STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CAMIKA S. JERIDO,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 08-1747
	)	
PPS WORLD MEDICAL,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

A hearing was held pursuant to notice, on July 1, 2008, via video-conferencing in Jacksonville and Tallahassee, Florida, before the Division of Administrative Hearings by its designated Administrative Law Judge, Barbara J. Staros.

APPEARANCES

For Petitioner: Camika S. Jerido, pro se
3344 Hunt Street
Jacksonville, Florida 32254

For Respondent: Timothy B. Strong, Esquire
Fowler White Boggs Banker, P.A.
50 North Laura Street, Suite 2200
Jacksonville, Florida 32202

STATEMENT OF THE ISSUE

Whether Respondent violated the Florida Civil Rights Act of 1992, as alleged in the Employment Complaint of Discrimination filed by Petitioner on October 5, 2007.

PRELIMINARY STATEMENT

On October 5, 2007, Petitioner, Camika S. Jerido, filed an Employment Complaint of Discrimination with the Florida Commission on Human Relations (FCHR) which alleged that Respondent, PPS World Medical, violated Section 760.10, Florida Statutes, by discriminating against her on the basis of race. The Employment Complaint of Discrimination alleged that Petitioner was subject to disparate treatment and denied promotion. Petitioner identified the two employees of Respondent who discriminated against her as Crystal Marx and Renee Placette.

The allegations were investigated and on March 26, 2008, FCHR issued its Determination: No Cause and a Notice of Determination: No Cause. A Petition for Relief was filed by Petitioner on April 8, 2008.

FCHR transmitted the case to the Division of Administrative Hearings on or about April 10, 2008. A Notice of Hearing was issued setting the case for formal hearing on July 1, 2008. The hearing proceeded as scheduled.

At hearing, Petitioner testified on her own behalf. Petitioner offered Exhibits numbered 1 through 16. Petitioner's Exhibits numbered 2 through 16 were admitted into evidence; however, Exhibits numbered 4 and 14 were admitted with the limitation that only the contents of the documents, not the

handwritten notes, were admitted in evidence. Petitioner's Exhibit numbered 1 was rejected. Respondent presented the testimony of Crystal Marx, Larmeka Alexander, Patricia Barnard, Sheila Renee Placette, and Ann Christante. Respondent's Exhibit numbered 3 was admitted into evidence.

A one-volume Transcript was filed on July 15, 2008. Petitioner timely filed a post-hearing letter and Respondent timely filed a Proposed Recommended Order. Respondent filed a Motion to Strike Post-hearing Letter by Camika S. Jerido.[1/] Petitioner filed a response in opposition to the Motion. Upon consideration, Respondent's Motion to Strike is granted.

FINDINGS OF FACT

1. Petitioner is an African-American female who was hired by Respondent as a temporary employee on January 17, 2005. She continued to be employed by Respondent until she resigned her position on November 7, 2007.

2. Respondent, PPS World Medical (PPS), is an employer within the meaning of the Florida Civil Rights Act. PPS is a distributor of medical supplies from manufacturers to physicians' offices.

3. Crystal Marx interviewed Petitioner and hired her as a temporary employee in January 2005. Petitioner worked for several months as a temporary employee, and her performance was very good.

4. Ms. Marx recommended to Renee Placette that Petitioner be hired as a regular, full-time employee. Ms. Placette had an opportunity to observe Petitioner's performance as a temporary employee. Ms. Placette made the final decision to hire Petitioner in a full-time position in May 2006 as a supply chain expediter. Ms. Marx and Ms. Placette are Caucasian females.

5. After three months of employment, Ms. Marx decided to conduct a 90-day performance review of Petitioner. It was not standard procedure in the department where Petitioner worked to receive a 90-day review. However, Ms. Marx made the decision to conduct the review to let Petitioner know about some concerns so Petitioner would have an opportunity to make improvements before her annual review.

6. In a meeting to discuss the 90-day review, Ms. Marx addressed the following issues with Petitioner: work that was not being completed correctly which resulted in Ms. Marx's receiving e-mails concerning mistakes Petitioner was making; issues Petitioner was having with her coworkers; and Petitioner's practice of skipping lunch and leaving an hour early without prior approval.

7. The score received by Petitioner on her 90-day review did not affect Petitioner's compensation in any way.

8. When initially hired, Ms. Marx was Petitioner's direct supervisor. At some point in time, Patricia Barnard was brought in as another layer of supervision. Ms. Barnard worked for Ms. Marx.

