STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BRENDA E. WARREN,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 04-1197
	)	
DEPARTMENT OF REVENUE,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Upon due notice, a disputed-fact hearing was held on June 16, 2004, in Gainesville, Florida, before Ella Jane P. Davis, a duly-assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Brenda E. Warren, pro se
6406 Northeast 27th Avenue
Gainesville, Florida 32609

For Respondent: Cindy Horne, Esquire
Department of Revenue
Post Office Box 6668
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STATEMENT OF THE ISSUE

Whether Respondent committed an unlawful employment practice against Petitioner by subjecting her to discrimination on the basis of her race (Black) or by retaliation.

PRELIMINARY STATEMENT

Petitioner's Charge of Discrimination on the basis of race and retaliation was filed October 29, 2002, with the Florida Commission on Human Relations (Commission). Following the Commission's "Determination: No Cause," on March 3, 2004, Petitioner timely filed a Petition for Relief. The matter was referred to the Division of Administrative Hearings on or about April 8, 2004.

At hearing, Petitioner presented the oral testimony of Sandra Sawyer, Tiffany Brown, Shneka Covington, né Shneka Hendrick (or Hendreith), Barbara Bryant, Cloria Hill, Glenda McConaghy (or McKinney), Tabitha Wiley, Candace Thomas, Brenda Gandy, Jeff Smith, Sandy King, and Barbara Jordan and testified on her own behalf. Petitioner's Exhibits P-1, 3, 4, 5, 6, 7, 8, 9, 16, and P-28, were admitted in evidence.

Respondent presented the testimony of Barbara Jordan, David Ostrander, Mark Kellerhals, and Sandy King. Respondent's Exhibits R-1, 2, 3, and 4 were admitted in evidence. The record was left open for the filing of the deposition of Bonnie Lazor, which filing occurred on June 29, 2004. That deposition has been admitted as Respondent's Exhibit 5.

Joint Exhibits AA and ALJ-A also were admitted in evidence.

No transcript was provided.

Both parties timely filed Proposed Recommended Orders which have been considered in preparation of this Recommended Order.

FINDINGS OF FACT

1. At all times material and as of the date of hearing, Respondent employed Petitioner, a Black female, as a Revenue Specialist II at the Gainesville Service Center of the Child Support Enforcement Program. She has had consistently good evaluations.

2. In her Proposed Recommended Order, Petitioner has limited her charge/petition to the period from September 29, 2000, until September 11, 2002, during which period she claims to have suffered from a hostile work environment, different terms and conditions of her employment than similarly situated Caucasian employees, and harassment.

3. At all times material, Barbara Jordan, a Caucasian female, was the Service Center Manager and Petitioner’s third-level supervisor.

4. Ms. Jordan became the Gainesville Service Center Manager by involuntary transfer, when the employer transferred the previous Service Center Manager to Lake City, in the midst of gossip and allegations that he was guilty of favoritism. As a result of his alleged favoritism, and/or as a result of Petitioner’s concern that other employees had incorrectly attributed to her the prior manager's transfer to Lake City,

and/or as a result of racial tensions and employee feuds of long standing in the Gainesville Service Center; that location was not a pleasant place to work, even prior to Ms. Jordan's arrival.

` 5. Among the pre-existing employee feuds was one between Petitioner and Karen Smyder, a Caucasian female Revenue Specialist III.

6. Although there were racial tensions and employee feuds in the Gainesville Service Center prior to Ms. Jordan's arrival, Ms. Jordan was not informed of these problems prior to assuming the position of Gainesville Service Center Manager.

7. Upon the evidence as a whole, it might reasonably be said that Ms. Jordan was a "by-the-book" administrator, who did not cut anybody any slack. While this managerial style is seldom pleasant for subordinates, and some would question its efficacy, it still is one of many acceptable forms of management, provided it does not discriminate against any employee for any of the reasons listed in Section 760.10(1), Florida Statutes.

8. Among other acceptable policies, Ms. Jordan strictly enforced the employer's attendance and leave requirements.

9. To inform employees of the leave policy, Jeff Smith, a Caucasian male supervisor who worked between Ms. Jordan and Petitioner on the chain of command, sent an e-mail to employees

in September 2000, reminding them that they were not permitted to leave the building during breaks or during regularly scheduled work hours without supervisory permission, and that they must use earned leave time for any time that they were away from the building.

10. One month after Ms. Jordan's arrival in the Gainesville Service Center, on September 28, 2000, Ms. Jordan was informed that Brenda Gandy, a Black female Revenue Specialist II, had left the office without prior permission for a period of 45 minutes. When Ms. Gandy returned to the office, Ms. Jordan admonished Ms. Gandy and instructed her to deduct the time she was away from work from her accrued annual leave.

11. Ms. Gandy had worked with Ms. Jordan in another location previously, as had Barbara Bryant, another Black female Revenue Specialist II. Both women had pre-formed purely subjective opinions that Ms. Jordan's managerial style was racially motivated. (See Finding of Fact 60).

12. Ms. Gandy was upset by Ms. Jordan's September 28, 2000, admonishment. She decided that Ms. Jordan's admonishment was discriminatory and based on her race. However, there were no other examples of employees of any race who were permitted to leave the Gainesville Service Center building without deducting earned leave.

13. Although Ms. Jordan had consulted Karen Smyder to determine if Ms. Gandy had left the building that day, Ms. Smyder had not reported Ms. Gandy's absence to Ms. Jordan. In fact, Sonnia Thomas, a Caucasian female Revenue Specialist II, had reported Ms. Gandy’s absence to Ms. Jordan, but Ms. Gandy apparently persisted in believing that Ms. Smyder had reported her.

14. Later on September 28, 2000, Sonnia Thomas reported to Ms. Jordan that she had overheard Ms. Gandy make threats against Ms. Smyder, outside Ms. Smyder's presence, during a conversation in which Ms. Gandy addressed other employees in Ms. Gandy’s cubicle, which was next to Ms. Thomas’s cubicle. Sonnia Thomas also advised Ms. Jordan that Petitioner, Barbara Bryant, and Schneka Covington, another Black female Revenue Specialist II, were present in Ms. Gandy's cubicle when Ms. Gandy made threats against Ms. Smyder.

