

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ALMA W. JESTER,)
)
 Petitioner,)
)
 vs.) Case No. 06-0733
)
 HAVERTY'S,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

This cause came on for formal hearing before Harry L. Hooper, Administrative Law Judge with the Division of Administrative Hearings, on May 16 and 17, 2006, in Shalimar, Florida.

APPEARANCES

For Petitioner: John W. Wesley, Esquire
Wesley, McGrail and Wesley
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For Respondent: W. Douglas Hall, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Respondent engaged in an unlawful employment practice.

PRELIMINARY STATEMENT

Petitioner Alma Jester (Ms. Jester) filed an Employment Complaint of Discrimination with the Florida Commission on Human Relations (Commission) on July 11, 2005. The Complaint alleged that Respondent Haverty's (Haverty's) discriminated against her based on her gender and further, alleged retaliation for having made a report to her supervisor that she had been discriminated against. The "Haverty's" against whom she made the allegations is in fact Haverty's Furniture, Inc.

The Commission's Office of Employment Investigations conducted an investigation into the allegations. The investigator recommended "that a determination of reasonable cause be issued on the Charge [sic] of Discrimination based on sex (female) and retaliation." The Office of the General Counsel, upon review, recommended that a determination of no cause issue. The Executive Director of the Commission directed that a "Notice of Determination: No Cause" be entered. That was done on January 26, 2006.

On February 23, 2006, Ms. Jester filed a Petition for Relief. She did not mention the retaliation claim in the Petition and for purposes of this Recommended Order, it is determined, after a close reading of her Petition, that she intended to go forward only with allegations of gender discrimination based on disparate treatment. There were two

examples of gender discrimination alleged in the Petition for Relief. One was an allegation that she was singled out at a sales meeting and humiliated. The other allegation was that she was suspended for three days because a group of employees that she referred to as the "Good Old Boys Club," railroaded her customer and stole a sale from her.

The Petition and allied papers were transmitted to the Division of Administrative Hearings and filed February 28, 2006. The hearing was set for May 3 and 4, 2006. Thereafter, Ms. Jester filed a Supplemental Response to Initial Order requesting new hearing dates. In response, the hearing was set for May 16 and 17 in Shalimar, Florida, and was heard as scheduled.

Prior to the hearing, Haverty's filed a motion in limine seeking to exclude any testimony that Ms. Jester might attempt to adduce relating to a sexually hostile work environment, on the ground it had neither been alleged in the Complaint nor considered as part of the Commission's investigation and determination. The motion was granted with the exception that testimony indicating a hostile work environment could be elicited to the extent that it supported Ms. Jester's claim of disparate treatment based on her gender.

At the hearing, Ms. Jester testified and presented the testimony of nine other witnesses. She offered four exhibits

into evidence and they were admitted. Respondent presented the testimony of one witness and offered five exhibits into evidence and they were admitted.

A three-volume Transcript was filed on June 14, 2006. After the hearing, Petitioner and Respondent filed their Proposed Findings of Fact and Conclusions of Law on July 5, 2006. Subsequently, on July 11, 2006, Haverty's filed Respondent's Motion to Strike or Respond to Plaintiff's Proposed Recommended Order, which alleged certain factual errors in Ms. Jester's Proposed Recommended Order. It is not necessary to rule on the motion because the Administrative Law Judge has based his Findings of Fact on the Transcript and the documents admitted.

References to statutes are to Florida Statutes (2005) unless otherwise noted.

FINDINGS OF FACT

1. Haverty's is a corporation that employs many more than 15 employees in many stores. Haverty's sells furniture. The store in which the allegations of this complaint arose is located at 1175 Eglin Parkway in Shalimar, Florida. Unless noted elsewhere, when Haverty's is mentioned, the reference is to the Shalimar store.

2. Ms. Jester is a woman who resides in Niceville, Florida. She obtained a job at Haverty's and began working

there as a sales associate on June 16, 2003. She was hired by Gary Hodge, who was the store manager. She was a sales associate during the entire time that she was employed by Haverty's.

3. A sales associate works on a straight commission and the commission is not paid until the furniture is delivered. A sales associate, after the first three months on the job, is required to sell at least \$40,000 in product each month. There are generally ten to fifteen sales associates on the floor at any given time. The environment is highly competitive.

4. There is a computer numbering system in place, called the "up" system, which is used to determine who may approach a customer who walks into the store. If a sales associate initially helps a customer and later the customer is helped by another sales associate, the commission, if a sale is made, is split between the two. During Ms. Jester's time as a sales associate she grossed about \$26,000 per year.

