

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SUHRA MERDANOVIC,)
)
 Petitioner,)
)
 vs.) Case No. 07-3118
)
 OMNI HOTEL RESORT,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

A formal hearing was conducted in this case on January 18, 2008, in Orlando, Florida, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Suhra Merdanovic, pro se¹
318 June Avenue
Haines City, Florida 33844

For Respondent: Keith L. Hammond, Esquire
Jackson, Lewis LLP
390 North Orange Avenue, Suite 1285
Post Office Box 3389
Orlando, Florida 32802-3389

STATEMENT OF THE ISSUE

The issue is whether Respondent committed an unlawful employment practice contrary to Section 760.10, Florida Statutes (2007),² by discriminating against Petitioner based on her national origin.

PRELIMINARY STATEMENT

On December 19, 2006, Petitioner Suhra Merdanovic ("Petitioner") filed an Employment Complaint of Discrimination against Respondent, Omni Hotel Resort (the "Omni" or "Respondent"). Petitioner alleged that the Omni discriminated against her by terminating her employment based on her national origin (Bosnian), in that she was harassed on a daily basis by Hispanic co-workers, yelled at by the manager, and ultimately badgered so intensely that she required hospitalization, after which the Omni fired her.

On June 14, 2007, the Florida Commission on Human Relations ("FCHR") issued a Determination: No Cause, finding no reasonable cause to believe that an unlawful employment practice occurred. On July 9, 2007, Petitioner filed a Petition for Relief with FCHR.

On July 11, 2007, FCHR referred the case to the Division of Administrative Hearings. The hearing was initially scheduled to be held on September 27, 2007. By Order dated September 24, 2007, the case was continued on Respondent's motion. The matter was rescheduled for and held on January 18, 2008.

At the hearing, Petitioner testified on her own behalf, with the assistance of her son, Jasmin Merdanovic. Ms. Merdanovic's English was less than fluent and, without objection, her son helped where translation from Bosnian to

English was necessary. Petitioner's Exhibits 1 and 2 were admitted into evidence, over the objection of Respondent. Respondent presented the testimony of Silvio Rosalen, who was sous chef at a restaurant at the Omni during Petitioner's employment; Lisa Borde-Christie, human relations manager for the Omni; and the telephonic testimony of Robert Fohr, who was the assistant food and beverage director at the Omni during Petitioner's employment. Respondent's Exhibits 1 through 6 were admitted into evidence.

On Respondent's motion, the record of the case was left open to allow Respondent time to examine and possibly submit rebuttal evidence to Petitioner's Exhibits 2, which had not been provided to Respondent prior to the hearing. The exhibit was a copy of Petitioner's medical bills. Respondent requested the opportunity to contact the medical providers named in the bills. On January 24, Respondent filed a status report notifying this tribunal that it would forego contacting the medical providers. An Order Closing the Record was entered on January 29, 2008.

No transcript of the hearing was ordered. Respondent filed a proposed recommended order on February 13, 2008. Petitioner did not file a proposed recommended order.

FINDINGS OF FACT

1. The Omni, advertised as "Omni Orlando Resort at ChampionsGate," is a golf resort located in the Orlando tourist

corridor near Walt Disney World. The Omni is an employer as that term is defined in Section 760.02, Florida Statutes.

2. Petitioner, Suhra Merdanovic, is a Bosnian female, and her first language is Bosnian. She speaks and understands English, but is more fluent and comfortable using her native language.

3. Ms. Merdanovic was employed by the Omni from approximately August 22, 2006, to October 9, 2006. Ms. Merdanovic worked in the kitchen of the Broadway Deli, a sandwich shop located in the resort. The Broadway Deli was one of several restaurants in the Omni complex.

4. During the brief period of Ms. Merdanovic's employment, the Broadway Deli did not have a full-time manager. Ms. Merdanovic reported to Silvio Rosalen, the sous chef at Teri's Restaurant, near the Broadway Deli in the Omni complex. Mr. Rosalen reported to Robert Fohr, the assistant food and beverage manager for the Omni.

5. The Omni has established a policy that prohibits harassment in the workplace. The policy defines harassment as:

[A]ny unwelcome verbal, non-verbal, physical or other conduct or behavior relating to an individual's race, religion, color, sex, national origin, age, disability or any other categories protected by state, federal or local law, that is made a term or condition of employment, is used as the basis for employment or advancement decisions, or has the purpose or effect of

unreasonably interfering with work or creating an intimidating, hostile or offensive work environment.

