STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GLORIA J. BIAS-GIBBS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 07-4785
	)	
JUPITER MEDICAL CENTER,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing by video teleconference on December 11, 2007, at sites in Tallahassee and West Palm Beach, Florida.

APPEARANCES

For Petitioner: Gloria Jean Bias-Gibbs, pro se
570 West 5th Street
Riviera Beach, Florida 33401

For Respondent: Gregory D. Cook, Esquire
FitzGerald Mayans & Cook, P.A.
515 North Flagler Drive, Suite 900
West Palm Beach, Florida 33402

STATEMENT OF THE ISSUE

The issue in this case is whether Respondent unlawfully discriminated against Petitioner on the basis of her race in violation of the Florida Civil Rights Act, when Petitioner was an employee of Respondent.

PRELIMINARY STATEMENT

On or before September 22, 2006, Petitioner Gloria J. Bias-Gibbs filed a Charge of Discrimination, which made it way to the Florida Commission on Human Relations ("FCHR") for investigation. In her Charge, Ms. Bias-Gibbs claimed that Respondent Jupiter Medical Center had committed numerous acts of unlawful racial discrimination against her during her time as an employee of the hospital.

On September 13, 2007, after conducting an investigation into Ms. Bias-Gibbs' allegations, the FCHR issued a "no cause" determination, finding the accusations of racial discrimination to be without merit. Ms. Bias-Gibbs elected to pursue administrative remedies, timely filing a Petition for Relief with the FCHR on or about October 15, 2007. The FCHR transmitted the Petition for Relief to the Division of Administrative Hearings on October 16, 2007, and an administrative law judge ("ALJ") was assigned to the case. The ALJ scheduled the final hearing for December 11, 2007.

At the hearing, Ms. Bias-Gibbs testified on her own behalf and presented Gina Daher, a former employee of Respondent, as a supporting witness. In addition, Petitioner's Exhibit 1 was admitted into evidence.

During its case, Respondent called as witnesses Beth Suriano, Joyce Stokes, and Gail O'Day, each of whom was, as of

the hearing, a current employee of Respondent. Respondent also introduced (as Respondent's Exhibits 8 and 9, respectively) the depositions of Ms. Bias-Gibbs and Janet Sparks, the latter being another former employee of Respondent. Respondent's Exhibits 1 through 7 were received in evidence as well.

The final hearing transcript was filed on February 12, 2008. Respondent timely filed a Proposed Recommended Order before the deadline established at hearing, which was March 28, 2008. Ms. Bias-Gibbs did not file a Proposed Recommended Order.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2007 Florida Statutes.

FINDINGS OF FACT

1. From 1991 until she resigned in November 2005, Petitioner Gloria J. Bias-Gibbs ("Bias-Gibbs") worked for Respondent Jupiter Medical Center ("JMC") in several different positions, which were mostly clerical in nature. Starting in 2001, and continuing throughout the time period relevant to this case, Bias-Gibbs' job was to perform "chart prep" in the Same Day Surgery unit, which is within JMC's Surgical Services Department.

2. As a chart prep employee, Bias-Gibbs' task was to assemble patients' charts for the medical personnel. During the time she held the chart prep position, Bias-Gibbs was the only person who occupied it. Volunteers had performed the chart prep

duties before Bias-Gibbs assumed them, and, after she resigned, volunteers once again were given the chart prep duties to perform.

3. Bias-Gibbs' immediate supervisor in Same Day Surgery was Janet Sparks, the Clinical Manager. Ms. Sparks, in turn, reported to Beth Suriano, the Director of Surgical Services. Ms. Sparks and Ms. Suriano are white women; Bias-Gibbs is a black woman.

4. Not long after she began her tenure as a chart prep, Bias-Gibbs began to believe that she was a victim of racial discrimination at work. In particular, she felt that Ms. Sparks was a racist who repeatedly took adverse action against her solely because she is black.

5. The many allegedly discriminatory acts about which Bias-Gibbs presently complains can be divided into three main categories: (a) denials of her requests for promotion or transfer to another position; (b) Ms. Sparks' conduct; and (c) refusals to provide training, most notably in relation to a computer program known as "Fast Forms," about which Bias-Gibbs alleges she received inadequate instruction.