15. When Ms. Thomas reported what she claimed to have overheard to Ms. Jordan, Ms. Jordan reasonably became concerned.

16. Ms. Jordan knew Ms. Gandy and Ms. Bryant, but Ms. Jordan had only been at the Gainesville Service Center for one month, and she did not know all of the named employees. Therefore, the next day, September 29, 2000, she asked the supervisors of all four employees named by Sonnia Thomas to locate them and bring them to a meeting.

17. Ms. Jordan opened her meeting in a conference room at the Service Center. Present with Ms. Jordan at this September 29, 2000, meeting were Gene Merrow, a Caucasian male Revenue Administrator I; Lee Ross, a Caucasian female Revenue Administrator I; Petitioner; Ms. Gandy; Ms. Covington; and Ms. Bryant.

18. Prior to the meeting, Ms. Jordan only knew the race of two named non-supervisory employees: Gandy and Bryant, because she had worked with them previously in a different location. Ms. Jordan did not know the race of the other lower level employees prior to the meeting but, in point of fact, the four persons alleged to have been in conversation at the time of Ms. Gandy's alleged threats against Ms. Smyder were all Black, as well as being all non-supervisory employees.

19. None of the Black subordinates called to the meeting had advance warning of the purpose of the September 29, 2000, meeting. They were caught off-guard when Ms. Jordan began by addressing the allegations of threats toward Ms. Smyder. Immediately, the four non-supervisory employees became very upset and agitated by what they perceived as Ms. Jordan’s surprise attack and accusatory tone. No racial terms were used by Ms. Jordan, but the four non-supervisory employees immediately formed the belief that Ms. Jordan's concerns were racially motivated. They became more and more angry and argued

loudly and belligerently with Ms. Jordan, without permitting her to stay on topic.

20. Ms. Jordan had called the meeting to determine if threats against Ms. Smyder had, in fact, occurred. She had no obligation to tell anyone in advance why she was calling a meeting. Likewise, there was no reason she had to keep her reason secret. It is probable that not all of the mid-level Caucasian supervisors knew the full purpose of the meeting in advance, although in hindsight, some Caucasian employees gave subsequent statements to investigators that they knew or guessed Ms. Jordan's purpose in calling the meeting, and these statements fueled Black employees' suspicions of racial favoritism and conspiracies.

21. Ms. Jordan considered the meeting to be out of control and attempted to end it. The Black subordinates would not grant Ms. Jordan the floor. Rather than being intimidated, Ms. Jordan walked out of the conference room. Because the Black employees had ignored her instructions to calm down and listen, Ms. Jordan viewed absenting herself from the room to be the only way to defuse a volatile situation.

22. Later that same day, Sonnia Thomas reported overhearing yet another conversation from Ms. Gandy's cubicle, in which Ms. Gandy allegedly threatened Ms. Jordan by stating that she would come to work with a gun and threaten Ms. Jordan

in a manner similar to what happened at “Columbine.” “Columbine” was assumed by all concerned to be a reference to a notorious tragic and fatal event involving school violence. As a result of Sonnia Thomas’ now third report concerning Ms. Gandy (leaving the building; threatening Ms. Smyder; and threatening Ms. Jordan), Ms. Jordan reasonably became concerned about her own safety and the safety of the workplace she was required to manage.

23. Ms. Jordan requested that Sonnia Thomas report what she had overheard to the employer's Office of the Inspector General (OIG), by filing a "Workplace Violence Report." Ms. Thomas filed the Report. Among other accusations in the Workplace Violence Report, Ms. Thomas alleged Petitioner had spoken profane and racially charged language to Ms. Jordan and to, or about, Ms. Smyder.

24. As part of the employer's zero tolerance workplace violence policy, the employer’s central office in Tallahassee placed Ms. Gandy on administrative leave. OIG investigators David Ostrander, a Caucasian male, and Mark Kellerhals, also a Caucasian male, went to the Gainesville Service Center to conduct investigations in response to Ms. Thomas' Workplace Violence Report.

25. Despite testimony to the effect that none of the Gainesville employees enjoyed the subsequent OIG investigation,

there is no credible evidence to disprove Ostrander’s and Kellerhals’ credible testimony that they simply used a standard investigative protocol for conducting interviews. The investigators took taped and sworn statements from subjects and witnesses. The interviews were transcribed and are in evidence. The investigators used standard lead-in language, and; at the beginning of each interview, they informed each respective interviewee of whether s/he was being interviewed either as a "witness" or as a "subject" of the investigation.

26. A "subject" of an OIG investigation is a person who has been accused of some misbehavior.

27. Ostrander and Kellerhals testified that the nature of an interview of a subject is more accusatory and aggressive than the nature of an interview of a mere witness. Interviews of subjects are conducted so as to determine the truth of the allegations against that subject by provoking the subject. Investigators typically deliberately antagonize subject employees to elicit truthful answers. By contrast, OIG interviews of mere witnesses are typically more refined and courteous than interviews of accused employees.

28. Among others, Petitioner, Ms. Gandy, Ms. Covington, and Ms. Bryant were interviewed.

29. There were two parallel investigations assigned to Ostrander and Kellerhals: the first investigation concerned

Ms. Gandy's alleged threats. The second investigation concerned the allegedly disruptive conduct of the four employees (Gandy, Petitioner, Covington, and Bryant) during the meeting presided over by Ms. Jordan on September 29, 2000; this was assigned OIG Case No. 000124. Each interview covered both sets of allegations. Ms. Gandy and Ms. Bryant were subjects of both investigations. Ms. Covington and Petitioner were subjects of one investigation, the meeting with Ms. Jordan, and were witnesses in the Gandy investigation.

30. All four Black employees were insulted by the tone of the questions asked by Ostrander and Kellerhals. All four believed that Ostrander and Kellerhals treated them as if they were guilty and that Ostrander and Kellerhals treated them more harshly because they were Black. However, all of the witnesses at hearing agreed that the OIG investigators made no racial comments or racial allusions, whatsoever, during the interviews. None of the four employees asked any Caucasian interviewees if they believed the interviews were harsh. Therefore, there is nothing beyond the Black interviewees' subjective speculations to suggest that their race, rather than their status as "subjects," motivated or determined the tone of the OIG interviews.

