

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

D'ANGELO A. SULLIVAN,)
)
 Petitioner,)
)
 vs.) Case No. 04-2609
)
 AUSSIE RESTAURANT)
 MANAGEMENT/OUTBACK STEAKHOUSE,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

This cause came on for formal hearing before Harry L. Hooper, Administrative Law Judge with the Division of Administrative Hearings, on February 8, 2005, in Pensacola, Florida.

APPEARANCES

For Petitioner: D'Angelo A. Sullivan, pro se
1006 West Hayes Street
Pensacola, Florida 32501

For Respondent: Maria A. Santoro, Esquire
George, Hartz, Lundeen, Fulmer,
Johnston, King & Stevens
863 East Park Avenue
Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

The issue is whether Petitioner was subjected to an unlawful employment practice as a result of retaliation.

PRELIMINARY STATEMENT

On September 16, 2003, Petitioner filed a Charge of Discrimination with the Florida Commission on Human Relations (FCHR) alleging retaliation. FCHR, subsequent to an inquiry, responded on July 1, 2004, with a Notice of Determination: No Cause. On July 16, 2004, Petitioner filed a Petition for Relief, which was forwarded to the Division of Administrative Hearings. It was filed on July 21, 2004.

The matter was set for hearing on September 15, 2004. Pursuant to a motion for continuance filed by Respondent, the matter was rescheduled for September 28, 2004. Because of turmoil caused in Pensacola by Hurricane Ivan, the hearing was continued. It was eventually set for February 8, 2005, and heard as scheduled.

At the hearing, Petitioner testified and offered one exhibit into evidence. Respondent presented the testimony of its manager, and offered four exhibits into evidence.

A Transcript was filed on March 1, 2005. Respondent timely filed a Proposed Recommended Order. Petitioner did not.

References to statutes are to Florida Statutes (2004), unless otherwise noted.

FINDINGS OF FACT

1. Petitioner D'Angelo A. Sullivan is a black male who worked for Respondent from January 14, 1999, until November 2002 as a blooming onion cook at Respondent's restaurant in Pensacola, Florida.

2. Respondent Aussie Restaurant Management is a company that operates an Outback Steakhouse in Pensacola, Florida. Respondent employs more than 15 people.

3. In a letter dated September 6, 2002, Petitioner requested a paid vacation. Petitioner believed he was entitled to a paid vacation. He departed on vacation on September 23, 2002. Upon returning on September 30, 2002, he was told that he would not be paid during the time he was on vacation.

4. Respondent has a policy that provides paid vacations to employees who have worked 32 hours per week for the six weeks prior to the time requested for a vacation. Petitioner averaged 30.20 hours per week for the six weeks prior to his request for a vacation. He was, therefore, not entitled to a paid vacation.

5. On October 11, 2002, Petitioner filed a Complaint Form with the Escambia-Pensacola Human Relations Commission. In the "Nature of the Complaint" section the blocks "race" and "color" were checked. The "other" block was completed with the words "promotion, pay raise."

6. In this complaint, Petitioner recited that he was not given paid leave, that his work schedule had been reduced, and that he had been given a \$.25 per hour pay raise instead of the annual \$.50 per hour pay raise that he had received in prior years. The complaint also asserted that only one black had been employed "out front" among the customers. In the complaint he alleged mistreatment by a manager identified as "Donnie." Petitioner suggested as a remedy, that Respondent cease discrimination, that Petitioner be given a pay raise, a paid vacation, and a W-4 tax form. He also suggested that he should be trained so that he could get a promotion.

7. No evidence was offered demonstrating that Respondent was aware of the existence of the complaint. Petitioner testified that he was advised by the person who took his complaint to refrain from telling Respondent he had complained, and that he followed that advice.

8. In November 2002, subsequent to an automobile accident, and upon the advice of the attorney representing Petitioner as plaintiff in a personal injury lawsuit arising from the accident, Petitioner determined that he should not continue to work. This decision was based in part upon his belief that working might lessen his chances of prevailing in the ongoing lawsuit.

9. In June 2003 Petitioner approached the manager of Respondent's restaurant, Nicholas Loizos, on at least four occasions and asked to be hired as a "take away" person in the "front of the house." Although his former position of blooming onion cook was offered to him, Petitioner insisted that he wanted the "take away" position.

