

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GENNIE C. BAGLEY,)
)
 Petitioner,)
)
 vs.) Case No. 06-0592
)
 CITY OF TAMPA, FLORIDA,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on June 14, 2006, in Tampa, Florida, before Susan B. Harrell, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Thomas Martin Gonzalez, Esquire
Jason L. Odom, Esquire
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For Respondent: Robert F. McKee, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether Respondent discriminated against Petitioner based on Petitioner's race.

PRELIMINARY STATEMENT

On July 26, 2005, Petitioner, Gennie C. Bagley (Ms. Bagley), filed an Employment Complaint of Discrimination with the Florida Commission on Human Relations (Commission), alleging that Respondent, City of Tampa, Florida (City), terminated her employment with the City based on her race. The Commission investigated the allegations and, on January 20, 2006, entered a Determination: No Cause to believe that the City discriminated against Ms. Bagley.

On February 13, 2006, Ms. Bagley filed a Petition for Relief, alleging that she "was terminated, at least in part, based on her race." On February 15, 2006, the petition was forwarded to the Division of Administrative Hearings for assignment of an administrative law judge. The case was originally assigned to Administrative Law Judge Carolyn S. Holifield and was reassigned to Administrative Law Judge Susan B. Harrell to conduct the final hearing.

The parties entered into a Joint Pre-Hearing Stipulation and agreed to certain facts contained in Section E of the Joint Pre-Hearing Stipulation. Those facts are incorporated into this Recommended Order to the extent relevant.

At the final hearing, Ms. Bagley testified in her own behalf and called the following witnesses: Dawn Marie Colvin, Linda D. Coomey, and John Skop, Jr. Petitioner's Exhibits 2

through 13 and 18 were admitted in evidence. At the final hearing, the City called Larry Michael Canelejo and Curtis Lane as its witnesses. Respondent's Exhibits 1, 2, 4 through 11, 13 through 18, 21, and 22 were admitted in evidence.

The one-volume Transcript of the final hearing was filed on July 6, 2006. At the final hearing, the parties agreed to file their proposed recommended orders within ten days of the filing of the Transcript. On July 7, 2006, Ms. Bagley filed Petitioner's Unopposed Motion for Extension of Time to file proposed recommended orders. The motion was granted, and the time for filing proposed recommended orders was extended to July 31, 2006. The parties timely filed their proposed recommended orders, which have been considered in rendering this Recommended Order.

FINDINGS OF FACT

1. Ms. Bagley, an African-American, was employed by the City from 1987 until her termination on July 9, 2004. At the time of her termination, she was employed as a Code Enforcement Officer II.

2. On Monday, March 15, 2004,¹ Ms. Bagley called her supervisor, Larry Canelejo (Mr. Canelejo), and advised him that she would be late to work because she had to assist her mother. Mr. Canelejo approved her absence.

3. Ms. Bagley's normal work hours on March 15, 2004, were 8 a.m. to 5 p.m., Monday through Friday. On March 15, 2004, she arrived to work at 11 a.m. She did not work through her lunch on that day or stay later to make up the time that she was late.

4. On Thursday, March 18, 2004, Ms. Bagley turned in a time and attendance sheet showing that she had worked from 8 a.m. to 5 p.m. on March 15, 2004. Mr. Canelejo verbally asked Ms. Bagley to turn in a leave slip for the time that she was absent on March 15, 2004. Ms. Bagley did not turn in a leave slip, and Mr. Canelejo sent an e-mail to Ms. Bagley on March 18, 2004, requesting that she do so and indicating that disciplinary action would result for her failure to do so.

5. Instead of turning in a leave slip for her three-hour absence, Ms. Bagley wrote a memorandum to Darrell Smith, Chief of Staff, complaining that she had been requested to submit a leave request for time she was absent from work when other workers who were absent were not required to submit a leave request for their absence.

