

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ETHEL RIALS,)
)
 Petitioner,)
)
 vs.) Case No. 04-1569
)
 BANKATLANTIC,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice a formal hearing was held in this case on June 21, 2004, by video teleconference with the parties appearing from Fort Lauderdale, Florida, before J. D. Parrish, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Ethel Rials, pro se
3832 Baymeadows Road, No. 211
Jacksonville, Florida 32217

For Respondent: Angelo Filippi, Esquire
Stearns, Weaver, Miller, Weissler,
Alhadeff & Sitterson, P. A.
200 East Broward Boulevard, Suite 1900
Fort Lauderdale, Florida 33301

STATEMENT OF THE ISSUE

Whether the Respondent, BankAtlantic, committed an act of discrimination in violation of Chapter 760, Florida Statutes, in relation to its treatment of the Petitioner, Ethel Rials.

PRELIMINARY STATEMENT

This case began on October 21, 2003, when the Petitioner, Ethel Rials, filed an Amended Employment Charge of Discrimination with the Florida Commission on Human Relations (FCHR) against the Respondent, BankAtlantic. The Petitioner alleged the Respondent discriminated against her in violation of Chapter 760, Florida Statutes, by harassing her and subjecting her to a hostile work environment. The Petitioner maintained she was constructively discharged from her employment as a result of such conduct on November 27, 2002.

On March 25, 2004, the FCHR issued a Determination: No Cause that found there was no reasonable cause to believe that an unlawful employment act had occurred. The Notice of Determination: No Cause afforded the Petitioner with 35 days within which to file a Petition for Relief. Thereafter, the Petitioner timely filed the Petition for Relief that outlined the basis for her claim for relief. The claim was transferred to the Division of Administrative Hearings for formal proceedings on April 27, 2004.

The hearing was scheduled for June 21, 2004. On June 17,

2004, the Respondent filed a Motion for Summary Final Order that represented the Petitioner's claim should be dismissed as a matter of law. That motion was not resolved prior to hearing. As it was filed so near the hearing time and presented issues of fact that required resolution, the questions of law were deferred until the entry of this Order.

At the hearing, the Petitioner presented testimony from Barbara Halprin, Sue Ann Cass, Edgardo Cardona, Alice Moore, Coleen Bacchus, and Victoria Bloomenfeld. The Petitioner's Exhibit 1 was received in evidence. The Respondent adopted the evidence presented during the Petitioner's case and the Respondent's Exhibits 1-4 were admitted into evidence.

The transcript of the proceedings was filed on July 9, 2004. By Order entered July 16, 2004, the Respondent's Motion for Extension of Time to File Findings of Fact and Conclusions of Law was granted. The parties were granted leave until 5:00 p.m., July 30, 2004, to file proposed recommended orders. Both parties timely filed Proposed Recommended Orders that have been fully considered in the preparation of this order.

FINDINGS OF FACT

1. At all times material to allegations of this case, the Petitioner, Ethel Rials, was an employee of BankAtlantic. The

Petitioner worked in the Loan Servicing Department and was responsible for monitoring outstanding loans. She is black.

2. The Loan Servicing Department was comprised of two divisions: standard loans and complex loans. Alice Moore supervised the standard loan division.

3. Barbara Halprin was the Senior Vice President and Manager of the entire Loan Servicing Department. She evaluated the employees and, in August 2000, gave the Petitioner an excellent evaluation. At that time, the Petitioner exceeded the performance expectations of her employer.

4. Subsequently, the Petitioner was promoted to the position of lead complex loan servicing specialist. Again, when the Petitioner was evaluated, her work exceeded the performance expectations of the employer. The Petitioner continued to perform her work responsibilities in an excellent fashion through September 2001.

5. Sometime in 2002 it was announced that Alice Moore intended to retire at the end of the year. Although Ms. Moore did not recommend the Petitioner to assume her role as the supervisor in standard loan servicing, other BankAtlantic employees did. In fact, Ms. Halprin determined the Petitioner to be the most qualified and intended to promote the Petitioner to the Moore position. She advised the Petitioner accordingly. Petitioner acknowledged that she would be interested in the

promotion and, until the fall of 2002, Ms. Halprin presumed the promotion would follow as planned.

6. In November 2002, the Petitioner took sick days on November 20-21. She was scheduled for vacation days and was off November 22 and 25. When the Petitioner returned to work November 26, 2002, she alleged she had been the victim of racial discrimination and hostilities.

