

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

EVELYN MARTINEZ,)
)
 Petitioner,)
)
 vs.) Case No. 03-1277
)
 BOCA DINER,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on July 23, 2003, in Boca Raton, Florida, before Errol H. Powell, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Evelyn Martinez, pro se
Post Office Box 9654
Port St. Lucie, Florida 34985

For Respondent: Dean J. Tantalos, Esquire
2255 Wilton Drive
Wilton Manors, Florida 33305

STATEMENT OF THE ISSUE

The issue for determination is whether Respondent discriminated against Petitioner on the basis of sex (sexual harassment), national origin, and retaliation in violation of the Florida Civil Rights Act of 1992, as amended.

PRELIMINARY STATEMENT

Evelyn Martinez filed an Amended Charge of Discrimination with the Florida Commission on Human Relations (FCHR) against Boca Diner alleging that Boca Diner discriminated against her on the basis of sex (sexual harassment), national origin, and retaliation. On March 10, 2003, FCHR issued a Determination of Adverse Inference-Cause (Determination) and a Notice of Determination of Cause. In the Determination, FCHR stated, among other things, that Ms. Martinez alleged discrimination on the basis of sex and retaliation; that Boca Diner failed to provide information within its control to FCHR; and that, because of Boca Diner's failure, FCHR drew an adverse inference as to sexual harassment and retaliation, determining that reasonable cause existed to believe an unlawful employment practice had occurred.

On March 27, 2003, Ms. Martinez filed a Petition for Relief from an unlawful employment practice with FCHR against Boca Diner alleging, among other things, that Boca Diner created a hostile work environment and that she was subjected to sexual harassment and retaliation. On April 9, 2003, FCHR referred this matter to the Division of Administrative Hearings.

At hearing, Ms. Martinez testified in her own behalf, presented the testimony of two witnesses, and entered one exhibit (Petitioner's Exhibit numbered 10) into evidence. Boca

Diner presented the testimony of one witness and entered one exhibit (Respondent's Exhibit numbered 1) into evidence.

A transcript of the hearing was not ordered. At the request of the parties, the time for filing post-hearing submissions was set for more than ten days following the hearing.

Only Boca Diner filed a post-hearing submission. Ms. Martinez chose not to file a post-hearing submission. Boca Diner's post-hearing submission was considered in the preparation of this Recommended Order.

All citations are to Florida Statutes (2003) unless otherwise indicated.

FINDINGS OF FACT

1. Evelyn Martinez is a female and Hispanic of Puerto Rican origin.
2. Ms. Martinez began working at the Boca Diner on May 29, 2000, as a waitress.
3. At all times material hereto, Ms. Martinez was an employee of Boca Diner.
4. Boca Diner does not dispute that it is an employer within the jurisdiction of the Florida Civil Rights Act of 1992, as amended.

5. The hours of operation of Boca Diner were from 6 a.m. to 10 p.m. Boca Diner was open for breakfast, lunch, and dinner.

6. The majority of the persons who were servers at Boca Diner were females; only a few were males.

7. At all times material hereto, even though other waitresses of Hispanic descent were employed by Boca Diner, Ms. Martinez was the only Hispanic waitress of Puerto Rican origin.

8. Ms. Martinez had prior experience as a waitress before beginning her employment with Boca Diner.

9. At Boca Diner, Ms. Martinez worked mostly evening shifts, reporting to work around 3 or 4 p.m. She worked five to six days a week.

10. During the week after July 4, 2000, an employee of Boca Diner by the name of Rick made a remark to Ms. Martinez that she considered sexual. He stated to her that she had nice breasts. Ms. Martinez told Rick not to make the remark again and walked away.

11. No dispute exists that the remark was a sexual remark.

12. Rick was a server but was not a full-time server, only part-time. His usual working hours were around 4-9 p.m.

13. Ms. Martinez reported the incident, regarding the remark by Rick, to Boca Diner's owner and manager, John

Pelekanos.¹ Mr. Pelekanos indicated to her that all the other waitresses tolerated such remarks from Rick and that she should also. Ms. Martinez stated to Mr. Pelekanos that she was not going to "take" such remarks from Rick.

