STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RONICA TUCKER,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 08-3313
	)	
CRANE AEROSPACE AND ELECTRONICS,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

This matter came on for final hearing before Robert S. Cohen, Administrative Law Judge with the Division of Administrative Hearings, on November 19 through 21, 2008, in Shalimar, Florida.

APPEARANCES

For Petitioner: Bruce A. Minnick, Esquire
The Minnick Law Firm
Post Office Box 15588
Tallahassee, Florida 32317-5588

For Respondent: Marty Denis, Esquire
Barlow, Kobata & Denis
525 West Monroe Street, Suite 2360
Chicago, Illinois 60661

STATEMENT OF THE ISSUE

The issue for determination in this matter is whether Respondent engaged in unlawful employment practices by

discriminating against Petitioner on the basis of race or sex in violation of the Florida Civil Rights Act of 1992, as amended.

PRELIMINARY STATEMENT

On May 16, 2007, Petitioner, Ronica Tucker, filed a timely charge of discrimination with the Equal Employment Opportunity Commission alleging that she had been discriminated against by her employer, Crane Aerospace and Electronics, Inc., on the basis of her race and sex. Petitioner's charge was transferred to and investigated by the Florida Commission on Human Relations ("FCHR").

On June 9, 2008, FCHR issued a determination of no cause as to all the claims brought by Petitioner and advised her of her right to file an administrative appeal at the Division of Administrative Hearings within 35 days.

On June 30, 2008, Petitioner filed a timely Petition for Relief at FCHR requesting a formal administrative hearing. The discrimination case was transferred to the Division of Administrative Hearings on July 9, 2008, and was assigned Case No. 08-3313.

Following a series of motions related to discovery issues, primarily involving the timeliness and completeness of Petitioner's responses to Respondent's requests, the final hearing was limited to the presentation of five issues by Petitioner concerning her claims of discrimination: 1) that Petitioner was not promoted; 2) that Petitioner was not invited to casual working dinners, a team luncheon, and award functions;

3) that Respondent changed processes and procedures while Petitioner was on vacation; 4) that Petitioner received a written reprimand and corrective action form; and 5) that Petitioner received a negative performance review on April 24, 2007.

The final hearing was conducted on November 19 through 21, 2008. At the hearing, Petitioner testified on her own behalf; called Marty Kassulke as a witness; and offered Exhibits 1 through 5, 5A, 6, 6A, 7 through 9, 9A, 9B, 10 through 13, 13A, 14 through 22, 22A, 23, 23A, 24 through 31, 33, and 35 through 39 into evidence. Respondent called Marty Kassulke, Nick Miles, Don Pearson, Matt Mulrain, Mark Harris, Lois Speights, and Floyd Cooper as witnesses; and offered Exhibits 9 through 11, 15, 17, 20 through 23, 25, 26, 30, 31, 34, 43 through 46, 57, 58, 60, 61, 63 through 65, 67, 68, 69A through 69H, and 70 through 75 into evidence.

A Transcript was filed on January 14, 2009. Respondent filed its Proposed Recommended Order on March 9, 2009, and, following leave from the undersigned, Petitioner filed her Proposed Recommended Order on March 10, 2009.

References to statutes are to Florida Statutes (2008) unless otherwise noted.

FINDINGS OF FACT

1. Petitioner is an African-American female who had several years of progressive experience working in the field of aerospace engineering when she was hired by Respondent in 2006 as a Quality Assurance Engineer III, the highest level for that non-management position at Respondent.

2. Petitioner reported to Quality Manager Ken Koehler, who is a white male.

3. When Petitioner began her employment with Respondent, Steve Schneider was the site leader. After Schneider left, Don Pearson, a white male, replaced him as the interim site leader. Pearson served in this capacity from the middle of June 2006 to February 2007.

4. Pearson had substantial managerial and quality manager experience before joining Respondent and helped to implement the operations excellence ("op ex") program. Under Pearson, the reporting structure changed, and the quality assurance people reported directly to the manufacturing managers.

5. As the interim site leader, Pearson had a leadership team that reported to him consisting of Wes Ryan, the head of the supply chain; Nick Miles, a value stream manager; Alan Hook, an interim quality assurance manager; Floyd Cooper, the "op ex" manager; Darlene Todd, a special projects manager; and Kris Hoffman, an interim value stream manager.

6. Petitioner had a good working relationship with Site Leader Mark Harris and an acceptable relationship with Pearson. Both site leaders acted professionally towards Petitioner.

7. Miles, a white male, began work with Respondent in January 2006 as an executive-level value stream manager. Miles had prior management experience with Respondent in various positions.

8. When Koehler left as the quality manager, Respondent had already changed its management model to the value stream approach. Petitioner began to report directly to Miles after Koehler left. The value stream manager position, which was designed to streamline operations on the manufacturing floor, was a new concept to Respondent.

9. Between May 2006 when Koehler left and February 2007, when Doug Bower started, Petitioner reported directly to Miles. Miles was Petitioner's supervisor.

10. Morris Stevens, a white male who had been working as a supervisor, was a quality engineer level two. There were two senior level quality engineers, Petitioner and Jim Stein. Tawanna Cobble was a quality level engineer two and an African-American female. Arlene Hamilton was a quality engineer and an Asian female.