6. The policy "strictly prohibit[s]" employees, supervisors, and members of management from harassing other employees, supervisors, or members of management. The policy directs an employee who has a complaint of harassment to report that complaint to any manager or supervisor, the human resources director, the general manager, or the regional vice president of operations. The complaint triggers a formal investigation, usually conducted by the human resources director.

7. The Omni's harassment and equal employment opportunity policies are set forth in the Omni's Associate Handbook, which is provided to all employees. The handbook is reviewed during an orientation session that all newly hired Omni employees must attend. Ms. Merdanovic attended an orientation session on August 26, 2006, and testified that she was familiar with the harassment policy.

8. The Omni calls the first 90 days of employment an "introductory period." The Associate Handbook describes the introductory period as follows:

During this time you will have a chance to see whether you like your job and Omni Hotels will have an opportunity to evaluate your performance and suitability for your position. If Omni Hotels concludes that your job performance and/or suitability have been unsatisfactory, you may be dismissed at

any time during the introductory period at Omni Hotels' complete discretion. You may also be dismissed at any time after the introductory period at the sole discretion of Omni Hotels. Both during and after the introductory period, all associates are associates at will.

9. If an employee's manager determines within the first 90 days of employment that an employee's job performance and/or "suitability" is unsatisfactory, the manager will meet with the employee to review the manager's concerns. After this meeting, the employee's job status is "suspended pending investigation" while the manager confers with the human resources department to review the issues. If the manager and the human resources department agree that the employee should be terminated, then human resources will advise the employee of the decision.

10. Ms. Merdanovic testified that two Hispanic co-workers, Erica Torres and Charlotte Ruiz, harassed her because of her nationality. Ms. Torres asked her what she was doing in America and refused to go into the kitchen with her. Both women made jokes and laughed about Ms. Merdanovic being from Bosnia.

11. Ms. Merdanovic testified that her co-workers also disliked her, because she refused to give them free food from the Broadway Deli's kitchen.

12. Ms. Merdanovic did not complain to a manager, supervisor, or any other Omni employee about the harassment she claimed to have experienced.

13. Mr. Rosalen testified that he received numerous complaints about Ms. Merdanovic's job performance from her co-workers. The co-workers told him that Ms. Merdanovic failed to follow instructions, argued with guests and co-workers, interrupted co-workers who were trying to explain how to complete job tasks, gave guests the wrong order at least twice, and failed to comply with the posted work schedule. Mr. Rosalen personally observed Ms. Merdanovic's performance deficiencies on several occasions.

14. The guest complaints were most significant to Mr. Rosalen. On one occasion, the guest had ordered a turkey sandwich, but was served a pastrami sandwich by Ms. Merdanovic. Rather than correcting the order immediately, Ms. Merdanovic attempted to convince the guest to keep the pastrami sandwich by telling him it was good and he would like it. On a second occasion, a guest ordered a milkshake and was served iced coffee.³

15. At the hearing, Ms. Merdanovic testified that she was unaware of any complaints about sandwiches. She stated that she has worked in kitchens for years and understands how to make sandwiches in a deli. She did complain that she was never trained to operate the "front of the store" equipment such as the milkshake machine or coffee machine, yet was expected to somehow be able to operate them.

16. Mr. Rosalen orally counseled Ms. Merdanovic on multiple occasions regarding her performance deficiencies, but he never observed any improvement.

17. Pursuant to the process for terminating employees during their introductory period, Mr. Rosalen and Mr. Fohr decided to meet with Ms. Merdanovic to discuss her performance deficiencies and to advise her not to return to work until she heard from human resources. After this meeting, Mr. Rosalen and Mr. Fohr would meet with the human resources director to discuss whether to terminate Ms. Merdanovic's employment.

18. Mr. Rosalen and Mr. Fohr prepared a "Problem/Solution Notice" form, dated October 2, 2006, that set out the performance deficiencies and possible corrective actions for Ms. Merdanovic. This notice was intended to be the outline for discussion during the meeting with Ms. Merdanovic. Under the heading "Specific Nature of Problem" were various categories, including absenteeism, tardiness, violation of company policies, and unsafe actions. Ms. Merdanovic's problem was categorized as "Performance Below Standards."

