

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LYNETTE BROWN,)
)
Petitioner,)
)
vs.) Case No. 07-3120
)
DEPARTMENT OF HIGHWAY SAFETY)
AND MOTOR VEHICLES,)
)
Respondent.)
_____)

RECOMMENDED ORDER

A formal hearing was conducted in this case on June 18 and 19, 2008, in Tallahassee, Florida, before Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: H. Richard Bisbee, Esquire
Patrick R. Frank, Esquire
H. Richard Bisbee, P.A.
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Tallahassee, Florida 32308

For Respondent: Glen A. Bassett, Esquire
Kara J. Berlin, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Respondent committed an unlawful employment action against Petitioner contrary to Sections 760.10(1)(a) and 760.10(7), Florida Statutes (2006).

PRELIMINARY STATEMENT

On or about December 4, 2006, Petitioner Lynette Brown (Petitioner) filed an Employment Complaint of Discrimination with the Florida Commission on Human Relations (FCHR). The complaint alleged that Respondent Department of Highway Safety and Motor Vehicles (Respondent) had discriminated against Petitioner based on her race and age by denying her promotions and harassing her. The complaint also alleged that Respondent had retaliated against Petitioner by terminating her employment for filing a formal internal complaint about the alleged discrimination.

On June 1, 2007, FCHR issued a Determination: No Cause. On July 6, 2007, Petitioner filed a Petition for Relief. On July 11, 2007, FCHR referred the petition to the Division of Administrative Hearings.

On July 18, 2007, Petitioner filed a Response to Initial Order. On July 20, 2007, Respondent filed an unopposed Motion for Extension of Time to respond to the Initial Order. On July 23, 2007, the undersigned issued an Order Granting Extension of Time.

On August 7, 2007, the undersigned issued a Notice of Hearing scheduling the hearing for September 20, 2007.

On September 10, 2007, Respondent filed an unopposed Motion for Extension, requesting a 45-day continuance but providing no mutually convenient dates to reschedule the hearing. On September 12, 2007, the undersigned issued an Order Canceling Hearing. The order required the parties to file a status report no later than September 28, 2007.

On September 28, 2007, Respondent filed a Status Report. Because Respondent had been unsuccessful in contacting Petitioner's counsel, Respondent requested that the case be continued until December 10, 2007.

A Notice of Hearing dated October 4, 2007, scheduled the hearing for December 11, 2007.

On November 14, 2007, Respondent filed an Unopposed Motion for Extension. The motion requested a 45-day continuance.

On November 16, 2007, the undersigned issued an Order Granting Continuance and Rescheduling Hearing. The order scheduled the hearing for January 29, 2008.

On January 23, 2008, Petitioner filed an Unopposed Motion for Extension. On January 25, 2008, the undersigned issued an Order Canceling Hearing and Placing Case in Abeyance.

On March 25, 2008, Petitioner filed a Notice of Compliance with the January 25, 2008, Order of the Court. On April 7,

2008, the undersigned issued a Notice of Hearing, scheduling the hearing for June 18 and 19, 2008.

During the hearing, Petitioner testified on her own behalf and presented the testimony of three additional witnesses. Petitioner offered Exhibit Nos.: P1 through P4 and P6 through P10 that were accepted as evidence. Petitioner's Exhibit No. P5 is hereby excluded based on a lack of authentication.

Respondent presented the testimony of one witness. Respondent offered Exhibit Nos.: A through N and P through Q that were accepted as evidence. Respondent's Exhibit No. O is hereby excluded to the extent it contains hearsay that is inadmissible under Section 120.57(1)(c), Florida Statutes (2008).

On July 10, 2008, Respondent's witness completed his testimony by post-hearing deposition. During the deposition, Petitioner offered Deposition Exhibit 1, a composite of documents that are hereby accepted as evidence. Petitioner also offered Deposition Exhibit 2, which is identical to Petitioner's Exhibit P5, and therefore, excluded.

The court reporter filed the four-volume Transcript on July 10, 2008. The post-hearing deposition of Respondent's witness was filed on July 28, 2008.

On August 18, 2008, Respondent filed an Unopposed Motion for Extension of time to file proposed recommended orders. On August 20, 2008, the undersigned granted the motion.

On September 2, 2008, the parties filed their Proposed Recommended Orders.