11. Petitioner's job as a quality engineer was to monitor production activities to ensure products were of good quality.

Some of Petitioner's responsibilities were to work on projects to find solutions, perform data analysis, determine what was happening with defects and test failures, and handling customer complaints.

12. Petitioner's job duties included:

a. exhibiting tact and consideration in dealing with her co-workers;

b. working cooperatively in group situations;

c. contributing to meetings and group efforts in a positive manner;

d. maintaining sensitivity to the needs and feelings of others;

e. supporting the organization's goals and values;

f. treating her co-workers or supervisors with respect;

g. maintaining the confidence of her supervisors or those above her in lines of authority or supervision;

h. establishing positive relations with others within the organization;

i. contributing effectively as a team member;

j. cooperating with others and responding appropriately in interpersonal situations;

k. inspiring trust in her co-workers and supervisors;

l. upholding organizational values; and

m. identifing the root cause of and solutions to problems.

13. In her interaction with her co-workers, Petitioner was not expected:

a. to be condescending;

b. to make her co-workers feel badly; or

c. to belittle her co-workers in front of others.

14. Putting her co-workers down could be disruptive of the team approach, cause friction in the workplace, and breed stress with her co-workers.

15. Respondent does not deem it acceptable conduct for Petitioner to call a co-worker a liar, whether in front of other co-workers or supervisors.

16. Petitioner's statements made during a team meeting that a manager was being untruthful to a customer was not acceptable conduct in the workplace. These statements were not diplomatic and might be considered disruptive.

17. Petitioner understood that she was expected not to undermine the authority of other managers.

18. Respondent was involved in a program known as "op ex" while Petitioner was under its employ. "Op ex" is part of the lean enterprise or lean manufacturing process Respondent adopted to focus on prioritizing business practices with the goal of improving performance. Respondent committed to implementing this philosophy throughout its operations.

19. "Op ex" was designed to achieve the goal of improving matrixes involving safety, quality, delivery, and costs to

ensure delivery of the highest quality product on time and under cost. The "op ex" program drove quality.

20. Respondent's employees were all required to participate in the continuous improvement activities. Petitioner was coached in "op ex".

21. Cooper held the post of "op ex" manager. He had been the "op ex" manager since February 2006. Prior to that time he had worked in various positions as a supervisor or manager for approximately 20 years. Respondent used the value stream as part of its "op ex" program.

22. "Root cause" relates to problem solving, data analysis, and corrective actions by defining what the actual root problem is and implementing a corrective action to keep the problem from recurring in the future. Petitioner had responsibility for group cause analysis. As part of her job responsibilities, she was expected both to report the data and to try to identify solutions to the problem.

23. Petitioner raised numerous issues related to her failure to be promoted to positions she believed herself qualified to fill. After Koehler left as the quality manager in May 2006, a search was begun for both internal and external candidates. At this time, Petitioner sent an email to Site Leader Schneider asking to be considered for the interim quality manager position. Schneider met with Petitioner for an hour to

discuss what his expectations were for the job, but three weeks later he was let go as the site leader.

24. After Schneider left as site leader, the hiring process for quality manager took several months. Petitioner went through a group interview, then Pearson, the interim site leader, interviewed both Petitioner and Cindy Burton, a white female. Burton had been employed by Respondent for 20 years and had previously served as the quality assurance manager. Burton was qualified for the position of quality manager.

25. Pearson concluded that based upon her prior experience as a quality assurance manager, Burton was better qualified for the position than Petitioner. Pearson offered the position to Burton. His decision to offer the job to Burton was based on the problems the company was having, including product yield in the factory, and upon her prior experience and familiarity with the customer base and product line. Burton turned down the job, and Pearson told Petitioner he would continue to seek candidates from the outside since he did not believe she had enough seasoning for the managerial position.

26. After Burton turned down the quality manager position, Pearson interviewed eight-to-ten external candidates for the job. Resumes from the internet were also considered. Bower, a white male, who had been employed by Respondent for five years at another site, was hired on February 22, 2007. Bower was

selected because he had experience as a quality assurance manager, and with one of Respondent's customers, Smith Aerospace. He had also been a production manager, and was both a certified quality engineer and quality manager. Bower was chosen for the position over Petitioner because he was better qualified and had significant prior management experience.

27. Bower was qualified for the position based upon 10 years more of experience in the industry than Petitioner, his professional certifications, and a strong resume. Petitioner even acknowledged that Bower was better qualified than she for the quality manager job.

28. The job description for the quality assurance manager requires a bachelor's degree in a related field, plus five years of manager level experience or a combination of education and experience. Supervision in an electronics environment is preferred. Based upon the job description alone, Petitioner lacked some of the necessary qualifications. She did not have a bachelor's degree and did not have five years of management experience.

29. Petitioner believes she was passed over for a value stream manager position in July 2006. Prior to Pearson's becoming the interim site leader, Schneider selected Hoffman, a white female, as an interim value stream manager. Hoffman had worked for Respondent since April 18, 2005. She was a planner

who planned the purchasing of parts to meet the production schedule. Hoffman had prior manufacturing experience with Burton Golf, a company she owned. Petitioner was not involved in the value stream job at the time Hoffman was selected for this position. Petitioner expressed her happiness to Hoffman when she was selected for the interim low value stream manager job.

