

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MILDRED SPEARS,)
)
 Petitioner,)
)
 vs.)
) Case No. 06-3664
 C. J. GAYFERS AND COMPANY,)
 d/b/a DILLARDS,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

A final hearing was conducted in this case on November 20, 2006, by video teleconference between Pensacola, Florida, and Tallahassee, Florida, before Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Christopher E. Varner, Esquire
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For Respondent: Lori R. Benton, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Respondent discriminated against Petitioner based on her race and/or age in violation of Section 760.10, Florida Statutes(2005).

PRELIMINARY STATEMENT

On October 26, 2005, Petitioner Mildred Spears (Petitioner) filed an Employment Charge of Discrimination with the Florida Commission on Human Relations (FCHR). The charge alleged that Respondent C. J. Gayfers and Company d/b/a Dillard's (Respondent) had discriminated against her based on her race and age.

On August 24, 2006, FCHR issued a Determination: No Cause. On September 19, 2006, Petitioner filed a Petition for Relief and Request for Administrative Hearing with FCHR. On September 25, 2006, FCHR referred the petition to the Division of Administrative Hearings.

On October 6, 2006, the undersigned issued a Notice of Hearing by Video Teleconference. The notice scheduled the hearing for November 20, 2006.

During the hearing, the parties filed five pre-filed joint exhibits (JE4, JE8, JE12, JE14, and JE15) that were accepted as evidence.

Petitioner testified on her own behalf and presented the testimony of three additional witnesses. Petitioner offered three exhibits (P1-P3) that were accepted as evidence. Exhibit No. P1 is Exhibit No. 1 in Respondent's pre-filed exhibits. Exhibit Nos. P2-P3 are attached to the hearing transcript.

Respondent presented the testimony of two witnesses. Respondent offered four pre-filed exhibits (R3, R21, R10, and R11) that were accepted as evidence.

On November 29, 2006, Respondent filed an Unopposed Motion for Extension of Time to File Findings of Fact and Conclusions of Law. On November 30, 2006, the undersigned issued an Order Granting Extension of Time.

The Transcript was filed on December 20, 2006. On January 2, 2007, Petitioner filed Proposed Findings of Fact and Proposed Recommended Order. On January 3, 2007, Respondent filed Proposed Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Petitioner is an African American female. She was over the age of 40 when Respondent hired her and when she resigned her position as Respondent's sales associate.

2. Respondent is an employer as defined by the Florida Civil Rights Act of 1992, as amended, Sections 760.01-760.11 and 509.092, Florida Statutes (2005)(FCRA).

3. Dillard's Inc., purchased numerous department stores owned by C. J. Gayfer and Company in 1998. Respondent, which is located in the Cordova Mall, Pensacola, Florida, is one of those stores.

4. Respondent employs 200 to 250 sales associates. Approximately 48 percent of Respondent's employees are over the

age of 40. About 90 percent of Respondent's employees are older than Petitioner. Additionally, 28 percent of Respondent's employees are African American.

5. Respondent hired Petitioner on May 11, 1999, as a sales associate in the Cordova Mall Store. Because Petitioner did not apply for a specific position, Respondent assigned her to the men's fragrance department/work center with a starting rate of pay at \$8.00 per hour. Respondent also provided Petitioner with health insurance benefits.

6. Petitioner was an experienced retail salesperson when Respondent hired her. However Petitioner had no experience or training in selling men's fragrances.

7. Throughout Petitioner's employment with Respondent, Beth Winter was the store manager. Ms. Winter is responsible for the store's profitability and merchandise. She also manages the area sales managers (ASM) of the various work centers.

8. Ms. Winter reports directly to Linda Sholtis, Respondent's District Manager. Ms. Sholtis is responsible for 18 of Respondent's stores.

9. In December 2004, Respondent was in the process of preparing its payroll budgets for the following year. Respondent's executive management made a business decision to reorganize some of its work centers. Specifically, Respondent decided to use its smaller work centers to train new sales

associates, to keep the lower pay rates in the smaller work centers, and to move the sales associates in the smaller work centers, who were earning higher rates, to other work centers that could support their higher rates.