31. Petitioner provided the names of two witnesses during her interview by Kellerhals and Ostrander, but the OIG

investigators did not interview either of them. The investigators did not interview either of the people named by Petitioner because neither of them had been present in the conference room on September 29, 2000, during the meeting with Ms. Jordan. The OIG investigators did interview all the people actually present in the room that day. (See Finding of Fact 17.)

32. Sandra Sawyer, a Caucasian female supervisor, testified that while the OIG investigators were in Gainesville for interviews, she observed them laughing and joking with Ms. Smyder for 30 minutes. Ms. Sawyer told what she saw to Petitioner and the other investigation subjects. She also wrote a letter to the OIG "reporting" the investigators. The subjects concluded that the behavior of the OIG investigators, as characterized by Ms. Sawyer, showed that the investigators were racially motivated and had showed favoritism toward Caucasian employees.

33. However, at hearing, Ms. Sawyer conceded that she did not overhear any of the content of the conversation she observed among Smyder, Ostrander, and Kellerhals. Ostrander and Kellerhals testified credibly that Ms. Smyder had information regarding “The Eye,” a telephone monitoring system, which could provide information necessary to confirm the location of various employees during the events being investigated. They also

testified credibly that they had talked cordially for about 10 minutes, rather than 30 minutes, with Ms. Smyder about The Eye, but had not discussed any other aspects of their investigation with Ms. Smyder or any other Gainesville employee, Caucasian or Black. They guessed it was this conversation which Ms. Sawyer had observed from a distance. They further testified credibly that they had not had any social contact with any employee of the Gainesville office. Neither racial discrimination nor unprofessional conduct by OIG investigators has been proven by this conversation.

34. Petitioner and seven other employees were transferred to the Call Center portion of the Gainesville Service Center in January 2001. Ms. Jordan signed-off on Mr. Smith's transfer of Petitioner because she thought Petitioner had requested the transfer or otherwise was "okay" with it. In fact, Petitioner had not requested the transfer and was not okay with it. Jeff Smith testified that the proposed transfer was based upon the transferees' personalities and abilities to perform the duties of the Call Center. There was no evidence all of the transferees were Black, and probably they were not all Black. (See Finding of Fact 62.) However, upon the evidence as a whole and the candor and demeanor of all the witnesses, it is found that it is more likely that Smith, Ross, and Merrow, two of whom had been present in the conference room on September 29, 2000,

were anxious to move Petitioner, whom they believed to be a disruptive influence, from their part of the Gainesville Center to another area. That said, there is no evidence that Petitioner's proposed transfer was racially motivated; that it was in retaliation for Petitioner's participation in the OIG's investigations of Gandy, Bryant, Covington, and Petitioner; or that the proposed transfer was in retaliation for any legal actions or protests of Ms. Gandy. (See Findings of Fact 43 and 46.)

35. There also is no evidence that Mr. Smith treated Petitioner any differently than he would have treated anyone else when Petitioner told him she did not want to be transferred. Petitioner did not want to transfer to the Call Center in part because Karen Smyder and Sonnia Thomas worked there. She told Mr. Smith that because of Smyder and Thomas, the tensions in the Call Center would affect her health. Mr. Smith instructed her to obtain a doctor’s note stating that she could not work in the Call Center and that she should report for work at the Call Center until she could demonstrate, by a medical excuse, that she could not work there. However, at Petitioner's request, Mr. Smith allowed Petitioner to use her accrued annual leave to avoid working in the Call Center until she obtained the medical excuse. When Petitioner provided the medical excuse, she was transferred to another position which

was not in the Call Center. Petitioner has not objected to that transfer. Although personality conflicts may have had more to do with Petitioner's proposed transfer to the Call Center and ultimate transfer to another position than did good management techniques, it was not demonstrated that this situation singled out Petitioner on the basis of her race; that any rule was applied inequitably among the races; or that the proposed or ultimate transfer was in retaliation for her “witness” or “subject” status in either OIG investigation up to that point.

36. Later, Petitioner applied for a promotion for which Mr. Merrow did not interview her. Petitioner did not provide any evidence that only Caucasian employees were interviewed or hired for the position for which she had applied. The employer's higher management did not contemporaneously know about Mr. Merrow's failure to interview Petitioner. Sandy King, a Caucasian female Revenue Administrator II, offered her opinion that Mr. Merrow, who had been present in the September 29, 2000, conference, had a personal dislike for Petitioner because he viewed Petitioner as a disruptive employee.

37. Ms. Jordan was in the supervisory chain of command for all four Black employees investigated.

38. Flouting the authority of a supervisor is "disruptive conduct," according to the employer’s disciplinary rules.

39. The OIG’s investigation of Ms. Jordan's subordinates, Petitioner, Gandy, Bryant and Covington, was closed March 2, 2001. It determined that there was reasonable cause to believe that Petitioner and Ms. Covington had engaged in disruptive conduct at the September 29, 2000, meeting with Ms. Jordan. Petitioner and Ms. Covington each received an oral reprimand, with no change of position, pay, benefits, or privileges. In other words, there was no “real world” employment consequence for Petitioner as a result of Sonnia Thomas' September 29, 2000, Workplace Violence Report.

40. The OIG’s investigation determined that Ms. Bryant had been present when Ms. Gandy had made threatening comments in her cubicle, and that Ms. Bryant had lied about the threats, and that Ms. Bryant had lied about having engaged in disruptive conduct during the September 29, 2000, meeting with Ms. Jordan. Ms. Bryant received a written reprimand. However, she also did not lose any position, pay, benefits, or privileges.

41. The employer has a zero tolerance policy regarding confirmed threats of violence. Employees are commonly terminated when such threats are made.

42. The OIG’s investigation determined that Ms. Gandy had made threats of violence toward Ms. Jordan, and Ms. Gandy was dismissed. The date of her dismissal is not clear from this record.