30. After replacing Schneider, Pearson promoted Hoffman from the interim position to the permanent value stream manager job. He sought to stabilize the leadership team at the site since a site leader and quality assurance manager had left, and rumors began to circulate that the facility might close. Pearson also had observed Hoffman's performance in the interim position in terms of team building and employing some of the "op ex" tools, as well as her team's ability to meet commitments, and deemed her the best fit for the position.

31. Petitioner also had hoped to secure a value stream manager position that Pearson filled with Jack Cox. Pearson selected Cox because he observed that Cox had practiced and implemented "op ex" and had been a manager at several other locations during his career. Cox was better qualified for a value stream manager position than Petitioner.

32. Cox left after six months as a value stream manager. Hoffman stepped down as a value stream manager after six months

and was demoted to cell leader for the shared services area. After these changes, effective January 8, 2007, Respondent announced a search for two value stream managers, one for shared services and one for low voltage.

33. On that same date, Pearson announced that Hoffman would become a cell leader and Martha Gentry, a white female, would become an interim value stream manager at no increase in salary from her previous position as cell leader.

34. Petitioner asked to apply for the value stream manager position and was told it was closed to internal applicants. The position of low voltage value stream manager remained open until Darnell Rogers, an African-American male, was hired. Rogers was better qualified for the value stream manager job than Petitioner.

35. When Koehler resigned, Hook was made the interim quality manager. Pearson continued him in this role based upon his qualifications and in the interest in maintaining some stability amidst all the changes being made. Between October 2006 and February 2007, Hook was the interim quality manager.

36. Petitioner claimed that she was acting as the interim quality manager during this time period. She asked to be appointed the interim quality manager, but was not given the job. Although she was involved with preparing forms and the monthly review of the strategic employment during this time

period, Petitioner was not part of the leadership team and was not entitled to attend leadership dinners. Petitioner was invited on one occasion to make a presentation before the executive team.

37. Petitioner was paid $66,300 as of April 12, 2006. This was more than both Gentry ($41,000), when she served as interim value stream manager; and Hoffman (her salary increased from $56,100 to $61,817.60), when she served as interim value stream manager.

38. Petitioner had some interactions with various employees that became an issue with respect to her assignments. Lois Speights, a female of "mixed race black and white" as she describes herself, was a quality inspector with Respondent for 13 years. She found it stressful to work with Petitioner and testified that Petitioner was condescending and arrogant towards her. Speights believed that Petitioner tried to make her feel stupid, which added to her stress level.

39. Speights complained about how Petitioner treated her to Miles, her supervisor, during the summer of 2006. After she complained to Miles about Petitioner, the situation did not improve and Speights felt as though Petitioner treated her "like the dirt on the sole of her shoe."

40. Petitioner also had some behavior issues that arose in team meetings. Two incidents were brought to Miles' attention. Both occurred in late summer or early fall of 2006.

41. The first incident involved Petitioner throwing down her materials and walking out of a meeting at which she disagreed with comments being made.

42. The second incident occurred during an "op ex" training class. Petitioner exhibited an argumentative tone with other members of the training class; expressed disagreements with how "op ex" was being handled; and, finally, threw up her hands and expressed frustration with having to do whatever the managers wanted done. Petitioner specifically disagreed with the methods of training being used by Cooper.

43. Miles spoke with Petitioner about each of these incidents and stressed the need to act professionally and courteously at team meetings. Petitioner told Miles that she recognized her behavior was not appropriate.

44. On December 12, 2006, Petitioner asked Stevens, a co-worker, to pull some data for her. Stevens informed her that he was too busy and that she would have to do it herself. Petitioner thereafter sent a series of emails which appeared to be disciplinary in nature concerning Stevens. Miles concluded these emails were not appropriate since Petitioner was not the

supervisor of Stevens, and these could be disruptive to the balance of the team.

45. Petitioner filed a complaint with Marty Kassulke, the Human Resources Manager, about Gentry refusing to talk to her. A meeting was held with Kassulke, Miles, Gentry, and Petitioner. The issue involved Petitioner being argumentative with Gentry, not cooperating or working well within the value stream team, and not performing tasks requested by Gentry. Petitioner had previously told Gentry she would not report to or take direction from her.

46. Petitioner believes that Gentry overreacted. At the close of the meeting, Petitioner and Gentry shook hands and agreed to work together.

47. Petitioner experienced issues concerning the ability to perform her job related to the Gunbay Program. This program involved Northrop Grumman as a customer. Petitioner was assigned to the project and attended periodic team meetings concerning it. These meetings were attended by material handlers, assemblers, and line inspectors.

48. Brian Fish was the director of engineering. Matt Mulrain was the business manager whose responsibility included interacting with customers. Mulrain worked at Keltec and with Respondent for 25 years and had been a business manager for

nearly three years. He was expected to be the primary contact with the customer.

49. As the quality engineer assigned to the Gunbay Program, Petitioner had no managerial authority over the people assembling the product. Setting the schedule and deadlines was Mulrain's job.

50. Petitioner understood she was expected to respect the lines of authority for the project and not to be disruptive at the Gunbay Program team meetings, which were held on a daily basis due to the pressure to deliver the project on time.

