STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MILLIE CARLISLE,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 04-1847
	)	
SALLIE MAE, INC.,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

A formal hearing was conducted in this case on December 2, 2004, in Panama City, Florida, before Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Millie Carlisle, pro se
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Panama City, Florida 32401

For Respondent: Luisette Gierbolini, Esquire
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STATEMENT OF THE ISSUE

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

PRELIMINARY STATEMENT

On June 3, 2003, Petitioner Millie Carlisle (Petitioner) filed an Employment Charge of Discrimination with the Florida Commission on Human Relations (FCHR). Specifically, Petitioner alleged that Respondent Sallie Mae, Inc. (Respondent) had discriminated against her by subjecting her to a hostile work environment, disparate treatment, unlawful discharge, and retaliation based on her race.

On April 12, 2004, FCHR issued a Determination: No Cause. On May 19, 2004, Petitioner filed a Petition for Relief with FCHR. On May 24, 2004, FCHR referred the case to the Division of Administrative Hearings.

On June 4, 2004, Respondent's counsel filed a Notice of Appearance and Motion for an Extension of Time to Respond to the Initial Order. The motion was granted in an Order dated June 8, 2004.

On June 9, 2004, Respondent filed a Response to Initial Order. A Notice of Hearing dated June 15, 2004, scheduled the hearing for August 10-11, 2004.

On July 20, 2004, Respondent filed a Motion to Compel Discovery and Unopposed Motion for Continuance of Administrative Hearing. An Order dated July 22, 2004, granted the Motion to Compel. Another Order dated July 22, 2004, granted a continuance and rescheduled the hearing for October 14-15, 2004.

On September 23, 2004, Respondent filed a Motion for Continuance of Administrative Hearing. An Order dated September 27, 2004, granted a continuance and rescheduled the hearing for December 2-3, 2004.

On November 15, 2004, Respondent filed a Motion for Summary Final Order. On November 23, 2004, Respondent filed a Motion to Stay Final Hearing Until Ruling on Currently-pending Motion for Summary Order and Motion in Limine. On November 30, 2004, the undersigned issued an Order denying the Motion for Summary Final Order and the Motion to Stay and reserving ruling on the Motion in Limine.

During the hearing, Petitioner testified on her own behalf but did not present the testimony of any additional witnesses. Petitioner's Exhibit Nos. P1-P3 and P5-P14 were accepted as evidence. Petitioner's Exhibit No. P4 was not accepted as evidence because she failed to disclose the document to Respondent as directed in the Order of Pre-hearing Instructions and the Order granting Respondent's Motion to Compel Discovery.

Respondent presented the testimony of three witnesses. Respondent's Exhibit Nos. R7, R12-R16, R19-R23, and R29-R33 were accepted as evidence.

The undersigned reserved ruling on the admissibility of Respondent's Exhibit No. R34, a transcript of Petitioner's October 6, 2004, deposition, pending verification that

Petitioner had an opportunity to review the deposition and return the errata sheet to the court reporter. After the hearing, Respondent filed Notice of Petitioner Millie Carlisle's Failure to Review her Deposition Transcript and Failure to Return Signed Errata Sheet to Court Reporter. Petitioner did not file a response to the notice. Accordingly, Respondent's Exhibit No. R34 is hereby admitted into evidence. Respondent's request for an order requiring Petitioner to reimburse Respondent for the cost incurred in hand-delivering a deposition transcript and errata sheet via a process server is hereby denied.

A transcript of the proceeding was filed on January 7, 2005. Respondent filed its Proposed Recommended Order on January 18, 2005. As of the date that this Recommended Order was issued, Petitioner had not filed proposed findings of fact and conclusions of law.

All citations hereinafter shall be to Florida Statutes (2002), except as otherwise specified.

FINDINGS OF FACT

1. Respondent is a financial company that owns and services student loans.

2. Petitioner is a black female. She was employed in Respondent’s Florida Loan Servicing Center (Service Center) on two separate occasions. The first time she worked for

Respondent from September 1989 until September 1990. During that time, Petitioner did not experience anything that she felt was racial discrimination at the Service Center. Petitioner left her initial period of employment with Respondent by resigning and moving to South Florida.

3. Petitioner subsequently returned to Panama City, Florida. Initially, she worked for the Bay County School Board. Thereafter, from July 2001 to November 2001, she returned to work as a Loan Origination Representative (LOR) for Respondent through a temporary agency, Kelly Services. In August 2001, Petitioner received a training evaluation, which indicated that Petitioner was meeting all expectations. In November 2001, Petitioner converted to a regular employee position with Respondent.

4. Petitioner received her 90-day initial review in February 2002. According to her written evaluation, Petitioner needed to improve in two areas: (a) successfully meeting the goals established during the 90-day initial review period; and (b) demonstrating initiative and resourcefulness in work performance. The evaluation states as follows in relevant part:

> A discussion was held with Millie regarding her productivity for application and phone call processing during the review period. At that time, Millie was placed on a verbal warning for her performance. She currently averages 3.65 applications per hour. The department standard is 5

> applications per hour. Millie also currently averages 6.66 calls per hour for the review period. The department standard is 8 calls per hour.