10. High rates in a small work center means that Respondent has less hours to allocate to the department, resulting in less hours available for customer service. Respondent made a business decision to move the higher rates into the larger work centers that could support those rates.

11. As a non-commissioned sales associate, Petitioner was subject to Respondent's Sales-Per-Hour (SPH) program. Respondent applies the SPH program to all non-commissioned sales associates and to some commissioned sales associates working in ladies shoes. The SPH program is based on objective criteria described below.

12. The SPH program has "standard goals" and "raise goals" that are based upon an employee's hourly rate. The standard goal is the dollar volume of sales an employee is required to average for each hour worked to support his/her pay. The raise goal represents the dollar volume of sales an employee should average per hour during a review period to justify a pay increase.

13. To determine the goals, each work center is assigned a "selling cost" (SC). Respondent's executive management

determines the SC for each work center in each store. The SC for a work center reflects the percentage of sales that Respondent determines should be the maximum amount budgeted for payroll expense for a particular work center.

14. SC calculations are based on historical sales and marketing data. The SC and the SPH goals for sales associates vary among work centers based on sales history. For example, in the Cordova Mall store, the men's fragrance work center has a SC of 12 percent, meaning that Respondent does not want the payroll budget in that department to exceed 12 percent of the dollars earned from its sales.

15. The men's fragrances department is a very small work center. It has a higher SC because it does not have as much sales volume as the larger work centers.

16. To derive an employee's SPH goals, an employee's hourly wage is divided by the SC percentage for the employee's work center. Accordingly, as an employee's hourly wage increases, the employee's SPH goal increases. Further, as the work center's SC percentage increases, an employee's SPH goals decrease.

17. An employee's age and race are not factored into the sales goals derived under Respondent's SPH program. The program is a mathematical formula centered around an employee's hourly rate and the SC of the employee's assigned work center.

18. Before the above-referenced reorganization took place, there were four sales associates assigned to men's fragrances. Petitioner was the only Africa American. Lois Thomas and Cathy Carlisle were Caucasian. Marie Aceval was Hispanic. All four associates were over the age of 40.

19. In December 2004, Petitioner was one of Respondent's top sales associates. She was the best sales person in men's fragrances and received the highest rate of pay. She was a very aggressive salesperson.

20. Over the course of Petitioner's employment, her salary increased substantially from \$8.00 to \$17.00 per hour as a result of her ability to sell men's fragrances and merchandise outside of her work center in men's clothing. Men's fragrances was a small work center that was not budgeted for a sales associate to earn \$17.00 per hour.

21. As of December 2004, Petitioner had a pay rate of \$17.00 per hour and men's fragrances had a 12 percent SC. Therefore, Petitioner's individualized SPH standard was \$142.00. On the other hand, a sales associate assigned to men's clothing would have a SC of 6 percent and an SPH of \$283.00 if paid \$17.00 per hour.

22. When assigned to men's fragrances, Petitioner's substantially increased her productivity by selling goods from the men's clothing work center. This significantly inflated

Petitioner's performance because she received double-credit for the sales outside of her assigned area.

23. Petitioner had less volume to sell in men's fragrances (with a SC of 12 percent) to meet her SPH, whereas, employees in men's clothing (with a 6 percent SC) had a larger volume of merchandize to sell. When Petitioner sold merchandize in men's clothing, she would still get the men's fragrances 12 percent SC credit. Petitioner sold more merchandize outside her area than any other employee in men's fragrances.

24. Petitioner understood that her primary duty was to sell goods in men's fragrances. However, about 25 percent of Petitioner's sales were from the men's clothing work center.

25. In December 2004, Respondent did not have a policy prohibiting sales associates from selling goods from other work center. Respondent did not write employees up for such sales. Respondent understood that a certain amount of such sales were necessary for customer convenience. However, Respondent discouraged out-of-area sales.

