

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SUSAN COFFY,)
)
 Petitioner,)
)
 vs.) Case No. 04-4316
)
 PORKY'S BARBEQUE RESTAURANT,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held on February 4, 2005, in Titusville, Florida, before Carolyn S. Holifield, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Susan Coffy, pro se
2966 Temple Lane
Mims, Florida 32754

For Respondent: Walter Milton, Owner
Porky's Barbeque Restaurant
4280 South Washington Avenue
Titusville, Florida 32780

STATEMENT OF THE ISSUE

The issue is whether Respondent, Porky's Barbeque Restaurant, engaged in an unlawful employment practice by terminating Petitioner, Susan Coffy, from her position.

PRELIMINARY STATEMENT

On or about December 26, 2003, Petitioner, Susan Coffy ("Petitioner"), filed an Employment Charge of Discrimination ("Charge of Discrimination") with the Florida Commission on Human Relations ("Commission"). The Charge of Discrimination alleged that Petitioner was laid off her job by Respondent, Porky's Barbeque Restaurant ("Porky's" or "Respondent"), and that the action was motivated by age discrimination. The Commission's Office of Employment Investigations conducted an investigation into Petitioner's allegations and based on the investigation, determined there was no reasonable cause to believe that an unlawful employment practice occurred. The Commission entered a "Notice of Determination: No Cause" on October 25, 2004. Petitioner timely filed a Petition for Relief, and the case was referred to the Division of Administrative Hearings for assignment of an Administrative Law Judge to conduct the formal hearing.

At hearing, Petitioner testified on her own behalf and presented the testimony of four other witnesses: Roberta Harty, Joyce Miller, Vivian Wilson, and James Kenaston. Petitioner offered and had three exhibits admitted into evidence. Respondent presented the testimony of three witnesses: Walter Milton, Catherine Allen, and David Dibble. Respondent offered and had two exhibits received into evidence.

After the hearing, on February 7, 2005, Respondent filed a letter requesting that certain "information and testimony" provided by Petitioner's witnesses be stricken. That request is denied.

The proceeding was recorded, but was not transcribed. Neither party filed a proposed recommended order.

FINDINGS OF FACT

1. Petitioner is a female and, at all times relevant to this proceeding, was over the age of 40.

2. From March 1, 2003, until October 28, 2003, Petitioner was employed as a waitress at Porky's, a barbecue restaurant. On October 28, 2003, Petitioner was terminated from her job as a waitress.

3. Prior to March 1, 2003, Petitioner had worked as a waitress at another restaurant, Fat Boy's Restaurant (Fat Boy's), that had been operating at the same location as Porky's. Fat Boy's closed after the building in which that restaurant was located was purchased by Walter Milton. After Mr. Milton purchased the building, he opened his own business, Porky's, at that location.

4. After Mr. Milton opened his restaurant, he employed many of the individuals who had been employed by Fat Boy's, but told them that their employment with Porky's was for a "trial period."

5. Immediately after Poriky's opened for business, Mr. Milton initiated operational directives that he believed were essential business needs for operating a barbecue business. He introduced these new directives to the employees of Poriky's, many of whom had previously worked for Fat Boy's. While some of these employees were successful in making the transition to the new operation, there were employees, including Petitioner, who were resistant to the operational directives initiated by Mr. Milton.

6. Even though Petitioner was resistant to the new operational directives that were implemented at Poriky's, Mr. Milton continued to try to work with Petitioner. In fact, Petitioner worked as a waitress at Poriky's the first eight months the restaurant was open.

7. During the course of her employment, Mr. Milton found that Petitioner was an employee who failed to follow simple instructions. For example, Mr. Milton directed employees to knock on his office door when the door was closed. Notwithstanding this very simple directive, Petitioner refused to comply.

8. One day Petitioner went to Mr. Milton's office and found the door to the office was closed. Instead of knocking as she had been previously directed, Petitioner simply barged into the office and stated that she needed a band-aid. After

Petitioner barged into the office without knocking, Mr. Milton reminded her that she should knock on the door and wait for a response before coming into his office. About three minutes after this admonition, Petitioner returned to Mr. Milton's office. Although the office door was closed, Petitioner, again, did not knock on the door, but simply opened the door and went into the office.

9. Mr. Milton was not pleased with Petitioner's failure to embrace the directives he initiated and implemented for Porky's. However, the "final straw" that resulted in Mr. Milton's terminating Petitioner's employment was an incident about a menu item.

10. On October 28, 2003, Petitioner was very upset that Mr. Milton had included an item on the Porky's menu that also had been on the Fat Boy's menu. That menu item was referred to as "Jim's Special Burger." Mr. Milton included that item on Respondent's menu to honor Jim Kenaston, who had been the owner of Fat Boy's.

11. On October 28, 2003, Petitioner "flew off the handle" and confronted Mr. Milton about his decision to include the item, "Jim's Special Burger," on the Porky's menu. Petitioner, who admits she was upset about this matter, confronted Mr. Milton and argued to him that he had no right to put the "Jim's Special Burger" on Respondent's menu.

12. The confrontation started in the kitchen of the restaurant, but continued after Petitioner left the kitchen and proceeded into the restaurant's dining room. Although there were customers in the dining room, Petitioner continued to argue with Mr. Milton about the menu item.