43. Ms. Gandy testified that Sonnia Thomas, who had made the allegations of violence against her, resigned on January 9, 2001, shortly before Ms. Gandy's unemployment compensation hearing on January 13, 2001, and that Mr. Merrow hired Ms. Thomas back on or about February 12, 2001, approximately a month after Ms. Thomas resigned. Ms. Gandy believed that Ms. Thomas resigned to escape testifying for the employer at Ms. Gandy's post-termination unemployment compensation hearing, and that Mr. Merrow's re-hiring of Ms. Thomas was a discriminatory action against herself. These dates were not corroborated and do not seem reasonable in light of one OIG investigation's closing in March 2001. (See Finding of Fact 39.) Further, it was not explained how Ms. Thomas's testimony for the employer would have assisted Ms. Gandy's unemployment case. It also was not demonstrated how Ms. Thomas's resignation would have prevented her testifying. Finally, whatever significance these events or Ms. Gandy's interpretation of them may hold for Ms. Gandy, it is irrelevant to the instant case involving Petitioner.

44. Petitioner, Ms. Bryant, and Ms. Covington had been listed in the September 29, 2000, Workplace Violence Report (see Findings of Fact 23-24), as having been present when Ms. Gandy made her threats against Ms. Jordan. They believed that being named in the Workplace Violence Report authored by Sonnia Thomas

was unfair and racially discriminatory against them, regardless of the outcome for them of the OIG investigation.

45. Even though it was Ms. Thomas who wrote the Report and it was the employer, through its OIG, who, in effect, cleared Petitioner and Ms. Covington of having any involvement in Ms. Gandy's threats made in her cubicle, Petitioner wanted to pursue some sort of remedy against Ms. Thomas for "falsely accusing" her of using bad language toward Ms. Jordan and of using bad language toward, or about, Ms. Smyder. This was in part because Petitioner felt Ms. Thomas could not have known what was said in the conference room on September 29, 2000.

46. Because they did not see the September 29, 2000, Workplace Violence Report containing allegations they had used profanity and racially charged language until after the OIG had completed some or all of its investigation/recommendation, Petitioner and Ms. Gandy also concluded that a discriminatory conspiracy existed. At some point, Ms. Gandy filed a civil action against the employer, which she testified was scheduled for trial in August 2003, and also filed a Charge of Discrimination. Petitioner's involvement in either of these actions, if any, was not explained.

47. Petitioner pursued a grievance against Sonnia Thomas because of Ms. Thomas' Workplace Violence Report. Petitioner’s grievance arising from the Workplace Violence Report was filed

April 5, 2001, and denied as untimely. The Employee Relations Manager, Patrick Schmidt, a Caucasian male, explained to Petitioner that a grievance must be filed within 14 days of the incident to which the grievance relates. Because Petitioner's grievance had been filed four months after the Workplace Violence Report (see Finding of Fact 23), Petitioner's grievance was considered untimely.

48. Petitioner testified that, in her opinion, because she did not discover the existence of the Workplace Violence Report until a few days before she filed her grievance, the employer should be estopped from dismissing her grievance as untimely. However, she did not include in her grievance request the date she discovered the Report. After being advised that her grievance had been denied due to its untimeliness, she still did not amend her grievance request to include the date she discovered the Report and re-submit her grievance. The employer only followed its standard policy in maintaining the 14-day time limit, and Petitioner was not diligent in pursuing her grievance. Moreover, there is no evidence that any Caucasian employee has been permitted to file a grievance beyond the 14-day limit, and accordingly, there is no evidence of disparate treatment related to the employer's handling of this grievance.

49. Sometime in October 2001, Tabitha Wiley, a Black female Clerk, overheard Ms. Smyder call Petitioner, "a fucking

bitch." Petitioner and other employees testified that Ms. Smyder and Petitioner had a long history of animosity toward each other. In the September 29, 2000, Workplace Violence Report, Ms. Thomas had accused Petitioner of using profane and racially-charged language towards Ms. Jordan and towards, or about Ms. Smyder, (See Finding of Fact 23.) In October 2001, Petitioner reported to her local supervisor, Lee Ross, and to Phyllis Lambrecht, a Caucasian female Regional Manager, what Ms. Wiley had recently overheard. Petitioner maintained Ms. Lambrecht had told her to report to her any profanity from Ms. Smyder. However, Petitioner did not file anything with OIG against Ms. Smyder at that time.

50. In November 2001, Sonnia Thomas initiated an OIG investigation against Petitioner for using foul, profane, and racially-charged language against Ms. Smyder apparently harking back to the events of September 2000. Ms. Thomas' filing was designated by the OIG as OIG Case No. 010206.

51. In response to Petitioner's October 2001, allegation of Ms. Smyder's profanity, Ms. Lambrecht did not contact Ms. Wiley to verify the incident as Petitioner thought she would. Instead, in December 2001, Ms. Lambrecht and Ms. Jordan met with Petitioner and Ms. Smyder and condemned their long history of hostility toward each other, including their use of profanity in the workplace. On December 6, 2001, Ms. Jordan

issued to both Ms. Smyder and Petitioner "memos of understanding." The memos indicated that management could not determine from their respective accusations whether it was Petitioner or Ms. Smyder who was telling the truth about Petitioner's October 2001, profanity allegations, but that if any further trouble arose between Smyder and Petitioner, one or both of them would be transferred to other Service Centers.

52. In January 2002, Ms. Thomas wrote to OIG to withdraw OIG Case No. 010206 against Petitioner, which Ms. Thomas had originated in November 2001. After inquiry, the OIG dropped its investigation and closed OIG Case No. 010206 in February 2002, because the situation had been addressed by local management.

53. In February 2002, Petitioner directly contacted the OIG to file a complaint of "false report" against Sonnia Thomas in response to Ms. Thomas' complaint of Petitioner's profane language towards Ms. Smyder (see Findings of Fact 50-52), which complaint Ms. Thomas had already withdrawn (OIG Case No. 010206), and which the OIG had closed. Petitioner spoke by telephone with Bonnie Lazor, a Caucasian female Investigations Manager with the OIG. Ms. Lazor tried to dissuade Petitioner from filing a formal complaint with the OIG, because Ms. Lazor believed that all matters regarding the Gainesville Service Center had been thoroughly investigated and that Petitioner’s new proposed action was a repetitive request. However, at

Petitioner’s insistence, Ms. Lazor opened OIG Case No. 010378, and assigned it to Alan Haskins, a Caucasian male investigator. Mr. Haskins interviewed Petitioner, who did not provide any new allegations not covered in previous investigations. In May 2002, Mr. Haskins closed his investigation of OIG Case No. 010378, brought by Petitioner against Ms. Thomas. The OIG has the authority to close a case if local management has already dealt with the issue by some sort of corrective action.

