it made. Similarly, Jennifer Whitehead, who was Mr. Fischer's secretary from February 1997 through May 2001, testified that she never heard anyone in the office make a statement that Petitioner was a "token" or a "quota." Nevertheless, Petitioner's testimony in this regard is persuasive.

32. Petitioner admits that she never reported the statement allegedly made by Ms. Carr to anyone in Respondent's

office. She admits that Mr. Fischer never made inappropriate racial comments in her presence. Mr. Fischer's dissatisfaction with Petitioner's performance may have caused Petitioner to be uncomfortable from time to time, but there is no evidence that his reactions to her poor performance were racially motivated.

CONCLUSIONS OF LAW

33. The Division of Administrative Hearings was jurisdiction over the parties and the subject matter of this proceeding. Sections 120.569, 120.57(1), and 760.11, Florida Statutes.

34. Section 760.10(1), Florida Statutes, states that it is an unlawful employment practice for an employer to discharge or otherwise discriminate against an individual on the basis of race.

35. The provisions of Chapter 760, Florida Statutes, are analogous to those of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sections 2000e, et seq. Cases interpreting Title VII are therefore applicable to Chapter 760, Florida Statutes. Brand v. Florida Power Corporation, 633 So. 2d 504, 509 (Fla. 1st DCA 1994); School Board of Leon County v. Hargis, 400 So. 2d 103 (Fla. 1st DCA 1981).

Disparate Treatment and Discriminatory Discharge

36. In Title VII discrimination cases involving disparate treatment and/or discriminatory discharge, a complainant

generally bears the burden of proof established in McDonnell Douglas v. Green, 411 U.S. 792 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). Under this model of proof, an employee bears the initial burden of establishing a prima facie case of discrimination. If the employee establishes a prima facie case, the burden shifts to the employer to articulate a legitimate, non-discriminatory explanation for the employment action. See Department of Corrections v. Chandler, 582 So. 2d 1183 (Fla. 1st DCA 1991). If the employer meets its burden of production, the employee must prove that the employer's stated reason is a pretext because it is not worthy of belief or because a discriminatory motive, more likely than not, motivated the decision. Chandler, 582 So. 2d at 1186. The ultimate burden of persuading the trier of fact that the employer intentionally discriminated against the employee remains at all times with the employee. St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

37. To prove a case of disparate treatment or discriminatory discharge in this case, Petitioner must show the following: (a) she is a member of a protected group; (b) she is qualified for the position; (c) she was subject to adverse employment decisions such as discipline for violation of office rules and/or termination; and (d) she was treated less favorably than similarly-situated persons outside the protected class and,

after she was fired, the position was filled by a person of another race. See Anderson v. WBMF-4, 253 F.3d 561 (11th Cir. 2001); Crapp v. City of Miami Beach, 242 F.3d 1017 (11th Cir. 2001).

38. Petitioner is a member of a protected group. She presented evidence that she was disciplined for breaking office rules and that she was discharged. However, she has not met her initial burden to show racial discrimination under theories of disparate treatment or discriminatory discharge for the following reasons.

39. First, Petitioner failed to show that she was qualified as a paralegal when she accepted the position in August 1997. She never learned the skills she needed to become proficient in work before she was terminated in September 1998.

40. Second, Petitioner failed to show that similarly-situated persons who were not members of the protected group were treated more favorably. There is no evidence that Caucasian paralegals were allowed to continually break office rules and repeatedly fail to meet performance expectations without being reprimanded.

41. Finally, Petitioner presented no evidence as to her replacement. However, she admitted during the hearing that an attorney, not another paralegal, wanted her office space.

42. On the other hand, Respondent presented persuasive evidence that Petitioner had routinely violated office rules related to attendance, leaving the office building during office hours, using office equipment for personal reasons, inappropriate use of company time, client billing procedures, and work productivity in general. Mr. Fischer fired Petitioner, after giving her repeated warnings, that her job performance needed to improve and that she needed to comply with office rules, procedures, and policies. Petitioner presented no persuasive evidence that Respondent's reasons for discipline and eventual termination were a pretext for racially motivated discrimination.

Racial Harassment

43. To show hostile work environment, Petitioner must prove that: (a) she belongs to a protected group; (b) she had been subject to unwelcome harassment; (c) the harassment was based on a protected characteristic; (d) the workplace is permeated with discriminatory intimidation, ridicule, and insult sufficiently severe or pervasive to alter the terms or conditions of employment and to create an abusive working environment; and (e) the employer is liable either directly or vicariously for the abusive environment.

44. To satisfy the fourth element, an employee must prove that: (a) he or she subjectively perceived the conduct to be

abusive; and (b) a reasonable person objectively would find the conduct at issue hostile and abusive. Harris v. Forklift Systems, Inc. 510 U.S. 17, 21-22 (1993).

45. To determine whether an employee felt harassed subjectively, a court may look to see if the employee reported the incident, quit, avoided the workplace, reacted angrily or exhibited some physical or psychological reaction to the environment. Daniels v. Essex Group, Inc., 937 F.2d 1264, 1272-73 (7th Cir. 1991).

46. To determine whether the conduct at issue objectively is hostile or abusive, a court should look at the totality of the circumstances using several factors including: (a) the frequency of the conduct; (b) its severity; (c) whether it was physically threatening or humiliating or whether it was merely offensive; and (d) whether it unreasonably interfered with the employee's job performance. Harris, 510 U.S. at 23. These factors taken together must reveal conduct extreme enough to "amount to a change in terms and conditions of employment." Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998).

47. Regarding an employer's liability for hostile environments, the court in Faragher, 524 U.S. at 807, stated as follows:

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a

> supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, see Fed. Rule Civ. Proc. 8(c). The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.

48. Here, Petitioner, as an African-American, is a member of a protected group. She has shown that she was subject to at least one unwelcome, race-related comment. She has not shown that Mr. Fischer or anyone else in the office engaged in abusive and unprofessional behavior, race-related or otherwise.

49. To the extent that Petitioner was subject to one unwelcome race-related comment that she was a "token" or a "quota," Petitioner has not proved that she subjectively and objectively viewed the comment as abusive and hostile. She did not report the comment to anyone in authority or show any physical or emotional reaction. The comment arose in a break room discussion and was not stated in a derogatory, name-calling intimidating manner meant to berate or taunt Petitioner. There is no evidence that her job performance was materially altered after she heard the comment.

50. Finally, Petitioner has not shown a basis for Respondent's liability. Ms. Carr was not Petitioner's supervisor and the making of the comment did not result in a tangible employment action. Respondent had an open door anti-discrimination policy. Petitioner was aware that she could have reported the unwelcome comment to Mr. Fischer or Ms. Seifert. She did not complain to anyone in the office about the comment.

RECOMMENDATION

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

RECOMMENDED:

That FCHR enter a final order dismissing the Petition for Relief.

DONE AND ENTERED this 23rd day of May, 2003, 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 23rd day of May, 2003.

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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.