6. The Requests for Transfer.

Between April 16, 2001, and February 22, 2005, Bias-Gibbs submitted sixteen job transfer applications, seeking positions at JMC that she believed were more in keeping with her

qualifications than chart prep. None of these applications was approved. Bias-Gibbs does not know the identities, racial characteristics, or qualifications of any of the persons whom JMC hired for the sixteen positions Bias-Gibbs sought. Because she applied for these positions and did not get them, however, Bias-Gibbs feels that she was discriminated against.

7. In addition, Bias-Gibbs once sought to transfer to another position in the Surgical Services Department. The job of Patient Access Specialist was given, however, to another employee of JMC, Joyce Stokes, who assumed the position some time in 2004. Unlike Bias-Gibbs, Ms. Stokes (who happens to be white) had taken a medical terminology course and examination. Because proficiency in medical and surgical terminology is desirable for the position in question, Ms. Stokes was more qualified than Bias-Gibbs to be a Patient Access Specialist.

8. Ms. Sparks' Conduct.

Bias-Gibbs' complaints about Janet Sparks, whom she calls a "racist," revolve around allegations that Ms. Sparks forced Bias-Gibbs to sit in a back room while on the job; made racially insensitive remarks concerning Bias-Gibbs' appearance (specifically, her hair); refused to transfer Bias-Gibbs to a different position in the Surgical Services Department (the incident discussed above); kept an overly watchful eye on Bias-Gibbs while she was working; and generally declined to give

Bias-Gibbs more challenging assignments in addition to chart prep.

9. Work Station. Bias-Gibbs worked in a room apart from the secretaries in the unit. Her work area was neither "on the floor" nor in public view. While she believes that this "back room" placement was discriminatory, Bias-Gibbs' job as a chart prep employee did not require her to sit "out front." There is no evidence that Bias-Gibbs was singled-out for different treatment regarding her work station. To the contrary, after Bias-Gibbs resigned, the chart prep work continued to be done in the same room where Bias-Gibbs had labored, with the same supplies that were available to Bias-Gibbs while she was employed.

10. Insensitive Remarks. Bias-Gibbs does not believe that she was harassed because of her race. She does complain, however, about derogatory remarks she attributes to Ms. Sparks. According to Bias-Gibbs, when Bias-Gibbs wore her hair in braids to work, Ms. Sparks made comments to the effect that she (Bias-Gibbs) looked like Whoopi Goldberg. In addition, Ms. Sparks once told Bias-Gibbs that she wished she (Ms. Sparks) were black because, if she were black, then it would be easier to take care of her hair. The undersigned takes Bias-Gibbs at her word that these quips were offensive and hurtful to her (although she

never told Ms. Sparks that the comments at issue made her uncomfortable).

11. To infer, however, that racial animus motivated these comments (there being no direct evidence of discriminatory intent) would require that the words be given a very mean connotation (and the speaker absolutely no benefit of the doubt) because, viewed objectively, the statements appear to be, at worst, inconsiderate, unkind, or rude. Ultimately, there is insufficient evidence upon which to base a finding (or to infer) that these remarks were anything but workplace banter of the sort that anti-discrimination laws are not designed to reach.

12. "Excessive" Supervision. Bias-Gibbs believes that Ms. Sparks was hypervigilant about watching her work, which made Bias-Gibbs nervous or uncomfortable. Although she attributes this watchfulness to racism, Bias-Gibbs conceded, when pressed, that it was not discriminatory for her supervisor to keep an eye on her at work. There is no evidence, in any event, that Ms. Sparks subjected Bias-Gibbs to closer scrutiny than other employees, much less that she treated Bias-Gibbs differently in this regard based on her race.

13. Underutilization. As an overarching complaint about Ms. Sparks, Bias-Gibbs believes that her supervisor generally refused to allow Bias-Gibbs to perform the kind of work that would make full use of her skills. At most, however, the

evidence shows that Ms. Sparks and Bias-Gibbs had different opinions about Bias-Gibbs' potential for taking on other responsibilities. There is no evidence that Ms. Sparks' opinion, which was that Bias-Gibbs should continue working in chart prep, was racially based.