5. Ms. Jester noticed shortly after she began her employment that there existed at Haverty's a clique of salespersons, including Michael Herring, Charles McEwen, Buzz Howard, and "Travis." Also in this clique was a woman named "Melanie" and another named "Trudy." This loosely

affiliated group was sometimes referred to by Ms. Jester and others, as the "Good Old Boys Club," even though women were members of the group.

6. Members of "Good Old Boys Club" would say unpleasant things to her, would make comments about her, and would sometimes make her feel uncomfortable. Sometimes sexual comments were made about her, and sometimes sexual comments were made about other female employees. On occasion, however, Ms. Jester made sexual comments.

7. The "Good Old Boys Club" falsely accused her of stealing sales on occasion. Sometimes persons in the alleged "Good Old Boys Club" would get her so upset that she would have to leave the floor. Her absence resulted in them making more sales, and thus, more money.

8. If a product is sold at a discount, or if a particular item is given to a person without charge to enhance a sale of other items, the official listed price must be overridden in the store computer by using an override code. A sales associate is not usually provided with the code and if, on a particular occasion, a sales associate is given the override code, it is subsequently changed by management. On one or more occasions Charles McEwen did overrides on his own, and at least twice he entered codes for Ms. Jester. Buzz Howard used an override code once.

9. Managers at the store made exceptions to the override policy. Lee Keiran, who was a sales associate, was also a "keyholder," and he had at all times, the authority to make overrides. However, the manager, Mr. Hodge or Michael Herring, when he was promoted to floor manager, would generally enter override codes. Obtaining someone to enter an override often added additional time to completing a sale, and personally having an override code gave the holder a slight advantage over a sales associate who did not have one. Ms. Jester was never provided with her own override code. She believed, incorrectly, that this was because of her gender.

10. Sales meetings were held at Haverty's every Saturday morning at 8:30 a. m. All sales associates were required to attend. At these meetings the manager reiterated rules and informed employees about new rules. New merchandise would be discussed and products being specially advertised would be discussed. During the time of Ms. Jester's employment, the meetings would usually be conducted by Mr. Hodge, the store manager.

11. On one occasion, in or near the month of January 2005, Mr. Herring conducted the sales meeting. There were twelve or thirteen sales associates at this meeting. Mr. Herring, after addressing other subjects, discussed the rules concerning checking out fabrics. He reiterated the rule that sales persons

must "check out" fabric samples prior to allowing customers to depart the store with them. "Checking out" fabric requires a credit card slip signed by the customer.

12. Thereafter, Mr. Herring grasped some fabric and raised it over his head and said to Ms. Jester, "Alma, come get your fabrics." Ms. Jester rose from her chair and walked in front of everyone and took the fabric from his hand. As she walked away he said, "Unacceptable." This was at the conclusion of the meeting. Ms. Jester found this to be humiliating.

13. Ms. Jester placed the fabrics on her desk and went straight to Mr. Hodge to complain. She and Mr. Hodge had a conversation. He inquired as to what she wanted him to do about it. She said she wanted Mr. Herring to apologize and he said, "I'll have him talk to you." Ms. Jester informed Mr. Hodge that she was sick and was going home. Mr. Herring never apologized to her.

14. During the time Ms. Jester worked at Haverty's no men were singled out and criticized at sales meetings. During the aforesaid time, some of the men have allowed customers to take fabrics out of the store without being "checked out" and no evidence was adduced that they were rebuked either privately or publicly.

15. Charles McEwen came to work late on more than one occasion. On one occasion when he reported late, an odor of

alcohol could be detected on his person. However, he was not under the influence of alcohol. He was never reprimanded for being late or smelling of alcohol.

16. On Sundays sales associates were required to come to work at 11:30, one-half-hour before opening, to clean, and straighten up the store. Employees would enter the building on Sundays through a side door, which was propped open by a rock. On one occasion Ms. Jester reported to the building five minutes late. The rock had been removed and the door was closed. She beat on the door and eventually someone opened it.

17. Ms. Jester believed that she was locked out purposefully, but the evidence indicates only that someone moved the rock, causing the door to close, which resulted in her inability to enter the building immediately upon arrival.

18. Male sales associates "Trent" and Bob Humphries were often late. Male sales associate "Travis" often left early. None of these men were disciplined for tardiness or for departing early.

19. Ms. Jester complained to Mr. Hodge about male sales associate Michael Herring. She informed him that Michael was a male chauvinist pig. Mr. Hodge agreed and suggested that she get over it.