Pursuant to this evaluation, Respondent extended Petitioner's 90-day initial review period for a 30-day period in which Petitioner was required to perform according to Respondent's standards. The evaluation advised Petitioner that failure to meet standards might result in further disciplinary action, up to and including termination of employment.

5. In March 2002, Respondent selected Petitioner to represent the National Team for Private Credit Originations. This designation required Petitioner to undergo two days of additional training.

6. Respondent has well-disseminated policies prohibiting discrimination and harassment on the basis of race. These policies are available to employees through Respondent’s Employee Reference Manual and Code of Business Conduct. Respondent’s internal website also contains employee-related information such as policies, notices and the company’s equal employment opportunity and anti-harassment policies. Further, Respondent distributes an annual affirmation of its anti-discrimination and anti-harassment/anti-retaliation policies via e-mail.

7. Petitioner knew of Respondent’s commitment to diversity. Petitioner became aware of Respondent’s equal employment opportunity and anti-harassment/anti-retaliation policies immediately upon being employed with Respondent. In November 2001, Petitioner received Respondent’s Employee Reference Manual, Respondent's Code of Business Conduct, and a copy of Respondent’s annual reaffirmation of its anti-harassment/anti-retaliation policies. The annual reaffirmation outlined the procedure an employee should follow to report discrimination or harassment, and provided several avenues for reporting such conduct. Petitioner was also aware that Respondent had an internal website with employee information.

8. Respondent’s anti-harassment policy prohibits retaliation against employees who report harassment. The policy also protects employees who participate in an investigation of a claim of harassment.

9. Petitioner knew individuals in Respondent’s Human Resources Department. For example, when Petitioner first interviewed for a job with Respondent, she met Joni Reich, Respondent’s vice president of human resources.

10. From July 2002 to November 2002, Petitioner’s immediate supervisor was Paul Wunstell. Mr. Wunstell was Respondent's supervisor of Private Credit Originations.

11. In early July 2002, Bobby Wiley, Respondent's human resources director for the Service Center was counseling an employee for performance issues when the employee made an internal discrimination complaint. The employee stated that a supervisor had made a racially discriminatory comment about the Martin Luther King, Jr. holiday. The employee told Mr. Wiley that Petitioner could confirm the racially derogatory comment.

12. On July 19, 2002, Petitioner was asked to go to the human resources department. Upon her arrival, Petitioner met Mr. Wiley for the first time. Mr. Wiley directed Petitioner to a conference room.

13. Mr. Wiley explained that he had asked Petitioner to meet with him because he was investigating a discrimination complaint made by another employee about a supervisor who might have said something derogatory about the Martin Luther King, Jr., holiday. He explained that he had been told that Petitioner might have some knowledge about these events.

14. Several times, Mr. Wiley asked Petitioner whether she knew of any racial discrimination at the Service Center and whether she had heard a supervisor make a racially derogatory comment. Petitioner denied being aware of any race discrimination at Respondent's facility. Petitioner stated that she did not want to talk to Mr. Wiley. Although Petitioner understood that she was required to report discrimination, she

did not provide Mr. Wiley any information supporting or corroborating the complaint that he was investigating.

15. During the meeting, Petitioner appeared nervous. She told Mr. Wiley that she was uncomfortable meeting with him. Mr. Wiley replied that their conversation would be confidential, “between the two of them,” or words to that effect. Petitioner mistakenly interpreted Mr. Wiley’s comment to mean that he would do nothing with any information provided by Petitioner and that he simply wanted to “contain” or cover up the issue of possible discrimination. Petitioner did not ask Mr. Wiley to clarify what he meant by his statement that their conversation would be “between the two of them.”

16. During his meeting with Petitioner, Mr. Wiley conducted himself in a professional manner. However, because he was eating ice cream when he met with Petitioner and did not have a note pad, Petitioner mistakenly thought he did not take allegations of discrimination seriously. Mr. Wiley was eating an ice cream bar that had been distributed around the human resources department immediately before Petitioner came to see him.

17. The conversation between Mr. Wiley and Petitioner lasted approximately ten minutes. Mr. Wiley thanked Petitioner for meeting with him. Mr. Wiley stated that he was glad to hear there was no discrimination at Respondent’s facility because

Respondent would not tolerate discrimination. Petitioner then left the conference room.

18. After the July 19, 2002, meeting, Petitioner never contacted Mr. Wiley to complain of discrimination or retaliation. Additionally, Petitioner's supervisor, Mr. Wunstall, never knew about Mr. Wiley's meeting with Petitioner.

19. On or about July 1, 2002, Respondent advised all employees serving as LORs that they would be required to attend a training class on July 13, 2002. The purpose of the class was to ensure the proper handling of Laureate School Accounts for Private Credit Originations. Each employee needed an active Laureate computer ID and password in order to participate in the hands-on training.