51. Mulrain attended a March 22, 2007, meeting of the Gunbay Program team. The purpose of the meeting was to pull the team together, discuss the day's activities, and to identify delivery dates and completion dates for the team. About eight people attended the meeting, including Petitioner; Fish, the technical lead on the program; and Mulrain. Mulrain spoke up about the urgency of meeting the deadlines for the customer, the assemblers, and the inspectors. He had told the customer the day before this meeting when it could expect delivery.

52. Petitioner disagreed with the deadline and spoke up at the meeting stating she did not believe the deadline could be met and that it was not appropriate for management to lie to a customer about delivery dates. Mulrain believed Petitioner was

criticizing him for lying to the customer. Both Fish and Mulrain became upset at Petitioner's comments.

53. At a meeting with Fish and Mulrain, Petitioner said she realized she may have been out of line in making her comments. Mulrain told Petitioner what she said was unacceptable and that she accused him of lying to a customer. Petitioner could have met in private with Fish or Mulrain to express her disagreement with the deadline rather than calling them out at the meeting.

54. Although Petitioner had a good working relationship with Mulrain and Fish prior to this incident, Mulrain now believed he could not go forward with Petitioner on the team. He believed she had undermined the team. Mulrain and Fish approached Bower and asked that Petitioner be removed from the Gunbay Program team.

55. On March 29, 2007, Petitioner was given a corrective action involving a verbal warning from Bower. Both Miles and Kassulke echoed the sentiments of Fish and Mulrain regarding the effect Petitioner's statements could have on the Gunbay Program team.

56. Respondent's performance evaluations are done by a team. Cooper, Todd, Hoffman, and Miles attended a meeting at which forced rankings were given. A forced ranking is based upon multiple evaluators so that not a single manager or

supervisor evaluates the employee. In November 2006, Kassulke appointed the evaluation teams and participated as the facilitator. The team met and discussed the different areas of evaluation and gave rankings to the six quality engineers. The outcome of the meeting was the composite scores of the forced rankings.

57. Five categories were considered in making the rankings based upon job knowledge, results, continuous improvement, change agent, digital quotation, teamwork, and interpersonal skills. Kassulke took the ratings of the six evaluators and calculated a composite number.

58. Respondent's practice was to display the rankings on a bell curve. Petitioner received an overall average of 1.625 on a maximum scale of 4.0. When forced onto the bell curve, Petitioner received a ranking of 1.0, making her the lowest scored engineer out of six evaluated.

59. In January 2007, Petitioner asked Miles what she needed to do to improve her performance. Miles told Petitioner that she was perceived by some people as hard to work with. Petitioner said she needed to work on getting along better with others. Later that month, after Petitioner inquired about her performance evaluation, Miles told her that her number one issue was teamwork.

60. Petitioner received the performance evaluation on April 24, 2007. The comment written on her evaluation which received a 1.0 was "Roni has a difficult time working in the team environment, and lacks the required tool set to excel in her current position." These comments reflected the consensus of the team meeting.

61. Respondent had a non-discrimination and harassment policy in place during Petitioner's employment. This policy included a toll-free hotline to call if an employee experienced discrimination or harassment. Petitioner never called the hotline to complain about her treatment by Respondent.

62. Petitioner filed a complaint with the EEOC on May 16, 2007.

63. Harris became the site leader in March 2007. He is now the Director of Global Operations for Respondent. When he started, his mandate was to improve the performance of the operation in Ft. Walton. In April and May, he had daily walk around meetings, which included the six quality engineers. After several weeks studying the operation, he decided to realign the quality manager responsibilities. Stein and Stevens were assigned to program quality and had direct interaction with the customers. Hamilton, Cobble, Hook, and Petitioner were assigned to be process oriented quality engineers.

64. Harris moved Petitioner to take on the dock to stock and supplier certifications to make the business better, drive down some of the costs of the business, and to give Petitioner an opportunity to do something professionally she had not done at that point. Petitioner gave Harris some ideas on how to deal with the dock to stock program which was a business initiative and problem Harris was trying to solve. The program was trying to reduce the time from the loading dock to the production floor by decreasing handling time.

65. Petitioner received a memo effective July 2, 2007, sent by either Harris or Kassulke. The memo emphasized that "the restructure is designed to maximize [Respondent's] effectiveness and efficiencies to achieve better service and coordination for our customers, vendors and internal staff." Harris relied primarily on recommendations by Bower about the strengths or weaknesses of the quality engineers. Petitioner was made the supply quality engineer as a result. Miles had nothing to do with this restructuring.

66. Petitioner worked in various locations during her tenure with Respondent. Prior to the June 2007 realignment, she worked in a bullpen. After the July realignment, Petitioner worked inside a fenced area that was locked at night to secure the inventory. She had a desk and chair in that area as well as three inspectors who had work stations, two white females and an

African-American female. Petitioner was not satisfied with the work area to which she was assigned in the last realignment.

67. Petitioner submitted her letter of resignation on July 30, 2007.

68. Petitioner acknowledged that only certain of Respondent's managers even knew she was African-American. In fact, on one occasion when answering how many African-Americans attended a meeting that she attended, she answered "none." She had never talked about her race and the issue never came up until an encounter with Miles where he asked her if she was African-American and she told him she was. This encounter was awkward for Petitioner. Harris also was aware of Petitioner's race, but Pearson, the site leader, and Mulrain, the business manager, were not.

