

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LOREAL BAILEY,)
)
 Petitioner,)
)
 vs.) Case No. 04-0711
)
 MFS, d/b/a WINDY'S/EXXON)
 TRAVEL CENTER,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

A formal hearing in this case was held pursuant to notice on May 6, 2004, by Stephen F. Dean, assigned Administrative Law Judge of the Division of Administrative Hearings, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Loreal Bailey, pro se
621 Smith Road
Moticello, Florida 32344

For Respondent: Lorraine Maass Hultman, Esquire
Kunkel, Miller & Hament
Orange Professional Center
235 North Orange Avenue, Suite 200
Sarasota, Florida 34236

STATEMENT OF THE ISSUE

Whether the Respondent engaged in an unlawful employment practice contrary to Chapter 760, Florida Statutes, by discharging the Petitioner?

PRELIMINARY STATEMENT

This case arose when the Respondent terminated the employment of the Petitioner because there were funds missing from her deposit following her shift. The Petitioner filed a charge of discrimination with the Florida Commission on Human Relations (FCHR). The Petitioner did not controvert that the funds were missing, but asserted that the Respondent had not discharged other employees who had missing funds, and that her discharge constituted disparate treatment based upon race.

FCHR was unable to complete its investigation within the statutory time, and notified Petitioner of her right to request an administrative hearing. The Petitioner availed herself of this right, and the matter was referred to the Division of Administrative Hearing. The referral was received on March 4, 2004, and an Initial Order was sent to the parties on that date requesting that they provide dates that they were available for hearing and the most convenient venue for the hearing.

The Respondent filed a response to the Initial Order, and the case was set for hearing on May 6, 2004, by notice dated March 10, 2004. The case was heard as noticed.

At the formal hearing, the Petitioner testified in her own behalf. The Respondent called Richard Eschenbacher, Ronnie Burk, and Cheryl Connell to testify. No exhibits were

introduced. No transcript was filed. The parties both submitted proposed findings which were read and considered.

FINDINGS OF FACT

1. The Petitioner, Loreal Bailey, is an African-American woman who was employed as a cashier by the Respondent.

2. One of the tasks that the cashiers were required to do was make a count of their registers at the end of their shift and "drop" the receipts, the cash, and their count of their cash drawer into a safe. The cashier did not have access to the safe. Cashiers were not supposed to let any other employee handle their deposit.

3. On or about January 7, 2003, the Petitioner was on duty, and, at the close of her shift, she was being assisted in closing out her tour by another employee, who helped her count her money. The other employee, Hattie Killingsworth, an African-American woman, dropped Petitioner's package containing the receipts, the cash, and her count of the cash drawer into the safe. A subsequent accounting of the deposits revealed that \$400 was missing from the Petitioner's "drop."

4. The Respondent discharged the Petitioner shortly after this incident on January 13, 2003. Killingsworth was also terminated at this time. Both women were terminated for failing to follow company procedures that prohibited an employee from handling another employee's money.

5. The matter was reported to the local sheriff's office; however, no charges were brought.

6. Testimony by the Respondent's managers revealed that the money was most probably taken by a management employee of the company who was video-taped shutting off the security cameras prior to a period when money went missing. Money was missing on more than one occasion. It was surmised by management that this employee had found a way to access the safe. When this employee was terminated, the losses stopped.

7. The general manager, Richard Eschenbacher, testified that the policy of not letting an employee touch another employee's money was not only to protect the employees, but to permit employees to testify about chain of custody of moneys if there were problems. The actions of Killingsworth and Bailey prevented Bailey from being able to testify that she had counted and deposited the money without interference from anyone else. Such testimony is helpful in prosecutions when a thief is caught, and a conviction without such chain of custody evidence is difficult to obtain.

8. The Petitioner presented no evidence showing that the grounds presented by the Respondent for her discharge were pretextual.

CONCLUSIONS OF LAW

9. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of the hearing pursuant to Sections 760.11 and 120.57, Florida Statutes.

10. The burden is on the Petitioner to prove the allegations of her complaint.

11. The Petitioner alleges that she was not treated in the same manner as white employees who had losses. However, the facts show that the basis for her discharge was not the loss that was suffered, but her failure to follow company procedures prohibiting other employees from handling her money and receipts. The Petitioner did not present any evidence to show that any white employees had let other employees handle their money and were not terminated.

12. The principal means of presenting a prime facie case of discrimination is via the four-pronged "McDonnell Douglass test" from the Supreme Court's decision in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973), which requires a plaintiff to establish a prima facie case by proving that he or she (1) was a member of the protected class, (2) was subject to an adverse employment action, (3) was replaced with a person outside the protected group, and (4) was qualified to do the job.

13. The Petitioner showed that she was a member of a protected class; that she was subject to an adverse employment action, and was qualified to do her job. She did not show that she was replaced by a white employee.

14. The Respondent presented a valid, non-discriminatory reason for discharging the Petitioner. In a classic McDonnell Douglas analysis, the employer need only be presented a nondiscriminatory rationale for its decision to require the employee to show that the reason advanced by the employer is pretextual. See Id. at 802-803. The Petitioner did not present any evidence that this was pretextual. In the absence of a showing that the reason advanced for the Respondent's action was pretextual, the Petitioner fails to meet her burden. The Petitioner's complaint should be dismissed.

RECOMMENDATION

Based upon the foregoing findings of law and conclusions of law, it is recommended that the Florida Commission on Human Relations enter its final order dismissing the Petitioner's complaint.

DONE AND ENTERED this 13th day of July, 2004, in
Tallahassee, Leon County, Florida.

S

STEPHEN F. DEAN
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of July, 2004.

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.