20. As instructed, Petitioner immediately advised Respondent that she did not have access to the Laureate software on her computer. On July 8, 2002, Respondent sent Petitioner an e-mail regarding her Laureate computer password. After receiving the password, Petitioner still could not gain the appropriate computer access.

21. On July 9, 2002, Petitioner informed Respondent that she did not have the Laureate software installed on her personal computer. Respondent then made arrangements for Petitioner to

test her password on another computer. Respondent also arranged to have the Laureate icon placed on Petitioner's computer.

22. On July 23, 2002, Petitioner wrote a letter to Ms. Reich complaining about her meeting with Mr. Wiley. The letter stated that, although she had not told Mr. Wiley about it, Petitioner thought there was racial discrimination at the Service Center. Petitioner's letter indicated that she wanted to make a statement concerning discrimination against blacks. In the letter, Petitioner requested information on Respondent's policies and procedures to report such discrimination. Mr. Wunstell never knew that Petitioner had sent a letter to Ms. Reich complaining about racial discrimination.

23. On July 29, 2002, Petitioner allegedly fainted at work due to panic attacks. Respondent's staff called an ambulance that took Petitioner to the hospital. Petitioner claims she was absent from work for three consecutive days without calling her supervisor and without being terminated for abandoning her job.

24. On August 2, 2002, Petitioner received a letter from Ms. Reich. In the letter, Ms. Reich apologized for Mr. Wiley's failure to handle the meeting with Petitioner in a manner that Petitioner felt was appropriate. Ms. Reich told Petitioner that Respondent viewed discrimination complaints seriously and she included a copy of the anti-harassment policy, which outlined

procedures for reporting harassment or discrimination. Ms. Reich explained several avenues to report discrimination.

25. Ms. Reich's letter also indicated that she and senior director of human resources, Joyce Shaw, would be in Florida within the next two weeks. In the letter, Ms. Reich asked Petitioner to meet with them to discuss her concerns and to promptly address any alleged discrimination.

26. On August 12, 2002, Petitioner received an e-mail from Ms. Shaw to schedule a meeting on August 19, 2002. The text of the e-mail did not state the reason why Ms. Shaw and Ms. Reich wanted to meet with Petitioner, but Petitioner knew the reason for the meeting. The e-mail asked Petitioner to contact Ms. Shaw either on her cellular telephone or by e-mail to schedule the meeting. Mr. Wunstell did not have the capability to access Petitioner's e-mail messages and there is no evidence that he saw Ms. Shaw's e-mail.

27. On August 19, 2002, Petitioner met with Ms. Shaw and Ms. Reich for approximately one hour. Ms. Shaw and Ms. Reich listened to Petitioner's concerns. They were pleasant to Petitioner during the meeting.

28. During the August 19, 2002, meeting, Petitioner first complained that Mr. Wiley had been disrespectful or inattentive during their July 19, 2002, meeting. Petitioner also told Ms. Shaw and Ms. Reich about her feelings that black employees

were treated differently in the workplace. This was the first time that Petitioner discussed her race discrimination concerns with anyone who worked for Respondent. When pressed for more specific information, Petitioner stated that: (a) she felt black employees received different training than non-black employees; and (b) black employees' questions were not answered as promptly or as thoroughly as the questions of non-black employees. Petitioner did not provide Ms. Shaw and Ms. Reich with specific examples of racially discriminatory behavior or the names of any minority employees who Petitioner felt experienced discrimination.

29. That same day, after the meeting with Ms. Shaw and Ms. Reich, Petitioner provided Ms. Shaw with several e-mails about the Laureate computer training. The e-mails did not illustrate any mistreatment of Petitioner.

30. During the August 19, 2002, meeting, Petitioner told Ms. Shaw and Ms. Reich that she was experiencing panic attacks. Ms. Reich suggested that Petitioner take advantage of Respondent's employee assistance program for the alleged panic attacks.

31. Ms. Reich and Ms. Shaw told Petitioner that they would look into her concerns. They did not tell her they would contact her again in the future. Instead, Ms. Reich gave her business card to Petitioner in case she needed to contact

Ms. Reich in the future. After the August 19, 2002 meeting, Petitioner did not contact Ms. Reich or Ms. Shaw again during her employment with Respondent.

32. During the hearing, Petitioner testified that she complained to Ms. Shaw and Ms. Reich about the following: (a) supervisor Melanie Childree's reference to the Martin Luther King, Jr. holiday as "spook day"; (b) three employees telling an African American manager not to go to the "master cube," which Petitioner felt was a racial reference to "slave talk"; (c) a hearsay statement from a student's mother who called another employee at the Service Center to accuse a white customer service representative of calling her daughter "stupid nigger"; and (d) where a black supervisor was married to a white woman, one employee allegedly said he was "going to string [the black supervisor] up for messing with our women." Apparently all of these alleged incidents occurred before Petitioner's July 19, 2002, meeting with Mr. Wiley.

33. The most persuasive evidence regarding these allegations is that Petitioner did not report them to Ms. Shaw or Ms. Reich or anyone else in Respondent's chain of command. Instead, the complaints that Petitioner shared with Ms. Shaw and Ms. Reich on August 19, 2002, were non-specific generalizations. Moreover, Mr. Wunstell was never aware of Petitioner’s meeting with Ms. Reich and Ms. Shaw to complain about discrimination.