54. Petitioner asserts that Ms. Jordan's, Ms. Lazor's, and Mr. Haskin's handling of the profanity issue was discriminatory. Petitioner's point with regard to the memos of understanding is that she was not guilty of bad or racial language as alleged in the September 29, 2000, Workplace Violence Report or as alleged in OIG Case No. 010206, abandoned by Ms. Thomas, whereas Ms. Smyder was guilty of using bad language toward, Petitioner; and management refused to contact Ms. Wiley, failed to root out the truth, and failed to discipline Ms. Smyder and all those who sided with Ms. Smyder, most notably Sonnia Thomas. This assertion is not persuasive. It is true that the employer's local management did not indulge in a lengthy "swearing contest" or assign guilt, but local management cautioned the Black Petitioner and the Caucasian; Ms. Smyder, equally concerning profanity and false reports. Local management’s approach may, or may not, have been perfectly just, but it was not disparate

treatment based on race. The OIG processed Petitioner's subsequent complaint against Ms. Thomas as far as reasonable under the circumstances.

55. Candace Thomas is a Black female Revenue Specialist II and apparently no relation to Sonnia Thomas. When Candace Thomas and Petitioner worked in the Drivers License Revocation Section, they recorded all of their work on a case in a computer program called a “workbook.” Sandy King was their direct supervisor. In September 2002, management was undertaking a restructuring of the process that Ms. King supervised. Mr. Merrow wanted to have input into the restructuring. Without Ms. King’s approval or knowledge, Mr. Merrow asked David Southworth, a Caucasian male computer analyst, to look at the work of Erica Brown, a Black female Revenue Specialist II; the work of Candace Thomas; and the work of Petitioner. Mr. Southworth found irregularities in Petitioner’s workbook and reported them to Mr. Merrow, who in turn reported them to Ms. King. Ms. King insisted that all the employees involved meet regarding Mr. Southworth’s allegations. After reviewing the program together, mis-postings to Petitioner's workbook that could not be explained were found. Nonetheless, Ms. King decided that Mr. Merrow’s allegations did not have merit because the mistakes found did not amount to an intentional or negligent act of Petitioner. There also was some concern on Ms. King's

part that Mr. Southworth had manufactured some of these mistakes. She took no further action against Petitioner, and she instructed Mr. Merrow not to pursue the matter. Ms. King was so disturbed by Mr. Merrow's behavior that she reported it to the regional manager directly above her in the chain of command. Her report concerning Mr. Merrow ultimately led to his termination. Petitioner suffered no consequences as a result of this incident.

56. Petitioner presented evidence of several situations which occurred between September 29, 2000, and September 11, 2002. Her position was that taken together these situations demonstrated that the Gainesville Service Center constituted either a hostile, harrassing workplace for her, personally, as a Black, or that they showed that there was such animosity by Ms. Jordan or other Caucasian supervisors toward Blacks, in general, that the OIG's and her superiors' respective investigations and disciplinary results were tainted by racial discrimination.

57. After the September 29, 2000, meeting, Black employees perceived anything that Ms. Jordan did as racially motivated. However, Ms. Jordan rarely saw Petitioner. Ms. Jordan gave positive performance evaluations to Petitioner. None of the employees who testified could recall any racist remarks made by Ms. Jordan or by any other Caucasian supervisor. Lower-level

supervisors Mr. Smith and Ms. King testified that Ms. Jordan never gave them any orders that discriminated against one race of employees over another. During her long career with the employer, Ms. Jordan has dismissed many more Caucasian employees than Black employees.

58. Mesdames Hill, Brown, Wiley, and McConaghy did not observe any discriminatory acts directed toward Petitioner.

59. On one occasion, Tiffany Brown, a Black female Revenue Specialist II, brought her very small child into the office. People complained that the child was disruptive. Ms. Jordan told Ms. Brown to take the child home. A few days later, Diane while she was legitimately signed out for annual leave. Ms. Jordan kept Ms. Lyons' twelve-year-old child in her own office and away from other employees briefly Lyons, a Caucasian female employee, was called into the office while the mother handled an emergency fax of business material for the employer. On the basis of these two incidents, Ms. Brown filed a Charge of Discrimination with the Commission, which was resolved through mediation. Ms. Brown never received any adverse employment action based on the incident.

60. Ms. Bryant testified to three incidents, besides the OIG investigations described supra, which she thought demonstrated Ms. Jordan’s racial bias. First, when Ms. Bryant worked for Ms. Jordan in Lake City in the 1990's, Ms. Bryant

worked on the other side of the building from Ms. Jordan. Monitoring Ms. Bryant's work was one of Ms. Jordan's supervisory responsibilities, and once or twice a day she walked to Ms. Bryant's area of the building to observe her. There were also many other employees on that side of the building, whom Ms. Jordan also observed. There is no evidence Ms. Jordan only observed Black employees. This situation is both purely subjective and too remote in time and place from the instant case to be of any probative value. Also, one day while they were both working in Gainesville, Ms. Jordan made Ms. Bryant stop her usual work and put on her badge, because the employer's policy requires that employees wear their badges at all times while they are in the Service Center. There is no evidence Ms. Jordan let Caucasian employees work without badges. Therefore, this second incident presents no discriminatory bias. According to Ms. Bryant, the third allegedly discriminatory action of Ms. Jordan was when Ms. Bryant received a memo of counseling from middle manager Gene Merrow, due to a dispute between Ms. Bryant and Ken Duncan, a Caucasian male computer analyst. Ms. Bryant did not know whether or not Mr. Duncan was likewise counseled, so no disparate treatment has been proven as regards this incident, either.