19. The specific performance problems were set out as follows:

There have been numerous complaints about Suhra Merdanovic's job performance from several of her co-workers. These complaints include:

- * Does not follow training of food preparation techniques and quantities.
- * Does not follow food, coffee and drink recipes.
- * Does not know what all the ingredients are to be able to make recipe.
- * Looses [sic] tickets for orders.
- * Has become argumentative with employees and guests when told that the product is wrong.
- * Has tried to convince guests that mistakenly prepared food is good and tried to get them to take it.
- * Does not understand the schedule after repeatedly having it explained.
- * Interrupts employees and does not let people finish talking when trying to explain how a task needs to be completed.
- * Is not a team player.

20. The notice set forth the following under the heading, "Expected performance or conduct/corrective action required":

Suhra must adhere to the following guidelines:

- * Must be receptive to and accept training in all facets of Broadway Deli culinary operations with a positive attitude.
- * Must follow all standard recipes without deviation to achieve a consistent product.
- * Must produce orders in timely fashion in accordance to [sic] the guest's specifications.

* Must never become argumentative with a guest and try to force a guest to take a product they do not want.

* Must get along with and assist teammates with all guest needs.

21. The notice concluded that the "disciplinary action taken" would be "Suspension/Termination."

22. On October 2, 2006, Mr. Rosalen and Mr. Fohr met with Ms. Merdanovic in Mr. Fohr's office to review the contents of the Problem/Solution Notice.

23. When her supervisors began reviewing her performance deficiencies, Ms. Merdanovic interrupted to argue with them. Mr. Fohr pointed out that this was the same sort of conduct that led to this counseling session in the first place.

24. Before Mr. Rosalen and Mr. Fohr could present her with the notice and commence the formal suspension/termination process, Ms. Merdanovic began to cry in a way that Mr. Rosalen described as "almost hysterical" for several minutes.

25. Ms. Merdanovic then walked to the kitchen of the Broadway Deli. Mr. Rosalen followed her, both to make sure she was all right and to escort her off the Omni property. Ms. Merdanovic again began crying and saying that she could not breathe. She described her condition as "couldn't breathe, couldn't think, couldn't stay."

26. Mr. Rosalen called in the Omni's security team, which also acts as the resort's first responder in medical emergencies. The entry of the security guards threw Ms. Merdanovic into a greater panic. Eventually, at Ms. Merdanovic's request, the Omni called an ambulance service, which transported her to Florida Hospital in Orlando.

27. Ms. Merdanovic was diagnosed with high blood pressure and discharged after an overnight stay in the hospital.⁴

28. After the incident leading to Ms. Merdanovic's hospitalization, Mr. Rosalen and Mr. Fohr met with Lisa Borde-Christie, the Omni's human resources manager, to discuss their meeting with Ms. Merdanovic, the complaints about her from guests and co-workers, and Mr. Rosalen's observations of her performance deficiencies and his previous attempts to correct them.

29. Ms. Borde-Christie agreed that Ms. Merdanovic was not meeting the Omni's performance expectations for her position. In light of Ms. Merdanovic's failure to improve her performance despite Mr. Rosalen's several attempts at verbal counseling, Ms. Borde-Christie, Mr. Fohr, and Mr. Rosalen agreed it was unlikely that Ms. Merdanovic's performance would improve in the future. They decided to terminate her employment.

30. On October 9, 2006, Ms. Borde-Christie and Mr. Rosalen met with Ms. Merdanovic to tell her that her employment was

terminated and to review the performance deficiencies that caused her termination.

31. When Ms. Borde-Christie attempted to review the performance issues, Ms. Merdanovic became argumentative, stating that these issues were all lies and that her co-workers did not like her. Ms. Borde-Christie testified that Ms. Merdanovic said nothing about her national origin being an issue in the workplace.

32. Ms. Merdanovic produced no credible evidence that her language or national origin played a role in the decision to terminate her employment. The Omni's management did not become aware of her allegations of harassment due to her national origin by her co-workers until Ms. Merdanovic filed her Employment Complaint of Discrimination, more than two months after her dismissal. The evidence produced at hearing demonstrated that the reasons for Petitioner's termination all related to her job performance.