34. Petitioner does not know what steps, if any, Ms. Shaw and Ms. Reich took after their meeting to look into her concerns. At the hearing, Ms. Shaw testified that she investigated Petitioner's concerns and found them to be unfounded. First, Ms. Shaw reviewed the e-mails provided by Petitioner but did not find anything inappropriate in their contents.

35. Second, Ms. Shaw interviewed the director in charge of Petitioner's department, Ann Nelson. Ms. Nelson explained that the process by which employee questions were answered made it unlikely that employees could be singled out due to their race. According to Ms. Nelson, all employee questions were directed to a central telephone helpline staffed by supervisors or senior employees who randomly responded to calls. Ms. Shaw correctly concluded that it would be difficult for racially discriminatory behavior to occur in such context.

36. Third, Ms. Nelson assured Ms. Shaw that training was the same for all employees. Student loans are heavily regulated by federal law and thus, the manner in which employees handle borrowers is regulated, making Petitioner's concerns about unequal employee training unfounded.

37. Finally, Ms. Shaw spoke to the person in charge at the Service Center, Renee Mang, to determine if Ms. Mang was aware of any racial discrimination concerns at the facility.

Ms. Mang, whose office was in close proximity to Petitioner's cubicle, indicated that she was not aware of any racially discriminatory behavior in the workplace and that no one had complained to her about discrimination. After the investigation, Ms. Shaw was unable to corroborate Petitioner's racial discrimination allegations.

38. On or about September 30, 2002, Respondent gave Petitioner a verbal warning regarding her phone quality control average. The department's expected call productivity average was 8 calls per hour at the minimum level of customer service. From July 1, 2002, to September 25, 2002, Petitioner's average was 7.5 calls per hour. Once again, Petitioner was given 30 days to meet the department's performance goal of at least 9 calls per hour at Petitioner's level of customer service.

39. On October 8, 2002, while employed with Respondent, Petitioner applied for full-time employment with the Bay County School Board. Petitioner applied for employment in the school system because she felt a lot was going on at Respondent's facility and her mental health counselor suggested she look for employment elsewhere.

40. Petitioner had followed Ms. Reich's suggestion and enrolled in mental health counseling through Respondent's employee assistance program. Respondent accommodated Petitioner by adjusting her work schedule and allowing her to report for

work late on the days she had appointments with her mental health counselor.

41. For example, on or about October 24, 2002, Respondent requested an adjustment in her work schedule so she could attend a mental health counseling session. Respondent accommodated Petitioner's request.

42. During the hearing, Petitioner testified that Respondent adjusted the work schedule of a white female LOR to match the work schedule of her husband who also worked for Respondent. The husband's work schedule required him to work until 7:30 p.m. every day. According to Petitioner, the schedule adjustment resulted in the white female employee having no work to perform for 30 minutes per day after the phones shut down at 7:00 p.m. However, there is no evidence that Petitioner or any other employee ever made a similar request for a work schedule accommodation under similar circumstances.

43. On October 29, 2002, Petitioner suffered a workers' compensation accident. A telephone headpiece flicked off and hit Petitioner across the face, resulting in an uncomfortable feeling and a small chip on her tooth.

44. On October 30, 2002, Petitioner reported the accident to Respondent's Benefits Specialist, Kristi Scott and requested to see a dentist. From that time on, Petitioner and Ms. Scott communicated directly with each other regarding treatment for

Petitioner’s injury. Ms. Scott kept Petitioner updated on her progress locating a dentist that would accept Petitioner as a patient for a workers' compensation claim.

45. Mr. Wunstell was not involved in arranging for treatment for Petitioner’s injury. Petitioner was not required to channel her communications with Ms. Scott through Mr. Wunstell.

46. On October 31, 2002, Ms. Scott sent Petitioner an e-mail stating that Ms. Scott had been unable to locate a dentist who would see Petitioner as a workers' compensation patient. Ms. Scott's e-mail directed Petitioner to see any dentist of her choice to treat her injury. Ms. Scott told Petitioner that Respondent would reimburse her for any out-of-pocket expenses that resulted from her dental visit.

47. Petitioner did not suffer immobilization as a result of the injury to her mouth and she did not have to undergo treatment as a result of her injury. Petitioner did not feel her condition was an emergency. In fact, she did not see a dentist immediately because neither her regular dentist nor other dentists considered her mouth injury an emergency.

48. Following the October 29, 2002, mouth injury, Petitioner continued working. She worked full days the rest of the week: October 30, 2002, through November 1, 2002.

49. On Monday, November 4, 2002, Petitioner did not show up for work. Instead, that morning Petitioner drove herself to her mental health counseling session. After her counseling session, around noon, Petitioner called Mr. Wunstell from home.

50. During this telephone conversation Petitioner told Mr. Wunstell that she had seen a doctor in the morning. She also told Mr. Wunstell that her mouth was in severe pain, and she was trying to find a dentist who would see her. At the time of Petitioner's conversation with Ms. Wunstell, Petitioner had made appointments with two dentists.

