

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DELENA R. STRINGFIELD,)
)
 Petitioner,)
)
 vs.) Case No. 05-3667
)
 DEPARTMENT OF REVENUE,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

A formal administrative hearing in this case was held on September 12, 2006, in Orlando, Florida, before Bram D. E. Canter, an Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Garth J. Milazzo, Esquire
37 North Orange Avenue, Suite 500
Orlando, Florida 32801

For Respondent: Cindy Horne, Esquire
Department of Revenue
Post Office Box 6668
Tallahassee, Florida 32399-0100

STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner was dismissed from her employment with Respondent on the basis of racial discrimination.

PRELIMINARY STATEMENT

On March 25, 2005, Petitioner filed a Complaint of Discrimination with the Florida Commission on Human Relations (Commission). The complaint alleged race and age discrimination by the Department of Revenue (Department). Following its investigation of the complaint, the Commission issued a Determination of No Cause on September 1, 2005. Petitioner filed a petition to dispute the Commission's action, and the matter was referred to DOAH to conduct an evidentiary hearing.

At the final hearing, Petitioner testified on her own behalf and also presented the testimony of Betty Tanner and Henry McKinney. Petitioner's Exhibits 1 and 2 were admitted into evidence. The Department presented the testimony of Mark Kellerhals, Lillie Bogan, and Nancy Kelly. The Department's Exhibits 1 through 5 were admitted into evidence. The undersigned requested and, without objection, admitted into evidence a document from the Department's public records as "Judge's Exhibit 1."

The two-volume Transcript of the hearing was filed with DOAH. The Department timely filed a Proposed Recommended Order that was considered in the preparation of this Recommended Order. No post-hearing submittal was filed by Petitioner.

FINDINGS OF FACT

1. Petitioner is an African-American female. She was employed as a Revenue Specialist I by the Department's Child Support Enforcement Program for a little over four years, from September 20, 2000, until January 28, 2005.

2. On January 24, 2005, the Department notified Petitioner by letter that her employment would be terminated, effective January 28, 2005, for violating three Disciplinary Standard Rules and the Department's policies related to "loafing," conduct unbecoming an public employee, and the misuse of state property and equipment.

3. The Department charged Petitioner with using the State's SunCom system to make 711 personal long-distance calls totaling 5,483 minutes in the 18-month period from December 1, 2002, to May 31, 2004.¹ Petitioner claimed that some of calls, totally about 700 minutes, were not personal calls.² Petitioner admitted that the balance of the calls, totaling about 4,783 minutes, were personal calls.

4. When Petitioner began employment with the Department, she signed a form acknowledging that she read and understood the "Department of Revenue Personnel Disciplinary Procedures and Standards Rule (#12-3.011, F.A.C., effective July 1999)." This rule includes a prohibition against personal use of state property or equipment without authorization. The rule further

provides that the disciplinary action for a violation of this prohibition ranges from oral reprimand to dismissal for the first occurrence, suspension to dismissal for the second occurrence, and dismissal for the third occurrence.

5. Petitioner did not receive authorization to use the SunCom system for personal long-distance calls.

6. Petitioner admitted that she knew it was wrong to use the SunCom system to make personal long-distance calls, but she "really didn't think that it was something that [she] would be terminated for."

7. Petitioner believes her co-workers also used the SunCom system to make personal long-distance calls. Even if this claim were relevant to the issue of whether the disciplinary action taken against Petitioner was discriminatory, she presented no evidence to support the claim.

8. Petitioner argues that her dismissal for misuse of the SunCom system was a pretext for her dismissal and that racial discrimination was the true reason. Petitioner did not pursue at the final hearing her initial claim that age discrimination was another basis for her dismissal.

9. Petitioner presented no evidence of written or oral statements made by Department supervisors or administrators indicating a racial motive for her dismissal. The sole basis for Petitioner's claim of racial discrimination is that other

Department employees who were not African-Americans were not dismissed for their misuse of the SunCom system.

10. In determining what disciplinary action to take against an employee, the Department considers mitigating factors, including the quality of the employee's work performance and his or her length of employment.

11. On December 3, 2003, Petitioner received an oral reprimand from her immediate supervisor, Betty Tanner, for tardiness. On February 25, 2004, Petitioner received another oral reprimand from Ms. Tanner for tardiness. On January 5, 2005, Petitioner received an oral reprimand from Ms. Tanner for an absence without leave and a "Memo of Concerns" because of unsatisfactory work performance issues.

12. Respondent's Exhibit 4 is a compilation of information about 25 cases of SunCom misuse by Department employees from 1996 through 2006. The list of employees is organized according to the number of minutes of SunCom misuse in an 18-month period. Of the 25 cases reported, Petitioner ranks third highest in total minutes of SunCom system misuse.