FINDINGS OF FACT

1. Petitioner is an African-American female who worked for Respondent's Division of Administrative Services from September 1992 through May 2006. Throughout her tenure, Petitioner consistently received favorable personnel evaluations.

2. During her employment, Petitioner received only the legislatively mandated annual state worker pay increases. However, at the time she was terminated in May 2006, Petitioner was the highest paid non-supervisory employee in Respondent's Division of Administrative Services. At that time, Petitioner was making \$70,000.

3. From September 1992 until November 1993, Petitioner worked as Respondent's human resources/relations administrator. Sandy DeLopez, a white female who served as Respondent's Director of Administrative Services, was on the selection team that hired Petitioner for the position of human relations administrator. In that position, Petitioner was charged with the intake and administration of race-based discrimination

complaints within the agency. Petitioner supervised two employees in her position as human relations administrator.

4. In November 1993, Respondent moved Petitioner to the Office of Employee Relations. This move occurred because the former human relations administrator wanted to return to her previous position. There is no evidence that Petitioner objected to being moved to the Office of Employee Relations.

5. In the Office of Employee Relations, Petitioner reported to Ken Wilson, the manager. While under his supervision, Petitioner handled employee grievances and drug testing, as well as maintaining Respondent's Supervisor Assistance System (SAS), a statewide computer program for supervisors.

6. In 1997, Respondent moved Petitioner into the Bureau of Personnel Services. This move was in conjunction with Mr. Wilson's move to the Bureau of Personnel Services as Bureau Chief. Petitioner's assignment was to continue handling special projects, including the drug testing program and the SAS computer program.

7. The Office of Employee Relations became the employee relations section in the Bureau of Personnel Services when Mr. Wilson became Bureau Chief. The Bureau of Personnel Services had other sections, including benefits, pay and classification, and employment. In 1997, the pay and

classification section was combined with the employment section, and referred to thereafter as the organization development section.

8. When Mr. Wilson became Bureau Chief of the Bureau of Personnel Services, his previous job position as manager of employee relations remained vacant after being advertised two times. Petitioner told Mr. Wilson that she was interested in filling his former position but she did not apply for the position either time it was advertised.

9. Mr. Wilson had a very open relationship with Petitioner. Petitioner frequently told Mr. Wilson that she wanted or needed more money. Mr. Wilson never told Petitioner that Ms. DeLopez would not let Petitioner fill his former position as manager of the employee relations section because Ms. DeLopez had a "hard-on" for Petitioner. Mr. Wilson never heard Ms. DeLopez make the following statements: (a) referring to Petitioner as another one of Mr. Wilson's experiments that had failed; and (b) Petitioner could have been one of "Ms. Ever's boys." There is no evidence that Petitioner ever complained to Mr. Wilson about any statement by Ms. DeLopez.

10. From June 1995 to March 1997, Rene Knight, a white female, was manager of the benefits section in the Bureau of Personnel Services. As manager, Ms. Knight was a senior personnel manager with supervision responsibilities.

11. In March 1997, Ms. Knight applied for, and was appointed to, the position of manager of the organization development section. Her title continued to be senior personnel manager.

12. In June 1997, Ms. Knight began dating Jim Hage, a white male, who worked in the one of the areas under Ms. Knight's supervision. For that reason, Ms. Knight requested a job reassignment as manager of the employee relations section. Mr. Wilson granted Ms. Knight's request for the lateral reassignment that did not require advertisement or an increase in pay.

13. In the Bureau of Personnel Services, the pay grade for the manager of employee relations had been downgraded from a pay grade of 26 to a pay grade of 24. Ms. Knight kept her pay grade of 24 after the lateral transfer.

14. Petitioner's pay grade was 25. It would have been a demotion for Petitioner to accept the position of manager of employee relations.

15. After Ms. Knight moved into the position as manager of the employee relations section, her old position was advertised as vacant. Petitioner did not apply for that position.

16. Subsequently, Ms. Knight married Mr. Hage. Later in 2002, Mr. Hage applied for and was appointed as a manager in one of the sections in the Bureau of Personnel Services. There is

no evidence that Petitioner applied for that job when it was advertised. In any event, Mr. Hage's managerial position would have been a demotion for Petitioner.

17. In April 2002, Respondent transferred Petitioner into the Office of Program Support. The move was the result of a need to accommodate a disabled employee, who was put in charge of the drug testing program, formerly part of Petitioner's duties. There is no evidence that Petitioner objected to the transfer.