51. Petitioner typically worked until 7 p.m. During their noon telephone conversation, Mr. Wunstell specifically asked Petitioner whether she was planning to return to work that day. Petitioner responded that she would be returning to work later that day. Petitioner did not tell him that she was unable to work, nor did she request time off work.

52. Petitioner alleges that she told Mr. Wunstell during their November 4, 2002, telephone conversation that her neck was bothering her, that she needed to see a doctor, in addition to a dentist, that she was unable to work and that she asked Mr. Wunstell to have Ms. Scott call her at home. The greater weight of the evidence indicates that Petitioner did not mention any of these things during her telephone conversation with Mr. Wunstell.

53. Petitioner made no effort to obtain Ms. Scott's telephone number. After her November 4, 2002, call to Mr. Wunstell, Petitioner made no effort to contact Ms. Scott directly regarding her workers' compensation injury, despite the fact that Petitioner and Ms. Scott had been communicating directly about the injury until that time.

54. Petitioner did not show up for work the rest of the week of November 4, 2002. She did not call Mr. Wunstell or anyone else at Respondent's office during the week of November 4, 2002, to inform them of her condition or her expected return to work date.

55. Respondent has a job abandonment policy. An employee who is absent from work for three consecutive days without notifying his/her immediate supervisor will be considered to have voluntarily resigned or abandoned his/her job. Respondent's job abandonment policy applies to all employees, including those who are injured on the job.

56. When an employee is a no call/no show for three consecutive days, the job abandonment policy is applied in a fairly automatic manner. The employee's immediate supervisor does not call the employee at home. Instead, the supervisor contacts Teresa Jones in the human resources department, indicates that the employee has been a "no call/no show" for three consecutive days, and directs the human resources

department to send a termination letter. This type of transaction is handled by lower-ranking human resources department employees at the Service Center, and neither Mr. Wiley nor Ms. Shaw participated in the process of sending out termination letters.

57. When Petitioner did not come to work and failed to contact Mr. Wunstell after their November 4, 2002, conversation, Mr. Wunstell instructed Ms. Jones to send Petitioner a letter informing of her termination for job abandonment. There is no evidence that Ms. Shaw, Ms. Reich or Mr. Wiley influenced Mr. Wunstell's decision to request that Respondent send Petitioner a termination letter pursuant to the job abandonment policy.

58. By letter dated November 8, 2002, Respondent informed Petitioner that, pursuant to the company's job abandonment policy, she was deemed to have voluntarily abandoned her job by being absent for three consecutive days without contacting her supervisor after November 4, 2002.

59. Respondent's letter encouraged Petitioner to contact Ms. Jones if she had any questions regarding Respondent's letter. Also attached to the termination letter was an Exit Interview questionnaire and postage pre-paid envelope. The questionnaire asked Petitioner to explain why she had resigned her employment. Petitioner did not return the questionnaire and

made no effort to contact Respondent to protest, contest, or clarify her employment status.

60. After receiving the November 8, 2002, letter, Petitioner did not file a petition for unemployment compensation benefits. Instead, on November 17, 2002, exactly two weeks after the last day She came to work for Respondent, Petitioner began working with the Bay County School District.

61. Mr. Wunstell did not apply Respondent's job abandonment policy to Petitioner for retaliatory reasons because he did not know of her alleged protected activity. Mr. Wunstell may not have terminated Petitioner in July 2002 when she was absent for three days. However, Mr. Wunstell has otherwise consistently and non-discriminatorily enforced the job abandonment policy and has terminated numerous employees pursuant to the job abandonment policy.

62. There is no evidence that Respondent applied its job abandonment policy differently to Petitioner than it did to other employees. During the year 2002 and the first few months of 2003, Respondent terminated 28 employees pursuant to its job abandonment policy. Of these 28 employees, 25 were white, and none had complained about discrimination or participated in a discrimination investigation. Except for Petitioner's three-day absence in July 2002, there is no evidence of any other employee who violated Respondent's job abandonment policy by being absent

from work for three consecutive days without calling and who was not terminated.

63. In January 2003, almost two months after her separation from Respondent, Petitioner wrote a letter to Al Lord, Respondent's CEO. The letter incorrectly alleged that Respondent had not provided assistance in obtaining dental treatment for Petitioner's on-the-job tooth injury. The letter for the first time informed Respondent that Petitioner felt she was involuntarily terminated. Unlike Petitioner's testimony at the final hearing, the letter to Mr. Lord did not allege that Petitioner had told Mr. Wunstell on November 4, 2002, that she needed to see both a dentist and a doctor for her injury. Likewise, the letter did not allege that Petitioner asked Mr. Wunstell to have Ms. Scott call her at home.