14. Inadequate Training.

Bias-Gibbs felt that she was discriminated against because other individuals were given more training than she was on using the Fast Forms computer program. Bias-Gibbs *did* receive instructions on using Fast Forms, however, which were sufficient to enable her to look up patients' names in the database——the only function of the program that was relevant to, and helpful in the performance of, her duties. The secretaries who used Fast Forms were provided more training in the use of the program, it is true, but their duties were different than Bias-Gibbs's duties, and hence they used Fast Forms for reasons in addition to retrieving names. The secretaries, in short, were provided more training than Bias-Gibbs, not because the latter is black, but because, as secretaries, they needed more training than Bias-Gibbs. The bottom line: there is no persuasive evidence that Bias-Gibbs was given inadequate training——period.

15. At all times during Bias-Gibbs' tenure as an employee of JMC, the hospital had an anti-discrimination policy, an anti-harassment policy, an equal employment policy, and a grievance

policy, which were available to all employees. Bias-Gibbs was aware of these policies, yet she never made any allegations of racial discrimination or harassment, disparate racial treatment, or racial comments to Ms. Sparks, Ms. Suriano, or anyone else. Similarly, she never used the grievance procedure to complain that she had been denied a promotion or transfer because of her race.

16. Bias-Gibbs resigned her position at JMC in November of 2005. Although she *now* maintains that she felt compelled to resign her position because she was denied opportunities to advance at the hospital (and because she needed a job that paid more money), *at the time* Bias-Gibbs informed others that she was leaving her position in Same Day Surgery because she had gotten a better-paying job at the post office.

17. Bias-Gibbs filed a Charge of Discrimination against JMC at some point on or after July 19, 2006. (She signed the charging document on September 22, 2006, but there is an inscription on the instrument indicating that it was filed on July 19, 2006. There is no evidence explaining this discrepancy.)

Ultimate Factual Determinations

18. Taken as a whole, the evidence in this case is either insufficient to establish that JMC discriminated unlawfully against Bias-Gibbs on the basis of her race; or it proves,

affirmatively, that JMC did *not*, in all likelihood, unlawfully discriminate against her. Either way, it is determined, as a matter of ultimate fact, that JMC did not violate the civil rights laws in its treatment of Bias-Gibbs while she was an employee of JMC.

CONCLUSIONS OF LAW

19. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to Sections 120.569, and 120.57(1), Florida Statutes.

20. The Florida Civil Rights Act of 1992 ("FCRA") is codified in Sections 760.01 through 760.11, Florida Statutes. When "a Florida statute [such as the FCRA] is modeled after a federal law on the same subject, the Florida statute will take on the same constructions as placed on its federal prototype." Brand v. Florida Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994). Therefore, the FCRA should be interpreted, where possible, to conform to Title VII of the Civil Rights Act of 1964, which contains the principal federal anti-discrimination laws.

21. Section 760.10, Florida Statutes, provides, in relevant part:

> (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.

22. Under Section 760.11(1), Florida Statutes, any person aggrieved by an unlawful employment practice may file a complaint with the FCHR within 365 days after the alleged violation. Failure to do so bars the claim under state law. See Greene v. Seminole Elec. Co-op, Inc., 701 So. 2d 646, 648 (Fla. 5th DCA 1997)(As a statute of limitations, Section 760.11(1) bars claims arising from acts that occurred more than one year before the charge was filed.); see also St. Petersburg Motor Club v. Cook, 567 So. 2d 488, 489 (Fla. 2d DCA 1990).[1]

23. The charge-filing period for a claim arising from a discrete act of alleged discrimination——e.g. termination, failure to promote, demotion, or refusal to hire——begins to run at the moment the act occurs, which is on the day it happens. See Maggio v. Dep't of Labor & Empl. Sec., 910 So. 2d 876, 879 (Fla. 2d DCA 2005); see also National R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 110, 122 S. Ct. 2061, 2070-71, 153 L. Ed. 2d 106, 120 (2002)("A discrete retaliatory or discriminatory act 'occurred' on the day it 'happened.' A party, therefore, must file a charge within [the specified number of days after] the date of the act or lose the ability to recover for it."). Pre-

limitation acts can be used, where relevant, "as background evidence in support of a timely claim," but they cannot themselves form the basis for liability. Morgan, 536 U.S. at 113, 122 S. Ct. at 2072, 153 L. Ed. 2d at 122; see also, Clarke v. Winn Dixie Stores, Inc., 2007 U.S. Dist. LEXIS 75980 at *9 (S.D. Fla. 2007)(failure to promote claims that involve events which occurred more than 365 days prior to the filing of the complaint with the FCHR dismissed as untimely).