13. Petitioner's verbal criticism and objection to Mr. Milton's decision to include "Jim's Special Burger" on Respondent's menu created such a commotion in the restaurant that Respondent's bookkeeper heard Petitioner's outbursts from her office located behind the cashier's counter. After the bookkeeper heard Petitioner arguing with Mr. Milton, the bookkeeper left her office and in an effort to de-escalate the situation, escorted Petitioner out of the dining room to a back hall of the restaurant where there were no customers.

14. On October 28, 2003, as a result of Petitioner's inappropriate and unprofessional conduct described in paragraphs 10 through 13, Mr. Milton terminated Petitioner's employment at Porky's.

15. The same day that he terminated Petitioner's employment, Mr. Milton completed a "Separation Notice" on which he indicated that Petitioner was laid off due to lack of work. The reason Mr. Milton wrote this on the form was so that Petitioner could receive unemployment compensation.

16. Petitioner presented no competent and substantial evidence that she was terminated from employment because of her age. Likewise, Petitioner presented no evidence that after she was terminated, she was replaced by a younger worker.

17. At all times relevant to this proceeding, Respondent had four or five employees who were over 40 years of age.

18. Petitioner presented several witnesses who testified that she was an excellent waitress when she was employed at Fat Boy's. However, Petitioner's job performance while working for her previous employer is not at issue or relevant in this proceeding. Even if that testimony is accepted as true, no inference can be drawn that Petitioner's performance remained the same or was viewed as such by her new employer.

19. Notwithstanding the opinions expressed by her previous employers and co-workers, Petitioner was terminated from her employment at Porky's as a result of her unacceptable and unprofessional conduct on October 28, 2003.

CONCLUSIONS OF LAW

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

21. The Florida Civil Rights Act of 1992 (the Florida Civil Rights Act or the Act), Chapter 760, Florida Statutes (2004), prohibits discrimination in the workplace. The Act,

among other things, forbids the discriminatory firing of an employee.

22. Subsection 760.10(1)(a), Florida Statutes (2004), states the following:

(1) 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.

23. Respondent is an "employer" as defined in Subsection 760.02(7), Florida Statutes (2004), which provides the following:

(7) "Employer" means any person employing 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such a person.

24. Florida courts have determined that federal case law applies to claims arising under the Florida's Civil Rights Act, and as such, the United States Supreme Court's model for employment discrimination cases set forth in McDonnell Douglas Corporation v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), applies to claims arising under Section 760.10, Florida Statutes (2004). See Florida Department of Community Affairs v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991).

25. Under the McDonnell analysis, in employment discrimination cases, Petitioner has the burden of establishing by a preponderance of evidence a prima facie case of unlawful discrimination. If the prima facie case is established, the burden shifts to Respondent, the employer, to rebut this preliminary showing by producing evidence that the adverse action was taken for some legitimate, non-discriminatory reason. If the employer rebuts the prima facie case, the burden shifts back to Petitioner to show by a preponderance of evidence that Respondent's offered reasons for its adverse employment decision were pretextual. See Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981).

26. In order to prove a prima facie case of unlawful employment discrimination under Chapter 760, Florida Statutes (2004), Petitioner must establish that: (1) she is a member of the protected age group; (2) she was subject to adverse employment action; (3) she was qualified to do the job; and (4) she was replaced by a younger worker. See Williams v. Vitro Services Corporation, 144 F.3d 1438, 1441 (11th Cir. 1998).

27. Petitioner presented neither direct evidence of discriminatory intent or statistical evidence demonstrating a pattern of such intent. Thus, only circumstantial evidence, if any, can be applied to analyze Petitioner's claim under the

McDonnell framework. Early v. Champion Int'l. Corp., 907 F.2d 1077, 1081 (11th Cir. 1990).

28. Petitioner has failed to prove a prima facie case of unlawful employment discrimination.

29. Petitioner established that she is a member of the protected group in that she is over 40 years of age. Petitioner also established that she was subject to adverse employment action in that she was terminated from her job as a waitress. Finally, Petitioner established that, based on her recent job performance, she was qualified to do the typical work expected of a waitress.

30. However, Petitioner presented no evidence that she was replaced by a younger person. Having failed to establish this element, Petitioner has not established a prima facie case of employment discrimination.

31. Even if Petitioner had met the burden, Respondent presented evidence of legitimate, non-discriminatory reasons for terminating Petitioner, thereby rebutting any presumption of age discrimination. The evidence presented by Respondent established that Petitioner was terminated for her inappropriate and unprofessional conduct, that is, Petitioner's confronting and arguing with the owner of the business in front of customers at the restaurant and while she was on duty.

32. Petitioner failed to prove that Respondent's reasons for firing her are pretextual.

RECOMMENDATION

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

RECOMMENDED that the Florida Commission on Human Relations issue a final order finding that Respondent, Porky's Barbeque Restaurant, did not commit any unlawful employment practice and dismissing the Petition for Relief.

DONE AND ENTERED this 18th day of March, 2005, in Tallahassee, Leon County, Florida.

Carolyn S. Holifield

CAROLYN S. HOLIFIELD
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 18th day of March, 2005.

COPIES FURNISHED:

Denise Crawford, Agency Clerk
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

Walter Milton
Porky's Barbeque Restaurant
4280 South Washington Avenue
Titusville, Florida 32780

Susan Coffy
2966 Temple Lane
Mims, Florida 32754

Cecil Howard, General Counsel
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

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.