64. On February 11, 2003, Petitioner received a letter from Ms. Shaw. The letter informed Petitioner that she had looked into the allegations contained in the letter to Mr. Lord and had found them to be unsupported and inaccurate. Ms. Shaw's letter concluded as follows: (a) Respondent non-discriminatorily and consistently enforced its job abandonment policy; and (b) Respondent had assisted Petitioner in obtaining treatment for her dental injury. Finally, the letter questioned why, if she had not intended to voluntarily quit her job, Petitioner had made no effort to contact

Respondent upon receipt of her November 8, 2002, termination letter.

65. On March 15, 2003, Petitioner wrote a letter to Ms. Shaw. In the letter, Petitioner did not allege that she had told Mr. Wunstell on November 4, 2002, that she needed to see a doctor, in addition to a dentist, as a result of her mouth injury. Petitioner's letter also did not state that she had asked Mr. Wunstell to tell Ms. Scott to call her at home regarding an appointment with a doctor.

66. Petitioner filed a charge of discrimination with the FCHR on June 2, 2003. During the processing of her charge of discrimination, Petitioner complained that Respondent had improperly withheld from her last payroll check a portion of her pay for 66 hours of accrued, unused vacation time. This was the first time Respondent learned of this allegation. Although Petitioner believed that Mr. Wunstell had given instructions for Respondent to withhold a portion of her vacation pay, she never contacted Mr. Wunstell or Respondent's human resources department to report or challenge this incorrect deduction. When, after the filing of the charge, Respondent received information about the incorrect deduction, it immediately investigated and reimbursed Petitioner for the incorrect deduction.

CONCLUSIONS OF LAW

67. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. See §§ 120.569, 120.57(1), and 760.11, Fla. Stat. (2004).

68. It is unlawful for an employer to discriminate against an employee based on race. See § 760.10(1), Fla. Stat.

69. It is an unlawful employment practice for an employer to discriminate against any individual because that person opposes an unlawful employment practice (the "opposition clause'). See § 760.10(7), Fla. Stat. It is also an unlawful employment practice to discriminate because that person has made a charge, testified, assisted or participated in any manner in an investigation regarding unlawful discrimination (the "participation clause"). Id.

70. The provisions of Chapter 760, Florida Statutes, are analogous to those of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e, et seq. Cases interpreting Title VII are therefore applicable to Chapter 760, Florida Statutes. School Board of Leon Co. v. Hargis, 400 So. 2d 103 (Fla. 1st DCA 1981).

71. A petitioner in a discrimination case has the initial burden of proving a prima facie case of discrimination. See

McDonnell Douglass Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).

72. If the petitioner proves a prima facie case, the burden shifts to the respondent to proffer a legitimate non-discriminatory reason for the actions it took. See Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). The respondent's burden is one of production, not persuasion, as it always remains the petitioner's burden to persuade the fact-finder that the proffered reason is a pretext and that the respondent intentionally discriminated against the petitioner. See Burdine, 450 U.S. at 252-256.

DISPARATE TREATMENT/UNLAWFUL DISCHARGE

73. To prove a prima facie case of disparate treatment or unlawful discharge, Petitioner must show the following: (a) she is a member of a protected group; (b) she is qualified for the position; (c) she was subject to adverse employment practices related to hiring, work schedules, job evaluations, job duties and/or termination; and (d) she was treated less favorably than similarly-situated persons outside the protected class and/or, after she was discharged, the position was filled by a person of another race. See Anderson v. WBMF-4, 253 F.3d 561 (11th Cir. 2001); Crapp v. City of Miami Beach, 242 F.3d 1017 (11th Cir. 2001).

74. In this case, Petitioner is a member of a protected group. She is qualified for the position. However, there is no persuasive evidence that she was subject to adverse employment practices relative to her hiring or her work schedule and duties. Petitioner was subject to adverse job evaluations and eventually terminated.

75. The greater weight of the evidence indicates that Petitioner's evaluations accurately reflected her need to improve her performance. Respondent did not treat any other employees more favorably in regard to training and/or access to the helpline for answers to questions.

76. Respondent terminated Petitioner because she abandoned her job for three days without calling Mr. Wunstell. Respondent's reason for terminating Petitioner was not a pretext for racial discrimination.

HARASSMENT/HOSTILE WORK ENVIRONMENT

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

environment; and (e) the employer is liable either directly or vicariously for the abusive environment.

78. To satisfy the fourth element, an employee must prove that: (a) he or she subjectively perceived the conduct to be abusive; and (b) a reasonable person objectively would find the conduct at issue hostile and abusive. Harris v. Forklift Systems, Inc. 510 U.S. 17, 21-22 (1993).

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

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

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

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

82. Here, Petitioner, as an African-American, is a member of a protected group. She has shown that she heard supervisors and co-workers make race-related comments at work on several occasions: (a) a reference to Martin Luther King, Jr. holiday as "spook day"; (b) mocking references to an area in the office known as the "master cube"; and (c) a discussion in which a white employee stated that he was "going to string up" a black manager married to white women.

83. To the extent that Petitioner was exposed to unwelcome race-related comments, Petitioner has not proved that she subjectively and objectively viewed the comments as abusive and

hostile. She did not report the comments to anyone in authority or show any obvious physical or emotional reaction. There is no competent evidence that Petitioner's alleged panic attacks were the result of a hostile work environment. There is no persuasive evidence that Petitioner's job performance was materially altered after she heard the comments.

