STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LESLIE STOKES,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 08-0693
	)	
LEXUS OF TAMPA BAY,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the final hearing in this proceeding for the Division of Administrative Hearings (DOAH) on May 21, 2008, in Tampa, Florida.

APPEARANCES

For Petitioner: Leslie P. Stokes, pro se
4714 Pleasant Avenue
Palm Harbor, Florida 34683

For Respondent: Andrew Froman, Esquire
Alva L. Cross, Esquire
Fisher & Phillips LLP
401 East Jackson Street, Suite 2525
Tampa, Florida 33602

STATEMENT OF THE ISSUE

The issue is whether Respondent discriminated against Petitioner on the basis of her race, subjected Petitioner to a hostile work environment, or retaliated against Petitioner in

violation of the Hillsborough County Human Rights Ordinance 00-37, Section 4(1)(a)(1).

PRELIMINARY STATEMENT

Petitioner filed a Charge of Discrimination with the Hillsborough County Human Rights Board (the Board) on June 4, 2004. Petitioner dual-filed an identical Charge with the Equal Employment Opportunity Commission (EEOC) on the same date.

The Board completed the investigation of the allegations in the Charge on January 8, 2008, and issued a determination that cause existed to believe the alleged discrimination occurred. Pursuant to Hillsborough County Human Rights Ordinance 00-37, the matter was referred to DOAH to conduct an administrative hearing.

At the hearing, Petitioner testified, presented the testimony of three other witnesses, and submitted seven exhibits for admission into evidence. Respondent cross-examined each witness and submitted seven exhibits.

The identity of the witnesses and exhibits, and any associated rulings, are reported in the Transcript of the hearing filed with DOAH on June 27, 2008. The parties timely filed their respective Proposed Recommended Orders (PROs) on July 14, 2008.

FINDINGS OF FACT

1. Petitioner is an aggrieved person within the meaning of Hillsborough County Human Rights Ordinance 00-37, Section 16. Petitioner is an African-American female and filed a complaint with the Board alleging that Respondent engaged in race, color, and gender discrimination; retaliation; and the creation of a hostile work environment.

2. Respondent is an employer within the meaning of Section 16. Respondent operates a car dealership and is in the business of selling and servicing new and used automobiles and trucks in several states, including Florida.

3. Respondent was not Petitioner's employer. Petitioner was a temporary worker during the relevant period, and her employment contract was with an employment agency. No written employment contract existed between the parties to this proceeding. The employment agency paid Petitioner, and Respondent paid the employment agency.

4. The employment agency assigned Petitioner to Respondent from January 13 through January 23, 2004. Other than Petitioner’s uncorroborated testimony, there is no written or other evidence that Respondent intended Petitioner’s temporary assignment either to become a permanent position or to last for six weeks. The fact-finder finds the testimony of Petitioner to be less than credible and persuasive.

5. From January 13 until January 21, 2004, Petitioner worked at Respondent's Tampa office at Lexus of Tampa Bay located on North Dale Mabry Avenue, Tampa, Florida. Respondent transferred Petitioner to its office at Lexus of Clearwater, Florida, on January 21, 2004, and terminated the assignment from the employment agency on January 23, 2004. The termination of assignment occurred in Pinellas County, rather than Hillsborough County, Florida.

6. Petitioner began her assignment at Lexus of Tampa Bay on January 13, 2004, as a receptionist. Respondent paired Petitioner with Ms. Mary Ann Browne, a full-time receptionist and Caucasian female. Respondent charged Ms. Browne with training Petitioner in the responsibilities of a receptionist.

7. Petitioner alleges that Ms. Browne engaged in unprofessional conduct during the 10 days she trained Petitioner. The unprofessional conduct, according to Petitioner's testimony included "racial undertones." For example, Ms. Browne asked Petitioner why, "Black people are all family, cousins, sisters, brothers." Petitioner responded, "Don't ask me. I wouldn't be that black."