13. Respondent's Exhibit 4 indicates that the worst SunCom abuser was M.D., an African-American male, who had 15,000 minutes of SunCom misuse. In the case of M.D., the Department's human resources administrator recommended that M.D. be dismissed, but he was ultimately demoted, instead. According to

the Department's witness, Nancy Kelly, the decision not to dismiss M.D. was because of his length of service (7 years) and good work record.

14. The next worse case of SunCom abuse by a Department employee involved L.W., an African-American female who had 13,186 minutes of SunCom system misuse. L.W. had 18 years of service and a good work record. Dismissal was recommended for L.W., but she was suspended, instead.

15. Dismissal was recommended for a Caucasian male employee, F.S., who had 11 years of service and who had misused 4,574 minutes on the SunCom system. He resigned before his dismissal.

16. An African-American female, L.C., with nine years of service, was allowed to refund the value of 3,551 minutes of personal use of the SunCom system.

17. The Department's disciplinary actions in the 25 cases of SunCom system misuse do not indicate a pattern of racial discrimination.

18. It should be noted that the director of the Child Support Enforcement Program in which Petitioner works, Lilly Bogan, is also an African-American.

19. In considering mitigating factors, the Department determined that Petitioner's past incidents of unsatisfactory work performance and her relatively short length of service did

not provide a basis for taking disciplinary action other than dismissal for her extensive misuse of the SunCom system.

20. The Department followed the procedures set forth in Subsection 110.227(5)(a), Florida Statutes (2005), that are required before an agency can dismiss a Career Service employee, including giving written notice of the proposed disciplinary action, providing an opportunity to appear before the Department official taking the action, and providing an appeal to the Commission.

21. Petitioner failed to prove that racial discrimination was the reason for her dismissal. The more persuasive evidence in the record shows that the reason Petitioner was dismissed was the reason given to her by the Department's Employee Relations Manager, "It was the minutes and they were just way too high."

CONCLUSIONS OF LAW

22. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to Section 120.569 and Subsections 120.57(1) and 760.10(1)(a), Florida Statutes (2006).

23. Subsection 760.10(1), Florida Statutes (2004), states that it is an unlawful employment practice for an employer to discharge or otherwise discriminate against an individual on the basis of race.

24. In discrimination cases alleging disparate treatment, the complainant generally bears a burden of proof that was established by the United States Supreme Court in McDonnell Douglas v. Green, 411 U.S. 792 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). Under this well established standard of proof, the complainant bears the initial burden of establishing a prima facie case of discrimination. When the complainant makes out a prima facie case, the burden to go forward shifts to the employer to articulate a legitimate, non-discriminatory explanation for the employment action. See Department of Corrections v. Chandler, 582 So. 2d 1183 (Fla. 1st DCA 1991). The employer has the burden of production, not persuasion, and need only persuade the finder of fact that the decision was non-discriminatory. Id. The complainant must then come forward with specific evidence demonstrating that the reasons given by the employer are a pretext for discrimination. "The employee must satisfy this burden by showing directly that a discriminatory reason more likely than not motivated the decision, or indirectly by showing that the proffered reason for the employment decision is not worthy of belief." Department of Corrections v. Chandler, 582 So. 2d 1186.

25. To establish her prima facie case, Petitioner had to prove that (1) she is a member of a protected class; (2) she was

subject to an adverse employment action; (3) her employer treated similarly situated employees, who are not members of the protected class, more favorably; and (4) she was qualified for the job or benefit at issue. See McDonnell, supra; Gillis v. Georgia Department of Corrections, 400 F.3d 883 (11th Cir. 2005).

26. Petitioner did not prove all of the elements to establish a prima facie case of discrimination. She did not prove that the Department treated similarly situated employees who are not African-Americans more favorably in other cases of SunCom system abuse.

27. The Department demonstrated a legitimate, non-discriminatory reason for dismissing Petitioner. Petitioner failed to prove that the non-discriminatory reason for dismissing her was a pretext for discrimination. She also failed to show that the Department's explanation is not worthy of belief.

28. In summary, Petitioner failed to carry her burden of proof that the Department engaged in racial discrimination against Petitioner when it dismissed her from employment.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law set forth herein, it is

RECOMMENDED:

That the Florida Commission on Human Relations enter a final order dismissing the Petition for Relief.

DONE AND ENTERED this 3rd day of January, 2007, in Tallahassee, Leon County, Florida.



BRAM D. E. CANTER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of January, 2007.

ENDNOTES

1/ It is the Department's policy to confine its investigation of SunCom system abuses to telephone records for the 18-month period preceding the allegation of misuse.

2/ Petitioner signed an affidavit in which she stated that the 5,483 minutes were all personal calls, but at the hearing she said her affidavit statement was incorrect.

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.