84. Finally, Petitioner has not shown a basis for Respondent's liability. The comments were not made by Petitioner's immediate supervisor and the making of the comments did not result in a tangible employment action. Respondent had an anti-discrimination/anti-harassment policy that was periodically/annually reviewed with all employees. Petitioner was aware that she could have reported the unwelcome comments to anyone in the human resources department. She did not complain to Mr. Wiley, Ms. Reich, Ms. Shaw, or anyone else in the office about the comments. Consequently, Respondent has proved its affirmative defense and cannot be held liable here.

RETALIATION

85. Petitioner has alleged two different theories of retaliation: (a) she experienced retaliation because she participated in Mr. Wiley’s internal investigation of another employee’s discrimination complaint on July 19, 2002 (the “participation claim”); and (b) she experienced retaliation because she opposed/complained about discrimination herself by

writing to Ms. Reich on July 29, 2002, and by meeting with Ms. Reich and Ms. Shaw on August 19, 2002 ("the opposition claim").

86. Petitioner cannot establish a retaliation claim under the "participation clause" because such claim requires participation in an investigation or proceeding which occurred in conjunction with, or after the filing of, a formal charge of discrimination with the Equal Employment Opportunity Commission or comparable administrative agency. See EEOC v. Total System Svc., Inc., 221 F.3d 1171 (11th Cir. 2000), r'hg. denied, 240 F.3d 899 (11th Cir. 2001). Here, Petitioner's meeting with Mr. Wiley was part of an internal investigation conducted by Mr. Wiley as a result of an internal discrimination complaint by another employee. Mr. Wiley's investigation did not occur in conjunction with, or after the filing of, a formal charge of discrimination by an employee with a fair employment practices agency. More importantly, Petitioner refused to participate in Mr. Wiley's investigation. Therefore, the undersigned analyzes Petitioner's claim under the "opposition clause."

87. To establish a prima facie case of retaliation, Petitioner must prove the following: (a) she engaged in an activity protected under law; and (b) she suffered an adverse employment action. Gupta v. Florida Board of Regents, 212 F.3d 751, 587 (11th Cir. 2000).

88. To the extent Petitioner claims that her meeting with Mr. Wiley in July 2002 was covered by the opposition clause, she cannot establish a claim. To be protected by the opposition clause's anti-retaliation provision, an employee's opposition to discrimination must be based on a reasonable belief that discrimination existed. See, e.g., Wu v. Thomas, 863 F.2d 1543, 1549 (11th Cir. 1989). Here, regardless of what Petitioner may have believed about the existence of discrimination at the Service Center, she did not oppose discrimination at her meeting with Mr. Wiley. She did not lodge a complaint or confirm another employee's complaint during that meeting. Therefore, her meeting with Mr. Wiley in July 2002 was not "protected activity."

89. To establish the second prong of a prima facie case of retaliation, there must be an adverse employment action taken against the employee. Courts have held that an employee who abandons her job has not been subjected to an adverse employment action. See Mihalik v. Illinois Trade Association, 1995 U.S. Dist. LEXIS 789 (N.D. Ill. 1995) (employee did not experience adverse employment action where she stopped showing up for work).

90. Here, the most persuasive evidence indicated that Petitioner simply stopped showing up for work after November 1, 2002. On November 4, 2002, Petitioner told Mr. Wunstell she

would be returning to work later that day. She made no effort to contact her employer after November 4, 2002. Therefore, Petitioner abandoned her job and cannot establish the second prong of a prima facie case of retaliation.

91. To establish the third prong of a prima facie case of retaliation, Petitioner must show that the individual who took the adverse action against her was actually aware of her protected expression when he decided to take adverse action. See Raney v. Vinson Guard Svc., 120 F.3d 1192, 1197-98 (11th Cir. 1997) (plaintiff failed to present concrete evidence that the individual who made the decision to terminate his employment was aware of his protected activity prior to terminating plaintiff); St. Hilaire v. The Pep Boys, 73 F. Supp. 2d 1350, 1363 (S.D. Fla. 1999) (plaintiff must establish that supervisor was actually aware of protected expression when he took adverse employment action); Sullivan v. Nat'l R.R. Passenger Corp., 170 F.3d 1056, 1060 (11th Cir. 1999) (retaliation charge without merit where plaintiff failed to produce any evidence that decision-maker was aware of the protected activity).

92. The most persuasive evidence here indicates that the person who decided to enforce the job abandonment policy against Petitioner, Mr. Wunstell, was not aware of any protected activity in the three prior months. Mr. Wunstell had no knowledge of Petitioner's involvement in the investigation

conducted by Mr. Wiley in July 2002. Mr. Wunstell did not know that Petitioner had complained to Ms. Reich about discrimination on July 23, 2002, or that she had met with Ms. Reich and Ms. Shaw in August 2002.