24. Here, the conclusion is inescapable that any action of JMC that could have constituted the discrete act of refusing to promote or transfer Bias-Gibbs happened more than 365 days prior to July 19, 2006. Her last request for transfer was made, after all, on February 22, 2005, some 17 months before the earliest possible date her Charge of Discrimination was filed. Thus, it is concluded that, to the extent she is alleging discrimination based on JMC's alleged refusals to transfer or promote her, Bias-Gibbs' claim is time-barred and must be dismissed with prejudice for that reason.

25. Even if Bias-Gibbs' Charge of Discrimination were timely filed in all respects, she still would not be entitled to relief because her claim is without merit, for the alternative, and independently dispositive, reasons set forth below.

26. A complainant alleging unlawful discrimination may, of course, prove her case using direct evidence of discriminatory

intent. Direct evidence is evidence that, if believed, would prove the existence of discriminatory intent without resort to inference or presumption. Denney v. City of Albany, 247 F.3d 1172, 1182 (11th Cir. 2001); Holifield v. Reno, 115 F.3d 1555, 1561 (11th Cir. 1997). Courts have held that "only the most blatant remarks, whose intent could be nothing other than to discriminate," satisfy this definition. See Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d 1354, 1358-59 (11th Cir. 1999)(internal quotations omitted), cert. denied, 529 U.S. 1109, 120 S. Ct. 1962, 146 L. Ed. 2d 793 (2000). Often, such evidence is unavailable, and in this case, Bias-Gibbs presented none.

27. As an alternative to relying exclusively upon direct evidence, the law permits a complainant to profit from an inference of discriminatory intent, if she can adduce sufficient *circumstantial* evidence of discriminatory animus——such as proof that the charged party treated persons outside of the protected class, who were otherwise similarly situated, more favorably than the complainant was treated. Such circumstantial evidence, when presented, constitutes a prima facie case.

28. In McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-803 (1973), the U.S. Supreme Court articulated a scheme for analyzing employment discrimination claims where, as here, the complainant relies upon circumstantial evidence of discriminatory intent. Pursuant to this analysis, the

complainant has the initial burden of establishing by a preponderance of the evidence a prima facie case of unlawful discrimination. Failure to establish a prima facie case of discrimination ends the inquiry. See Ratliff v. State, 666 So. 2d 1008, 1012 n.6 (Fla. 1st DCA), aff'd, 679 So. 2d 1183 (Fla. 1996)(citing Arnold v. Burger Queen Systems, 509 So. 2d 958 (Fla. 2d DCA 1987)). If, however, the complainant succeeds in making a prima facie case, then the burden shifts to the accused employer to articulate a legitimate, non-discriminatory reason for its complained-of conduct. This intermediate burden of production, not persuasion, is "exceedingly light." Turnes v. Amsouth Bank, N.A., 36 F.3d 1057, 1061 (11th Cir. 1994). If the employer carries this burden, then the complainant must establish that the proffered reason was not the true reason but merely a pretext for discrimination. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 516-518, 113 S. Ct. 2742, 2752-53, 125 L. Ed. 2d 407, 422-23 (1993). At all times, the "ultimate burden of persuading the trier of fact that the [charged party] intentionally discriminated against [her]" remains with the complainant. Silvera v. Orange County Sch. Bd., 244 F.3d 1253, 1258 (11th Cir. 2001), cert. denied, 534 U.S. 976, 122 S. Ct. 402, 151 L. Ed. 2d 305 (2001), reh'g denied, 535 U.S. 1013, 122 S. Ct. 1598, 152 L. Ed. 2d 513 (2002).

29. To establish a prima facie case of discrimination on failure-to-promote (or transfer) grounds, Bias-Gibbs needed to show that: (1) she is a member of a protected class; (2) she was qualified for and applied for the promotion; (3) she was rejected despite these qualifications; and (4) other equally or less qualified employees who were not members of the protected class were promoted. See Mathis v. Wachovia Bank, 255 Fed. Appx. 425, 429 (11th Cir. 2007); Wu v. Thomas, 847 F.2d 1480, 1483 (11th Cir. 1988), cert. denied, 490 U.S. 1006, 109 S. Ct. 1641, 104 L. Ed. 2d 156 (1989).