9. For a period of time, Petitioner e-mailed Ms. Barnard when she went to, and returned from, her 15-minute break. This issue initially arose when several people asked Ms. Barnard where Petitioner was when she was away on her break. Ms. Barnard discussed this with Petitioner.

10. Petitioner then suggested that she e-mail Ms. Barnard when she left on her break and upon her return. Ms. Barnard did not require Petitioner to do this. When Petitioner stopped sending these e-mails, Ms. Barnard did not instruct Petitioner to resume sending the e-mails or take any action regarding the e-mails.

11. During a period of time when Petitioner was on medical leave, two accounts were reassigned to other employees while she was away. One of the accounts was assigned to another employee, Tracy Hundley, who is African-American. After that, Ms. Barnard and Ms. Marx took over the account for a while, later assigning it to Tara Nelson, another African-American employee. In any event, Petitioner did not receive any extra pay when she handled those accounts, and did not receive any cut in pay when these accounts were reassigned to others.

12. On November 17, 2006, Petitioner received a Documented Verbal Warning for failure to properly notify management of her absence. On August 15, 2007, Petitioner received a Final Written Warning for unprofessional and inappropriate behavior towards an employee relations representative.

13. On May 8, 2007, Ms. Barnard completed a job performance annual review of Petitioner. On her annual review, Petitioner received a score of 80, which is an average score. Ms. Marx approved the review as prepared by Ms. Barnard.

Allegations of failure to promote

14. Petitioner applied for the position of "WM Supply Chain Procurement Specialist" in November 2006.

15. Petitioner again applied for the Procurement Specialist position in May 2007. Petitioner received an e-mail from Ms. Placette advising her that three people were hired with "a lot of buying experience."

16. In July 2007, Petitioner applied for the position of IT Governance Process Analyst. She received a letter from the IT Governance Process Manager of PSS which informed her that she was not selected for the position.

17. There is nothing in the record establishing the qualifications required for these positions, whether Petitioner met these qualifications, or even whether these positions could be considered as promotions. Further, no competent evidence was

presented as to the identity, qualifications, or race of the persons who were hired into these positions.

Other allegations

18. Petitioner also alleged that she was paid less then what had been promised, $11.54 an hour, in her letter offering employment. Petitioner contends that she was instead paid one cent an hour less, i.e., $11.53 per hour. The official pay stub reflects her rate of pay to have been $11.54 per hour.

19. Further, Petitioner alleged that she was, at some point, given a new wireless headset which was replaced by a used one that she described as "yucky."

20. Employees who work in "confirmation" received wireless headsets because those employees needed to be able to go to the fax machine and the printer while on the telephone with a vendor. Petitioner was an "expediter" not a "confirmation" person, and did not need to be able to go to the fax machine or the printer as often while on the telephone.

21. Petitioner resigned her position on November 2, 2007. At the time she resigned, she informed her co-workers that she owned her own t-shirt business and resigned to run her own company full time. At hearing, Petitioner asserted that she resigned because there was a "different atmosphere," that she was stressed, and could not work there anymore.

22. There was no competent evidence presented that establishes or even suggests that any employment action taken by Respondent toward Petitioner was based on race.

CONCLUSIONS OF LAW

23. The Division of Administrative Hearings has jurisdiction over the parties and subject matter in this case. §§ 120.569 and 120.57, Fla. Stat.

24. Section 760.10(1), Florida Statutes, states that it is an unlawful employment practice for an employer to discharge or otherwise discriminate against an individual on the basis of race.

25. In discrimination cases alleging disparate treatment, the Petitioner generally bears the burden of proof established by the United States Supreme Court in McDonnell Douglas v. Green, 411 U.S. 792 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).[2/] Under this well established model of proof, the complainant bears the initial burden of establishing a prima facie case of discrimination. When the charging party, i.e., Petitioner, is able to make out a prima facie case, the burden to go forward shifts to the employer to articulate a legitimate, non-discriminatory explanation for the employment action. See Department of Corrections v. Chandler, 582 So. 2d 1183 (Fla. 1st DCA 1991)

(court discusses shifting burdens of proof in discrimination cases). The employer has the burden of production, not persuasion, and need only persuade the finder of fact that the decision was non-discriminatory. Id.; Alexander v. Fulton County, Georgia, 207 F.3d 1303 (11th Cir. 2000). The employee must then come forward with specific evidence demonstrating that the reasons given by the employer are a pretext for discrimination. "The employee must satisfy this burden by showing directly that a discriminatory reason more likely than not motivated the decision, or indirectly by showing that the proffered reason for the employment decision is not worthy of belief." Department of Corrections v. Chandler, supra at 1186; Alexander v. Fulton County, Georgia, supra. Petitioner has not met this burden.