8. Ms. Browne allegedly stated aloud that two female employees who hugged in greeting each other were lesbians. Ms. Browne allegedly called another African-American employee a "pimp" and referred to an Hispanic employee as a "macdaddy."

The fact-finder does not know the meaning of the term "macdaddy," or even how to spell the term, and the record does not provide an adequate definition or spelling. Ms. Browne allegedly referred to homosexual customers as "flamers." Finally, Ms. Browne allegedly engaged in threatening physical behavior by tossing items at Petitioner across the reception desk. No one but Petitioner heard the alleged racial and sexist comments by Ms. Browne or witnessed the physically aggressive behavior.

9. The preponderance of evidence does not establish a prima facie showing of discrimination or retaliation. Nor does the preponderance of evidence show that Respondent subjected Petitioner to a hostile work environment. Finally, a preponderance of the evidence does not show that Respondent engaged in a discriminatory practice.

10. The evidence of Ms. Browne's conduct consists of Petitioner's testimony and a diary that Petitioner created contemporaneously with the acts Petitioner attributes to Ms. Browne. No other employees at Lexus of Tampa Bay witnessed the events evidenced in Petitioner's testimony and diary. Ms. Browne left her employment with Respondent in the fall of 2004 and did not testify.

11. Ms. Toni Davis, now Ms. Toni Scotland, was a receptionist during part of the relevant time but was not

present during the entire time because she was being promoted to a position in accounting. Ms. Scotland did not recall any improper behavior by Ms. Browne in 2004.

12. The Investigative Report based its recommendation of a finding of cause on statements attributed in the Report to then Ms. Davis and the documentation of the disciplinary action taken by Respondent against Ms. Browne. However, Ms. Scotland testified that she did not recall being contacted by an investigator for the Board and denied making any statements to the investigator.

13. The investigation took approximately 3.5 years to complete because the investigator is the only investigator for the Board and because the investigator suffered a heart attack during the investigation. At the hearing, the testimony of the investigator concerning statements he attributed to Ms. Scotland, also Ms. Davis, was vague and sparse and is less than credible and persuasive.

14. A preponderance of the evidence does not show that Respondent is responsible for the acts Petitioner attributes to Ms. Browne. Petitioner complained to her employment agency about the conduct of Ms. Browne. The employment agency notified Respondent, and Ms. Helene Ott, the supervisor at the time, interviewed both Petitioner and Ms. Browne on January 19, 2004.

15. The only complaint made by Petitioner to Ms. Ott on January 19, 2004, was that Ms. Browne went to the break room to bring back a drink in separate disposable drink cups for Ms. Browne and Petitioner. Upon returning with the drinks, Ms. Browne told Petitioner that Ms. Browne had spit in Petitioner's cup. Petitioner did not tell Ms. Ott that Petitioner witnessed Ms. Browne spit in the cup.

16. Petitioner's version of events changed at the hearing. Petitioner testified that she saw Ms. Browne spit in Petitioner's cup. Petitioner testified that Ms. Browne offered to refill the cup Petitioner already had on the receptionist desk, grabbed the cup, stood, drew up a large volume of spit from deep in Ms. Browne's throat, and let the long volume of liquid drop into Petitioner's cup in full view of Petitioner. Petitioner further testified in tears that she stated repeatedly to Ms. Browne, "Give me back my cup!"

17. The foregoing testimony of Petitioner is less than credible and persuasive. The fact-finder is not persuaded that any reasonable person would have wanted Ms. Browne to return the cup. The cup was a disposable cup from the vending area which was of no value to Petitioner. Petitioner did not relate this version of the events to Ms. Ott when Ms. Ott investigated Petitioner's complaints on January 19, 2004.

18. The version of events that Petitioner related to Ms. Ott on January 19, 2004, is consistent with the contemporaneous account by Mr. Browne. When Ms. Ott interviewed Ms. Browne on January 19, 2004, Ms. Browne admitted that she told Petitioner she had spit in Petitioner's cup when Ms. Browne returned from the vending area to the reception desk with Petitioner's drink. Ms. Browne also admitted to engaging in offensive language, offensive commentary about customers, and unprofessional conduct.

