STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

QUEENIE E. BOOTH,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 07-5688
	)	
GULFPORT LIQUORS,	)	
	)	
Respondent.	)	
	)	

FINAL ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the final hearing in this proceeding for the Division of Administrative Hearings (DOAH) on February 8, 2008, in St. Petersburg, Florida.

APPEARANCES

For Petitioner: Queenie E. Booth, pro se
Post Office Box 35201
St. Petersburg, Florida 33705

For Respondent: (No appearance)

STATEMENT OF THE ISSUE

The issue is whether Respondent discriminated against Petitioner on the basis of her race in violation of Pinellas County Code Chapter 70 (the Code).

PRELIMINARY STATEMENT

On March 1, 2007, Petitioner timely filed a complaint of racial discrimination against Respondent with the City of

St. Petersburg, Community Affairs Department, Human Relations Division (the Department). The Department referred the matter to DOAH to assign an ALJ to conduct an administrative hearing.

At the hearing, Petitioner testified and submitted one composite exhibit. Respondent did not appear or present any evidence.

The description of the exhibits, and any associated rulings, are set forth in the record of the hearing. Neither party ordered a transcript of the hearing.

At the conclusion of the hearing, Petitioner and a representative of the Department stated that they were uncertain whether either would order a transcript of the hearing, but that each would decide and notify the ALJ. On March 28, 2008, no notice regarding the transcript had been filed in the DOAH case file. The administrative assistant for the undersigned telephoned the Department to find out if the Department or Petitioner would be causing the transcript to be filed with DOAH. On April 8, 2008, the Department representative telephoned the administrative assistant and indicated no transcript would be ordered.

No exceptions to the Recommended Order have been filed as of the date of this Final Order.

FINDINGS OF FACT

1. The Department investigated the complaint of Petitioner and issued a determination on August 7, 2007, that reasonable cause exists to believe that Respondent discriminated against Petitioner on the basis of her race. Petitioner is an African-American female. At the hearing, Petitioner presented a prima facie case of discrimination that is undisputed in the evidentiary record.

2. Respondent is an "employer." Respondent employed Petitioner from December 19, 2006, through February 16, 2007. Respondent employs approximately five employees. Respondent was the only African-American employee.

3. Respondent paid Petitioner at the rate of $7.00 an hour. Petitioner performed the duties required by the terms of her employment in a competent and reliable manner. Petitioner received no complaints from her employer concerning the performance of her job duties.

4. The first adverse employment action occurred on January 29, 2007, when Respondent reduced the hours for Petitioner's shift from 40 hours a week to 24 hours. The second adverse employment action occurred on February 5, 2007, when Respondent reduced the hours for Petitioner's shift to 16 hours. Respondent did not reduce the hours of any Caucasian employee.

5. The final adverse employment action occurred on February 16, 2007, when Respondent terminated Petitioner's employment without cause and with no explanation. Respondent replaced Petitioner with a Caucasian employee who works a 40-hour schedule. No evidence of record shows that Respondent took any adverse employment action against a Caucasian employee.

6. During the Department's investigation of this matter, the Department provided Respondent with repeated opportunities to respond to the allegations, to participate as a party subject to investigation, and to participate in mediation. Respondent has not responded to the allegations of racial discrimination.

7. Petitioner submitted no proof of damages other than lost wages. The Code does not prescribe the methodology for calculating lost wages and interest. The Department interprets the Code to mean that Petitioner is entitled to lost wages through the date of the final order to be issued in this proceeding plus interest at the statutory rate prescribed by the chief financial officer of the state in accordance with Subsection 55.03(1), Florida Statutes (2007).

8. The total amount of lost wages through the date of the Recommended Order was $16,856.00. The trier of fact calculated lost wages in the following manner. If Petitioner had suffered no adverse employment action, Petitioner would have worked

40 hours a week at $7.00 an hour for 62 weeks from January 29, 2007, through the date of the Recommended Order on April 11, 2008, for a total of $17,360.00. That amount is offset by the wages Petitioner earned after the first and second adverse employment actions in a total amount of $504.00. The difference between $17,360.00 and $504.00 is $16,856.00.

9. The total amount of lost wages through the date of this Final Order, is the $16,856.00 through the date of Recommended Order, increased by a weekly amount of $280, for seven weeks from April 11 through May 30, 2008, for a total increase of $1,960.00. The total amount of lost wages due on the date of this Final Order is $18,816.00.

10. No reduction to lost wages is made for wages earned by Petitioner from another employer after the date of the final adverse employment action on February 16, 2007. Neither Petitioner nor Respondent submitted any evidence that Petitioner earned wages from another employer or received unemployment benefits. The record deprives the trier of fact of a factual basis for an offset to lost wages owed by Respondent.

11. The website of the chief financial officer prescribes rates of interest for current and past years to be utilized in determining interest due on judgments and decrees. The applicable interest rate for 2007 and 2008 is 11 percent. The interest rate will apply to the unpaid portion of the amount

determined to be due, if any, in the final order until Respondent pays the amount due, if any.

