STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

THERESA L. DAWSON,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 06-3788
	)	
BANK OF AMERICA,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on August 9 and 10, 2007, in Orlando, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Dennis Wells, Esquire
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For Respondent: Annette Torres, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether Respondent discriminated against Petitioner by terminating her employment in violation of Section 760.10, Florida Statutes,[1] the Florida Civil Rights Act.

PRELIMINARY STATEMENT

Petitioner filed an Employment Charge of Discrimination with the Florida Commission on Human Relations (the "Commission") on May 4, 2006. A Determination: No Cause was entered by the Commission on September 13, 2006. Petitioner filed her Petition for Relief on September 29, 2006, and the Petition was forwarded to the Division of Administrative Hearings (DOAH). The Petition alleges an unlawful employment practice; specifically that Petitioner's employment with Respondent had been terminated wrongfully on the basis of age and race (African-American). After several continuances for cause, the final hearing in this matter was conducted at the time and place set forth above.

At final hearing, Petitioner testified on her own behalf and also called the following witnesses: Sherri Nichols, former teller at the Bank of America Rosemont branch (hereinafter, "Rosemont"); Carmita Kelly, former teller at Rosemont; Dorothy Faulk, former personal banker and customer services specialist at Rosemont; Karen Franklin, former head teller at Rosemont; and Jeremy Barkley, customer service manager/assistant manager at Rosemont. Petitioner offered seven exhibits into evidence; Exhibits 1, 2, 4, and 5 were admitted. Respondent called three witnesses: Marcia Clark, business banking client manager at Rosemont; Roy Gonzaque, vice president and senior investigator

for Bank of America; and Debbie Nelson, Bank of America consumer market manager. Respondent offered Exhibits 1 through 3, 8 through 10, 14, 17, 22 through 24, 27, 30, 34, 35, and 39 into evidence, each of which was admitted.

During the final hearing, Petitioner made an ore tenus motion for an order allowing certain proffered documents to be submitted as late-filed exhibits.[2] Petitioner was directed to file a written motion stating the basis and support for his motion; Respondent was given the opportunity to respond. No motion was filed, thus none of the documents proffered by Petitioner in the final hearing will be considered evidence in this case. Petitioner was also granted the opportunity to submit transcripts of pre-hearing depositions for inclusion into the record, but no transcripts were filed at DOAH. At this point, the record in this proceeding is closed.

The five-volume Transcript of the final hearing was filed with the Clerk of the DOAH on September 25, 2007. The parties asked and were afforded the right to file proposed recommended orders on or before September 28, 2007. Each party timely submitted proposed findings of fact and conclusions of law, and each party's submission was considered in the preparation of this Recommended Order by the undersigned Administrative Law Judge. (Note: The Transcript of the final hearing is

erroneously marked as Case No. 07-3788 instead of 06-3788, but otherwise appears accurate.)

FINDINGS OF FACT

1. Petitioner, Theresa Dawson, is a 47-year-old, African-American woman. At all times pertinent to this matter, Petitioner was employed by Respondent as a personal banker at Rosemont. As a personal banker, Petitioner was responsible for, inter alia, opening new accounts for customers of Bank of America (the "Bank").

2. Petitioner had worked for the Bank (including its predecessor entities) for almost 25 years, beginning her employment in 1981 as a bank teller. She served at a number of Bank branches until being transferred to Rosemont in 1998. Petitioner was a valued employee of the Bank and was considered to be one of the best workers at Rosemont. She was nominated for and received bonuses almost every quarter. She received annual salary increases well in excess of the average for her peers. During a certain period when Bank headquarters directed managers to limit all raises to two percent, Petitioner was given a six-percent raise due to her substantial performance record. Petitioner had never been disciplined or reprimanded by the Bank concerning her employment activities until the actions leading to this administrative proceeding.

3. Personal bankers were paid a base salary and could earn additional compensation based upon performance. To obtain bonuses or extra compensation, the employee must first meet all of their objectives (as predetermined by the Bank). Once those goals were met, more income in the form of incentives could be earned. Incentives were based on productivity: A personal banker would receive credit for opening new accounts in excess of his or her stated goals. In addition, the employee could accumulate points which could be used to purchase consumer goods such as televisions, stereos and other household goods.