69. Other non African-American employees received discipline from Respondent. Edgar Salcedo, an Hispanic male and a non African-American, was a program manager who received a performance improvement plan (PIP) on January 16, 2007, and was removed from the Gunbay Program.

70. Kevin Kennedy, a white male, received a corrective action on November 12, 2007. Burton, a white female, was issued a final warning on June 3, 2008. John Irvine, a white male, received a final warning. Hook, a white male, was given a PIP as part of a corrective action dated September 13, 2007.

Hoffman, a white female, received a corrective action and a verbal warning concerning her job duties and skills. She received a PIP because she was not meeting the performance expected of her position. Hoffman received a demotion as a result of her performance.

71. Respondent's available progressive disciplinary steps include a verbal warning, written warning, final warning, and a PIP. Petitioner received only the lowest of the steps, a verbal warning. She never received a PIP.

72. Petitioner did not receive a raise in 2007. She was not alone since 23 employees did not receive raises that year, including four quality engineers. At least 17 white employees did not receive a raise in 2007.

73. Respondent hired and promoted other African-American employees. Cobble, an African-American female, was promoted from a quality engineer to a quality supervisor. Rogers, an African-American male, was hired in 2007 as a value stream manager. Speights, Iris Fidel, and Jennifer Williams, all African-American females, were employed as assemblers.

74. Of the three quality engineers employed in November 2008, Yataive Harris is an African-American male, Marisol Sade is Hispanic, and Ahmad Allaoui is from Morocco.

75. After resigning from Respondent, Petitioner was able to secure a position in her field with General Dynamics.

CONCLUSIONS OF LAW

76. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. §§ 120.569, 120.57(1), and 760.11 Fla. Stat.

77. Petitioner is an "aggrieved person," and Respondent an "employer" within the meaning of Subsections 760.02(10) and (7), Florida Statutes, respectively. Section 760.10, Florida Statutes, makes it unlawful for Respondent to discharge or otherwise discriminate against Petitioner based upon an employee's race or sex.

78. The Florida Civil Rights Act of 1992 (the "Act") makes certain acts "unlawful employment practices" and gives FCHR the authority, following an administrative hearing conducted pursuant to Sections 120.569 and 120.57, Florida Statutes, to issue an order "prohibiting the practice and providing affirmative relief from the effects of the practice, including back pay," if it finds that such an "unlawful employment practice" has occurred. §§ 760.10 and 760.11(6), Fla. Stat.

79. Pursuant to Subsection 760.10(1), Florida Statutes, 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.

80. Federal discrimination law may properly be used for guidance in evaluating the merits of claims arising under Section 760.10, Florida Statutes. See Brand v. Florida Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994); Florida Dept. of Community Affairs v. Bryant, 586 So. 2d 1205, 1209 (Fla. 1st DCA 1991).

81. In McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973), the Supreme Court articulated a burden of proof scheme for cases involving allegations of discrimination under Title VII, where the plaintiff relies upon circumstantial evidence. The McDonnell Douglas decision is persuasive in this case, as is St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506-07 (1993), in which the Court reiterated and refined the McDonnell Douglas analysis.

82. Pursuant to this analysis, the plaintiff (Petitioner herein) 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 (1996) (citing Arnold v. Burger Queen Systems, 509 So. 2d 958 (Fla. 2d DCA 1987)).

83. If, however, the plaintiff succeeds in making a prima facie case, then the burden shifts to the defendant (Respondent

herein) to articulate some legitimate, nondiscriminatory reason for its complained-of conduct. If the defendant carries this burden of rebutting the plaintiff's prima facie case, then the plaintiff must demonstrate that the proffered reason was not the true reason, but merely a pretext for discrimination. McDonnell Douglas, 411 U.S. at 802-03; Hicks, 509 U.S. at 506-07.

84. In Hicks, the Court stressed that even if the trier-of-fact were to reject as incredible the reason put forward by the defendant in justification for its actions, the burden nevertheless would remain with the plaintiff to prove the ultimate question of whether the defendant intentionally had discriminated against him. Hicks, 509 U.S. at 511. "It is not enough, in other words, to disbelieve the employer; the fact finder must believe the plaintiff's explanation of intentional discrimination." Id. at 519.

85. In order to prove intentional discrimination, Petitioner must prove that Respondent intentionally discriminated against her. It is not the role of this tribunal (or any court, for that matter) to second-guess Respondent's business judgment. As stated by the court in Chapman v. AI Transport, 229 F.3d 1012, 1031 (11th Cir. 2000), "courts do not sit as a super-personnel department that reexamines an entity's business decisions. No matter how mistaken the firm's managers, the [Civil Rights Act] does not interfere. Rather, our inquiry

is limited to whether the employer gave an honest explanation of its behavior (citations omitted). An employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason."

86. At the administrative hearing held in this case, Petitioner had the burden of proving that she was the victim of a discriminatorily motivated action. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932, 934 (Fla. 1996) ("The general rule is that a party asserting the affirmative of an issue has the burden of presenting evidence as to that issue."); Florida Department of Health and Rehabilitative Services v. Career Service Commission, 289 So. 2d 412, 414 (Fla. 4th DCA 1974) ("The burden of proof is 'on the party asserting the affirmative of an issue before an administrative tribunal.'").