19. A preponderance of evidence does not show that Respondent created or fostered a work environment that was hostile toward Petitioner. On January 19, 2004, Ms. Ott issued a written counseling/final warning to Ms. Browne for her use of "offensive language, offensive commentary about customers, and unprofessional conduct." The disciplinary action advised Ms. Browne that any further misconduct would result in the termination of her employment.

20. On January 20, 2004, Ms. Ott interviewed Petitioner again concerning additional complaints from the employment agency. Petitioner told Ms. Ott that Ms. Browne used vulgar and unprofessional language, but Petitioner did not state to Ms. Ott that Ms. Browne made racial or sexist comments.

21. On January 21, 2004, Ms. Ott needed to fill another temporary vacancy at Lexus of Clearwater. Ms. Ott asked

Petitioner to go to Clearwater, and Petitioner went to the Clearwater office voluntarily. Respondent ended the employment agency assignment on January 23, 2004.

22. Ms. Ott described Petitioner's performance as "very good." On January 23, 2004, Ms. Ott offered to write a letter of reference for Petitioner. Ms. Ott told Petitioner that Ms. Ott would consider Petitioner for a position at Lexus of Tampa Bay or Lexus of Clearwater if the need arose.

CONCLUSIONS OF LAW

23. DOAH has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2008). The parties received adequate notice of the administrative hearing.

24. Petitioner bears the burden of proof in this proceeding. Petitioner must show by a preponderance of the evidence that Respondent intentionally discriminated against her on the basis of her race, color or sex or retaliated against her because of a protected activity. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 142, 120 S. Ct. 2097, 2106 (2000).

25. The burden of proving retaliation follows the general rules enunciated for proving discrimination. Reed v. A.W. Lawrence & Co., 95 F.3d 1170, 1178 (2d Cir. 1996). Federal discrimination law may be used for guidance in evaluating the Charge filed by Petitioner. Tourville v. Securex, 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).

26. 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 or retaliation 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). By analogy, direct evidence of retaliation must be equally egregious.

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

28. Circumstantial evidence of discrimination or retaliation 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, 95 F.3d at 1178. Petitioner must

first establish a prima facie case of discrimination or retaliation. McDonnell Douglas, 411 U.S. at 802; Munoz v. Oceanside Resorts, Inc., 223 F.3d 1340, 1345 (11th Cir. 2000). If Petitioner fails make a prima facie case, the inquiry ends. See Ratliff v. State, 666 So. 2d 1008, 1013 n.6 (Fla. 1st DCA 1996), aff'd, 679 So. 2d 1183 (1996) (citing Arnold v. Burger Queen Sys., 509 So. 2d 958 (Fla. 2d DCA 1987)). A preponderance of evidence does not establish a prima facie case of discrimination.

29. 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, color or sex 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).

30. A preponderance of the evidence does not show that Petitioner received disparate treatment compared to similarly-situated individuals, or that the alleged disparate treatment was causally connected to Petitioner's race, color or sex. A preponderance of the evidence does not show disparate treatment

or that any adverse treatment is causally connected to Petitioner's race, color or sex. Failure to establish the last prong of the conjunctive test is fatal to a claim of discrimination. Mayfield v. Patterson Pump Co., 101 F.3d 1371 (11th Cir. 1996); Earley, supra. See also Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997).

31. If it were determined that Petitioner established a prima facie case of discrimination, the burden shifts to Respondent to articulate a legitimate, non-discriminatory, non-retaliatory 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, 119 S. Ct. 405 (1998). Petitioner must then prove by a preponderance of evidence that the reason(s) offered by Respondent for its action(s) are mere pretexts for unlawful discrimination. Id.

32. A preponderance of evidence establishes a legitimate, non-discriminatory, non-retaliatory reason for the challenged termination of the temporary assignment by the employment agency. Respondent no longer needed a temporary receptionist. The testimony of Ms. Ott on this issue is credible and persuasive.

