

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BENJAMIN TORRES,)
)
 Petitioner,)
)
 vs.) Case No. 05-0506
)
 MANPOWER, INC.,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

A formal hearing was conducted in this case on April 7, 2005, in Pensacola, Florida, before Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Debra Dawn Cooper, Esquire
309 West Gregory Street
Pensacola, Florida 32502

For Respondent: Jane M. Rolling, Esquire
5301 North Ironwood Road
Post Office Box 2053
Milwaukee, Wisconsin 53217

STATEMENT OF THE ISSUE

The issue is whether Respondent committed an unlawful employment practice contrary to Section 760.10, Florida Statutes, by discriminating against Petitioner based on his gender.

PRELIMINARY STATEMENT

On December 15, 2003, Petitioner Benjamin Torres (Petitioner) filed an Amended Charge of Discrimination against Respondent Manpower, Inc. (Respondent). The amended charge alleged that Respondent had discriminated against him by terminating his employment based on his gender. On January 4, 2005, the Florida Commission on Human Relations (FCHR) issued a Determination: No Cause.

On February 8, 2005, Petitioner filed a Petition for Relief, requesting an administrative hearing. On February 10, 2005, FCHR referred the case to the Division of Administrative Hearings.

A Notice of Hearing dated February 25, 2005, scheduled the hearing for April 7, 2005.

On March 11, 2005, Respondent's staff attorney, who is licensed to practice law in Wisconsin, requested a determination that she was qualified to represent the interests of Respondent at the hearing. An Order dated March 14, 2005, granted the request.

During the hearing, Petitioner testified on his own behalf. Petitioner presented no exhibits for admission into evidence.

Respondent presented the testimony of four witnesses. Respondent offered six exhibits that were admitted as evidence.

The Transcript of the proceeding was filed on May 5, 2005. Subsequently, the parties filed Proposed Recommended Orders.

All citations hereinafter shall be to Florida Statutes (2003) unless otherwise specified.

FINDINGS OF FACT

1. Respondent is a staffing company that provides temporary employees to a variety of customers/employers. Respondent performs workforce management for its customers, including hiring personnel, providing new-employee orientation, and conducting ongoing training after the initial hire.

2. Respondent provides its employees with harassment-free workplace training as part of the initial orientation. Thereafter, Respondent provides the harassment-free workplace training on an annual basis and more frequently at the request of its customers.

3. Petitioner is a white male who worked as a temporary employee for Respondent on two occasions: from May 17, 1993, through July 27, 1996, and from June 30, 1997, through July 28, 2003. On both occasions, Respondent assigned Petitioner to perform maintenance work at the Island House Hotel in Orange Beach, Alabama.

4. Petitioner was a maintenance technician at the Island House Hotel until Respondent promoted him to the position of Assistant Supervisor of Maintenance in 1998. Respondent

promoted Petitioner to the management position of Chief Engineer in 1999.

5. As Chief Engineer, Petitioner supervised five or six maintenance technicians. Petitioner received a salary but often worked more than a 40-hour week. For instance, Petitioner would stay at the hotel during hurricanes instead of going home to be with his family.

6. At all times relevant here, Petitioner was aware of Respondent's written "Harassment-Free Workplace Policy." The policy defines sexual harassment as "unwelcome conduct of a sexual nature where an employee feels compelled to comply with the harassment as part of job betterment, or where the harassment interferes with an employee's work creating an intimidating or hostile work environment." The policy lists examples of sexual harassment, including unwelcome physical contact, request for sexual favors, and/or displays of a sexual nature.

7. Respondent's Harassment-Free Workplace Policy goes on to discuss other types of discriminatory conduct. Specifically, the policy prohibits discrimination, such as intimidation or ridicule based on gender, race, color, national origin, sexual orientation, pregnancy, age, religion, disability, veteran status, or any other basis that creates an offensive work environment, or which results in an unfavorable job action. The

policy lists verbal or written jokes or offensive comments based on race, sex, etc., as examples of discriminatory conduct.

8. Respondent's Harassment-Free Workplace Policy advises employees, whether a victim or a witness, to report all incidents of discrimination or harassment. Respondent instructs its employees to report such complaints to their manager, their local office staffing specialist, and/or Respondent's corporate office, using a toll-free employee hot line.

9. Petitioner had a good professional and personal relationship with Respondent's employees who were assigned management positions at the Island House Hotel. Specifically, Petitioner was friends with the following employees: (a) Barbara Walters, General Manager; (b) Glenn Johnson, Director of Operations; and (c) Margaret Lathan, Director of Housekeeping.

10. Petitioner and Ms. Walters occasionally shared off-color jokes with each other. Sometimes they laughed about jokes with sexual connotations that one of them had copied from the Internet. On at least one occasion, Ms. Walters and Petitioner discussed hotel guests who were wearing bathing suits at the pool. There is no evidence that Petitioner was ever offended by the jokes; he never complained to Respondent about the jokes.