14. No evidence was presented to show that Boca Diner had a sexual harassment policy.

15. Rick made no further sexual remarks to Ms. Martinez after she reported him to Mr. Pelekanos.

16. After reporting the incident to Mr. Pelekanos, Ms. Martinez's working schedule changed. Instead of working five to six days a week, she now worked two days.² However, Ms. Martinez was able to obtain two additional days from other workers by them agreeing for her to work their days.

17. Boca Diner contends that Ms. Martinez's workdays were reduced because of the slowness of business in the summer; however, Boca Diner only reduced her workdays. The undersigned considers it reasonable to reduce the number of working hours of waitresses due to a slowness of business, but considers it unreasonable to reduce the workdays of only one waitress, i.e., Ms. Martinez, by three to four days, but none of the other waitresses, because of the slowness of business.

18. Before reporting the remark by Rick, Ms. Martinez felt harassed by and hostility from the other waitresses. The other waitresses "hassled" her for not properly performing the "side

work," which consisted of setting-up the salad bar, and filling bottles of mayonnaise, ketchup, etc.

19. After Ms. Martinez reported the remark by Rick, the hassling escalated. Additionally, Rick began to constantly tell Ms. Martinez to quickly do her work.

20. Ms. Martinez did not inform the floor manager, Alex Lazarus, how the other waitresses or Rick were hassling her. She did not approach Mr. Lazarus because she considered him to be verbally abusive to her and other employees.

21. Additionally, after Ms. Martinez reported the remark by Rick, on July 15, 2000, she was assigned to a different serving section at Boca Diner. Her new serving section was section one, which was the number one section and the busiest and most demanding section at Boca Diner.³ When she placed her orders, the orders were completed late. As a result, customers were complaining.

22. Boca Diner contends that customers were complaining about Ms. Martinez before she was moved to section one. It is not reasonable to move a waitress, about whom customers are already complaining, to a busier and more demanding section of the restaurant.

23. At the end of her shift on July 15, 2000, she was fired by the floor manager, Alex Lazarus. No dispute exists that Mr. Lazarus had the authority to fire Ms. Martinez.

24. Mr. Pelekanos was not in the country when Ms. Martinez was fired.

25. No dispute was presented that Boca Diner does have the right to fire waitresses or waiters who are not performing adequately or who are performing poorly.

26. No evidence was presented as to whether Boca Diner had employed other Hispanic waitresses of Puerto Rican origin prior to Ms. Martinez's employment.

27. No evidence was presented as to whether Boca Diner had fired other waitresses and, if so, for what reason(s).

28. As to Ms. Martinez's income while she worked at Boca Diner, no time records were provided by Boca Diner. Boca Diner failed to retain her time records. Further, Boca Diner had no documentation regarding Ms. Martinez's employment with it. Boca Diner gave no reasonable explanation for its failure to retain time records or other documentation regarding Ms. Martinez's employment with it. Boca Diner did not provide any testimony regarding monetary remuneration to Ms. Martinez for being a waitress at Boca Diner.

29. Ms. Martinez did not provide any pay records or federal income tax returns regarding her employment with Boca Diner. However, she did provide a handwritten statement showing her income at Boca Diner for the time that she worked at Boca

Diner⁴ and gave testimony regarding her income at Boca Diner subsequent to her termination. Her testimony is found to be credible.

30. At the time Ms. Martinez was employed at Boca Diner, her base pay was \$40.00 every two weeks, resulting in her base pay being \$80.00 per month.

31. Ms. Martinez handwritten document indicated that she received \$300.00 from May 29 through June 4, 2000; \$325.00 from June 5 through 11, 2000; \$325.00 from June 12 through 18, 2000; \$325.00 from June 19 through 25, 2000; \$300.00 from June 26 through July 2, 2000; \$250.00 from July 3 through 9, 2000; and \$225.00 from July 10 through 15, 2000; totaling seven weeks and \$2,050.00. The evidence did not demonstrate whether the base pay was included in her income. An inference is drawn that Ms. Martinez's total income at Boca Diner included the base pay of \$40.00 every two weeks or \$80.00 per month.