18. In the Office of Program Support, Petitioner served as a management review specialist and worked under the supervision of Mallory Horne, Jr., then Chief of Staff. Mr. Horne reported directly to Ms. DeLopez. In the Office of Program Support, Petitioner participated in special projects, such as executing the STARS report and working on workers' compensation claims.

19. In 2003, Ms. Knight became the Assistant Chief of Personnel Services just before Mr. Wilson retired. Ms. Knight received this lateral transfer/reassignment because she had served as a manager/supervisor in just about every office in the Bureau of Personnel Services.

20. Ms. Knight was appointed Bureau Chief of the Bureau of Personnel Services when Mr. Wilson retired in May 2003. The Bureau Chief position was a promotion to a higher pay grade for Ms. Knight.

21. The most persuasive evidence indicates that Petitioner was not qualified for the Bureau Chief job. Unlike Ms. Knight, Petitioner did not have five years of experience as a supervisor in the human resources area.

22. In 2002 or 2003, Ms. DeLopez authorized Petitioner's participation in Respondent's Educational Leave with Pay Program. The program allows employees to be full-time students for the final year of their educational programs, with Respondent paying the costs of the programs, as well as their full salary and benefits. Ms. DeLopez also personally authorized at least one semester longer than the usual term for Petitioner because she needed extra time to complete the coursework for a doctorate in instructional systems. Petitioner completed the coursework but did not earn the doctoral degree.

23. When Ms. Knight became Bureau Chief of the Bureau of Personnel Services, Ms. Knight recommended that Cindy Mazzar, a white female, apply for the position of manager of employee relations. Ms. Mazzar applied for and was appointed to the position. Petitioner did not apply for the job and never told Ms. Knight that she was interested in filling the position.

24. In 2004, Kristen Watkins, a white female, applied for and was appointed to the advertised position of human resources manager. Petitioner did not apply for the job. The position of human resources manager would have been a lateral transfer for

Petitioner if she had been interested. It would not have increased her pay grade.

25. In 2006, Petitioner continued to work for Mr. Horne in the Office of Program Support as a management review specialist. In that capacity, Petitioner continued to serve as a special projects person. Among other things, Petitioner helped develop an agency-wide safety program.

26. Toward the end of April 2006, Respondent decided to implement a realignment of some of its administrative offices. The reorganization called for the elimination of the Office of Program Support and for Petitioner to be transferred to the Bureau of Personnel Services, working under Ms. Knight as Bureau Chief, and under Ms. DeLopez as Division Director of Administrative Services.

27. As with any reorganization, Respondent wanted to find a position for Petitioner rather than terminate her employment. However, there is no evidence that there ever was a vacant position to which Petitioner preferred to be assigned rather than moving to personnel services.

28. On April 24, 2006, Petitioner received a telephone call from Ms. DeLopez, asking Petitioner to attend a meeting in Ms. Knight's office. During the meeting, Ms. DeLopez informed Petitioner that due to the realignment, effective May 1, 2006, Petitioner would work in Bureau of Personnel Services with

Ms. Knight performing Petitioner's Annual Performance Evaluation. Petitioner's office furniture would be moved to her new office on May 3, 2006.

29. Petitioner inquired whether the new job assignment was a promotion. Ms. DeLopez responded by commenting that Petitioner already was the highest paid employee in administrative services that was not a Bureau Chief. Ms. DeLopez also stated that when a Bureau Chief position became available, Petitioner could compete for it.

30. On April 25, 2006, Ms. Knight scheduled a meeting with Petitioner to discuss her currently assigned work projects. The meeting was set for 3:00 p.m. on April 26, 2006, in the personnel services conference room.

31. On April 26, 2006, Ms. Knight sent Mr. Horne an e-mail, requesting a copy of Mr. Horne's position description for Petitioner. Ms. Knight also wanted to know Petitioner's job responsibilities and assigned projects with timelines.

32. On April 26, 2006, Petitioner sent Ms. DeLopez an e-mail, requesting an opportunity to discuss the personnel action being taken. Petitioner wanted Ms. DeLopez to know that Petitioner was seeking an opportunity to advance within the agency and that she wanted to discuss further options.