87. There was an absence of proof at hearing that Petitioner's managers, other than Miles and Harris (who was the site leader for a short period of Petitioner's employment and is now Director of Global Operations) were even aware Petitioner was African-American. Knowledge of an employee's race is required in order to prove a discriminatory business practice. See Bafford v. Township Apartments Associates, 2007 U.S. Dist. LEXIS 88109 (M.D. Fla. Nov. 30, 2007) ("Simply put, if Township

did not know of Plaintiff's race, it could not have intended to discriminate against Plaintiff on the basis of race."); accord Lubetsky v. Applied Card Systems, Inc., 296 F.3d 1301, 1306 (11th Cir. 2002), cert. denied, 537 U.S. 1106 (2003) ("An employer cannot intentionally discriminate against an individual based upon his religion unless the employer knows the individual's religion."). Petitioner's own testimony indicated she did not consider herself an African-American.

88. The evidence produced at hearing failed to demonstrate that Pearson knew Petitioner was African-American. Since he was involved in the decision-making process concerning offering Burton the quality manager job, selecting Bower as the quality manager, continuing Hook as the interim quality manager, and selecting Cox and Hoffman as value stream managers, he could not have discriminated against Petitioner on the basis of her race in the absence of knowledge of her race. Therefore, Respondent did not commit an unlawful employment practice with respect to the promotion issues raised by Petitioner. Further, decisions by Mulrain and Fish concerning Petitioner's comments at the Gunbay Program meeting which led to her removal from the program could not have been racially motivated since they were unaware of Petitioner's race at the time the decisions were made. Bafford v. Township Apartments Associates, supra. Petitioner's mere opinion regarding a discriminatory basis or motivation for

employment action does not suffice to establish that discriminatory animus was present regarding the making of the decision. Earley v. Champion International Corporation, 907 F.2d 1077 (11th Cir. 1990).

89. Petitioner's discrimination claims with respect to Respondent's failure to promote her to a managerial position must similarly fail. To make a prima facie case for failure to promote, Petitioner must show: 1) that she belongs to the protected class; 2) that she was qualified and applied for the promotion; 3) that despite her qualifications she was rejected; and 4) that the employer either filled the position with someone of a different race and sex or sought to promote less qualified employees who are not members of the protected class. If the Petitioner establishes a prima facie case of discrimination, the burden then shifts to the employer to articulate some legitimate, non-discriminatory reason for the employee's rejection. If the employer meets this burden of persuasion, the Petitioner must then establish that the employer's proffered reasons for the employee's rejection were pretextual. Taylor v. Runyon, 175 F.3d 861, 866 (11th Cir. 1999).

90. Petitioner has failed to establish a prima facie case of race discrimination involving a failure to promote. As indicated above, there was no evidence that Pearson, who made the promotions or decisions, was even aware of Petitioner's

race. Absent evidence of his knowledge of Petitioner's race, Pearson cannot be found to have discriminated against Petitioner on that basis.

91. Moreover, Petitioner's claims regarding sex discrimination were not supported by the evidence at hearing. Women were selected for several of the positions for which Petitioner either applied or to which believed she should have been promoted regardless of application. Petitioner was unable to demonstrate at hearing that any of the promotions were motivated by the gender of the applicants. Therefore, her claims as to gender discrimination must fail.

92. Regarding the quality manager position, which Burton was offered and for which Bower made the selection, Petitioner has failed to make a prima facie case because Petitioner was not qualified for that position based upon her education and experience. The quality manager position required a bachelor's degree in a related field, plus five years of manager level quality experience, or a combination of education and experience. Petitioner lacked both the bachelor's degree and the five years of manager level quality experience.

93. Even if Petitioner had proven herself qualified for the managerial positions for which she applied, for which she did not, Respondent articulated legitimate non-discriminatory reasons why others were selected instead of Petitioner.

Petitioner has not shown that these legitimate reasons were merely a pretext for race or sex discrimination. The support for this finding is strongly supported by the evidence of record.

94. Burton was better qualified than Petitioner for the quality manager job because she had prior experience as a quality manager. Bower was better qualified for the quality manager job because he also had prior experience as a quality assurance manager. Petitioner even acknowledged in her own testimony that Bower was better qualified than she for the position. Petitioner has not demonstrated that the reasons for these promotions were a pretext for race or sex discrimination.

95. Legitimate, non-discriminatory reasons were also given for Hoffman's promotion to value stream manager. Pearson sought to stabilize the leadership team at the Ft. Walton site, and Hoffman had been the interim value stream manager previously selected by Schneider. Petitioner testified that she had thought it was great at the time Hoffman was given the job. No pretext for race or sex discrimination was demonstrated by Petitioner concerning this promotion.

96. Respondent articulated a legitimate non-discriminatory reason for selecting Cox for the value stream manager job. Cox had been a manager previously at several locations. Petitioner has not shown that the reason was a pretext for race or sex

discrimination, and she acknowledged in her testimony that Cox was better qualified than she.