20. Once Buzz Howard called her a stupid liar on the sales floor in front of three people. Ms. Jester was upset about

this. She complained to Mr. Hodge. He suggested to her that Mr. Howard's intent was to get her off the sales floor so she couldn't compete with the other sales associates. He said she should, "Cowboy up."

21. In April 2005, a woman named Ashley Bloomfield walked into the store. Ms. Jester spent an hour and a half showing her bedroom suites. Ms. Bloomfield eventually indicated that she was going to cogitate about the purchase, and departed the store. Before she left Ms. Jester gave her a business card so that she could ask for her when she returned. Customers often spend a lot of time looking at furniture, depart, and subsequently return. These customers are called, "be-backs." Sometimes "be-backs" return, and sometimes they don't.

22. A few days after her visit, Ms. Bloomfield called for Ms. Jester on the telephone. She spoke to sales associate Bob Humphries who told her that Ms. Jester was not present. On Wednesday, April 20, 2005, Ms. Bloomfield returned to Haverty's and was assisted by Buzz Howard. Mr. Howard told her that he would ring up the sale but would credit the sale to Ms. Jester. The transaction was completed, but Ms. Jester was not given any credit for the sale.

23. On a Thursday subsequent to Ms. Bloomfield's visit Ms. Jester entered the side door of the store and observed Buzz Howard at the office with Ms. Bloomfield. The office is the

place where customers arrange payment for purchases. Mr. Howard informed Ms. Jester that when Ms. Bloomfield walked in the door she asked for Mr. Humphries, that he, Mr. Howard helped her, and that he, and Mr. Humphries, were going to split the commission. Pursuant to policy, Ms. Jester should have gotten half of the commission and a three-way split is not, she believes, possible.

24. Ms. Jester complained to Mr. Hodge about this. Mr. Hodge explained that Ms. Bloomfield had called when she was absent and Mr. Humphries had spoken with her on the telephone. Mr. Hodge said the commission would be subject to a three-way split.

25. The next day Ms. Bloomfield called Ms. Jester to inquire why Mr. Humphries' name was on the sales slip and not hers. When she learned that Ms. Jester was not going to get credit for the sale, she asked Ms. Jester what to do. Ultimately, Ms. Jester told her she should call "management" in Pensacola and gave her the number for "management." Specifically, she referred her to Hunter Wrisley or Zack Mattson.

26. Ms. Bloomfield did call "management" and spoke to Zack Mattson who in turn called Ms. Jester. Mr. Mattson told Ms. Jester, "Don't do anything about this. I will get back to you."

27. Although Ms. Bloomfield testified that Mr. Mattson intimated that Ms. Jester would get all of the commission if she was working solely with Ms. Bloomfield, this did not occur. When Ms. Bloomfield learned that Ms. Jester did not get all of the commission, she announced that she would return to the store, return the merchandise previously purchased, and then would re-purchase it from Ms. Jester.

28. Ms. Jester called Mr. Mattson and left a message on his voicemail informing him of Ms. Bloomfield's plan of action. He did not respond to her immediately.

29. Ms. Bloomfield returned to the store and the office manager, "Michelle," with the assistance of Ms. Jester, deleted the previous sale, and thereafter modified the transaction to reflect Ms. Jester as the seller. Mr. Mattson determined that this event ran afoul of his instruction to, "Don't do anything about this. I will get back to you."

30. Shortly thereafter, Mr. Hodge called Ms. Jester to his office. Mr. Mattson was on the speaker phone. Mr. Mattson announced that she had deliberately disobeyed a direct order.

31. After Mr. Mattson terminated his participation in the conversation, Ms. Jester told Mr. Hodge that she was too upset to continue working that day and that she must go home. Thereafter, she departed the premises.

32. The next day Mr. Hodge directed that Ms. Jester report to his office and she did as requested. Mr. Hodge, in the presence of Lee Keiran, required her to sign a disciplinary form which recited that she had been insubordinate and had discussed commissions with a customer, an activity which is against Haverty's policy. The form further informed that she was suspended with no pay for three days. She signed the form and went home.

33. When Ms. Jester returned to work she asked Mr. Hodge if she could have leave so that she could go on vacation. He denied her request.

34. She submitted a letter of resignation to Mr. Hodge on May 20, 2005. The letter stated that she had put up with being mistreated by the "Good Old Boys Club" for the last time. However, this is not found to be a constructive termination. She gave two weeks notice but Haverty's discharged her on May 22, 2005, in accordance with their policy on notice of termination.

35. Ms. Jester also sent a letter of resignation to a Mr. Smith of Haverty's corporate office in Atlanta. The corporate office did not respond.