33. Around 1:00 p.m. on April 26, 2006, Petitioner went to Ms. DeLopez' office uninvited and with no appointment.

Ms. DeLopez was working in her office suite alone.

34. Petitioner began talking to Ms. DeLopez about Petitioner wanting to make more money. As the conversation continued, Petitioner became agitated and hostile. When Petitioner would not stop talking, Ms. DeLopez stood up to leave the office. Petitioner, who was standing in the doorway, then stated that she would call 911 if Ms. DeLopez left the office. At that point, Ms. DeLopez felt threatened and decided to leave the room.

35. Petitioner followed Ms. DeLopez down the hall to the office of Lieutenant Colonel Rick Gregory of the Florida Highway Patrol. Ms. DeLopez informed Lt. Col. Gregory that she could not make Petitioner disengage. Lt. Col. Gregory told Petitioner to go back to her office and asked Ms. DeLopez to stay in his office to talk to him.

36. Lt. Col. Gregory went to Petitioner's office a few minutes before 2:00 p.m. He advised Petitioner about a meeting with Ms. Knight that afternoon at 2:00 p.m.

37. In the 2:00 p.m. meeting, Ms. Knight explained that she would be the in-take officer for Petitioner's complaint against Ms. DeLopez. Petitioner stated that she did not want to discuss her complaint with Ms. Knight because both of them were

subordinate to Ms. DeLopez. Petitioner also would not discuss her complaint without having someone else in the room.

Petitioner then told Ms. Knight that Petitioner was leaving the meeting and that Ms. Knight should "just go ahead and call the police." Ms. Knight and Petitioner never had the 3:00 p.m. meeting to discuss Petitioner's new job responsibilities.

38. Later on the afternoon of August 26, 2006, Petitioner had a meeting with Fred Dickinson, Respondent's Executive Director, David Westberry, Respondent's Deputy Executive Director, and Lieutenant Colonel Austin of the Florida Highway Patrol. Petitioner misunderstood the results of this meeting. She erroneously thought the following: (a) the planned move of her office location would be placed on hold; (b) she would not work for Ms. DeLopez or Ms. Knight; and (c) she would contact the Executive Director's office the week of May 8, 2006, to schedule an appointment to explore other options with the agency.

39. On April 28, 2006, Ms. DeLopez sent Petitioner an e-mail. The message requested her work schedule, an outline of her work assignments, and a list of projects or activities that Petitioner was working on for the week of May 1-5, 2006. On May 1, 2006, Petitioner responded with the requested information by e-mail.

40. In a letter to Mr. Westberry dated May 8, 2006, Petitioner described her employment history at the agency and samples of her work, including but not limited to a concept paper relating to technological innovations and workplace performance. The letter stated that Petitioner wanted to discuss employment options within the agency.

41. The May 8, 2006, letter and attached documents were not responsive to the request that Mr. Dickenson and Mr. Westberry made in the August 26, 2008, meeting. The documents did not identify a position or place within the agency where Petitioner could be of value to the organization and benefit Petitioner at the same time.

42. During a meeting on May 8, 2006, Petitioner gave the above referenced letter and documents to Mr. Westberry. Because Petitioner could not identify another vacant position in the agency that she preferred, Mr. Westberry directed Petitioner to coordinate with Ms. Knight about future job duties.

43. On May 11, 2006, Petitioner participated in a meeting in Mr. Westberry's office where Ms. Knight and Petitioner sat together on a love seat. Later, Petitioner falsely accused Ms. Knight of having intentionally kicked Petitioner when Ms. Knight crossed or uncrossed her legs.

44. In a letter dated May 11, 2006, from Petitioner to Mr. Westberry, Petitioner complained that Ms. DeLopez had

subjected Petitioner to a hostile work environment, disparate hiring and promotional practices, and a form of retaliation. The letter states that Petitioner's complaint stems from an extended period of time during her employment and most recently on April 26, 2006. The letter requested that someone other than Ms. Knight be assigned as the complaint in-take officer. The letter did not specify race, gender, age, or any specific form of discrimination as a basis for the alleged mistreatment.

45. In a letter dated May 12, 2006, from Mr. Westberry to Petitioner, he states that he received Petitioner's complaint naming Ms. DeLopez and Ms. Knight as parties. In the letter, Mr. Westberry directed Petitioner to go to Maggie Lamar, Senior Consultant in the employee relations section, who would serve as the in-take officer and investigator of Petitioner's complaint. Mr. Westberry advised Petitioner that Ms. Lamar would report directly to Judd Chapman, as Respondent's counsel, and Mr. Dickenson.