26. Respondent continued to give Petitioner annual raises because there was no specific prohibition against her selling merchandize from men's clothing. Petitioner actively went out of her work center to get customers, knowing such sales would inflate her rate. On several occasions, Lisa Bell, the ASM for cosmetics and the direct supervisor for men's fragrances,

advised Petitioner and other associates about the need to limit sales outside of men's fragrances.

27. Early in December 2004, Ms. Sholtis visited the Cordova Mall store. Ms. Sholtis met Ms. Winter and Ms. Bell in Ms. Bell's office.

28. During the meeting, Ms. Sholtis explained that employees in the smaller work centers, who are earning more than their assigned work center's support rate, would be moved to better areas in the store that could support their pay rates. Ms. Sholtis also explained that some of the smaller work centers would be used as training areas. Specifically, men's and ladies' fragrances, junior's clothing, ladies' accessories, and children's clothing would become training grounds for new associates. The company-wide plan for all stores included moving associates to better areas in the store after a training period.

29. Ms. Sholtis reviewed a computer screen that identified employees by last name and pay rate. The screen did not disclose the employees' race and age. Ms. Sholtis, without any knowledge of Petitioner's race and age, selected her as the first employee to be reassigned from men's fragrances. Ms. Sholtis selected Petitioner solely because her pay rate was the highest at \$17.00 per hour.

30. The men's fragrances work center could support a rate of \$10.00 or \$11.00 per hour. All of the employees in men's fragrances earned more than that amount. Therefore, all four sales associates had to transfer out to another area. Respondent transferred them in rank order from highest to least paid. The same reorganization involving Caucasian employees took place in the children's work center and the ladies' accessories area.

31. When Ms. Bell questioned the timing of the transfers, Ms. Sholtis explained that the reorganization was a corporate-wide decision. Respondent was transferring associates in ladies' and men's fragrances in other stores. The transfers were affecting associates with up to 15 years of experience. In some cases, all of the employees in a work center would be transferred.

32. Ms. Sholtis informed Ms. Bell that transfers should not be delayed until after the holidays. According to Ms. Sholtis, Petitioner's immediate transfer would give her first choice of the best available positions in the store. Moreover, Petitioner's compensation would not be affected by transferring before Christmas.

33. At the time that Respondent made its decision to reorganize, the company could have instituted a policy that allowed Petitioner and other employees to remain in men's

fragrances and limit the credit they received for sales outside their work center. However, Respondent decided instead to transfer its most experienced associates to larger areas where they could maintain their high rates of pay.

34. In any event, Petitioner would have considered it a demotion to have her pay reduced to \$8.00 per hour, even if she had been allowed to stay in men's fragrances. By the time of the hearing, Respondent had adopted a policy that limits the credit employees receive on sales outside their work center.

35. In December 2004, Ms. Winter met with Petitioner to explain the decision to move her out of men's fragrances due to her high rate of pay. Ms. Winter explained that the best areas in the store to support her pay rate would be the shoe department and cosmetics.

36. Over a period of about two weeks, Ms. Winter provided Petitioner with several options for reassignment. Ms. Winter explained the benefits of each area, but specifically and repeatedly recommended ladies' shoes and cosmetics, especially the Estee Lauder makeup counter. Respondent had associates making the highest rates of pay in those areas.

37. At the time of the hearing, Respondent had four people in ladies' shoes making \$17.00 per hour or higher. One employee made \$21.53 per hour.

38. An employee in ladies' shoes does not need years of experience to develop a client base in order to achieve a high rate of pay. One employee in ladies' shoes was able to earn \$15.81 per hour after seven months. Respondent transferred this employee from the junior department to shoes with no special knowledge about shoes and no customers.

39. Another example of not needing time in ladies' shoes to be successful involved an employee hired two weeks before Petitioner resigned in September 2005. The employee achieved an hourly pay of \$18.46 after 15 months in ladies' shoes.