6. On the morning of Friday, March 19, 2004, Mr. Canelejo sent another e-mail to Ms. Bagley requesting that she submit her time card and leave slip by 11:30 a.m. Ms. Bagley retrieved the time card that she had previously submitted and covered her signature with white-out. She did not submit a leave slip as

requested by her supervisor. Mr. Canelejo marked on Ms. Bagley's time sheet that she was absent without leave for three hours on March 15, 2004, and submitted a leave slip for Ms. Bagley showing that she was absent without leave for that time. The time card and leave slip was later changed by the City's personnel office to sick leave for others.

7. On March 17, 2004, Mr. Canelejo received a complaint from the general manager of Wendy's Restaurant located on North 15th Street in Tampa, Florida. The general manager advised Mr. Canelejo that Ms. Bagley had come into the restaurant on three separate occasions demanding that she be given free food for food that she had purchased which she felt was bad. Ms. Bagley did not have receipts for the previously-purchased food, and indicated that other managers in the store had told her that she could get free replacements for the bad food. The general manager advised Mr. Canelejo that other managers at Wendy had not given authorization for Ms. Bagley to receive free food. A co-manager at Wendy's also wrote to the City confirming Ms. Bagley's actions in getting free food.

8. The City's Department of Code Enforcement received a letter dated March 31, 2004, from Hazel Hill, who was the sales floor supervisor at Martin's Uniforms Retail Store (Martin's Uniforms). The City had a contract with Martin's Uniforms to supply uniforms and related items to City employees, including

code enforcement employees. Ms. Hill related an incident involving Ms. Bagley on March 12, 2004. Ms. Bagley came to the store, requesting to return some shirts and pants, which she claimed to have received from Martin's Uniforms as part of the 2004 uniform allotment. Ms. Hill inspected the garments and determined that the uniforms could not have been received as part of the 2004 order because the shirts were not the same style as those that had been sent. The 2004 shirts were made of gabardine with two new-style patches, one on each arm. The shirts that Ms. Bagley was attempting to return were made of poplin with only one patch, which had been discontinued. The shirts also appeared to have a yellow tint, which could be attributed to age. The pants which Ms. Bagley was attempting to return had been altered in the waist. The pants which had been sent with Ms. Bagley's 2004 uniform order were not altered in the waist.

9. Ms. Hill also advised that the incident concerning the 2004 uniform order was not the first time that Ms. Bagley had attempted to exchange old merchandise. About four months earlier, Ms. Bagley had tried to return an old jacket for a new one, but Ms. Hill refused to make the exchange. The previous year, Ms. Bagley came to exchange a pair of shoes for which she had no receipt and for which no record of the purchase could be found at the store.

10. On July 9, 2004, the City dismissed Ms. Bagley from her employment. The final decision to terminate Ms. Bagley's employment was made by the Director of Code Enforcement, Curtis Lane, who is an African-American. Mr. Lane based his decision on Ms. Bagley's failure to submit a leave request for the three hours that she was absent on March 15, 2004; submission of a time sheet showing that she worked eight hours on March 15, 2004; the complaints from the employees at a Wendy's restaurant that Ms. Bagley had requested free food while she was in a City code enforcement uniform; and the complaint from Martin's Uniforms that Ms. Bagley tried to get new uniforms by falsely claiming that she was not sent the correct uniforms in her 2004 uniform order. The allegations against Ms. Bagley were investigated by City staff, and, based on the results of the investigations, Mr. Lane believed the allegations against Ms. Bagley and felt that Ms. Bagley's actions demonstrated a lack of honesty and integrity, two traits which are essential for a code enforcement officer.

11. At the time of her termination, Ms. Bagley's employment with the City was subject to a collective bargaining agreement between the City and Amalgamated Transit Union. The collective bargaining agreement provided a grievance and arbitration procedure.

12. Ms. Bagley filed a grievance contesting her termination, which she submitted to final arbitration. On February 15, 2005, an evidentiary hearing was held on Ms. Bagley's grievance before arbitrator Genellen Kelly Pike. On June 15, 2005, Ms. Pike denied Ms. Bagley's grievance.