46. In the mean time, Mr. Westberry directed Petitioner to continue under the direct supervision of Ms. Knight. Mr. Westberry specifically directed Petitioner to contact Ms. Knight prior to close of the business day to clarify work assignments and related responsibilities.

47. On May 12, 2006, Petitioner sent Mr. Westberry a letter. In the letter, Petitioner states that she had contacted

Ms. Knight to clarify job responsibilities. According to the letter, Ms. Knight had not provided Petitioner with information about Petitioner's work assignments and related responsibilities. The letter states Petitioner's concerns that Ms. Knight will abuse her authority as Petitioner's supervisor. The letter includes Petitioner's requests as follows: (a) that Respondent have Ms. Knight clarify Petitioner's work assignments and related responsibilities in writing pending completion of the investigation of Petitioner's complaint; and (b) that Respondent provide a witness during any meeting or conversations between Petitioner and Ms. Knight.

48. In a letter dated May 16, 2006, Mr. Westberry acknowledged Petitioner's May 12, 2006, letter. Mr. Westberry then proceeded to clarify his previous instructions as follows: (a) Petitioner should attend a meeting with Ms. Knight and Mr. Chapman at 11:00 a.m. on May 17, 2006; and (b) In the absence of any documented threat to Petitioner's personal safety, Respondent would not provide a witness to document day-to-day discussions between Petitioner and Ms. Knight. Finally, Mr. Westberry reminded Petitioner of the appointment of Ms. Larmar as the in-take officer for Petitioner's complaint.

49. On May 16, 2006, Ms. Knight sent Petitioner an email. The e-mail alleged that Petitioner had not been at work and had not requested sick leave or any other kind of leave on May 15,

2006. Ms. Knight had left Petitioner several written and telephone messages at Petitioner's office. Ms. Knight called Petitioner's home. Petitioner did not respond to any of the messages on the day in question. Ms. Knight's e-mail urged Petitioner to contact Ms. Knight as soon as possible to discuss work assignments.

50. Petitioner responded to Ms. Knight's May 16, 2006, e-mail by requesting a 4:00 p.m. meeting on May 17, 2006. On May 17, 2006, Ms. Knight sent Petitioner an e-mail, confirming a meeting at 4:00 p.m. in Petitioner's office with Ms. Knight and Mr. Chapman.

51. During the 4:00 p.m. meeting on May 17, 2006, Petitioner gave Ms. Knight a written statement. The statement asserts, in part, that Petitioner considered the meeting to be a continued abuse of authority by Ms. DeLopez and Ms. Knight with the intent to adversely affect Petitioner's employment. During the meeting, Petitioner for the first time accused Ms. Knight of kicking Petitioner on May 11, 2006, in Mr. Westberry's office. It was during this meeting that Ms. Knight first knew about Petitioner's unhappiness with being transferred to the Bureau of Personnel Services.

52. On May 17, 2006, Petitioner sent Ms. Knight an e-mail referencing the 4:00 p.m. meeting. The message provided Ms. Knight with Petitioner's schedule for May 18 and 19, 2006.

Petitioner stated she was available to meet with Ms. Knight at her convenience within the confines of that schedule.

53. On May 19, 2006, Ms. Knight visited Petitioner's office at 2:45 p.m. because Ms. Knight wanted to make sure Petitioner knew about the meeting scheduled with Ms. Knight on May 23, 2006, at 9:30 a.m. During the visit, Ms. Knight and Petitioner discussed their professional relationship. Ms. Knight advised Petitioner that everything would work out as long as Petitioner refrained from making further false allegations. Petitioner then said she knew Ms. Knight had not meant to bump Petitioner with her foot in the May 11, 2006, meeting in Mr. Westberry's office. Ms. Knight answered that if Petitioner knew it was an accident, why did Petitioner accuse Ms. Knight of kicking her in front of Judd Chapman in the May 17, 2006, meeting.

54. After the meeting with Ms. Knight on May 19, 2006, Petitioner sent an e-mail to Kay Pietrewicz, Ms. Knight's personal assistant. The e-mail states that Petitioner wanted to change the time of the 9:30 a.m. meeting on May 23, 2006, with Ms. Knight because it conflicted with an unspecified commitment that Petitioner wanted to honor. The message went on to express Petitioner's view of her employment issues, including details of the alleged kicking incident and subsequent conversations with Ms. Knight regarding that incident.