40. The record indicates that African American and other minority employees earn rates of pay as high or higher than \$17.00 in ladies' shoes. It is undisputed that some of the minority employees earning these high rates are older than Petitioner.

41. Employees in the shoe department may earn a commission in addition to their SPH pay rate. They have a support rate but can earn higher raises if they support their rate. They can also request to raise their rates. Therefore, all associates in shoes may not have the same base rates, but they all earn 9.5 percent as commissions. The SC in shoes is also 9.5 percent. The average SPH goal for employees in shoes is \$120.00. Employees earn the commission on sales made after they reach their SPH goal.

42. Petitioner rejected the opportunity to transfer to shoes. She did not want to perform the work required to sell shoes.

43. Petitioner was aware that one employee in her late 40s or early 50s earned approximately \$17.00 in cosmetics. Ms. Bell wanted Petitioner to work in cosmetics because it would mean that she stayed in Ms. Bell's work center. Nevertheless, Petitioner rejected the opportunity to work in cosmetics because she did not want to put make-up on people.

44. After refusing a job in cosmetics or shoes, and not being permitted to transfer to a training work center, Petitioner's remaining choices were in men's clothing or women's clothing. Petitioner elected to work in the ladies' designer/bridge work center where Respondent sold women's better clothes. Petitioner believed that she had a chance to support her pay rate in that area.

45. Ms. Winter advised Petitioner not to transfer to the ladies' designer area because it would be difficult for her to support her rate. Petitioner did not take Ms. Winter's advice.

46. Ms. Winter informed Petitioner that her transfer would not result in an immediate reduction in pay rate to the minimum rate paid to new hires. Rather, Petitioner would be paid her \$17.00 rate regardless of her sales performance for six months. After that time, Petitioner's rate, as well as the other

transferees' rates, would be adjusted based upon sales performance during the second three-month period and the new work center's SC.

47. Respondent required every transferring employee to sign a conditional transfer agreement setting forth the payment terms. The only option besides signing the conditional transfer agreement was to resign.

48. In accordance with Respondent's reorganization plan, Respondent used men's fragrances to train new associates. Some of the new employees were younger than Petitioner. For example, Ms. Bell hired Renee McCurley, a Caucasian female to fill Petitioner's position at \$8.00 per hour. Ms. McCurley was 19 or 20 years old. Ms. McCurley trained in men's fragrances for four or five months before transferring to ladies' fragrances. Respondent subsequently fired Ms. McCurley because she was unable to meet her hourly goals after her transfer.

49. On or about December 21, 2004, Respondent transferred Petitioner to ladies' designer clothes. She was aware that the women's work center had a SC of 6 percent.

50. Brenda Maldon was the ASM over women's clothing. Ms. Maldon became Petitioner's direct supervisor. Ms. Maldon is African American and older than Petitioner.

51. Petitioner's annual review period ended in June 2005. However, Respondent gave Petitioner a review in December 2004

pursuant to policy that requires a review when any employee leaves his or her assigned area. The December 2004 monthly report indicated that Petitioner had not satisfied her SPH standard goal at that time.

52. After several months, Petitioner was fourth in sales among about 30 people in the entire women's clothing work center. She ranked number one in sales in the ladies' designer area.

53. Petitioner's successful performance in the ladies' designer area was not simply the result of the holiday season, which ended in January 2005. Petitioner ranked number one in her area, and number four in the entire work center, during the time between December 2004 and February 2005. January and February usually are slow retail months.

54. Respondent reviewed Petitioner performance again in April 2005. As set forth in the conditional transfer agreement, employees who have transferred to another area receive a three-month review.

55. During the second three-month period of her reassignment, Petitioner's sales decreased. She took long weekends off from work, thereby missing the busiest sales time of the week. She ranked number 18 in sales in the entire women's clothing work center. However, she still ranked number one in sales in the ladies' designer area.

56. Petitioner's sales performance during the second three months after the transfer could not support her \$17.00 pay rate. Instead, her sales performance supported a pay rate of \$7.95 per hour.