61. Cloria Hill, a Black female former employee, testified that Ms. Jordan discriminated against her by initiating an

investigation against Ms. Hill for use of the employer's telephone to conduct her personal business. There were two of the employer's phones in Ms. Hill's cubicle, one for personal use and one for the Call Center line. Because Ms. Hill worked in the Call Center, she was expected to be on the Call Center line most of the time. So, when Ms. Jordan noticed that Ms. Hill was often on her personal line instead, and also received complaints from other employees that Ms. Hill was conducting personal business during working hours, Ms. Jordan initiated an OIG investigation regarding Ms. Hill's telephone usage. Mr. Ostrander was assigned to that investigation. He checked the telephone line described to him as Ms. Hill's line and asked Ms. Hill to explain in an affidavit the nature of the calls listed on the affidavit, which calls appeared not to be work-related. This is the standard OIG investigative practice for alleged misuse of the employer's telephones. After Ms. Hill responded, the OIG's investigation cleared Ms. Hill. The suspected telephone number was assigned to Deborah Sheffield, whose race was not provided by testimony. The telephone calls Ms. Sheffield had made also turned out to be business-related. Ms. Hill then filed a Charge of Discrimination, largely because she thought Ms. Sheffield should be investigated because she, Ms. Hill, had been investigated. The Commission determined that Ms. Hill's charge was without reasonable cause. The record is

silent as to whether Ms. Hill filed a Petition for Relief. However, the sum of all this is that Ms. Hill did not suffer any adverse employment actions by the employer as a result of the OIG investigation which cleared her, and she had no knowledge of any discrimination against Petitioner.

62. Glenda McConaghy, a Caucasian female former employee, testified in a conclusory manner that Ms. Jordan treated Black employees differently than she treated Caucasian employees. However, Ms. McConaghy did not personally witness the events underlying her beliefs. She based her opinion on stories she had heard from other employees. The only incident she recalled from personal knowledge was that when she and Ms. Hill were transferred to the Call Center, Ms. McConaghy received notice and Ms. Hill did not receive adequate notice which upset Ms. Hill. Ms. McConaghy did not know if Ms. Hill had been on leave prior to this transfer or if the notice seemed sudden for that reason. Accordingly, the failure to notify Ms. Hill, at worst, appears to be a merely thoughtless or inconsiderate managerial oversight which was unrelated to race.

63. Ms. McConaghy believed that Mr. Merrow did not assist her as a supervisor due to her association with Black employees, but her mere speculation was not corroborated. Also, Ms. McConaghy admitted that the employer had dismissed Mr. Merrow in 2002 due to other employees' complaints. (See

Finding of Fact 55.) She had no knowledge of any discrimination against Petitioner.

64. Tabitha Wiley worked at a front counter where clients came into the Gainesville Service Center. There were three clerks at the same counter area and three telephones. One employee, Betty, a Caucasian female, needed a telephone to accomplish her job duties. The other two employees, Ms. Wiley and Anna, a Hispanic female, did not need individual telephones to conduct their job duties. Ms. Jordan needed another telephone line for business purposes elsewhere in the Service Center. Jeff Smith suggested that Ms. Jordan move Ms. Wiley's telephone to the location where it was needed in order to save the employer the cost of installing a new telephone line. Ms. Wiley told Ms. Jordan that she needed a telephone assigned to her individually so that her children could check with her throughout the day. Ms. Jordan told Ms. Wiley that she could share Anna's business telephone for that purpose or she could use her own personal cell phone. As a result, Ms. Wiley filed a union grievance, contending that "her" business phone had been taken away because she was Black. At the union's suggestion, the parties agreed, within 24 hours of the grievance being filed, that Ms. Wiley would share a business telephone with Anna, which had been Ms. Jordan's proposal in the first place. Since the employer provided telephone equipment to its employees

for business purposes, Ms. Wiley’s position on this matter was untenable from its inception. The employer offered a sound business reason for its decision to remove the telephone. There has been no proof the employer's reason constituted a discriminatory pretext. The employer further compromised in order to accommodate Ms. Wiley. The situation was addressed and resolved by the employer to Ms. Wiley's satisfaction. There was no discriminatory employment practice demonstrated by these events.

65. The Gainesville Service Center has a training room that contains new computers. There were complaints that employees who were using the room for special projects were laughing and talking loudly and disturbing other employees. Ms. Jordan determined that the room provided a “constant party atmosphere” when employees gathered there. The entrance to this room was near an exit door on a hallway separated from the main hallway. It was difficult to monitor who went in and out of the computer room. During 2000-2002, there were contract employees from Tacachalee, who used the nearby exit, as well as child support clients in the building. Someone could remove a computer from the training room without being observed if the room were not locked.

66. Candace Thomas was working in the training room one day with another Black employee. Both employees had computers

at their respective desks and could have accomplished the same employment tasks in their cubicles. On that day, Ms. Jordan sent Sandy King to tell whoever was in the training room to leave it and lock it. Ms. Thomas testified that Caucasian employees had been in the room the day before and had not been asked to leave, so she believed that she and others were only asked to leave the second day because they were Black. She believed that when Ms. King said something to the effect of, “You need to leave this room and lock it. We’ve already had two computers stolen,” it was an accusation of theft against Ms. Thomas and her Black co-worker. In fact, Ms. King's statement was a neutral one. Ms. King testified credibly that at the time, two laptops had already been stolen from another building. Ms. Jordan testified credibly that she was not aware that anyone had used the room on the previous day. This incident demonstrates no disparate treatment on the basis of race, no harassment, no hostility, and no retaliation.

67. One day, Ms. Jordan told Candace Thomas that she resembled Condoleeza Rice, a Black female who is the National Security Advisor. Ms. Jordan further remarked that Ms. Rice must be very smart because she worked with the President of the United States in the White House. Ms. Thomas interpreted Ms. Jordan's comment as a disrespectful racial slur, to the effect that Ms. Jordan believed that the White House only hires

smart Black people but is free to hire dumb Caucasian people. Ms. Thomas was also offended because she did not think she favored Ms. Rice. Although beauty may be in the eye of the beholder, Ms. Thomas's interpretation of Ms. Jordan's comments is a purely subjective reaction with no reasonable basis. If anything, comparing an employee to a smart, high-ranking, public official is more in the nature of a compliment than a derogatory slur.

CONCLUSIONS OF LAW

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

69. Petitioner is an "employee," and Respondent is an "employer" as those terms are defined in Section 760.02, Florida Statutes.

70. Petitioner basically alleged three types of discrimination: (1) the disparate treatment of herself and all other Black employees by the OIG, Patrick Schmidt, Barbara Jordan, and Gene Merrow; (2) hostile work environment for all Black employees in the Gainesville Service Center; and (3) retaliation against Petitioner for her involvement in the investigation of Brenda Gandy.