32. Ms. Martinez testified that she received \$1,275.00 in tips for a month. Reducing her four-week income by her base pay indicates that she received \$1,195.00 in tips for the four-week period: May 29 through June 4, 2000, at \$280.00 in tips; June 5 through 11, 2000, at \$305.00 in tips; June 12 through 18, 2000, at \$305.00 in tips; June 19 through 25, 2000, at \$305.00 in tips. Reducing the remaining three-week period by her base pay indicates that she received \$715.00 in tips for the three-week

period: June 26 through July 2, 2000, at \$280.00 in tips; July 3 through 9, 2000, at \$230.00 in tips; and July 10 through 15, 2000, at \$205.00 in tips. As a result, the total amount of tips that Ms. Martinez received for the time period that she was employed at Boca Diner totaled \$1,910.00. Consequently, it is reasonable and an inference is drawn that she received \$1,910.00 in tips for the seven-week period.

33. After her termination, Ms. Martinez borrowed money in July and August 2000 from family to pay her monthly obligations, which included rent, food, gas, insurance, and incidentals. She estimates that she borrowed from \$600.00 to \$800.00.

34. After her termination, Ms. Martinez was hired on August 26, 2000, as "counter-help" at a dry cleaners. She was paid \$6.00 an hour and worked less than 30 hours a week. Ms. Martinez worked for two weeks at the dry cleaners. An inference is drawn that Ms. Martinez's income was \$348.00, using 29 hours a week at \$6.00 an hour.

35. Afterwards Ms. Martinez was hired part-time as a waitress at a restaurant. She received \$100.00 per week, including tips. Ms. Martinez worked at the restaurant for three weeks. An inference is drawn that Ms. Martinez's income was \$300.00, using \$100.00 per week for three weeks.

36. Ms. Martinez was subsequently hired as a waitress at another restaurant. She received \$50.00 per week, including

tips. Ms. Martinez worked at the restaurant for two weeks. An inference is drawn that Ms. Martinez's income was \$100.00, using \$50.00 per week for two weeks.

37. On October 26, 2000, Ms. Martinez began working at RTA Catering, a restaurant. She was receiving \$2,000.00 per month. According to Ms. Martinez, at that time, her income was comparable or equal to her income at Boca Diner and she saw no need to go further into her employment history.

38. After her termination and prior to receiving employment at RTA, Ms. Martinez' income was \$748.00.

39. The total number of weeks from July 15, 2000, the date of Ms. Martinez's termination, to October 26, 2000, the date of her comparable employment, is 15 weeks.

CONCLUSIONS OF LAW

40. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the parties thereto, pursuant to Sections 760.11 and 120.569, Florida Statutes, and Subsection 120.57(1), Florida Statutes.

41. Section 760.10, Florida Statutes (2000), provides in pertinent part:

(1) It is an unlawful employment practice for an employer:

(a) 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.

(b) To limit, segregate, or classify employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities, or adversely affect any individual's status as an employee, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.

42. The instant case has no direct evidence of unlawful unemployment practices. A three-step burden and order of presentation of proof have been established for unlawful employment practices in which no direct evidence of unlawful employment practices exists. McDonnell Douglas Corporation v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 688 (1973); Aramburu v. The Boeing Company, 112 F.3d 1398, 1403 (10th Cir. 1999). The initial burden is upon Ms. Martinez to establish a prima facie case of discrimination. McDonnell Douglas, at 802; Aramburu, at 1403. Once she establishes a prima facie case, a presumption of unlawful discrimination is created. McDonnell Douglas, at 802; Aramburu, at 1403. The burden shifts then to Boca Diner to show a legitimate, nondiscriminatory reason for its action. McDonnell Douglas, at 802; Aramburu, at 1403. If Boca Diner carries this burden, Ms. Martinez must then prove by a preponderance of the evidence that the reason offered by Boca

Diner is not its true reason, but only a pretext for discrimination. McDonnell Douglas, at 804; Aramburu, at 1403.

43. However, at all times, the ultimate burden of persuasion that Boca Diner intentionally discriminated against Ms. Martinez remains with her. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981).