57. At that time, due to the impact of a hurricane, no one in the ladies' designer area supported their rates. Everyone was off their sales goals.

58. Although Petitioner ranked number one in sales in her area, the decision that she was unable to support her \$17.00 pay rate was based on the mathematical formula set forth in the conditional transfer agreement. Petitioner's \$7.95 pay rate was derived by dividing her actual SPH of \$136.00 by her SHP goal of \$291.00 and multiplying the product by her pay rate of \$17.00.

59. Petitioner's \$7.95 pay rate became effective July 31, 2005. Of all the employees transferred out of men's fragrances, Petitioner received the largest pay reduction after six months because she had the highest pay rate before the transfer.

60. Respondent applied the same formula and calculations to every employee who transferred out of a work center. For example, Ms. Thomas, who continued to work for Respondent at the time of the hearing, received a reduction in her pay rate after transferring from men's fragrances to another work center from \$13.45 to \$8.60 per hour.

61. There is no persuasive evidence that Respondent denied Petitioner training in the ladies' designer area. Additionally, Petitioner never complained to Respondent's management that she was experiencing a hostile work environment because of her race and/or age.

62. Petitioner requested and received a leave of absence on August 8, 2005. She resigned on September 1, 2005.

63. Petitioner advised Respondent's staff that she was resigning due to the stress and anxiety related to her "demotion" and her resulting financial problems. Petitioner implied that she had another job that she did not want to discuss. During the hearing, Petitioner testified that she resigned because she "could no longer afford to drive 90 miles per day."

64. After leaving her job with Respondent, Petitioner received about \$6,000.00 in unemployment compensation. Six months after her resignation, Petitioner began working for another employer, earning \$9.00 per hour without any medical or other benefits. Two months later, Petitioner quit her job again; she was unemployed for approximately three months without unemployment compensation. In August 2006, Petitioner accepted employment with Wal-Mart.

CONCLUSIONS OF LAW

65. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this case pursuant to Sections 120.569, 120.57(1), and 760.11, Florida Statutes (2006).

66. The FCRA makes it unlawful for an employer to make an employment decision that is motivated by an employee's race or age. See §760.10, Fla. Stat. (2005).

67. The FCRA is patterned after Title VII, the Age Discrimination in Employment Act (ADEA), and the federal case law interpreting Title VII and ADEA. Therefore, federal case law interpreting Title VII and the ADEA is applicable to cases arising under the FCRA. See Green v. Burger King Corp., 728 So. 2d 369, 370-371 (Fla. 3rd DCA 1999).

68. This case presents no direct evidence of intentional discrimination under the FCRA. Ms. Sholtis had no knowledge of Petitioner's race or age when she selected Petitioner for reassignment. If a decision maker has no actual knowledge regarding an employee's protected status, there can be no adverse employment action based on that status. See Silvera v. Orange County Sch. Bd., 244 F.3d 1253, 1262 (11th Cir. 2001).

69. In the absence of direct evidence of intentional discrimination, an employee in a discrimination case has the initial burden of proving a prima facie case of discrimination.

See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. ED. 2d 668 (1973). If the employee proves a prima facie case, the burden shifts to the employer to proffer a legitimate non-discriminatory reason for the action it took. See Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. ED. 2d 207 (1981). The employer's burden is one of production, not persuasion, as it always remains the employee's burden to persuade the fact-finder that the proffered reason is a pretext and that the employer is guilty of intentional discrimination. See Burdine, 450 U.S. at 252-256.

70. In order to prove a prima facie case of age discrimination, Petitioner must show the following: (a) she is a member of a protected group; (b) she was qualified for the job; (c) she was subjected to an adverse employment action; and (d) Respondent treated similarly situated employees of a different age more favorably. See Turlington v. Atlanta Gas Light Company, 135 F.3d 1428, 1432 (11th Cir. 1998).