13. On July 26, 2005, Ms. Bagley filed a charge of discrimination with the Commission, claiming that she was terminated from her employment with the City on account of her race.

14. Ms. Bagley claims that she was discriminated against based on her race because other employees of the Code Enforcement Department were allowed to come in late and either to make up the time on their lunch hours or after work or to not have to make up the time at all. Mr. Canelejo did have a practice of allowing employees to make up their time if they were 15 to 30 minutes late for work. The time could be made up during the employee's lunch hour or at the end of the employee's regularly scheduled work day. There was no practice or policy allowing employees to make up absences as long as three hours rather than requiring them to submit leave slips for the missed time. Ms. Bagley claims that both African-American and Caucasian employees were allowed to make up missed work.

15. Not all employees in the Code Enforcement Department had the same work schedule. Some employees worked ten-hour

shifts, Sunday through Wednesday; some employees worked 7:30 a.m. to 4:30 p.m., Monday through Friday; and some employees worked 8 a.m. to 5 p.m., Monday through Friday. Some employees were required to attend neighborhood meetings at night after their regularly scheduled hours, and were allowed to adjust their work schedule to avoid overtime as a result of the meetings at night. The code inspectors used City-owned vehicles in making their inspections. The vehicles were parked in a central location, and the employees picked up the City vehicles each day. Sometimes an inspector would schedule an inspection at the beginning of the inspector's shift. The inspector was not required to report into the office prior to making the inspection, but could pick up the City vehicle and leave from the parking lot.

16. Ms. Bagley took it upon herself to begin keeping notes on when the inspectors would arrive at the office. She noted that some of the inspectors, both African-American and Caucasian, did not arrive at the office at the beginning of their regularly scheduled shift. However, Ms. Bagley had no knowledge if these inspectors had attended a night meeting during that week, if the inspectors had gone to an inspection prior to coming to the office, or if the inspectors had made up their tardiness by either working during their lunch hours or after the end of their regularly scheduled shift. Ms. Bagley

just assumed that these employees were not putting in 40 hours per week. She produced no evidence at the final hearing that there were other employees who claimed they worked 40 hours per week, when they did not and were allowed to do so without taking leave. She presented no evidence at the final hearing that African-American employees were treated differently than Caucasian employees. In fact, she claims that both African-American and Caucasian employees were allowed to come in late without having to submit a leave slip for the missed time.

CONCLUSIONS OF LAW

17. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of these proceedings. §§ 120.569 and 120.57(1), Fla. Stat. (2005).²

18. Subsection 760.10(1)(a), Florida Statutes, provides that it is unlawful for an employer to discharge or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment, based on the employee's race, gender, or national origin. In the instant case, Ms. Bagley alleges that the City terminated her employment based on her race.

19. Subsection 760.11(1), Florida Statutes, provides that "any person aggrieved by a violation of ss.760.01-760.10 may file a complaint with the commission within 365 days of the alleged violation." The time for filing a charge of

discrimination with the Commission begins to run at the time of termination, which is a discrete act. The pendency of a grievance does not toll the time for filing the charge of discrimination. See Delaware State College v. Ricks, 449 U.S. 250 (1980).

20. Ms. Bagley's employment was terminated on July 9, 2004. She filed her charge of discrimination with the Commission on July 26, 2005. She failed to file her charge of discrimination within 365 days of her termination, which she alleges is the unlawful employment practice. Thus, her petition should be dismissed for failure to comply with Subsection 760.11(1), Florida Statutes.

21. Even if Ms. Bagley had timely filed her charge of discrimination, she failed to establish that the City discriminated against her based on her race.

22. In evaluating claims arising under Section 760.10, Florida Statutes, federal laws against discrimination may be used for guidance. See Brand v. Florida Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994); and Florida Dept. of Community Affairs v. Bryant, 586 So. 2d 1205, 1209 (Fla. 1st DCA 1991).

23. In McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973), the United States Supreme Court articulated a burden of proof scheme for cases involving allegations of discrimination under Title VII, where, as here, Petitioner

relies upon circumstantial evidence of discriminatory intent. The McDonnell Douglas decision is persuasive in this case, as is St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506-07 (1993), in which the Court reiterated and refined the McDonnell Douglas analysis.