10. Mr. Loizos told Petitioner that in order to be a "take away" person, he would have to take the "Front-of-the House Selection Test." Petitioner was provided the opportunity to take this test. Petitioner did not avail himself of this opportunity.

11. No evidence was adduced that would indicate that Respondent engaged in racial discrimination against Petitioner, or any of Respondent's employees. No evidence was adduced that would prove that Respondent was aware that Petitioner had filed a discrimination complaint. Because Respondent was unaware of the discrimination complaint, Respondent could not have engaged in retaliation against Petitioner.

CONCLUSIONS OF LAW

12. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. § 120.57(1), Fla. Stat.

13. Respondent is subject to the Florida Civil Rights Act because it is located in Florida and employs more than 15 people. § 760.02(7), Fla. Stat.

14. In order to prevail, Petitioner must prove retaliation by a preponderance of the evidence. § 120.57(1)(j), Fla. Stat.

15. It is an unlawful employment practice to discriminate against any person because the person opposed an unlawful employment practice or filed a charge alleging an unlawful employment practice. § 760.10(7), Fla. Stat.

16. Section 760.10(7), Florida Statutes, is identical to the language found at 42 U.S.C. Section 2000e-3(a), with the exception that the paragraph begins, "It is" in the Florida version and begins, "It shall be" in the Federal version. The difference in the first few words has no effect on the meaning of the statutes.

17. 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. Sections 2000e, et seq. Cases interpreting Title VII are, therefore, applicable to Chapter 760, Florida Statutes. School Board of Leon County v. Hargis, 400 So. 2d 103 (Fla. 1st DCA 1981).

18. To prove a prima facie case of retaliation, Petitioner must demonstrate the following: (a) he engaged in a statutorily protected expression; (b) he suffered an adverse employment

action such as demotion or assignment to a position with less responsibility; and (c) the adverse employment action was causally related to the protected activity. Little v. United Technologies, 103 F. 3d 956, 959 (11th Cir. 1997) and Harper v. Blockbuster Entertainment Corp., 139 F.3d 1385, 1388 (11th Cir. 1998).

19. For purposes of a Title VII retaliation claim, plaintiff engages in "statutorily protected activity" when he or she protests an employer's conduct, even if the conduct is actually lawful, so long as he or she demonstrates a good faith, reasonable belief that the employer was engaged in unlawful employment practices. See Harper v. Blockbuster Entertainment Corp., 139 F.3d 1385, 1388 (11th Cir. 1998).

20. Retaliation is a separate offense from discrimination under Title VII. An employee need not prove an underlying claim of discrimination for a retaliation claim to succeed. Sullivan v. National RR Passenger Corp., 170 F. 3d 1056 (11th Cir. 1999).

21. When Petitioner made his complaint to the Escambia-Pensacola Human Relations Commission, on October 11, 2002, he was engaged in a statutorily protected expression.

22. Only events which occurred after the October 11, 2002, complaint are relevant to the question of whether Petitioner suffered an adverse employment action. Therefore, whether or

not Petitioner should have been paid for his September 2002 vacation is irrelevant to the outcome of this case.

23. The event about which Petitioner asserted to be retaliation was the alleged failure of Respondent to re-hire him in June 2003. Petitioner's claim that he would have taken his old position as blooming onion cook, when he returned to work, is directly contrary to Nicholas Loizos's testimony that Petitioner refused that position and wished instead to become a "take away" person. That Petitioner had long contemplated an upgrade in employment status is reflected in the complaint of October 11, 2002, wherein he suggested that he should be trained so that he could get a promotion. Upon the evidence, taken as a whole, Petitioner failed to prove that Respondent failed to offer him his former position. Thus, no adverse employment action occurred.

24. Moreover, no evidence at all was adduced that would demonstrate that Respondent was aware that Petitioner had filed a complaint with the Escambia-Pensacola Human Relations Commission. It is in the nature of retaliation that there first be a precipitating event. Such a precipitating event is not present in this case. As noted in paragraph 18 above, an adverse employment action must be causally related to the

protected activity. Therefore, even if it could be found that Petitioner was the victim of an adverse employment action, it was not causally related to the protected activity.

RECOMMENDATION

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

RECOMMENDED that the Petition be dismissed.

DONE AND ENTERED this 16th day of March, 2005, in Tallahassee, Leon County, Florida.



HARRY L. HOOPER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of March, 2005.

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.