12. Petitioner is not entitled to attorney's fees and costs. Petitioner is pro se and submitted no evidence of having incurred attorney's fees or other costs.

CONCLUSIONS OF LAW

13. DOAH has jurisdiction over the parties and the subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2007). The parties received adequate notice of the administrative hearing.

14. Petitioner bears the burden of proving by a preponderance of the evidence that Respondent intentionally discriminated against her on the basis of her race. Reeves v. Sanderson Plumbing Products., Inc., 530 U.S. 133, 142, 120 S. Ct. 2097, 2106 (2000). Federal discrimination law may be used for guidance in evaluating the merits of claims arising under local jurisdictions. Tourville v. Securex, Inc., Inc., 769 So. 2d 491 (Fla. 4th DCA 2000); Greene v. Seminole Elec. Co-op. Inc., 701 So. 2d 646 (Fla. 5th DCA 1997); Brand v. Florida Power Corp., 633 So. 2d 504 (Fla. 1st DCA 1994).

15. Petitioner can meet her burden of proof with either direct or circumstantial evidence. Damon v. Fleming Supermarkets of Florida, Inc., 196 F.3d 1354, 1358 (11th Cir. 1999), cert. denied, 529 U.S. 1109 (2000). Direct evidence must

evince discrimination without the need for inference or presumption. Standard v. A.B.E.L. Services., Inc., 161 F.3d 1318, 1330 (11th Cir. 1998). In other words, direct evidence consists of "only the most blatant remarks, whose intent could be nothing other than to discriminate." Earley v. Champion Int'l Corp., 907 F.2d 1077, 1081 (11th Cir. 1990).

16. There is no direct evidence of discrimination in this case. In the absence of direct evidence, Petitioner must meet her burden of proof by circumstantial evidence.

17. Circumstantial evidence of discrimination is subject to the burden-shifting framework of proof established in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973); Reed v. A. W. Lawrence & Co., Inc., 95 F.3d at 1170, 1178 (2nd Cir. 1996). Petitioner must first establish a prima facie case of discrimination. McDonnell Douglas, 411 U.S. at 802; Munoz v. Oceanside Resorts, Inc., 223 F.3d 1340, 1345 (11th Cir. 2000). See Ratliff v. State, 666 So. 2d 1008, 1013 n.6 (Fla. 1st DCA 1996), aff'd, 679 So. 2d 1183 (Fla. 1996) (citing Arnold v. Burger Queen Sys., 509 So. 2d 958 (Fla. 2d DCA 1987)).

18. In order to establish a prima facie case of race discrimination, a preponderance of the evidence must show that Petitioner is a member of a protected class, that she suffered an adverse employment action, that she received disparate treatment compared to similarly-situated individuals in a non-

protected class, and that there is sufficient evidence of bias to infer a causal connection between her race and the disparate treatment. Rosenbaum v. Southern Manatee Fire and Rescue Dist., 980 F. Supp. 1469 (M.D. Fla. 1997); Andrade v. Morse Operations, Inc., 946 F. Supp. 979, 984 (M.D. Fla. 1996). A preponderance of the evidence establishes a prima facie case that Petitioner was qualified to perform her job, is a member of a protected class, received disparate treatment compared to similarly-situated individuals in a non-protected class, and the alleged disparate treatment is causally connected to Petitioner's race.

19. Once Petitioner establishes a prima facie case, the burden shifts to Respondent to articulate a legitimate, non-discriminatory, reason for the challenged action. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 257, 101 S. Ct. 1089, 1096 (1981); Munoz, 223 F.3d at 1345; Turlington v. Atlanta Gas Light Co., 135 F.3d 1428, 1432 (11th Cir. 1998), cert. denied, 525 U.S. 962, 119 S. Ct. 405 (1998). Respondent did not appear at the hearing and did not otherwise present evidence.

20. Set off, offset, and mitigation of damages from Petitioner's subsequent employment, if any, are affirmative defenses in avoidance of liability. Fla. R. Civ. P. 1.110(d). The failure of Respondent to plead and prove affirmative defenses, if any, waives the defense and deprives DOAH of

jurisdiction to make findings and conclusions regarding the affirmative defense. Fla. R. Civ. P. 1.140(h); Udell v. Udell, 950 So. 2d 528 (Fla. 4th DCA 2007); JoJo's Clubhouse, Inc. v. DBR Asset Managemnt, Inc., 860 So. 2d 503 (Fla. 4th DCA 2003).

ORDER

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

ORDERED that Respondent is guilty of the racial discrimination alleged in this proceeding, and Respondent must pay to Petitioner, no later than June 30, 2008, the amount of lost wages and interest ordered herein.

DONE AND ORDERED this 30th day of May, 2008, in Tallahassee, Leon County, Florida.

DANIEL MANRY
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of May, 2008.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original Notice of Appeal with the agency clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.