4. Each Bank employee was assigned a NBK number, which is essentially an internal employee number. Each employee was also asked to select a private, confidential password for use in logging on to the Bank computer system. Bank policy forbade employees from sharing their password with anyone, even with Bank computer technology personnel. Passwords had to be changed on a regular basis (usually every 90 days) as an added measure of security. All employees were charged with understanding and following the policy concerning passwords.

5. In order for a personal banker (or other authorized employee) to open a new account for a customer, the employee must log onto the Bank computer using their NBK and password. The account would then be electronically opened using the Bank computer system. Once the electronic process was complete, a

signature card would be printed for the customer's signature. Sections of the signature card would be manually filled in by the Bank employee who opened the account; that person would theoretically be the same employee who had electronically opened the account.

6. On Saturday, April 30, 2005, Marcia Clark, the bank manager for Rosemont, was at work. It was a busy day at the banking center. Dorothy Faulk, a long-time employee of the Bank, was also working on that day. Faulk was a customer service specialist who had authority, among other things, to open new accounts for customers. On that day Faulk was filling the role of personal banker (in name only; she was not included in the personal banker's incentive program while filling the role in that limited basis). Towards the end of the workday (1:00 p.m. because it was Saturday), Clark found a new account signature card on the office copy machine. The signature card indicated that Petitioner had opened the account, but Clark knew Petitioner had not been working on that day. Since it was almost time to close for the day, Clark opted to deal with the apparent discrepancy during the next business week.

7. On the following Tuesday, May 3, 2005, Clark asked Petitioner about the signature card she had found the previous Saturday. Petitioner indicated that Faulk must have logged on to the Bank computer system using Petitioner's password. In

response to further inquiry by Clark, Petitioner admitted giving her password to Faulk for that purpose. The next day, Clark asked Faulk about the signature card and whether she had logged on using Petitioner's password. Faulk said that she had indeed used the password, but that it had been a one-time occurrence.

8. Clark then discussed the situation with her supervisor, Debbie Nelson, the Bank's consumer market manager. Nelson was concerned about what Clark told her, and she told Clark to contact the Bank's senior investigator, Roy Gonzaque, so that he could look into the matter. Meanwhile, Clark pulled internal bank documents known as PMRRs (the Performance Measurement Rewards and Recognition tool) in an effort to determine whether there were other instances where Petitioner's password had been used when she was not actually at work.[3]

9. Within a week, Gonzaque came to Rosemont and interviewed a number of employees, including Petitioner and Faulk. He also examined the documents which had been reviewed by Clark and which showed the following: December 18, 2004--four new accounts were opened under Petitioner's password; March 5, 2005--three new accounts were opened under Petitioner's password; March 19, 2005--three new accounts were opened under Petitioner's password; and April 30, 2005--three new accounts were opened under Petitioner's password. Each of those days was a Saturday on which Petitioner was not at work. A signature

card was found for each of those days as well; each of the cards had Faulk's handwriting on it.[4]

10. Gonzaque questioned Petitioner and obtained a voluntary written statement in which Petitioner admitted giving her password to Faulk, but said she believed prior managers had known about and condoned the practice. Petitioner then admitted her wrong-doing and apologized for engaging in that activity. Faulk was also questioned and wrote a statement saying that she had been opening accounts using personal bankers' passwords for about one and a half years.[5] Faulk said she opened accounts under the personal banker number in order to make sure customers would not have to wait to long. That statement is not credible because Faulk had the authority to open new accounts under her own number. Further, the statement contradicts what Faulk said to Clark on the day she was first confronted. Faulk also wrote that she didn't know Petitioner would benefit financially as a result of the action. Again, this statement is not credible because Faulk had been a personal banker and knew how the incentive bonuses were calculated. Faulk stated that Clark not only knew about this practice, but that Clark inquired why Faulk was not opening accounts for other personal bankers as well in order to be "fair."[6]

11. Gonzaque, Nelson, and Clark met to discuss the situation further. They called the Personnel Office at the Bank's

headquarters during their meeting. The Personnel Office recommended that upon those facts, both Petitioner's and Faulk's employment should be terminated. Despite the fact both employees had exemplary work histories, a consensus was reached by the three management personnel to terminate employment. It was a difficult decision to make and, actually, was detrimental to Rosemont because Faulk and Petitioner were well known by bank customers.