93. Temporal proximity between an employee's protected activity and her employer's adverse employment action, standing alone, is insufficient to establish the third prong of a prima facie case of retaliation. See, e.g., Higdon v. Jackson, No. 03-14894 (11th Cir. Dec. 16, 2004) (that adverse action occurred three months after protected activity is insufficient, standing alone, to satisfy the third element of an ADA retaliation claim); Wascura v. City of South Miami, 257 F.3d 1238, 1245 (11th Cir. 2001) (three and one-half month period is insufficient); Spence v. Panasonic Copier Co., 46 F. Supp. 2d 1340 (N.D. Ga.), aff'd., 204 F.3d 11220 (11th Cir. 1999); Lewis v. Holsum of Fort Wayne, Inc., 278 F.3d 706 (7th Cir. 2002) (four-month period is insufficient); Anderson v. Coors Brewing Co., 181 F.3d 1171 (10th Cir. 1999) (three-month period is insufficient); Richmond v. ONEOK, Inc., 120 F.3d 205, 209 (10th Cir. 1997) (three-month period is insufficient). Thus, the mere fact that Respondent enforced its job abandonment policy against Petitioner almost four months after her conversation with

Mr. Wiley and three months after her July 2002 complaint and her meeting with Ms. Reich and Ms. Shaw does not support her retaliation allegation.

94. Further, an inference of a causal connection between a protected activity and an adverse employment action does not rise when intervening events are established. See Spence v. Panasonic Copier Co., 46 F. Supp. 2d 1340 (N.D. Ga. 1999); Gleason v. Mesirow Financial, 118 F.3d 1134, 1147 (7th Cir. 1997) (plaintiff's termination a few weeks after she complained about certain conduct did not establish inference of retaliation when the termination followed a significant and costly error by plaintiff); Booth v. Birmingham News Co., 704 F. Supp. 213, 215-16 (N.D. Ala. 1988) (short span of time created no inference of retaliation when intervening factors, i.e., other reasons for the adverse employment action, arose after the employee's protected activity).

95. The most persuasive evidence here was that Petitioner stopped showing up for work after Friday, November 1, 2002. On Monday, November 4, 2002, Petitioner told her supervisor she was returning to work later in the day. However, she did not show up for work and never contacted Mr. Wunstell again. Under these circumstances, Mr. Wunstell was justified in deciding that Petitioner had abandoned her job. This intervening event, which occurred months after Petitioner's protected activity, and which

was entirely Petitioner's doing, broke any suggestion of a causal connection between her protected activity and the termination of her employment.

96. After Petitioner received Respondent's termination letter, she made no efforts to contact Respondent to protest, contest or clarify her employment status. As a result, Petitioner did not establish a prima facie case of retaliation.

97. Other persuasive evidence also shows no causal connection between Petitioner's protected activity and the termination of her employment for job abandonment. Specifically, Petitioner complained to Ms. Reich about race discrimination on July 23, 2002. Petitioner claims that she violated Respondent's job abandonment policy a week later but was not terminated. Thus, Respondent clearly did not retaliate against Petitioner immediately after she complained about race discrimination. Petitioner's allegation that Respondent retaliated against her by enforcing the job abandonment policy against her on November 4, 2002, over three months after she complained to Respondent about discrimination, is not persuasive.

98. To the extent that Petitioner has established a prima facie case of retaliation, Petitioner has not demonstrated that the proffered reason for her termination, job abandonment, is merely a pretext for unlawful retaliation. See Humphrey v.

Sears, Roebuck & Co., 192 F. Supp. 2d 1371, 1372 (S.D. Fla. 2002) (termination pursuant to job abandonment policy was legitimate and nondiscriminatory reason where employee did not return to work after on-the-job injury); Hussein v. Genuardi's Family Market, 2002 U.S. Dist. LEXIS 430 (E.D. Pa. 2002)(employer articulated legitimate, nondiscriminatory reason for terminating plaintiff for job abandonment where plaintiff did not keep in touch while out on leave); Munck v. New Haven Sav. Bank, 251 F. Supp. 2d 1078, 1088 (D. Conn. 2003) (job abandonment is legitimate, nondiscriminatory reason for termination); Torres v. Cooperative Seguros de Vida de P.R., 260 F. Supp. 2d 365, 372 (D. P.R. 2003) (same); Bell v. Store, 83 F. Supp. 2d 951 (N.D. Ill. 2000) (employee's absence from work for five consecutive days in violation of four-day no call/no show policy was legitimate, non-retaliatory reason for termination); Scott v. DMN, 2001 U.S. Dist. LEXIS 4929 (N.D. Texas 2001).

99. Petitioner failed to present persuasive evidence that she was treated any differently than similarly-situated employees who did not complain about discrimination or who did not participate in an investigation of a discrimination complaint. She failed to present persuasive evidence that Respondent's stated reason for her termination was pretextual. Petitioner's termination was not based on a retaliatory motive.

RECOMMENDATION

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

RECOMMENDED:

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

DONE AND ENTERED this 28th day of January, 2005, in Tallahassee, Leon County, Florida.

SUZANNE F. HOOD
Administrative Law Judge
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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.