71. In cases alleging racial discrimination based on disparate treatment, a petitioner bears the burden of proof established in McDonnell-Douglas v. Green, 411 U.S. 792 (1973); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). Under this model of proof, a petitioner bears the initial burden of establishing a prima facie case of discrimination. If she meets her initial burden, the burden to go forward shifts to the employer to articulate a legitimate, non-discriminatory explanation for the employment action. Dept. of Corrections v. Chandler, 582 So. 2d 1183 (Fla. 1st DCA 1991). If the employer meets its burden of production, the petitioner must then persuade the court that the employer's proffered reason is a pretext for intentional discrimination.

72. To establish a prima facie case of racial discrimination based on disparate treatment, a petitioner must show the following: (a) she belongs to a racial minority; (b) she was subjected to adverse employment action(s); (c) she was qualified for her position; and (d) the employer treated similarly situated employees outside the protected class more favorably. Holifield v. Reno, 115 F.3d 1555 (11th Cir. 1997)

73. In order to show an adverse employment action, a petitioner must establish that the action caused a serious and material change in the terms of her employment. Lindsay v. Burlington Northern Santa Fe Railway Co, 2004 Westlaw 443773

(11th Cir. 2004); Davis v. Town of Lake Park, Florida, 245 F.3d 1232 (11th Cir. 2001).

74. Petitioner herein is a Black female and is qualified for her position. All testimony indicates that she meets or exceed standards. She meets the first and third criteria. She did not meet the burden of production for adverse employment action and disparate treatment from similarly situated non-minority employees.

75. Petitioner proffered two adverse employment actions: an oral reprimand for disruptive conduct with regard to the disharmonious screaming match that occurred in Ms. Jordan's conference room on September 29, 2000, and a memo of counseling dated December 6, 2001, with regard to an alleged exchange of profanities between herself and Ms. Smyder. Petitioner did not suffer any loss of pay, benefits, or privilege as a result of either management action. Therefore, there was no serious and material change in the terms of her employment. Petitioner alleged that she suffered disparate treatment by the OIG investigators because they were harsh in questioning her during her interview and because they were seen joking and laughing with Karen Smyder, but no improper or unprofessional interchange between the OIG investigators and Karen Smyder was proven. Petitioner was the subject of one investigation and a witness in another investigation. The two investigations were merged for

interviewing purposes. There is no question that the OIG investigators were aggressive and perhaps harsh, with the subjects of their investigation(s), of which Petitioner was one subject. Any differing treatment between Petitioner and other employees was based on their respective statuses as a witness or a subject (accused) and not on their races. Ms. Smyder was never a subject of either investigation.

76. Petitioner alleged that Patrick Schmidt treated her disparately by denying her April 2001 grievance as untimely filed. Petitioner's grievance concerned the 2000 Workplace Violence Report filed by Sonnia Thomas. The Report was dated September 29, 2000. Petitioner did not file a grievance until April 5, 2001. Petitioner's grievance was untimely, and she did not amend it to cure any elements of untimeliness based on late notice.

77. Petitioner alleged that she suffered disparate treatment in the fall of 2001, by the OIG because Bonnie Lazor was reluctant to assist her in opening a new charge against Ms. Sonnia Thomas concerning the charge against Petitioner that Ms. Thomas had recently withdrawn. Nonetheless, Petitioner had to concede that the investigation of Ms. Thomas she requested was opened and that Mr. Haskins only closed it after interviewing Petitioner. The fact that Investigator Haskins closed his investigation without reaching the solution that

Petitioner proposed is not the decisive point. Haskins found that management had already addressed the matter by a memo of understanding to Petitioner. Evidence shows that Ms. Smyder simultaneously received a similar memo of understanding. The memos of understanding do not demonstrate diseparate treatment or any other form of discrimination. Under the circumstances, Ms. Thomas' withdrawn allegations were moot, and Petitioner had no cause to pursue an action against her.

78. Most of the situations involving other employees are irrelevant to these instant proceedings because they did not involve Petitioner even peripherally; because none of them rise to the level of an unfair employment practice on the basis of race; and because no retaliation nexus was established.

79. Petitioner alleged that Barbara Jordan had a pattern of treating Black employees disparately, but she was unable to prove this allegation. Although Petitioner presented numerous incidents experienced by Black employees, she failed to establish that Caucasian employees of the Gainesville Service Center received different or better treatment than did Black employees. With the exception of Ms. Gandy, none of the employees lost any pay or benefits. Petitioner failed to establish a prima facie case of disparate treatment upon racial grounds for any employee.

80. To establish a prima facie case for a hostile work environment, a petitioner must provide evidence that shows: (a) she belongs to a protected group; (b) she and other Black employees have been subject to unwelcome harassment; (c) the harassment was based on a protected characteristic; (d) the workplace is permeated with discriminatory intimidation, ridicule, and insults sufficiently severe or pervasive to alter the terms or conditions of employment and to create an abusive working environment; and (e) the employer is responsible under either a theory of vicarious or direct liability. Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269 (11th Cir. 2002); Lawrence v. Wal-Mart Stores, Inc., 236 F. Supp. 2d 1314 (M.D. Fla. 2002).

81. Petitioner and the other employees whom she alleged suffered disparate treatment are Black and thus all are members of a protected class. Therfore, Petitioner has met part (a) of the prima facie case. The accused harassers are members of the employer's management, its OIG, and its Employee Relations Office. The employer is liable for their actions if it knows about them. Therefore, Petitioner has met part (e) of the prima facie case for hostile work environment.

82. Petitioner has offered a litany of minor complaints from witnesses alleging that the treatment they received was due

to their race. Petitioner, therefore, has met part (b) of the prima facie case.

83. However, to satisfy items (c) and (d), Petitioner must prove that she and the other employees subjectively perceived the conduct, and that a reasonable person objectively would find the conduct, at issue to be hostile or abusive. Lawrence v. Wal-Mart Stores, Inc., supra. Clearly, Petitioner and the other employees subjectively believe that they are victims of discrimination. However, to prove that a reasonable person would perceive the conduct as hostile or abusive, Petitioner must also prove that the totality of the circumstances constitutes a hostile work environment, using several factors, including: (1) the severity of the conduct; (2) the frequency; (3) whether it was physically threatening or humiliating or whether it was merely offensive; and (4) whether it unreasonably interfered with the employee's job performance. The conduct at issue must be so extreme as to amount to a change in terms and conditions of employment. Farringer v. City of Boca Raton, 524 U.S. 775 (1988).