12. Clark was responsible for informing Petitioner about the termination of employment. When Clark did so, Petitioner did not raise any objection. Without saying a word Petitioner turned over her keys and other Bank property in her possession and then walked out of the bank. She showed no emotion and made no comments to Clark or anyone else.

13. Petitioner had earned performance and incentive bonuses on a regular basis. Her earned bonus for the quarter preceding her termination from employment was to be in excess of $8,300. That was significantly larger than average bonuses earned by other employees.[7] The Bank opted not to pay that bonus to Petitioner on the basis that she had gained it fraudulently, i.e., by allowing someone else (Faulk) to open accounts for her. As Gonzaque described it, Petitioner had "lied, cheated and manipulated the system" to get the bonus.

14. Each Bank employee must read and understand the "Code of Ethics and General Policy on Insider Trading" (the "Code"). The Code is available both on-line and in hard copy format. Petitioner acknowledged in writing annually that she had read, understood, and agreed to comply with the Code. The Code requires employees to abide by the Associate Handbook, to abide by all Bank policies, and to seek counsel concerning any questions about ethical issues that might arise. The Bank's Associate Handbook includes information concerning passwords. It states unequivocally that "Associates must not share their passwords, including e-mail passwords, with any other person--not even technical support personnel." Further, passwords were not to be stored under keyboards or other unsecured places.

15. Two former Rosemont employees remembered isolated incidences of password sharing. Sherri Nichols remembers an assistant manager asking each teller for their passwords on one occasion so that he could take some sort of test for them. The assistant manager (Jeremy Barkley) does not remember doing so, and his testimony is credible. Carmita Kelly remembers Barkley using her terminal--where she had logged on--for a short period of time while she stood nearby. Even if those instances did occur, they did not involve use of a personal banker's password to open new accounts. There was no other competent evidence

that employees had been sharing passwords in the manner alleged by Petitioner.

16. Petitioner has not found suitable employment since the date of her termination from Rosemont. She has applied to a number of places without success. In some of her employment applications, she misrepresented her departure from Rosemont, indicating that she had not been terminated from employment. Her explanation for that false statement was that "I was trying to get employment." Petitioner seemed devoid of remorse or guilt and appeared to believe that the end justified the means, thus diminishing her credibility at final hearing. Unlike Petitioner's failure, Faulk was able to obtain employment with another lending institution only a couple of weeks after being let go by Rosemont. She now works with yet another bank.

17. After Petitioner's and Faulk's employment was terminated, Rosemont hired new employees. It appears the two positions held by Petitioner and Faulk (personal banker and customer service specialist, respectively) were not filled by persons with the same level of experience as the terminated employees. Rather, persons were hired who could be trained to fill those positions upon further training. A number of persons were hired, but it is unclear from the evidence at final hearing whether any one person was hired to directly fill Petitioner's position. Two white males were hired, as was a Hispanic woman,

but no witness could provide a clear history of when each was hired and for what specific job.

18. At no time during her employment with the Bank or Rosemont did Petitioner hear anyone make a discriminatory remark to her based on her race or age. Employees described the Rosemont employees as a "team" who all worked together for the common good. Both the Bank and Rosemont had a history of diversity in hiring practices. One of the three persons making the decision to terminate the employment of Petitioner was African-American.

19. The evidence at final hearing was conclusive that race was not a factor in the decision to terminate Petitioner (and Dorothy Faulk).[8] It is clear that Rosemont did not hire or fire employees on the basis of race and that every employee was given the opportunity for advancement regardless of race. In the case of Petitioner, she had been regularly promoted, honored, and financially rewarded for her work. She suffered no adverse actions on the basis that she was African-American.