97. After Gentry was selected as the interim value stream manager in January 2007 and Petitioner was told the permanent position was closed to internal candidates, Rogers, an African-American male, was ultimately selected several months later. Petitioner has not shown that the reasons for this particular hire were a pretext for race or sex discrimination. Petitioner also acknowledged that Mr. Rogers was better qualified for the position than she.

98. When Pearson became the interim site leader in June 2006, he elected to keep Hook as the interim quality manager in order to maintain some stability of leadership. That reason was legitimate and non-discriminatory for Pearson's actions, and Petitioner has not demonstrated that this was merely a pretext for race or sex discrimination.

99. Based upon Petitioner's own admissions that the employees selected for the manager positions discussed above were at least as qualified or better qualified than she, her claims of discrimination on the basis of race or gender must fail. Moreover, the evidence fails to support Petitioner's claim that the hiring decisions were merely a pretext for discrimination. In the context of a promotion, it is not sufficient for Petitioner to argue (which she scarcely has) that

she is better qualified for a position than another. Springer v. Convergys Customer Management Group, Inc., 509 F.3d 1344, 1349 (11th Cir. 2007). Petitioner "must show that the disparities between the successful applicant's and his own qualifications were of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff." Id. Petitioner must show not merely that Respondent's employment decisions were mistaken, but that they were in fact motivated by race. Alexander v. Fulton County, 207 F.3d 1303, 1339 (11th Cir. 2000); Brooks v. County Comm'n, 446 F.3d 1160 (11th Cir. 2006). In this case, Petitioner did not meet her burden to show that the disparities, if any, between her qualifications and those of Burton, Bower, Hoffman, Cox, Gentry, Rogers, and Hook were of such weight and significance that no reasonable person could have chosen those individuals over her. The evidence shows that these employees were selected on the basis of better experience or other legitimate business reasons.

100. Petitioner alleged race or sex bias in the application of discipline to her on the job. In order to prevail on this claim, Petitioner must demonstrate that: 1) that she did not violate the work rule, or 2) that she engaged in misconduct similar to that of a person outside the protected class, and that the disciplinary measures enforced against her

were more severe than those enforced against other persons who engaged in similar conduct. McCalister v. Hillsborough County Sheriff, 2006 U.S. App. LEXIS 31617 (11th Cir. Dec. 20, 2006); Jones v. Gerwens, 874 F.2d 1534, 1540 (11th Cir. 1989).

101. Petitioner failed to establish a prima facie case of either race or sex discrimination regarding the verbal corrective action she was given for her comments during the May 2007 Gunbay Program meeting for several reasons. First, Mulrain, whom Petitioner claims wanted her removed from the program for discriminatory reasons, was not aware that she was African-American. Therefore, the corrective action could not have been taken by him based upon her race. Second, a verbal corrective action does not even constitute an adverse employment action. Counseling memoranda and "negative performance evaluations, standing alone, cannot constitute an adverse employment action." Davis v. Town of Lake Park, 245 F.3d 1232, 1241-42 (11th Cir. 2001), citing Sweeney v. West, 149 F.3d 550, 556 (7th Cir. 1998); Nelson v. University of Maine Sys., 923 F. Supp. 275, 282-83 (D. Me. 1996) ("mere criticism, or counseling, of an employee" is not actionable); Coney v. Department of Human Resources, 787 F. Supp. 1434, 1442 (M.D. Ga. 1992) (non-threatening written reprimand, later removed from employee's personnel file, held not actionable); Medwig v. Baker, 752 F. Supp. 125, 137 (S.D.N.Y. 1990) (counseling of employee for

performance deficiency not materially adverse action). Finally, Petitioner's own testimony established that she was not to undermine the authority of her managers. Undermining her supervisors in the workplace was not acceptable behavior, and other opportunities existed for Petitioner to make known to her managers her disagreement with their actions or comments concerning promises made to customers. Petitioner's comments at the March 22, 2007, Gunbay Program meeting were taken by her supervisors as accusing them of lying, and, when made in such a public setting, undermined their authority with other program members. Her comments were not consistent with the work expectations for Petitioner.

102. The evidence of record does not prove that other employees, regardless of race or gender, were not similarly disciplined. Petitioner received the mildest form of rebuke for her actions, the verbal reprimand. Other employees, such as Edgar Salcedo, Hook, Kennedy, and Burton, received far greater discipline for less disruptive conduct such as failure to follow through on tasks or for lack of responsiveness. Further, even assuming that Petitioner established a prima facie case that she was given a verbal corrective action because of her race or sex, Respondent has articulated legitimate, non-discriminatory reasons for the verbal corrective action, namely, that the managers were trying to impress upon all members of the Gunbay

Program team the importance of meeting deadlines and delivery dates. Petitioner's criticism of Mulrain at the team meeting was out of line and undermined the objectives of what the team was trying to accomplish.

103. Petitioner has failed to establish a prima facie case of race or sex discrimination in her receiving the corrective action form in March 2007. Petitioner failed to demonstrate that she did not violate a work rule; or that she was engaged in conduct similar to that of a person outside of the protected class, and that the disciplinary measures enforced against her were more severe than those enforced against other persons who engaged in similar conduct. In fact, Petitioner received less severe discipline than others who violated Respondent's work rules.