84. The "bottom line" here is that Petitioner must show some real-world effect, as opposed to merely subjective speculation on the part of those who believe they have been discriminated against. Even "[e]vidence that only suggests discrimination or that is subject to more than one

interpretation does not constitute direct evidence of discrimination." Chambers v. Walt Disney World Co., 132 F. Supp 2d 1356 (M.D. Fla. 2001). See also Standard v. A.B.E.L. Services, Inc., 161 F.3d 1318 (11th Cir. 1998), and Merritt v. Dillard Paper Co., 120 F.3d 1181 (11th Cir. 1997). Under no circumstances is proof that, in essence, amounts to no more than mere speculation and self-serving belief on the part of the complainant concerning the motives of the employer sufficient, standing alone, to establish a prima facie case of intentional discrimination. See Little Republic v. Refining Co. Ltd. 924 F.2d 93, (5th Cir. 1991); Elliott v. Group Medical & Surgical Service, 714 F.2d 556 (5th Cir. 1983); and Shiflett v. GE Finance Automation, 960 F. Supp. 1022 (W.D. Va. 1997).

85. To prove a prima facie case of retaliation, Petitioner must show the following: (a) she engaged in statutorily protected expression; (b) she suffered an adverse employment action such as a demotion or dismissal; and (c) the adverse employment action was causally related to the protected activity. Harper v. Blockbuster Entertainment Corp., 139 F.3d 1385 (11th Cir. 1998).

86. Petitioner claimed that she suffered “retaliation” as a result of her role as a witness in the Gandy investigation. However, the OIG investigations of Petitioner and Ms. Jordan's other three subordinates for the September 28-29, 2000, period

are not the type of protected employee activity upon which a retaliation claim may be based. These investigations were in the nature of disciplinary action originated by the employer against Petitioner and the others. They were not originated by discriminatory charges brought by the employees against the employer or its management. Even assuming arguendo, but not ruling, that Petitioner's, Gandy's, Bryant's, and Covington's conduct in the September 29, 2000, meeting with Ms. Jordan constituted a protected protest against discrimination, Petitioner did not demonstrate in the instant proceeding that she suffered any adverse employment action as a result. She was not demoted. She was not dismissed. She was not affected as to pay or benefits.

87. Petitioner's assertion that she made clear to her supervisors that she did not want to be transferred to the Call Center because she believed Sonnia Thomas and Karen Smyder would harass her is accepted. It also is accepted that the transfer was proposed against her will. However, since seven employees, not all of them Black, were simultaneously transferred, it is clear that neither Blacks nor Petitioner were singled out. At worst, there may have been some personal animosity involved in the proposed transfer. This is the opposite side of the "favoritism" coin discussed in Chandler v. Dept. of Corrections, supra. Petitioner may reasonably have been perceived as a

disruptive employee because of what was ultimately proven to be her prior disruptive conduct at the September 29, 2000, conference. Furthermore, Petitioner was permitted every opportunity to make her case against transfer to the Call Center, and she was not transferred to the Call Center after she presented her doctor's excuse. Neither the proposed nor the alternative transfer resulted in any change of pay, benefits, or status for her. Therefore, there is no evidence arising from the proposed transfer that any Caucasian employee received greater consideration in assignment of position or that Petitioner was retaliated against by its proposal. Also, Petitioner apparently did not object to her ultimate transfer. No racial bias, harassment, or retaliation has been shown by this incident.

88. It was proven that Mr. Merrow did not interview Petitioner for promotion, but his failure to interview was not discovered by Mr. Merrow's superiors until after it had occurred, which prevents the employer's vicarious liability. See Miller v. Kenworth of Dothan, Inc., and Lawrence v. Wal-Mart Stores, Inc., both supra. There also is no evidence that Mr. Merrow interviewed any Caucasian employee for that position. One may conjuncture that he disliked Petitioner personally, but no racial bias or retaliation has been shown here.

89. Petitioner received only an oral reprimand for her disruptive conduct during the meeting on September 29, 2000, after she had been a subject of the OIG investigation of that event and after she had been a witness in the OIG investigation of whether or not Ms. Gandy had made threats against Ms. Smyder and/or Ms. Jordan, but Petitioner's reprimand was not tied to her participation in the investigations. Petitioner's reprimand was the result of Petitioner's own disruptive behavior. That others perceived as disruptive her September 29, 2000, actions and her actions subsequent thereto and made management decisions accordingly, does not amount to retaliation.

90. Most of the ill-feeling in the Gainesville Service Center is the result of employees not understanding that when an OIG investigation results in eliminating an accused person from certain charges, that finding also resolves the accusation itself and, in effect, also determines that the accusing or reporting employee, who started the investigatory wheels in motion, was mistaken, inaccurate, or just plain wrong. It is not necessary for the accused employee to then file a grievance/request/complaint that a new OIG investigative file with a new number, be opened in order to prove that the reporting employee was mistaken, inaccurate, or just plain wrong. The conclusion that the accuser was mistaken, inaccurate, or just plain wrong is subsumed in the result of the

first investigation if it does not discipline the accused employee. Herein, the “tit for tat” mentality of many persons overwhelmed their good judgment so that minor or subordinate accusations and counter-accusations flew right and left, even after the OIG had resolved all material accusations. Local management's or the OIG’s declining to make repetitive investigations, or to make any lengthy determination(s) concerning minor or immaterial accusations, or their failure to resolve major investigations upon mere “She said. No, she said,” types of evidence, is not proof of racial discrimination, harassment, hostile work environment, or retaliation.

91. Petitioner has failed to carry her burden of proof and persuasion.

RECOMMENDATION

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

RECOMMENDED:

That the Florida Commission on Human Relations enter a final order dismissing Petitioner’s Charge of Discrimination and Petition for Relief.

DONE AND ENTERED this 3rd day of September, 2004, in Tallahassee, Leon County, Florida.

ELLA JANE P. DAVIS
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Filed with the Clerk of the
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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.