36. Haverty's employee Charles McEwen once told a customer named Schneider to ask for Ms. Whalls when she returned on a Wednesday after a Tuesday visit because he would not be working

on the proposed return date. He asked Ms. Whalls for her business card to give to Ms. Schneider so that she would be sure and remember to ask for Ms. Whalls. There was some minimal discussion of commission splits at this time. However, this discussion did not result in any further involvement by the customer in the commission structure.

37. Although evidence was adduced indicating that some of the sales associates engaged in underhanded methods designed to deprive their fellow workers of commissions, and that some had their own override codes, and others had tardiness excused, there was no evidence that any other sales associate at Haverty's involved a customer in a dispute over commissions.

38. Although during the time of Ms. Jester's employment no one other than Ms. Jester was rebuked in front of the sales associates, being rebuked is not the type of employment practice that can be an adverse employment action.

39. The facts in this case demonstrate that being a sales associate at Haverty's is extremely competitive. Because of the highly competitive, straight commission sales environment, employees engaged in activities designed to subvert the efforts of their fellow employees to earn commissions. Sales associates often made crude and inappropriate remarks that were upsetting to those who were the targets, in an effort to reduce competition.

40. Ms. Jester's supervisors tolerated this behavior. Undoubtedly, a tough environment existed at Haverty's, but this should not be confused with discrimination. The sometimes unfortunate and mean employment practices permitted at Haverty's were not grounded in gender discrimination or some other prohibited basis. There is no evidence in the record that any employee of Haverty's received favorable treatment, or unfavorable treatment, because of their gender.

41. After Ms. Jester's employment at Haverty's came to an end, she made an unsuccessful attempt to go into business for herself. For about eight months subsequent to her departure from Haverty's she was absolutely unemployed.

42. She received unemployment compensation in the amount of \$257.00 per week for four months after her departure from Haverty's. Then she went to work for the Shoe Salon for \$9.50 per-hour for three weeks. Ms. Jester did not indicate how many hours per-week she worked at the Shoe Salon.

43. Thereafter she found employment with Massey Wholesale about three months before the hearing, and at the time of the hearing she was still employed there. Her wages at Massey Wholesale compare closely to what she was receiving when working for Haverty's.

44. Massey Wholesale will soon pay for her health insurance. She paid \$387.00 per month for health insurance

pursuant to COBRA for a period of three months subsequent to leaving Haverty's then secured a policy for which she pays a premium of \$250.00 per month.

CONCLUSIONS OF LAW

45. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. §§ 120.57(1) and 760.01, et seq., Fla. Stat.

46. Ms. Jester's case is based on her assertion that she suffered an adverse employment action, in violation of the Florida Civil Rights Act of 1992 (the Act), Sections 760.01-760.11 and 509.092, because of her gender.

47. The Act, is patterned after Title VII of the Federal Civil Rights Act, 42 U.S.C. Section 2000e, et seq. Federal case law interpreting Title VII and similar federal legislation is applicable to cases arising under the Florida Act. See Florida Department of Community Affairs v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991) and School Board of Leon County v. Weaver, 556 So. 2d 443 (Fla. 1st DCA 1990).

48. In order to prevail, Ms. Jester has the ultimate burden of proving by the preponderance of the evidence that Respondent committed an unlawful employment practice by discriminating against her on account of her gender. Florida Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

49. Petitioner is an "aggrieved person" and Respondent is an "employer" within the meaning of Section 760.02(10) and (7), respectively.

50. Section 760.10(1) provides as follows:

§ 760.10. Unlawful employment practices

(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.

* * *

51. No direct or statistical evidence of gender discrimination exists in this case. Therefore a finding of discrimination, if any, must be based on circumstantial evidence.

52. The burden and order of proof in gender discrimination cases involving circumstantial evidence is set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973).

53. To demonstrate discrimination under McDonnell Douglas Corp., Ms. Jester must first establish a prima facie case of gender discrimination. Thereafter, the employer may offer legitimate, nondiscriminatory reasons for its employment action. If the employer does that, in order to prevail, Ms. Jester must

establish that the employer's articulated legitimate, nondiscriminatory reasons were a pretext to mask unlawful discrimination. Smith v. J. Smith Lanier & Co., 352 F.3d 1342 (11th Cir. 2000).

54. To establish a prima facie case of gender discrimination, under Section 760.10(1)(a) and McDonnell Douglas Corp., Ms. Jester must show that (1) she belongs to a protected class; (2) Haverty's treated similarly situated employees outside of her classification differently; (3) she was qualified for the position she held; (4) and she suffered an adverse employment action. Maynard v. Board of Regents of Division of Universities of the Florida Department of Education, 342 F.3d 1281 (11th Cir. 2003), citing McDonnell Douglas Corp.