7. On November 26, 2002, the Petitioner told Ms. Halprin of incidents that she claimed evidenced a hostile work environment. For example, the Petitioner claimed that on one occasion someone had spilled coffee in front of her desk (a large volume) such that the mess made her work area difficult to use. Second, the Petitioner claimed that on one occasion someone had left a note for her with "KKK" written on it. Third, the Petitioner claimed that someone had spit on her desk. And, fourth, the Petitioner claimed that an employee (Ms. Cass) had attempted to publicly humiliate and harass the Petitioner by implying work errors were attributable to the Petitioner.

8. It is undisputed a large quantity of coffee was spilled in front of the Petitioner's desk on one occasion. Who spilled the coffee is unknown.

9. The alleged "KKK" note was not produced or offered into evidence. If written, it is unknown who wrote the "KKK," when it was written, or what it was intended to mean.

10. There is no evidence that anyone spit on the Petitioner's desk.

11. There is no evidence that Ms. Cass intended to humiliate or embarrass the Petitioner when errors were identified. Unknown persons in the Loan Department committed errors that the Loan Servicing Department was required to identify and correct. Although generally found and corrected without issue, Ms. Cass did not like to deal with errors. The Petitioner misapprehended her comments. The comments complained of occurred on one occasion.

12. On November 27, 2002, the Petitioner resigned her position with BankAtlantic and claimed she could not continue in the hostile work environment.

13. The Respondent timely submitted all of the Petitioner's claims to its personnel office for investigation, but the Petitioner terminated employment without waiting for the conclusion of the review.

CONCLUSIONS OF LAW

14. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of these proceedings. §§ 120.569 and 120.57(1), Fla. Stat.

15. The Petitioner bears the burden of proof in this case to establish that the Respondent committed an act of discrimination in violation of Florida law. More specifically,

the Petitioner maintains that the Respondent created such a hostile work environment that she was constructively discharged on November 27, 2002.

16. Section 760.10(1), Florida Statutes (2003), provides:
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.

17. The Respondent's response to the allegations maintains that the Petitioner is barred as a matter of law as she did not raise a claim within 365 days of the alleged act of discrimination or, if timely filed, the Petitioner's claims do not support a conclusion of harassment or hostile work environment.

18. Inasmuch as Chapter 760, Florida Statutes, is patterned after the federal law prohibiting discriminatory acts in employment, courts in Florida look to the wealth of federal court precedent in construing provisions of Florida law.

Accordingly, the case of Lawrence v. Wal-Mart Stores, Inc., 236 F. Supp. 2d 1314 (M.D. Fla. 2002) is instructive in resolving the instant matter. Lawrence, supra, holds that in order to establish a hostile work environment the employee must prove he belongs to a protected group (it is undisputed the Petitioner is black and is, therefore, within a protected group); he has been the subject of unwelcome harassment; the harassment was based on a protected characteristic; the workplace was permeated with discriminatory intimidation, ridicule, or insult; and the employer was responsible for the conduct or failed to correct the environment. Aside from establishing her membership within a protected group, the Petitioner failed to establish any of the other criteria.

19. The Petitioner did not testify. She did not establish how spilled coffee, an allegation of a "KKK" note, or an allegation of spit on her desk were made known to her employer and ignored. There is no evidence the employer fostered or supported any of the acts, if true. Additionally, she did not establish when or how the employer was to have become aware of her concerns. When she did complain to the employer (who promptly began an investigation of the allegations), the Petitioner had already determined to leave employment.

20. Again, as set forth in Lawrence, supra, in order to support a claim of discrimination, harassment of an employee

must be real, it must appear to a reasonable person to be physically intimidating or humiliating, and it must be related to the race of the complaining party. In this case, the Petitioner has failed to establish that the "harassment" was real. She did not testify. The Respondent's acknowledgment of a spilled pot of coffee does not mean it was spilled for the purpose of harassing the Petitioner. How a reasonable person could make that conclusion absent additional facts (not in evidence in this case) is unknown. There is no evidence the Respondent directed someone to spill coffee knowing it would be particularly offensive to the Petitioner. Similarly, the other allegations raised by Petitioner are either not supported by the evidence in this cause or so remotely tied to the Respondent that they cannot support a claim of harassment.

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 dismissing the Petitioner's claim.

DONE AND ENTERED this 27th day of August 2004, in
Tallahassee, Leon County, Florida.



J. D. PARRISH
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 27th day of August, 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.