30. While there is no dispute that Bias-Gibbs belongs to a protected class and that she was rejected for the positions for which she applied, there is also no persuasive evidence that Bias-Gibbs was qualified for any of the positions.[2] Moreover, Bias-Gibbs presented no evidence that other equally (or less) qualified employees who were not members of the protected class[3] were transferred or promoted, leaving unproved yet another element of the prima facie case.

31. Bias-Gibbs failed, therefore, to make out a prima facie case of racial discrimination on failure-to-promote (or transfer) grounds, ending the inquiry. Because the burden never shifted to JMC to articulate a legitimate, non-discriminatory reason for its conduct, it was not necessary above to make any findings of fact in this regard.

32. To establish a prima facie case of discriminatory discipline or treatment, Bias-Gibbs was required to show that: (1) she is a member of a protected class; (2) she was subjected to an adverse employment action; (3) her employer treated similarly situated employees outside of her protected class more favorably than she was treated; and (4) she was qualified to do the job. Mathis, 255 Fed. Appx. at 429-30; Burke-Fowler v. Orange County, Fla., 447 F.3d 1319, 1323 (11th Cir. 2006).

33. Once again, it is not disputed that Bias-Gibbs belongs to a protected class, or that she was qualified for the chart prep position. Bias-Gibbs failed, however, to produce evidence showing that any employee outside of the protected class, who was similarly situated to her in all relevant aspects, was treated more favorably than she was. Likewise, Bias-Gibbs offered no persuasive evidence that she suffered *legally cognizable* adverse employment action.

34. Regarding the third element of a prima facie case of disparate treatment, which necessitates a finding that Bias-Gibbs' employer treated similarly situated employees outside of the protected class more favorably than she was treated, the courts have held that "'the [complainant] must show that [s]he and the employees [outside of the protected class] are similarly situated in all relevant respects.'" Mathis, 255 Fed. Appx. at 430 (quoting Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir.

1997)). The comparator must be nearly identical to the complainant to prevent courts from second-guessing a reasonable decision by the employer. Id.; see also, Cooley v. Great Southern Wood Preserving, 138 Fed. Appx. 149, 157 (11th Cir. 2005).

35. Bias-Gibbs was the only individual in the chart prep position. No one, therefore, was similarly situated to her in all relevant respects. But even if there were a similarly situated employee to whom Bias-Gibbs could be compared, there is no persuasive evidence that JMC treated non-minorities *differently*, much less *better*, than Bias-Gibbs. The third element of a prima facie case of disparate treatment simply was not met.

36. A prima facie case also requires proof of "adverse employment action." "An adverse employment action [for the purposes of a discrimination claim] is an ultimate employment decision, such as discharge or failure to hire, or other conduct that alters the employee's compensation, terms, conditions, or privileges of employment, deprives him or her of employment opportunities, or adversely affects his or her status as an employee." Gupta v. Fla. Bd. of Regents, 212 F.3d 571, 587 (11th Cir. 2000), cert. denied, 531 U.S. 1076, 121 S. Ct. 772, 148 L. Ed. 2d 671 (2001) (internal quotations and citations omitted). "[The Eleventh Circuit] has never adopted a bright-

line test for what kind of effect on the [complainant's] 'terms, conditions, or privileges' of employment the alleged discrimination must have for it to be actionable; nor would such a rigid test be proper." Davis v. Town of Lake Park, Fla., 245 F.3d 1232, 1238 (11th Cir. 2001) (citing Gupta, 212 F.3d at 586). "It is clear, however, that not all conduct by an employer negatively affecting an employee constitutes adverse employment action." Id. "Title VII is neither a general civility code nor a statute making actionable the ordinary tribulations of the workplace." Id. at 1239 (internal quotations and citations omitted).

37. The Eleventh Circuit has stated generally that "to prove adverse employment action in a case under Title VII's anti-discrimination clause, an employee must show a *serious and material* change in the terms, conditions, or privileges of employment." Id. at 1239 (emphasis in original). "Moreover, the employee's subjective view of the significance and adversity of the employer's action is not controlling; the employment action must be materially adverse as viewed by a reasonable person in the circumstances." Id.