11. Ms. Walters personally was not offended by the jokes. In time, however, she became concerned that Petitioner's jokes and comments to employees other than herself were no longer

appropriate in the workplace. Eventually, Ms. Walters began to verbally counsel Petitioner to clean up his language and to be careful of his remarks to other employees because they might consider them offensive.

12. Petitioner and Ms. Latham also enjoyed sharing jokes of a sexual nature with each other. On one occasion, Ms. Latham gave Petitioner a T-shirt when she returned from vacation. The back of the shirt had pictures of ladies' butts wearing bikinis. There is no evidence that Petitioner found the shirt offensive; he never complained to Respondent or anyone else about the T-shirt.

13. On or about June 23, 2001, Ms. Walters wrote a note to Petitioner. Ms. Walters requested that Ms. McDowell place the note in Petitioner's personnel file. The note stated as follows:

After our conversation on Wednesday, I thought we had cleared up my concerns with you. Today I discover that your "blond" lady that does awnings was in your office yesterday and that you allowed her to accompany you to repair the washer in the laundry.

This is totally unacceptable and violates Hotel policy and safety issues. I do not expect you as a manager to have outside vendors in areas that they are not here to inspect, study, or to prepare estimates for. I will not discuss this any further with you.

14. Ms. Walters would have written the above-referenced note if Petitioner had invited an unauthorized male to accompany him into a secure area. However, Ms. Walters was especially concerned because the incident involved a female.

15. On at least two occasions, Ms. Walters made special requests for Respondent to conduct a class to review Respondent's harassment policy with her management team. She made these requests because her management team consisted of members who were of various ages. Ms. Walters wanted to make sure that the management team was aware that times had changed, and that conduct, which had been acceptable years ago, was no longer acceptable in today's workplace.

16. At the request of Ms. Walters, Respondent's staffing specialist, Martina McDowell, conducted a class on Respondent's harassment policy at the Island House Hotel on January 31, 2002. Petitioner, Ms. Walters, and Ms. Latham attended the class.

17. During the January 2003 class, Petitioner received a copy of Respondent's Harassment-Free Workplace Policy. He signed a statement acknowledging that he had read and understood the policy, including the procedure to report violations.

18. On February 14, 2002, Petitioner signed a copy of Respondent's "New Employee Orientation Guidelines: Policy & Procedures." This document includes Respondent's discrimination

and harassment policies, which Petitioner initialed.

Ms. McDowell signed the document under Petitioner's signature.

19. In the last year of Petitioner's employment at the Island House Hotel, Ms. Walters realized Petitioner was under stress in his personal life. She also noticed a change in his behavior at work. Ms. Walters felt that Petitioner's jokes and other attempts to be humorous became more intense.

20. Ms. Walters was so concerned that she requested Ms. McDowell to counsel Petitioner on more than one occasion. During the counseling sessions, Ms. McDowell advised Petitioner that off-color jokes were not accepted in the workplace. Ms. McDowell also told Petitioner that flirting with female co-workers was inappropriate and would be considered as sexual harassment under Respondent's policy.

21. Respondent does not provide the Island House Hotel with employees to perform housekeeping duties. Island House Hotel contracts with a company by the name of TIDY for housekeeping services.

22. Ms. Latham, as Director of Housekeeping, does not supervise TIDY's housekeepers directly. Instead, she interacts with TIDY's supervisors to ensure that the housekeeping duties are performed.

23. One of TIDY's housekeepers was a young female named April. She began working at Island House Hotel on or about July 23, 2003.

24. On Friday, July 25, 2003, Petitioner grabbed and jiggled his private parts as he walked down the hall to the elevator at the Island House Hotel. April, Ms. Latham, and a porter named Alan Hoffman, were standing at the elevator. Ms. Latham observed Petitioner's conduct and considered it offensive. Ms. Latham could tell that Petitioner's inappropriate behavior embarrassed April.

25. On Saturday, July 26, 2003, Ms. Walters was working at the Island House Hotel when she learned that a young man was at the front desk. The young man wanted to speak to Ms. Walters privately. Therefore, Ms. Walters invited the young man to go with her to the sales office.

26. During the conversation, the young man complained to Ms. Walters that an older gentleman named Ben, who worked at the hotel, had made inappropriate gestures to his fiancéé, April. Specifically, the young man alleged that Ben had grabbed his private parts and jiggled them in front of April, who was offended by such behavior.

27. Ms. Walters talked to Ms. Latham after the young man left the hotel. Ms. Latham confirmed that she had witnessed Petitioner grabbing his private parts in front of April.

28. Immediately after talking to Ms. Latham, Ms. Walters called Respondent's branch manager, Sherry Moore. Ms. Walters told Ms. Moore that Respondent needed to release Petitioner from his assignment at Island House Hotel.

29. Ms. Moore contacted Ms. McDowell by telephone. Ms. Moore instructed Ms. McDowell to contact Petitioner and instruct him to report to Respondent's office in Gulfport, Florida, on July 28, 2003.

30. On Sunday, July 27, 2003, Ms. McDowell contacted Petitioner. Ms. McDowell told Petitioner to report to her office the next day instead of returning to work at Island House Hotel.