55. After work on May 19, 2006, Ms. Knight got a call at home from Ms. Pietrewicz. During that conversation, Ms. Knight learned about Petitioner's e-mail to Ms. Pietrewicz. Ms. Knight subsequently sent Petitioner an e-mail, giving her a direct order to cease communications relative to her employment issues with any employee except Ms. Knight and Ms. Lamar. Ms. Knight advised Petitioner that the meeting at 9:30 a.m. on May 23, 2006, would take place as scheduled.

56. On May 23, 2006, Petitioner sent Ms. Knight an e-mail to recap the meeting they had earlier in the day. The e-mail indicates that the following topics were discussed during the meeting: (a) the physical move of Petitioner's office furniture on May 24, 2008; (b) the signing of certain administrative forms; (c) the reduction of Petitioner's annual leave balance by eight hours because Petitioner had not been at work on May 15, 2006; (d) the drafting of Petitioner's position description; (e) Petitioner's volunteer/mentor activities; (f) Ms. Knight's direction for Petitioner to refrain from sending e-mails like the one she sent to Ms. Pietrewicz on May 19, 2008; (g) Petitioner's dissatisfaction with her work assignment; (h) Petitioner's computer skills; and (i) Petitioner's project assignment to begin updating the SAS.

57. In a letter dated May 24, 2006, Mr. Westberry advised Petitioner that her employment was terminated effective at the

close of business that day. Mr. Westberry made the decision to fire Petitioner 12 days after referring Petitioner to Ms. Lamar.

58. At the time of Petitioner's termination, there was no pending complaint because Petitioner had not contacted Ms. Lamar. Instead of discussing her complaint with the designated in-take officer, Petitioner continued to demonstrate unwillingness to accept the responsibilities assigned to her as a result of the agency reorganization.

59. Three law enforcement officers went to Petitioner's office around 5:00 p.m. on May 24, 2006. They delivered the termination letter and offered to escort Petitioner out of building. Respondent uses officers to escort terminated employees when the agency has concerns that termination might be less than a mutual parting of the ways.

60. In this case, Petitioner refused to sign the termination letter or to leave the building. Petitioner inquired about what would happen if she did not leave. After hearing the response to her question, Petitioner stated that the officer would have to arrest her and take her to jail.

61. Next, Petitioner called her husband and the Tallahassee Democrat. When Lt. Col. Austin arrived, he talked to Petitioner alone. He was unsuccessful in persuading Petitioner to leave the premises.

62. When the officers re-entered Petitioner's office, Petitioner confirmed that she wanted to be arrested rather than leave the office voluntarily. The officers then put the handcuffs on Petitioner and began to inventory her purse.

63. Lt. Col. Austin reentered the office, accompanied by Petitioner's husband. After removing the handcuffs, all of the officers left the office so that Petitioner could talk to her husband alone.

64. The officers continued to wait for Petitioner to leave the building. Other officers and Petitioner's pastor arrived to offer assistance in persuading her to exit the building. Petitioner eventually left the premises without being arrested.

65. On May 24, 2006, Ms. DeLopez was afraid for her personal safety after the termination letter was delivered to Petitioner. Ms. DeLopez requested that Mr. Westberry escort her to her car at the end of the workday. Mr. Westberry complied with the request.

66. On May 25, 2008, Petitioner attempted to call Ms. Lamar by telephone. In a letter dated May 26, 2008, Petitioner requested Ms. Lamar to move forward with the processing of her complaint against Ms. DeLopez and Ms. Knight for retaliatory and harassing behaviors toward Petitioner. Petitioner's letter did not allege that the behavior of

Ms. DeLopez and Ms. Knight was due to a specific type of unlawful discrimination.

CONCLUSIONS OF LAW

67. 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 (2008).

68. Pursuant to Section 760.10(1), Florida Statutes (2006), it is unlawful for an employer to discharge, refuse to hire, or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment, based on the employee's race, gender, or national origin.

69. Florida law also prohibits retaliation against any person who opposes an unlawful employment practice or because a person complains about such a practice. See § 760.10(7), Fla. Stat. (2006).