CONCLUSIONS OF LAW

20. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to Section 120.569 and Subsection 120.57(1), Florida Statutes (2007).

21. The Florida Civil Rights Act of 1992 (the "Act") is codified in Sections 760.01 through 760.11 and 509.092, Florida Statutes. Among other things, the Act makes certain actions by employers "unlawful employment practices" and gives the Commission authority--following an administrative hearing conducted pursuant to Sections 120.569 and 120.57, Florida Statutes--to issue an order "prohibiting the practice and providing affirmative relief from the effects of the practice, including back pay." §§ 760.10 and 760.11(6), Fla. Stat.

22. One unlawful employment practice prohibited by the Act is described in Subsection 760.10(1)(a), Florida Statutes:

> It is an unlawful employment practice for an employer:
>
> 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.

23. Petitioner has the burden of proof that she was the victim of a discriminatory act. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932, 934 (Fla. 1996), wherein the Court stated: "The general rule is that a party asserting the affirmative of an issue has the burden of presenting evidence as to that issue."

24. "Discriminatory intent may be established through direct or indirect circumstantial evidence." Johnson v. Hamrick, 155 F. Supp. 2d 1355, 1377 (N.D. Ga. 2001). However, direct evidence is often unavailable, and so "inferential and circumstantial proof" is permitted to prove discrimination. Kline v. Tennessee Valley Authority, 128 F.3d 337, 338 (6th Cir. 1997).

25. Where, as in the instant case, the complainant uses circumstantial evidence to prove intentional discrimination, the shifting burden framework established by the U.S. Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), applies. Under this framework, the complainant has the initial burden of establishing a prima facie case of discrimination. If she meets that burden, then an inference arises that the challenged action was motivated by a discriminatory intent. The burden then shifts to the respondent to articulate a legitimate, non-discriminatory reason for its action. If the respondent successfully articulates a reason, then the burden shifts back to the complainant to show that the proffered reason is really pretext for unlawful discrimination. See also Schoenfield v. Babbitt, 168 F.3d 1257 (11th Cir. 1999). The petitioner must prove her prima facie case through the traditional four-prong test established in McDonnell, supra, i.e.: (1) that she is within a protected class, (2) that she

was qualified for the position she held, (3) that she was subjected to an adverse employment action, and (4) that similarly situated employees outside her protected class were treated differently or more favorably for the same violations. See also Knight v. Baptist Hospital of Miami, 330 F.3d 1313 (11th Cir. 2003).

26. There is a similar four-prong test for establishing a prima facie case of discrimination where, as in the instant case, no decision maker has made discriminatory statements. The complainant must show that (1) she is a member of a protected group, (2) she was qualified for the job she formerly held, (3) she was discharged from employment, and (4) after her discharge, the position she held was filled by someone not within her protected class. Singh v. Shoney's, Inc., 64 F.3d 217 (5th Cir. 1995).

27. However, the courts have held that proof that amounts to mere speculation and self-serving belief on the part of the complainant concerning motives of the respondent, standing alone, is not sufficient to establish a prima facie case. See Lizardo v. Denny's, Inc., 270 F.3d 94, 104 (2d Cir. 2001), where the court said: "The record is barren of any direct evidence of racial animus. Of course, direct evidence of discrimination is not necessary. . . . However, a jury cannot infer discrimination from thin air. Plaintiffs have done little more

than cite to their mistreatment and ask the court to conclude that it must have been related to their race. This is not sufficient." See also the holding in Little v. Republic Refining Co., Ltd, 924 F.2d 93 (5th Cir. 1991), an age discrimination case applying the same requirements for establishing a prima facie case. "First, Little points to his own subjective belief that age motivated Boyd [his supervising employer]. An age discrimination plaintiff's own good faith belief that his age motivated his employer's action is of little value." Little, at 96. In Elliott v. Group Medical & Surgical Service, 714 F.2d 556, 567 (5th Cir. 1983), cert. denied, 467 U.S. 1215, 104 S. Ct. 2658, 81 L. Ed. 2d 364 (1984), the court held that "[w]e are not prepared to hold that a subjective belief of discrimination, however genuine, can be the basis of judicial relief."