26. To establish a prima facie case regarding Petitioner's allegation that Respondent failed to promote her because of her race, Petitioner must prove that: (1) she is a member of a protected class; (2) she was qualified and applied for the promotion; (3) she was rejected despite her qualifications; and (4) equally or less qualified employees who are not members of the protected class were promoted. See Alexander v. Fulton County, supra at 1339 (11th Cir. 2000); Taylor v. Runyon, 175 F. 3d 861, 866 (11th Cir. 1999); Wu v. Thomas, 847 F. 2d 1480, 1483 (11th Cir. 1988).

27. Petitioner meets the first element in that she is African-American. However, there is no competent evidence that the positions she applied for were indeed promotions, that she met the job qualifications, or that she was rejected despite those qualifications. Even if the positions applied for by Petitioner were promotions, there is no evidence that those persons who received those jobs were equally or less qualified or that they were not members of the protected class. Accordingly, Petitioner did not establish a prima facie case of race discrimination in regard to her allegations that Respondent failed to promote her because of her race.

28. To establish an adverse employment action in a failure to promote case, Petitioner must be able to show that the position she desired had a greater wage or salary, a more distinguishable title, or significantly more responsibilities. Weston-Brown v. Bank of America Corp., 2006 U.S. App. LEXIS 318 (11th Cir. 2006) quoting Johnson v. Fulton Concrete Co., 330 F. Supp. 2d 1330, 1339 (N.D. Ga. 2004).

29. There is no evidence in the record that the positions for which Petitioner applied had a greater wage or salary, a more distinguishable title, or significantly greater responsibilities.

30. To establish a prima facie case of race discrimination based on disparate treatment, Petitioner must prove that (1) she is a member of a protected class; (2) she was subject to an adverse employment action; (3) her employer treated similarly situated employees, who were not members of the protected class, more favorably; and (4) she was qualified for the job or benefit at issue. See McDonnell, supra; Gillis v. Georgia Department of Corrections, 400 F. 3d 883 (11th Cir. 2005).

31. As for Petitioner's disparate treatment allegations, (i.e., that she received one cent per hour less than promised, that she received a used wireless headset, and other matters discussed above), there is insufficient evidence to establish that these matters rise to the level of adverse employment action. To be actionable, the employment action must be materially adverse as viewed by a reasonable person in the circumstances, not by the employee's subjective view. The adverse action must be material, that is, more than a de minimus inconvenience or alteration of responsibilities. Weston-Brown v. Bank of America, supra; citing Davis v. Town of Lake Park, 245 F.3d 1232, 1239 (11th Cir. 2001). "Not all conduct by an employer negatively affecting an employee constitutes adverse employment action." Id. at 1238.

32. Applying the McDonnell analysis, Petitioner did not meet her burden of establishing a prima facie case of disparate treatment in that these actions do not rise to the level of an adverse employment action.

33. To the extent that Petitioner's assertion that she resigned due to stress could be construed to be constructive discharge, Petitioner must show that the working conditions were so difficult or unreasonable as to compel a reasonable person to resign. Hill v. Winn-Dixie Stores, Inc., 934 F.2d 1518, 1527 (11th Cir. 1991). In order to show constructive discharge, Petitioner must show a high degree of deterioration in her working conditions, approaching the level of "intolerable." Wardwell v. School Board of Palm Beach County, Florida, 786 F.2d 1554, 1559 (11th Cir. 1986). The evidence was not sufficient to establish that Petitioner was constructively discharged.

34. In summary, Petitioner has failed to carry her burden of proof that Respondent engaged in unlawful racial discrimination toward her.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law set forth herein, it is

RECOMMENDED:

That the Florida Commission on Human Relations enter a final order dismissing the Petition for Relief.

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

BARBARA J. STAROS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of August, 2008.

ENDNOTES

1/ Petitioner attached several documents to her post-hearing letter. However, these attachments, with the exception of a copy of Respondent's Motion for Extension of Time, are in the nature of late-filed exhibits and, therefore, cannot be considered in formulating these findings of fact. § 120.57(1)(j), Fla. Stat.

2/ FCHR and Florida courts have determined that federal discrimination law should be used as guidance when construing provisions of Section 760.10, Florida Statutes. See Brand v. Florida Power Corporation, 633 So. 2d 504, 509 (Fla. 1st DCA 1994).

COPIES FURNISHED:

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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.