38. None of the treatment Bias-Gibbs claims was discriminatory constitutes adverse employment action. To review, although she sat in a different room than the secretaries who sat out front, Bias-Gibbs was not a secretary,

and her job could be performed in a less visible location. Indeed, the volunteers who resumed performing the chart prep duties after Bias-Gibbs resigned worked in the very same room, apart from the secretaries. There was nothing "adverse" about this, in any sense of the word. Similarly, while Bias-Gibbs claims that her supervisor, Ms. Sparks, supervised her work with excessive zeal, even such vigilant oversight cannot be considered adverse action——at least not without more than was shown here. And Bias-Gibbs' allegation that she was denied adequate training on the Fast Forms computer program was not supported by the evidence; her own testimony establishes that she received all the computer training she needed for her position.

39. Bias-Gibbs resigned her employment in November 2005; in her Charge of Discrimination, she alleged that she had been compelled to resign. Constructive discharge can be an adverse employment decision for the purposes of claims brought under Title VII or the FCRA. Poole v. Country Club of Columbus, 129 F.3d 551, 553 (11th Cir. 1997). Under the doctrine of constructive discharge, a complainant "must demonstrate that working conditions were 'so intolerable that a reasonable person in her position would have been compelled to resign.'" Id. (quoting Thomas v. Dillard Dep't Stores, Inc., 116 F.3d 1432, 1433-34 (11th Cir.1997), cert. denied, 512 U.S. 1221, 114 S. Ct.

2708, 129 L. Ed. 2d 836 (1994)). A complainant's "subjective feelings about his employer's actions" will not be considered in evaluating a constructive discharge claim. Doe v. Dekalb County School Dist., 145 F.3d 1441, 1450 (11th Cir. 1998). "Rather, we determine whether 'a reasonable person in [the complainant's] position would be compelled to resign.'" Id. (quoting Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311, 1317 (11th Cir. 1989)).

40. The Eleventh Circuit has defined a reasonable employee as one who does not "assume the worst" or "jump to conclusions too fast." Garner v. Wal-Mart Stores, Inc., 807 F.2d 1536, 1539 (11th Cir. 1987)(affirming summary judgment in discrimination case where employee quit after one day in self-perceived unacceptable position). "Before finding a constructive discharge, [the Eleventh Circuit] has traditionally required a high degree of deterioration in an employee's working conditions, approaching the level of 'intolerable." Hill v. Winn-Dixie Stores, Inc., 934 F.2d 1518, 1527 (11th Cir. 1991).

41. Mindful of the foregoing principles, the undersigned concludes that the evidence is insufficiently persuasive to establish that Bias-Gibbs' working conditions were so intolerable that a reasonable person in her position would have felt compelled to resign. In sum, on the instant record, it cannot be found that Bias-Gibbs was constructively discharged.

42. Because Bias-Gibbs failed to establish a prima facie case of discriminatory treatment or constructive discharge, she did not create a presumption of discrimination under the McDonnell Douglas framework, and the burden never shifted to JMC to rebut the presumption by demonstrating legitimate, non-discriminatory reasons for its actions.

43. Bias-Gibbs has not alleged specifically that she was harassed on the basis of her race, and her testimony, consistently, includes a denial that such harassment occurred. Bias-Gibbs did testify, however, that her supervisor made some comments she considered derogatory, and so the issue of racial harassment will be addressed.

44. To establish a prima face case of racial harassment as a result of a hostile work environment, Bias-Gibbs needed to prove that: (1) she belongs to a protected group; (2) she was subjected to unwelcome harassment; (3) the harassment was based on the protected characteristic, such as race; (4) the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and thus create a discriminatorily abusive working environment; and (5) the employer is responsible for that environment under a theory of either direct or vicarious liability. Miller v. Kenworth of Dothan Inc., 277 F.3d 1269, 1275 (11th Cir. 2002).

45. The legal requirement that harassment, to be actionable, must have been severe or pervasive ensures that Title VII and the FCRA do not become "general civility code[s]." See Faragher v. City of Boca Raton, 524 U.S. 775, 788, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998). The severity or pervasiveness of the alleged harassment, moreover, must be established as both a subjective experience and an objective fact. See Mendoza v. Borden, Inc., 195 F.3d 1238, 1246 (11th Cir. 1999)(en banc), cert. denied, 529 U.S. 1068, 146 L. Ed. 2d 483, 120 S. Ct. 1674 (2000). That is, the complainant must have personally perceived any harassment as severe or pervasive, and the environment must have been one that a reasonable person in the complainant's position would have found hostile or abusive. Id.