24. Pursuant to this analysis, Petitioner has the initial burden of establishing by a preponderance of the evidence a prima facie case of unlawful discrimination. Failure to establish a prima facie case of discrimination ends the inquiry. See Ratliff v. State, 666 So. 2d 1008, 1012 n.6 (Fla. 1st DCA), aff'd, 679 So. 2d 1183 (1996). If, however, Petitioner succeeds in making a prima facie case, then the burden shifts to Respondent to articulate some legitimate, nondiscriminatory reason for its conduct.

25. If Respondent carries the burden of rebutting Petitioner's prima facie case, then Petitioner must demonstrate that the proffered reason was not the true reason, but merely a pretext for discrimination. Hicks, 509 U.S. at 506-07; McDonnell Douglas, 411 U.S. at 802-03.

26. In order to establish a prima facie case of an unlawful employment practice in the instant case, Ms. Bagley must establish that: (1) she is a member of a protected class; (2) she was qualified for the employment as a code enforcement

officer; (3) she was terminated from her employment; and (4) the City treated similarly situated employees outside her protected class more favorably than she was treated. See Burke-Fowler v. Orange County, Florida, 447 F.3d 1319, 1323 (11th Cir. 2006).

27. Ms. Bagley failed to establish a prima facie case of an unlawful employment practice. She established that she was an African-American and therefore a member of a protected class. She established that she was qualified to work as a code enforcement officer and that she was terminated from her employment. She failed to establish that others outside her protected class were not terminated when they refused to submit a leave slip for a three-hour absence or that others outside her protected class were not required to submit a leave slip for a three-hour absence.

28. The evidence did establish that members of Ms. Bagley's protected class and members outside her protected class were treated similarly when it came to leave. Both African-Americans and Caucasians were allowed to make up time when the tardiness or absence was of short duration. Both African-Americans and Caucasians were required to submit leave slips for absences of the duration of Ms. Bagley's absence. Ms. Bagley claims that certain employees habitually came into the office later than the beginning of their scheduled shifts. However, she did not establish that the employees who came to

the office after the beginning of their shift were working less than 40 hours per week. She did not know if those employees had other official duties which required them to work beyond their regularly scheduled shifts or if the employees had made inspections prior to coming into the office. Thus, she has failed to establish that those employees were similarly situated to her.

29. Even if Ms. Bagley had established a prima facie of discrimination, the City presented legitimate, non-discriminatory reasons for terminating her employment. Ms. Bagley was insubordinate by failing to submit a leave slip when she was directed to do so by her supervisor. She falsified her time sheet by indicating that she worked eight hours when she came to work three hours late. Complaints were made against Ms. Bagley by employees at Wendy's for requesting free food while in her code enforcement officer uniform. A complaint was made against Ms. Bagley by a sales supervisor at Martin's Uniforms. The allegations were investigated and were felt to be true by Mr. Lane who made the final decision to terminate Ms. Bagley. Ms. Bagley has failed to establish that the reasons proffered by the City for her termination were a pretext for discrimination.

RECOMMENDATION

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

RECOMMENDED that a final order be entered dismissing the petition because the charge of discrimination was not filed timely and because Ms. Bagley failed to establish that the City discriminated against her based on her race.

DONE AND ENTERED this 15th day of August, 2006, in Tallahassee, Leon County, Florida.

Susan B. Harrell

SUSAN B. HARRELL
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of August, 2006.

ENDNOTES

1/ The City claims that Ms. Bagley reported late for work on Monday, March 15, 2004, and Ms. Bagley claims that she reported late for work on March 16, 2004. Neither party disputes that she reported to work late one day during the week on March 15, 2004. For purposes of this Recommended Order, the day that Ms. Bagley reported three hours late for work is found to be March 15, 2004.

2/ Unless otherwise stated, all references to Florida Statutes are to the 2005 version.

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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.