33. In order for Petitioner to establish that she was subjected to a hostile work environment, Petitioner must show, by a preponderance of the evidence, (1) that she belongs to a protected group; (2) that she has been subject to unwelcome harassment; (3) that the harassment was based on a protected characteristic; (4) that the workplace is permeated with discriminatory intimidation, ridicule, and insult sufficiently severe or pervasive to alter the terms or conditions of employment and to create an abusive working environment; and (5) that the employer is responsible for such environment under either a theory of vicarious or direct liability. Miller v. Kenworth of Dothan, 277 F.3d 1269, 1275 (11th Cir. 2002); Lawrence v. Wal-Mart Stores, Inc., 236 F. Supp. 2d 1314 (M.D. Fla. 2002).

34. A preponderance of the evidence does not show that Petitioner was subjected to a hostile work environment. The alleged statements by Ms. Browne were not made about Petitioner. Nor were the statements sufficiently severe or pervasive to constitute a hostile work environment as a matter of law. See, e.g., Mendoza v. Borden, Inc., 195 F.3d 1238, 1245 (11th Cir. 1999), cert. denied, 529 U.S. 1068 (2000)(actionable harassment must be "sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment"); Gupta v. Florida Board of Regents,

212 F.3d 571, 583 (11th Cir. 2000), cert. denied, 531 U.S. 1076 (2001) ("innocuous statements or conduct, or boorish ones that do not relate to the [protected characteristic] of the actor or of the offended party are not counted"); Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986)(noting that the "mere utterance of a racial epithet that engenders offensive feelings in an employee but does not alter the conditions of employment, does not present an actionable situation.")

35. It is undisputed that the term "pimp" is not a term reserved exclusively for African-Americans. Petitioner testified at the hearing that she is unaware of the definition of the epithet allegedly referencing Latin-Americans as, "macdaddy." Finally, before asking Ms. Browne what the term "flamers" meant, Petitioner was unaware that Ms. Browne allegedly used the term as a derogatory reference to homosexuals.

36. Petitioner never complained to Respondent about the alleged "unprofessional" behavior of Ms. Browne. Rather, Petitioner notified her employer, the employment agency. When Respondent received information from the employment agency, Respondent reacted quickly and effectively. Respondent is not responsible for the alleged "unprofessional" conduct of

Ms. Browne. Burlington Industries v. Ellerth, 542 U.S. 742, 118 S. Ct. 2257 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 118 S. Ct. 2275 (1998).

37. To establish a prima facie case of retaliation, Petitioner must show that (a) she engaged in statutorily protected activity, (b) she suffered an adverse employment action, and (c) the adverse employment action was causally connected to the protected activity. Harper v. Blockbuster Entertainment Corp., 139 F.3d 1385, 1388 (11th Cir. 1988). Petitioner did not engage in statutorily protected activity. Petitioner did not charge, testify, assist or participate in any investigation, proceeding, or hearing or opposed any unlawful employment practice. E.E.O.C. v. Total Sys. Servs., Inc., 221 F.3d 1171, 1174 (11th Cir. 2000). An employee's statement or communication cannot be deemed to be in opposition to an unlawful employment practice unless it refers to a specific practice of the employer that is allegedly unlawful. Guess v. City of Miramar, 889 So. 2d 840, 847 (Fla. 4th DCA 2005).

38. A preponderance of the evidence does not establish a prima facie case of retaliation. A preponderance of evidence does not show that Petitioner engaged in statutorily protected activity or that there was a causal connection between Petitioner's "complaint" concerning Ms. Browne's

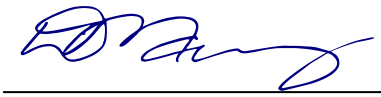
"unprofessional" behavior and the termination of the assignment by the employment agency.

RECOMMENDATION

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

RECOMMENDED that the final order issued in this proceeding should find that Respondent is not guilty of the allegations made by Petitioner.

DONE AND ENTERED this 7th day of August, 2008, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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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.