71. To prove a prima facie case of race discrimination, Petitioner must show the following: (a) she is a member of a protected group; (b) she was qualified for the job; (c) she was subjected to an adverse employment action; and (d) Respondent treated similarly situated employees outside the protected group more favorably.

72. Petitioner has not met her initial burden as to age or race discrimination for two reasons. First, Petitioner did not suffer an adverse employment action when she transferred from men's fragrances to ladies' designer at the same rate of pay for six months.

73. Based on an objective corporation-wide business decision, Respondent required all experienced employees to transfer out of training areas into work centers that would support their higher rates of pay. Petitioner elected to transfer to the ladies' designer area with the understanding that she would be subject to an objective mathematical formula to determine her rate of pay at the end of the six-month period. Petitioner's pay rate was reduced due to her poor sales performance during the second three-month period and not because she was demoted.

74. Second, Petitioner did not show that similarly situated employees of a different age or race were treated more favorably. To the contrary, Respondent transferred Petitioner, several Caucasians, and one Hispanic associate in the Cordova store based on the same objective business decision. Further, undisputed evidence shows that Respondent paid Petitioner and all other transferred employees based on their sales performance at the end of the second three-month period after reassignment.

Respondent's employee compensation policy does not take an employee's age or race into account.

75. To the extent that Petitioner proved a prima facie case of age or race discrimination, Respondent had a legitimate non-discriminatory reason for reassigning Petitioner to a larger work center and subsequently reducing her pay rate based on decreased sales. The purpose of the policy was to establish training areas for new employees in small work centers and to move the more experienced and higher paid associates to larger work centers that could support a higher rate of pay. The policy was race and age neutral on its face and as applied in this case.

76. Respondent's objective business decisions and compensation policy was not a pretext for discrimination. Petitioner did not meet her ultimate burden of showing that Respondent intentionally discriminated against her based on her age or race.

77. Petitioner alleges that Respondent constructively discharged her when it reassigned her and reduced her pay rate after six months. To meet her burden on this issue, Petitioner must prove that Respondent deliberately made the terms or conditions of her employment so intolerable that a reasonable person in her position would have been compelled to resign. See

Rowell v. BellSouth Corp., 433 F.3d 794,806-807 (11th Cir. 2005).

78. Petitioner claims she resigned due to emotional and financial stress. However, Respondent is not responsible for Petitioner's emotional reaction to the lower pay rate. Employees are not guaranteed stress-free working environments. Discrimination laws "'cannot be transformed into a palliative for every workplace grievance, real or imagined, by the simple expedient of quitting.'" See Gray v. York Newspapers, Inc., 957 F.2d 1070, 1083 (3rd Cir. 1992), quoting Bristow v. Daily Press, Inc., 770 F.2d 1251, 1255 (4th Cir. 1985).

79. Petitioner chose to transfer to the ladies' designer area where her performance resulted in insufficient sales and a reduction in pay rate. Being paid an hourly rate based upon sales performance is not a condition that Respondent imposed only on Petitioner. "'[N]o individual employee or employee group may claim constructive discharge where all employees are subject to the same working conditions.'" See Rowell, 433 F.3d at 804, quoting Bodnar v. Synpol, Inc., 843 F.2d 190, 192 (5th Cir. 1988).

80. Petitioner alleged but failed to present any evidence showing she was subjected to a hostile work environment based on her race or age. Petitioner did not show that her workplace was "'permeated with discriminatory intimidation, ridicule, and/or

insult,' that [was] 'sufficiently severe or pervasive to alter the conditions of the [Petitioner's] employment and create an abusive working environment.'" See Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993), quoting Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65, 67 (1986)(internal citations omitted).

81. Respondent requested attorney's fees and costs for the first time in its Proposed Findings of Fact and Conclusions of Law but failed to cite any authority for the award. Accordingly, Respondent's request is denied.

RECOMMENDATION

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

RECOMMENDED:

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

DONE AND ENTERED this 8th day of February, 2007, in Tallahassee, Leon County, Florida.



SUZANNE F. HOOD
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Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of February, 2007.

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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.