55. Ms. Jester failed to prove a prima facie case with regard to the fabric sample incident. Although she belongs to a protected class and was qualified for the position she held, and though no men, during the time Ms. Jester was employed at Haverty's, were publicly reprimanded about being derelict in checking out fabric samples, Ms. Jester failed to prove that she suffered an adverse employment action.

56. Being publicly reprimanded or berated with regard to her failure to properly check out fabric samples, is not an action affecting her "compensation, terms, conditions, or privileges of employment" as contemplated by

Section 760.10(7)(a), Florida Statutes. Although the Florida Legislature certainly could have extended the protection of the Act to all aspects of the employment relationship, it plainly did not, and instead contemplated relief under the statute's anti-discrimination clause only to employees injured in the "terms, conditions, or privileges" of their employment.

57. In Davis v. Town of Lake Park, Fla., 245 F.3d 1232 (11th Cir. 2001), a minority police officer complained about two corrective job performance memoranda placed in his personnel file and two instances where he was temporarily removed as the designated officer-in-charge. He asserted that these personnel actions were racially motivated and sued under the Act as well as Title VII of the Civil Rights Act of 1964.

58. The court noted in Davis that memoranda of reprimand or counseling that amount to no more than a mere scolding, without any following disciplinary action, do not rise to the level of adverse employment actions sufficient to satisfy the requirements of Title VII. Likewise, in Merriweather v. Alabama Dept. of Pub. Safety, 17 F. Supp. 2d 1260 (M. D. Ala.1998), the court held that non-selection for a training course was not an adverse employment action because the plaintiff did not demonstrate that his non-selection affected the terms or conditions of his employment.

59. Moreover, in Allen v. Michigan Dep't of Corr., 165 F.3d 405 (6th Cir. 1999), the court held that the employment action must result in a "materially adverse" change in employment status or in the terms and conditions of his employment. In the Allen case, the plaintiff's claims that he received disciplinary actions in the form of counseling memoranda because of his race, and that his supervisors referred to him using racial epithets, and monitored him more closely than they monitored non-black employees, were not found to be "materially adverse" changes in his employment status or in the terms or conditions of his employment. (Allen prevailed in his appeal of an adverse ruling on a summary judgment motion on other grounds.) See also Burlington Northern & Sante Fe Railway Co. v. White, 74 U.S.L.W. 3559 (April 3, 2006).

60. The second prong of Ms. Jester's complaint rests on the suspension she received based on her interactions with Ms. Bloomfield with regard to her entitlement to a sales commission. In this regard, she failed to satisfy the element of a prima facie case requiring proof that Haverty's treated similarly situated employees outside of her classification differently. No proof was adduced that any employee, in her classification, or out of it, had gotten a customer entangled in an internal commission dispute.

61. Someone outside of her classification, Mr. McEwen, did have a discussion with a Ms. Schneider, a customer, regarding a commission split, but there was no evidence that anyone other than Ms. Jester, Ms. Whalls, Ms. Schneider, or Mr. McEwen knew about this. In any event, to the extent that Ms. Schneider became aware of the commission structure, it did not devolve into a disturbance involving management, as was the case with Ms. Jester's involvement with Ms. Bloomfield.

62. Ms. Jester's assertion that Mr. McEwen's interaction with Ms. Schneider somehow made Mr. McEwen a comparator, is not supported by the facts. There was no evidence that Haverty's management was aware of McEwen's offense, his failure to abide by store policies did not result in an embarrassment to Haverty's, and there was no evidence that Mr. McEwen was insubordinate.

63. Even if one assumes arguendo that Ms. Jester proved a prima facie case, Haverty's provided nondiscriminatory reasons for suspending Ms. Jester. Specifically, Ms. Jester's actions with Ms. Bloomfield were violations of store policy and resulted in embarrassment to Haverty's. Moreover, when Ms. Jester was told to take no further action in the matter, she persisted in doing so.

64. Ms. Jester did not establish that the employer's articulated legitimate, nondiscriminatory reasons for suspending her were a pretext to mask unlawful discrimination.

RECOMMENDATION

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

RECOMMENDED that the Florida Commission on Human Relations dismiss the Petition of Alma W. Jester.

DONE AND ENTERED this 17th day of July, 2006, in Tallahassee, Leon County, Florida.



HARRY L. HOOPER
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Filed with the Clerk of the
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this 17th day of July, 2006.

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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.