70. Federal discrimination law may be used for guidance in evaluating the merits of claims arising under Section 760.10, Florida Statutes (2006). See Brand v. Florida Power Corporation, 633 So. 2d 504, 509 (Fla. 1st DCA 1994).

71. Section 760.11(1), Florida Statutes (2006), requires that a complainant file a complaint with FCHR within 365 days of the alleged violation. In this case, Petitioner filed her charge with FCHR on December 4, 2006. Therefore, any claim of

discrimination arising before December 5, 2005 is barred as untimely.

72. Petitioner claims that she was not aware of the continuing nature of Respondent's unlawful practice of failing to promote her based on racial discrimination until she made her complaint against Ms. DeLopez and Ms. Knight in May 2006. According to Petitioner, Respondent discriminated against her based on race every time a white male or female employee received a reassignment or a promotion beginning in 1997.

73. Petitioner's argument is unpersuasive. Given Petitioner's background in human resources, she was, or should have been, aware of her civil rights each time she did not receive a job after expressing an interest in the job. Additionally, Petitioner cannot claim discrimination because: (a) she did not fill out applications for jobs that Respondent advertised; (b) she did not express an interest in some jobs that Respondent filled by reassignment; (c) some of the jobs would have been a demotion with a lower pay grade; and (d) some of the jobs required more supervision experience than Petitioner had.

74. Petitioner's charge is timely in regards to the following allegations of racial discrimination in April and May 2006: (a) Respondent failed to promote her; (b) Respondent subjected her to a hostile work environment; (c) Respondent

wrongfully terminated her employment; and (d) Respondent unlawfully retaliated against her for filing a complaint. Each claim is discussed below.

75. In McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-803 (1973), the Supreme Court articulated a burden of proof scheme for cases involving allegations of discrimination, where the complainant relies on circumstantial evidence. In St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506-507 (1993), the Supreme Court reiterated and refined the McDonnell Douglas legal analysis.

76. Pursuant to this analysis, Petitioner has the initial burden of establishing by a preponderance of the evidence a prima facie case of unlawful discrimination and retaliation. See Texas Dep't of Cmty Affairs v. Burdine, 450 U.S. 248 (1981).

77. If Petitioner succeeds in making a prima facie case, then the burden shifts to Respondent to articulate some legitimate, non-discriminatory reason for its complained-of conduct. See Hicks, 519 U.S. at 506. If Respondent meets its burden, Petitioner must then prove that the reason articulated by Respondent was a pretext for discriminatory action. See Hicks, 519 U.S. at 515-516.

Failure to Promote

78. In order to prove a prima facie case of failure to promote, Petitioner must show the following: (a) she is a

member of a protected group, (b) she was qualified for and applied for the promotion; (c) she was rejected despite her qualifications; and (d) other employees with equal or lesser qualification who were not members of the protected group were promoted. See Walker v. Mortham, 158 F.3rd 1177 (11th Cir. 1998).

79. Petitioner has not met her prima facie burden relative to her 2006 failure to promote claim because she never identified, expressed an interest in, or applied for a vacant position that she preferred over being assigned to work under the supervision of Ms. DeLopez and Ms. Knight. Respondent was not required to create a position, at the same or higher pay grade, in another area for Petitioner. Under the facts of this case, Petitioner did not apply for a promotion or get rejected for that promotion and Respondent did not give the job to a person outside her protected class employee who was equally or lesser qualified.

Hostile Work Environment

80. To prove that Respondent discriminated against Petitioner by subjecting her to a hostile work environment, Petitioner must prove the following prima facie case: (a) she is a member of a protected group; (b) she was subjected to unwelcome harassment or a hostile work environment; (c) the harassment or hostile work environment was based on her race;

(d) the harassment or hostile work environment was sufficiently severe or pervasive to alter her working conditions and create an abusive environment; and (e) Respondent knew or should have known of the harassment or hostile work environment, failed to correct the harassment, and therefore is liable under a theory of direct or vicarious liability. See Razner v. Wellington Regional Medical Center, Inc., 837 So. 2d 437 (Fla. 4th DCA 2002); Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1275 (11th Cir. 2002).