31. On Monday, July 28, 2003, Petitioner met Ms McDowell at her office. Ms. McDowell explained that Respondent had received a sexual harassment complaint involving his behavior. Petitioner's initial reaction was to state that he had talked to the little girl and that she was okay with his apology.

32. The little girl that Petitioner referred to was not April. Petitioner's initial statement in Ms. McDowell's office related to an incident involving a female employee of the hotel's beach service.

33. Ms. McDowell informed Petitioner that the complaint involved a housekeeper. After explaining the allegations against him, Ms. McDowell relieved Petitioner of his work

assignment at Island House Hotel. Petitioner became angry, stating as follows: "Well, if Ms. Walters was going down the hallway and her ass was itching and she scratched it, would you fire her too?" Ms. McDowell responded that she was dealing only with a complaint brought against him, where another employee had witnessed his conduct. Ms. McDowell did not tell Petitioner that he was terminated as one of Respondent's temporary employees.

34. Respondent's policy requires employees to make themselves available for work assignments. Employees are supposed to contact Respondent within 48 hours of the time that a work assignment ends if they are available for another job. Thereafter, employees are required to contact Respondent on a weekly basis. Petitioner did not follow Respondent's policy in this regard.

35. In any event, Ms. McDowell conducted a follow-up investigation. The investigation included interviews with Ms. Walters, Ms. Latham, and Mr. Hoffman. Ms. McDowell was unable to talk to April who never returned to work. After completing her investigation, Ms. McDowell considered Petitioner's employment terminated.

36. On or about November 21, 2003, Ms. McDowell requested that Ms. Latham make a written statement regarding the July 25, 2003, incident. Ms. Latham made the following statement:

April (housekeeper), Alan (porter) and myself were standing by the elevator when Ben Torres came down the hall and grabbed his privates. Ben might not have realized April was standing there, he made these gestures all the time and I told him many times, that one of these days he will do it in front of the wrong person and get in trouble. Most of the housekeepers knew how he was and just ignored his behavior.

37. Respondent did not hire another Chief Engineer to replace Petitioner. Instead, Respondent assigned the duties of Chief Engineer to Glenn Johnson, the Director of Operations at the Island House Hotel. Mr. Johnson is a white male.

CONCLUSIONS OF LAW

38. 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.

39. It is an unlawful employment practice for an employer to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's gender. See § 760.10(1)(a), Fla. Stat.

40. The provisions of Chapter 760, Florida Statutes, are analogous to those of the Federal Employment Discrimination Act, 42 U.S.C. Section 2000(e), et seq., and the cases interpreting the Federal Employment Discrimination Act are therefore applicable to Chapter 760, Florida Statutes. See Razner v.

Wellington Regional Medical Ctr., Inc., 837 So. 2d 437, 440
(Fla. 4th DCA 2002).

41. In order to establish a prima facie case of gender discrimination, an employee must demonstrate the following: (a) he is a member of a protected class; (b) he is qualified to do his job; (c) his employer discharged him but did not discharge similarly situated employees outside of the protected class. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir 1997).

42. If an employee is successful in establishing a prima facie case, the employer must articulate a legitimate, nondiscriminatory reason for its actions. Rojas v. Florida, 285 F.3d 1339, 1342 n.2 (11th Cir. 2002); Combs v. Plantation Patterns, 106 F.3d 1519, 1526 (11th Cir. 1997).

43. If the employer satisfies its burden, the employee must prove that the employer's reason for its action is a pretext for illegal discrimination. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 255-256, 101 S. Ct. 1089, 1094-1095, 67 L. Ed. 2d 207 (1981).

44. As a male, Petitioner was a member of a protected class. His history of working in maintenance at the Island House Hotel for many years indicates that he was qualified to perform his duties as Chief Engineer. Respondent fired

Petitioner, but did not fire female managers (Ms. Walters and Ms. Latham), who shared jokes of a sexual with Petitioner.

45. Despite these facts, Petitioner has not met his burden of proving a prima facie case for two reasons. First, there is no evidence that Ms. Walters' and Ms. Latham's conduct ever offended Petitioner or any other co-worker at the hotel. Second, neither Petitioner nor any other individual ever complained to Respondent about the behavior of the female managers. Therefore, it cannot be said that Respondent treated the female managers in a more favorable way.

46. Assuming, but not concluding, that Petitioner proved his prima facie case, Respondent presented a legitimate and nondiscriminatory reason for relieving Petitioner of his work assignment. Respondent's behavior in the presence of other employees clearly violated Respondent's Harassment-Free Workplace Policy.

47. Petitioner failed to present any evidence that the reason for his termination was a pretext for discrimination. There could be no gender discrimination where Respondent was never aware that any female employee's conduct was of the type that could be considered contrary to the harassment policy.

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 6th day of June, 2005, in
Tallahassee, Leon County, Florida.

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SUZANNE F. HOOD
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Filed with the Clerk of the
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this 6th day of June, 2005.

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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.