104. Petitioner's claim that her 2007 performance evaluation was based upon her race or gender is similarly without a factual or legal basis. A low performance rating is not an adverse action. Rabinovitz v. Pena, 89 F.3d 482, 488 (7th Cir. 1996); Meredith v. Beech Aircraft Corp., 18 F.3d 890, 896 (10th Cir. 1994); Anderson v. UPS, 248 Fed. Appx. 97, 98 (11th Cir. 2007). An "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 under the circumstances." Davis

v. Town of Lake Park, 245 F.3d 1232, 1239 (11th Cir. 2001). Although Petitioner received the lowest overall rating among the six engineers, Cobble, another African-American female, received the highest ranking among the engineers. Additionally, even if Petitioner could state a prima facie case that she was given a low evaluation because of her race or sex, Respondent has articulated several legitimate non-discriminatory reasons for Petitioner's 2007 performance evaluation. Petitioner cannot demonstrate that these reasons are pretextual. Her performance evaluation was based upon a group decision of managers who attended the team meeting where the forced rankings were made. The quality engineers were ranked according to multiple job related categories involving job knowledge, results, continuous improvement, change agent, digital quotation, teamwork, and interpersonal skills. From their numerical ratings, Kassulke calculated a composite number. A bell curve was utilized to calculate the overall score.

105. Testimony from her co-employees and managers proved that Petitioner did not always get along with her co-workers, took an argumentative approach on multiple occasions with co-employees and supervisors, and had problems with following instructions from her supervisors on some occasions. The evaluation was legitimate and non-discriminatory and not a pretext for race or sex discrimination.

106. Petitioner's claim that she suffered adverse employment actions as retaliation for having filed a complaint with the EEOC is similarly without merit. In order to establish a prima facie case of retaliation under Title VII, Petitioner must show that: 1) she engaged an activity protected under Title VII; 2) she suffered a materially adverse employment action; and 3) there was a causal connection between the protected activity and the adverse employment action. Burlington Northern v. White, 548 U.S. 53 (2006). Petitioner contends that after she filed her charge of discrimination with the EEOC, she was retaliated against in that her quality engineer job duties were changed to working on the dock to stock program and her desk location was shifted with Cobble to work in what she referred to as a "cage." The evidence at hearing was that Harris, the site leader at the time of the filing of Petitioner's EEOC charge, was unaware she had filed a complaint. There was no evidence produced linking the filing of the EEOC complaint with the realignment of job duties by Harris. To establish a causal connection in a retaliation case, the Petitioner must show that the decision maker, in this case Harris, was aware of the "protected expression" (the claim of discrimination made to the EEOC). Bass v. Board of County Commissioners, 256 F.3d 1095, 1119 (11th Cir. 2001).

107. Even if Harris was aware that Petitioner had filed a complaint with the EEOC or engaged in protected activity under Title VII or the Florida Commission on Human Relations, Respondent articulated legitimate, non-discriminatory reasons for realigning the job duties of the quality engineers, including Petitioner.

108. Petitioner engaged in several conversations with Harris about the realignment and how better to perform her duties in the dock to stock program. The "cage" complained about by Petitioner was nothing more than an area secured to protect the inventory. Petitioner was given a desk and all the appropriate equipment expected for a quality engineer to perform her duties. No causal connection between the realignment or the designation of Petitioner to a particular area to perform her duties and the filing of charges of discrimination were made. Moreover, Petitioner's claims of retaliation must be dismissed as untimely filed. The initial charge of discrimination on the basis of race or sex was filed on May 16, 2007. The retaliation claim was not asserted until the time of hearing, November 19 through 21, 2008, more than 365 days from the alleged violation. Therefore, Petitioner's claim of retaliation must fail as untimely. Gonima v. Manatee County School Board, 2007 U.S. Dist. LEXIS 30155 at 13-14 (M.D. Fla. Apr. 24, 2007).

109. Petitioner did not produce any evidence at hearing that she was denied attendance at the Xetron lunch or a monetary bonus associated with that lunch on the basis of her race or sex, a claim she asserted prior to the hearing. Therefore, these claims must be dismissed.

110. The evidence produced at hearing failed to prove, by a preponderance of the evidence, that Petitioner suffered discrimination in her employment on the basis of her race or sex. Respondent articulated legitimate, non-discriminatory reasons for its actions and decisions regarding Petitioner. The greater weight of the evidence clearly supports that Respondent did not commit an unlawful employment practice.

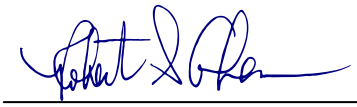
111. Based upon the evidence and testimony offered at hearing, Respondent is not found to have committed an unlawful employment practice as alleged by Petitioner in her Petition for Relief. Therefore, her Petition should be dismissed.

RECOMMENDATION

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

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

DONE AND ENTERED this 3rd day of June, 2009, in Tallahassee, Leon County, Florida.



ROBERT S. COHEN
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of June, 2009.

COPIES FURNISHED:

Marty Denis, Esquire
Barlow, Kobata & Denis
525 West Monroe Street, Suite 2360
Chicago, Illinois 60661

Bruce A. Minnick, Esquire
The Minnick Law Firm
Post Office Box 15588
Tallahassee, Florida 32317-5588

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

Larry Kranert, 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.