81. In this case, Petitioner was not subjected to a hostile work environment by Ms. Knight or Ms. DeLopez. To the contrary, from the beginning, Petitioner resented Ms. Knight's attempts to assume the role as Petitioner's supervisor. Petitioner was insulted when Ms. Knight asked Petitioner about her work schedule and projects. Petitioner argued with Ms. Knight about Petitioner's absence on April 15, 2006, without explaining where she was and what she was doing on that day. Petitioner found fault with every inquiry and took advantage of every opportunity to delay her transition to the new job at the same pay grade because she felt she deserved a position that paid more money.

82. Petitioner also resented the fact that Ms. DeLopez would not create a higher paying job for Petitioner. Instead of Ms. DeLopez being hostile during the April 2006 incident, it was

Petitioner who became agitated, hostile, and threatening to Ms. DeLopez.

83. Any feelings of animosity that Petitioner perceived were unwarranted. Mr. Westberry properly referred Petitioner's complaint to an uninvolved in-take officer. Mr. Westberry correctly informed Petitioner he could not reassign her unless she identified a vacant position she preferred. Absent some threat of harm to Petitioner, Mr. Westberry rightly refused to require a witness to conversations with Ms. Knight or to require that all such communications be written.

84. It is impossible to say that the alleged harassment or hostile work environment was based on race. The greater weight of the evidence indicates that Petitioner was unhappy at work because the reorganization required her to move back to the Bureau of Personnel Services without a promotion and to work under a supervisor that Petitioner thought was not as qualified as herself.

85. From a strictly objective point of view, Petitioner's work environment after April 2006 was not sufficiently severe or pervasive to alter her working conditions and create an abusive environment. Respondent's refusal to meet Petitioner's demands resulted in Petitioner having a negative attitude that may have subjectively altered her working conditions and interfered with her ability to perform her job. In other words, Petitioner, not

Respondent, was responsible for her discontent in the work environment.

86. Mr. Westberry knew Petitioner was unhappy about the move to the new job. Mr. Westberry did the best that he could to encourage Petitioner to move forward with her complaint by taking it to Ms. Lamar, to work as assigned during the investigation, and/or to find a position she preferred. Petitioner did not take advantage of any of these opportunities. Under these circumstances, Respondent cannot be vicariously liable.

Unlawful Discharge

87. To prove a prima facie case of wrongful termination, Petitioner must prove the following: (a) she is a member of a protected class; (b) she was qualified for the job; (c) she was terminated from employment; and (d) Respondent treated similarly situated non-black employees more favorably. See Holified v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997).

88. Petitioner was qualified for the job to which Respondent reassigned her. It is impossible to know whether she was qualified for a position that was never identified. Additionally, there is no evidence that Respondent treated similarly situated non-black employees more favorably, i.e. no white employee ever demanded and received a job that had to be created for that employee. Most importantly, Respondent's

reason for terminating Petitioner was that she refused to make a transition to her new job as set forth above.

Retaliation

89. To prove a prima facie claim of retaliation, Petitioner must prove the following, (a) she engaged in a statutorily protected expression; and (b) she suffered an adverse employment action such as dismissal. See Harper v. Blockbuster Entertainment Corp., 139 F.3d 1385, 1388 (11th Cir. 1998).

90. Petitioner arguably met the requirement to establish a claim of retaliation. Petitioner gave Mr. Westberry a letter claiming discrimination without specifying the basis. Mr. Westberry terminated Petitioner's employment 12 days later.

91. There is no evidence that Mr. Westberry fired Petitioner because she filed her complaint. Instead, he discharged Petitioner because he realized that she was not going to follow his instructions to take her complaint to Ms. Lamar and to continue under the supervision of Ms. Knight pending completion of the investigation.

92. Respondent sent three law enforcement officers to escort Petitioner out of the building on the day of her discharge. Respondent takes such precautions when the discharge is likely to be less than amicable. In this case, Petitioner's

subsequent behavior proved that Respondent was correct in anticipating Petitioner's anger at being discharged.

93. Petitioner presented no evidence to show that Respondent's reason for terminating her was a pretext for unlawful retaliation. Therefore, Petitioner's retaliation claim is without merit.

94. During the hearing, Petitioner presented no evidence of discrimination based on age. Accordingly, age discrimination has not been considered here.

RECOMMENDATION

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

RECOMMENDED:

That Florida Commission on Human Relations dismiss the Petition for Relief.

DONE AND ENTERED this 21st day of October, 2008, in Tallahassee, Leon County, Florida.



SUZANNE F. HOOD
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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.