28. In the instant case, Petitioner proved that she was a member of a protected class, that she was qualified for the position she held, and that she was terminated from her employment. She could not prove that the person or persons hired to replace her were of a different race or age. She could not prove that similarly situated employees outside her class were treated differently for the same violations.[9] In short, she did not prove a prima facie case.

29. Then, even though it is not required to do so because the burden never shifted to it, Respondent showed a legitimate, non-discriminatory reason for terminating Petitioner's employment, to wit: Petitioner violated clearly elucidated policy concerning use of her confidential password; she defrauded Respondent by claiming the financial benefit for new accounts she had not opened; and she lied to her employer concerning her actions.

30. Petitioner was then unable to establish any evidence that Respondent's actions were really a pretext for unlawful discrimination. Rather, it is clear the decision to terminate Petitioner's employment from the Bank was based solely on the improper actions engaged in by Petitioner.

31. Petitioner failed in all the criteria regarding her burden of proof in this matter.

RECOMMENDATION

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

RECOMMENDED that a final order be entered by the Florida Commission on Human Relations, finding Respondent not guilty of an unlawful employment practice and dismissing Petitioner's Petition for Relief. It is

FURTHER RECOMMENDED that each party's request for an assessment of attorney's fees and costs in this matter is

DENIED. Although Petitioner acknowledged that no one at the Bank had ever made any remarks concerning her race, she nonetheless alleged and attempted to prove that the issue resulting in her termination from employment was motivated by race. The facts did not support her allegation, but it was not a frivolous charge in and of itself.

DONE AND ENTERED this 9th day of October, 2007, in Tallahassee, Leon County, Florida.

S

R. BRUCE MCKIBBEN
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of October, 2007.

ENDNOTES

[1/] Unless stated otherwise, all references to the Florida Statutes herein shall be to the 2005 version.

[2/] The documents included a spread sheet provided to Petitioner by Respondent which Petitioner felt might show some inconsistencies in the Bank's record keeping. However, no one appeared at final hearing to authenticate the documents, and their value was thus questionable, at best.

[3/] PMRR reports are maintained to monitor business transactions at the Bank. The reports have information concerning all

accounts opened by all employees. Managers of local banking centers review summaries of the PMRR reports daily and weekly, but not on a line-by-line basis. Rather, the managers refer to summaries from the PMRRs which provide a broad overview for a specific period of time. The reports pulled by Clark to begin her investigation were a bit more in-depth than the summaries she generally reviewed.

[4/] Counsel for Petitioner correctly pointed out that signature cards for the other identified accounts on those days were not offered into evidence. He concludes that the cards may have shown that someone other than Faulk was opening accounts using Petitioner's password. There is no evidence to support that theory, but even if true it would only support the continued violation of Bank policy by Petitioner.

[5/] Testimony from Petitioner that a prior bank manager, Cheryl Page, had condoned the sharing of passwords was not substantiated by competent testimony. Since Page had not worked at the bank since 2003, that testimony also refuted Dorothy Faulk's written statement that the practice had been going on for only about one and a half years.

[6/] Clark denies any knowledge of employees using others' passwords to open accounts. Her testimony on this issue is credible. Faulk had also testified that she had been given several other employees' passwords, but there was no corroborating evidence of that statement.

[7/] For the same quarter in 2005, Petitioner had earned a bonus of approximately $2,000. That bonus was far more consistent with an average bonus for personal bankers.

[8/] Petitioner has effectively dropped her claim concerning <u>age</u> as a reason for her termination from employment. No evidence was presented to attempt to prove discrimination on that basis.

[9/] The only other personal banker identified by Petitioner as having shared her personal password was Jill DeVita. The Bank's investigator did expand his investigation to include DeVita. Besides, DeVita did not testify and there was no testimony or evidence as to DeVita's race, so it cannot be determined if she would be outside Petitioner's protected class.

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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.