46. Four factors are important in analyzing whether alleged harassment was severe or pervasive, objectively altering the terms and conditions of employment: (1) the frequency of the conduct; (2) the severity of the conduct; (3) whether the conduct was physically threatening or humiliating——or merely an offensive utterance; and (4) whether the conduct unreasonably interfered with the employee's job performance. Id. For harassing statements and conduct to be considered in determining whether the "severe or pervasive" requirement is met in a race-based case, they must be racial in nature. Cf. Gupta, 212 F.3d

at 583. "Accordingly, innocuous or boorish statements or other behavior that does not relate to the race of the actor or the employee do not count." Laosebikan v. Coca-Cola Co., 167 Fed. Appx. 758, 765 (11th Cir. 2006). Teasing, offhand comments, and isolated incidents (unless extreme) will not amount to discriminatory changes in the terms and conditions of employment. Mendoza, 195 F.3d at 1245.

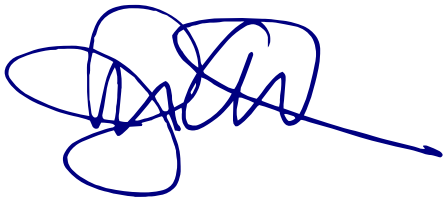
47. Bias-Gibbs failed to present sufficient, persuasive evidence to establish a prima facie case of a hostile work environment. The only incidents of an objectively racial nature were (a) the comments by Ms. Sparks, made when Bias-Gibbs wore her hair in braids, comparing Bias-Gibbs's appearance to Whoopi Goldberg's; and (b) Ms. Sparks' remark suggesting that she would prefer to have hair like a black person's. As found above, these comments might be considered boorish or inconsiderate, but viewed objectively, they are at worst clumsy attempts at humor. Further, no evidence was presented that such comments were constantly being made, nor was it established that these (or any other) remarks were threatening, humiliating, or interfered with Bias-Gibbs' job performance. That Bias-Gibbs was offended by the comments, while certainly unfortunate, is nevertheless insufficient to demonstrate conditions sufficiently severe or pervasive to alter the terms and conditions of her employment.

In short, the objective component of the fourth element of the prima facie case was not established.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the FCHR enter a final order dismissing Bias-Gibbs' Petition for Relief as partially time-barred, and alternatively (and additionally) finding JMC not liable on the merits for racial discrimination.

DONE AND ENTERED this 24th day of April, 2008, in Tallahassee, Leon County, Florida.



JOHN G. VAN LANINGHAM
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 24th day of April, 2008.

ENDNOTES

[1]/ Although Section 760.11(1) "states that a complaint 'may' be filed with the [FCHR], it is clear that such a complaint must be filed either with the [FCHR] or its federal counterpart by anyone who wishes to pursue either a lawsuit or an administrative proceeding under the act." Ross v. Jim Adams Ford, Inc., 871 So. 2d 312, 315 (Fla. 2d DCA 2004).

[2]/ Her own personal opinion, without more, is not enough to establish that she was qualified. Cf. Holifield v. Reno, 115 F.3d 1555, 1564 (11th Cir. 1997); see also, Austin v. Progressive RSC, Inc., 510 F. Supp. 2d 855, 865 (M.D.Fla. 2007)(prima facie case of race discrimination failed as plaintiff could not demonstrate he was qualified for the promotion he sought), aff'd, 2008 U.S. App. LEXIS 3728 (11th Cir. Feb. 19, 2008).

[3]/ With the exception of Joyce Stokes, the better qualified white woman who received the position in Same Day Surgery that Bias-Gibbs desired, Bias-Gibbs has no knowledge of the race of any of the individuals who received the positions. Thus, quite apart from the matter of qualifications, there is no evidence that any of the positions Bias-Gibbs sought (except for the job of Patient Access Specialist) were filled by non-minorities.

COPIES FURNISHED:

Gloria Jean Bias-Gibbs
570 West 5th Street
Riviera Beach, Florida 33401

Gregory D. Cook, Esquire
FitzGerald Mayans & Cook, P.A.
515 North Flagler Drive, Suite 900
West Palm Beach, Florida 33402

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

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.