44. Ms. Martinez must establish a prima facie case of discrimination by showing: (1) that she belongs to a protected group; (2) that she was subjected to an adverse employment action; and (3) that her employer treated similarly situated employees outside the protected group differently or more favorably. McDonnell Douglas, supra; Holifield v. Reno, 115 F.3d 1555 (11th Cir. 1997); Aramburu, supra.

45. Ms. Martinez has satisfied the first two requirements of the prima facie test.

46. As to the third requirement of the prima facie test, Ms. Martinez must show that she and the other employees (the comparator employees) are "similarly situated in all relevant respects." Holifield, supra, at 1562. In making such a determination, consideration must be given to "whether the employees are involved in or accused of the same or similar conduct and are disciplined in different ways." Ibid.

47. The comparator employees "must be similarly situated in all material respects, not in all respects." McGuinness v. Lincoln Hall, 263 F.3d 49,53 (2d Cir. 2001); Shumway v. United Parcel Service, Inc., 118 F.3d 60, 64 (2d Cir. 1997). "In other words, . . . those employees must have a situation sufficiently similar to plaintiff's to support at least a minimal inference that the difference of treatment may be attributable to discrimination." McGuinness, supra, at 54.

48. Ms. Martinez has demonstrated that the other similar situated employees, i.e., the other waitresses, were treated differently than she was. No evidence was presented that any other waitresses' days were reduced because of the slow summer. No evidence was presented that any other waitress was fired.

49. The evidence is sufficient to show disparate treatment between Ms. Martinez and the other waitresses.

50. Ms. Martinez satisfied the third requirement of the prima facie test.

51. However, Boca Diner demonstrated a legitimate, nondiscriminatory reason for its employment action of terminating Ms. Martinez. That reason was poor performance.

52. Ms. Martinez must now demonstrate by a preponderance of the evidence that the reason offered by Boca Diner for terminating her is not its true reason, but only a pretext for discrimination. McDonnell Douglas, at 804; Aramburu, at 1403.

53. The evidence failed to show that a comparator employee was terminated, not only for poor performance, but at all.

54. The evidence is insufficient to demonstrate that the reason offered by Boca Diner for terminating Ms. Martinez was a pretext for discrimination.

Retaliation

55. Section 760.10(7), Florida Statutes (2000), provides in pertinent part:

It is an unlawful employment practice for an employer . . . to discriminate against any person because that person has opposed any practice which is an unlawful employment practice under this section, or because that person has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section.

56. Rick made a sexual remark to Ms. Martinez. She protested the remark and reported it to the owner and manager of Boca Diner.

57. To establish a prima facie case of retaliation, Ms. Martinez must present evidence to show: (1) that she engaged in protected activity; (2) that she suffered an adverse employment action; and (3) that there is some causal relationship link between her protected activity and the adverse employment action. Holifield, supra, at 1566; Brown v. Sybase, Inc., ___ F.Supp.2d ___, 2003 WL 22407152 (S.D. Fla. September 23, 2003). To meet the causal link, Ms. Martinez must at least

establish that Boca Diner was actually aware that she complained of Rick's sexual remark (of the protested expression) at the time that she was fired, which may be established by circumstantial evidence. Holifield, ibid.; Brown, ibid.

58. Once Ms. Martinez establishes a prima facie case, Boca Diner must show a legitimate, nondiscriminatory reason for its action of firing her. Holifield, ibid.; Brown, ibid. If Boca Diner carries this burden, Ms. Martinez must then show that the reason offered by Boca Diner is not its true reason, but only a pretext for retaliation. Holifield, ibid.; Brown, ibid. The United States Supreme Court has held that the "prima facie case, combined with sufficient evidence that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." Brown, ibid., citing Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 148, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000).

59. In the instant matter, Ms. Martinez presented a prima facie case of retaliation. Ms. Martinez has shown that she is a member of a protected group; and she has presented sufficient evidence to show that she was subjected to unwelcome, sexual related harassment and that she reported the sexual remark made to her by Rick to the owner of Boca Diner. Furthermore, she demonstrated that Boca Diner was aware of the protected activity

in which she engaged and that she was subsequently terminated after having engaged in the protected activity.