CONCLUSIONS OF LAW

33. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

34. The Florida Civil Rights Act of 1992 (the Florida Civil Rights Act or the Act), Chapter 760, Florida Statutes,

prohibits discrimination in the workplace. The Act, among other things, forbids the discriminatory firing of an employee.

35. Subsection 760.10(1)(a), Florida Statutes, states the following:

(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.

36. Respondent is an "employer" as defined in Subsection 760.02(7), Florida Statutes, which provides the following:

(7) "Employer" means any person employing 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such a person.

37. Florida courts have determined that federal case law applies to claims arising under the Florida's Civil Rights Act, and as such, the United States Supreme Court's model for employment discrimination cases set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), applies to claims arising under Section 760.10, Florida Statutes. See Florida Dept. of Community Affairs v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991).

38. Under the McDonnell analysis, in employment discrimination cases, Petitioner has the burden of establishing by a preponderance of evidence a prima facie case of unlawful discrimination. If the prima facie case is established, the burden shifts to Respondent, as the employer, to rebut this preliminary showing by producing evidence that the adverse action was taken for some legitimate, non-discriminatory reason. If the employer rebuts the prima facie case, the burden shifts back to Petitioner to show by a preponderance of evidence that Respondent's offered reasons for its adverse employment decision were pretextual. See Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981).

39. In order to prove a prima facie case of unlawful employment discrimination under Chapter 760, Florida Statutes, Petitioner must establish that: (1) she is a member of the protected group; (2) she was subject to adverse employment action; (3) she was qualified to do the job; and (4) her employer treated similarly-situated employees of other national origins more favorably. See, e.g., Williams v. Vitro Services Corporation, 144 F.3d 1438, 1441 (11th Cir. 1998); McKenzie v. EAP Management Corp., 40 F. Supp. 2d 1369, 1374-75 (S.D. Fla. 1999).

40. Petitioner has failed to prove a prima facie case of unlawful employment discrimination.

41. Petitioner established that she is a member of a protected group, in that she is a Bosnian female whose primary language is Bosnian. Petitioner also established that she was subject to adverse employment action in that she was terminated from her job.

42. However, Petitioner presented no evidence that her language or national origin played any role in her termination. Having failed to establish this element, Petitioner has not established a prima facie case of employment discrimination.

43. Even if Petitioner had met the burden, Respondent presented evidence of legitimate, non-discriminatory reasons for terminating Petitioner, thereby rebutting any presumption of language or national origin discrimination. The evidence presented by Respondent established that Petitioner was terminated for poor job performance that continued despite repeated efforts by management to counsel her and correct specific deficiencies.

44. Petitioner failed to prove that Respondent's reasons for firing her are pretextual.

RECOMMENDATION

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

RECOMMENDED that the Florida Commission on Human Relations issue a final order finding that the Omni Hotel Resort did not

commit any unlawful employment practices and dismissing the Petition for Relief.

DONE AND ENTERED this 26th day of March, 2008, in Tallahassee, Leon County, Florida.

Lawrence P. Stevenson

LAWRENCE P. STEVENSON
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of March, 2008.

ENDNOTES

^{1/} Ms. Merdanovic's son, Jasmin Merdanovic, assisted in the presentation of her case because of his better command of the English language. Respondent did not object to Mr. Merdanovic's participation.

^{2/} Citations, hereinafter, shall be to Florida Statutes (2007), unless otherwise specified.

^{3/} Mr. Rosalen testified that he did not actually see the pastrami sandwich or the iced coffee in question, but that he did meet personally with the irate customers who received those items.

^{4/} Ms. Merdanovic was eventually billed several thousand dollars for the ambulance service, emergency room admission, hospital stay, and cardiac testing. The sole relief Ms. Merdanovic seeks in this proceeding is payment of these bills by the Omni.

COPIES FURNISHED:

Denise Crawford, Agency Clerk
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

Keith L. Hammond, Esquire
Jackson Lewis LLP
390 North Orange Avenue, Suite 1285
Post Office Box 3389
Orlando, Florida 32802-3389

Suhra Merdanovic
318 June Avenue
Haines City, Florida 33844

Cecil Howard, General Counsel
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

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.