60. As stated earlier, Boca Diner has presented a legitimate non-discriminatory reason for firing Ms. Martinez, i.e., poor work performance.

61. Ms. Martinez has demonstrated that Boca Diner's explanation is a pretext for retaliation. The evidence demonstrates that, after Ms. Martinez reported the sexual remark made to her by Rick, her workdays were significantly reduced, but no other waitresses' workdays were reduced. Furthermore, the evidence demonstrates that Ms. Martinez's work-section was changed to the busiest and most demanding work-section of the restaurant when Boca Diner was aware that customers had been complaining about her service; and that her orders were slow and late in being prepared after the change to the new section, which resulted in numerous complaints about her service. The evidence further demonstrates that Boca Diner relied upon the complaints by customers in the number one section to terminate her.

62. Consequently, the evidence demonstrates that Boca Diner retaliated against Ms. Martinez.

63. Ms. Martinez lost income because of her wrongful termination.

64. As to the time that Ms. Martinez worked at Boca Diner, her workdays were wrongfully reduced the week after July 4, 2000. It is reasonable to infer that she should have worked four more days during the week of July 10-15, 2000. The evidence does not show that Ms. Martinez failed to receive her base pay of \$40.00 every two weeks; therefore, she failed to receive only tips in that week. Tips are traditionally dependent upon the whim of customers. Since there was wrongful action on the part of Boca Diner, it is reasonable to calculate an average of weekly tips prior to the wrongful reduction in workdays and apply that figure to the last week of Ms. Martinez's employment. The average per week for tips is in the amount of \$273.00.⁵ Consequently, Ms. Martinez failed to receive \$273.00 in tips for the last week that she worked at Boca Diner.

65. Further, Ms. Martinez averaged a monthly income (a four week period) in the amount of \$1,275.00, including tips, at Boca Diner. She considers herself to have received a comparable income when she obtained a position on October 26, 2000, at RTA Catering, a restaurant, and was receiving \$2,000.00 per month. Her contention is reasonable. Ms. Martinez was terminated by Boca Diner on July 15, 2000. She was without comparable employment for 15 weeks and earned \$748.00 during that 15-week period. Estimating for 15 weeks, Ms. Martinez would have earned

\$4,781.25 at Boca Diner. Consequently, she lost \$4,033.25 in income.

RECOMMENDATION

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

RECOMMENDED that the Florida Commission on Human Relations enter a final order:

1. Finding that Boca Diner discriminated against Evelyn Martinez on the basis of retaliation.

2. Ordering Boca Diner to cease the discriminatory practice.

3. Ordering Boca Diner to pay Evelyn Martinez back pay in the amount of \$4,033.25.

DONE AND ENTERED this 31st day of October, 2003, in Tallahassee, Leon County, Florida.

S

ERROL H. POWELL
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of October, 2003.

ENDNOTES

1/ Mr. Pelekanos testified that Ms. Martinez did not report the incident to him. His testimony is not found to be credible.

2/ The testimony of the only former waitress who testified, Florence Marcus, is not credible pertaining to the reduction in the number of workdays for Ms. Martinez.

3/ The testimony of the only former waitress who testified, Florence Marcus, is not credible pertaining to one section of Boca Diner not being busier and more demanding than other sections.

4/ Ms. Martinez prepared the handwritten statement in July 2001 for an unemployment benefits case. The amounts were fresh in her mind at that time and more reliable than her present memory. The document was persuasive. The Unemployment Appeals Commission decision, which included the Decision of the Appeals Referee, was not persuasive as to Ms. Martinez's lost income.

5/ The average was \$272.857 per week for tips. The average was rounded to the nearest dollar.

COPIES FURNISHED:

Evelyn Martinez
Post Office Box 9654
Port St. Lucie, Florida 34985

Dean J. Tantalos, Esquire
2255 Wilton Drive
Wilton Manors, Florida 33305

Denise Crawford, Agency Clerk
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

Cecil Howard, General Counsel
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

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.