

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARSHALL MEIKLE,)
)
 Petitioner,)
)
 vs.) Case No. 08-4495
)
 HOTELS UNLIMITED, INC./DOUBLE)
 TREE,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on May 4 and October 23, 2009, by video teleconference with connecting sites in West Palm Beach and Tallahassee, Florida, before Errol H. Powell, an Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Marshall Meikle, pro se
416 Arabian Road
Palm Springs, Florida 33461

For Respondent: Thomas A. Groendyke, Esquire
Douberley & Cicero
1000 Sawgrass Corporate Parkway, Suite 590
Sunrise, Florida 33323

STATEMENT OF THE ISSUE

The issue for determination is whether Respondent committed an unlawful employment act by discriminating against Petitioner

on the basis of age and retaliating against Petitioner in violation of the Florida Civil Rights Act of 1992, as amended.

PRELIMINARY STATEMENT

Marshall Meikle filed an employment discrimination complaint against Hotels Unlimited, Inc./Double Tree (Hotels Unlimited) on the basis of age and retaliation with the Florida Commission on Human Relations (FCHR). The FCHR determined that no reasonable cause existed to believe that an unlawful employment practice occurred and issued a "Determination [of] No Cause" and a "Notice of Determination [of] No Cause."

Mr. Meikle timely filed a Petition for Relief. On September 16, 2008, FCHR referred this matter to the Division of Administrative Hearings.

The final hearing was scheduled, but a continuance was granted. The hearing was held on May 4, 2009, at which testimony was taken and documentary evidence was admitted. However, a controversy regarding one witness was brought before this tribunal, which resulted in the re-opening and re-scheduling of the final hearing in order to take the testimony of the witness.

At hearing, Mr. Meikle withdrew his claim of employment discrimination based on age, leaving his claim of retaliation. Mr. Meikle presented the testimony of two witnesses, including testifying on his own behalf, and entered three exhibits

(Petitioner's Exhibits numbered 1 through 3) into evidence. Hotels Unlimited presented the testimony of two witnesses and entered eight exhibits (Respondent's Exhibit numbered 1 through 8)¹ into evidence.

A transcript of the hearing was not ordered. At the request of the parties, the time for filing post-hearing submissions was set for more than ten days following the conclusion of the hearing. The parties timely filed their post hearing submissions, which were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Mr. Meikle is an African-American male.
2. At hearing, Mr. Meikle withdrew his claim of age discrimination.
3. Mr. Meikle is only pursuing the claim of retaliation.
4. Mr. Meikle was employed with the Radisson Hotel (Radisson), which was owned by Hotels Unlimited.
5. Mr. Meikle's supervisor at the Radisson was Harland McPhun, who was the Assistant General Manager.
6. Mr. McPhun's supervisor at the Radisson was Diane Gray, who was the General Manager.
7. During his employment at the Radisson, Mr. Meikle was promoted from a cook to the Kitchen Director. He was very proud of being in the position of Kitchen Director.

8. Mr. McPhun had not encountered any problems with Mr. Meikle being on time for work or being a "no-show" for work as scheduled.

9. However, Mr. McPhun had encountered problems with Mr. Meikle in other areas, such as Mr. Meikle's providing his sister, who was employed at the front desk of the Radisson, with larger portions of food than the other employees; and being in places other than the kitchen area talking, i.e., at or near the front desk. Mr. McPhun gave Mr. Meikle verbal warnings, regarding the incidents, but never documented any of the verbal warnings.

10. At some point in time, Hotels Unlimited decided to convert the Radisson to a Double Tree Hotel (Double Tree). The Double Tree's structure required the position of a Food and Beverage Manager, who would supervise the food and beverage personnel, kitchen staff, and restaurant servers.

11. Gerald Brown was hired as the Food and Beverage Manager in January 2008. Mr. Brown began his employment before the completion of the conversion from the Radisson to the Double Tree.

12. On February 14, 2008, Mr. Brown held his first staff meeting with the entire staff over whom he had supervision. Mr. Meikle was late for the staff meeting.

13. On February 16, 2008, Mr. Brown issued a "Disciplinary Document" indicating that he was giving Mr. Meikle his first written warning for being late at the meeting. Mr. Meikle admits that he was late for the meeting. The Disciplinary Document was signed by Mr. Meikle (the date of the signature was not completed), by Mr. Brown, as the Manager (the date of the signature was not completed), and by Ms. Gray, as the General Manager, on February 18, 2008.

14. Additionally, on February 16, 2008, Mr. Brown issued another Disciplinary Document indicating that he was giving Mr. Meikle his first written warning for failing to follow rules and direction involving four different matters about which Mr. Brown had repeatedly counseled Mr. Meikle on several occasions, but were not being adhered to by Mr. Meikle. The Disciplinary Document was signed by Mr. Meikle (the date of the signature was not completed), by Mr. Brown, as the Manager, on February 16, 2008, and by Ms. Gray, as the General Manager, on February 18, 2008.

15. On February 25, 2008, Mr. Brown issued a Disciplinary Document for an incident that occurred on February 23, 2008, a Saturday night. Mr. Meikle was scheduled to work, but he departed the kitchen and the hotel property without informing and obtaining permission from the manager. Hotels Unlimited's policy required the informing of the manager in order for the

manager to take appropriate steps to make adjustments to accommodate the absence. Mr. Meikle was entitled to a break, but he failed to notify the manager of his absence in accordance with the policy. The Disciplinary Document included a statement that "Disciplinary Action to be decided by the General Manager." The Disciplinary Document was signed by Mr. Meikle on February 26, 2008, by Mr. Brown, as the Manager, on February 25, 2008, and by Ms. Gray, as the General Manager, on February 26, 2008.

16. Regarding Mr. Meikle's absence from work on Saturday evening, February 23, 2008, he was working an 18-hour shift, without anyone to relieve him, which meant that he was unable to take a break. He was exhausted and needed to take a break. Before Mr. Brown was hired, Mr. Meikle was working the 18-hour shift, and after Mr. Brown was hired, Mr. Meikle agreed to continue working the 18-hour shift. Mr. Brown did not wish to disrupt what was already in place, so he agreed to allow Mr. Meikle to keep the 18-hour shift. It was not unreasonable for Mr. Brown to maintain Mr. Meikle on the 18-hour shift, as Mr. Meikle requested.

17. On that same day, February 25, 2008, Mr. Brown issued a Disciplinary Document for an incident that occurred on February 25, 2008. Mr. Meikle raised his voice and became very loud, resulting in guests being disturbed. As Mr. Meikle had

been absent from work on Saturday evening, February 23, 2008, Mr. Brown was inquiring of Mr. Meikle the reason for his (Mr. Meikle's) absence. Further, during the conversation, Mr. Brown raised several other concerns. Mr. Meikle raised his voice and became very loud, which Mr. Brown determined was disturbing the guests. Mr. Brown requested Mr. Meikle to remove himself from the dining area. The Disciplinary Document was signed by Mr. Brown on February 26, 2008. Mr. Meikle refused to sign the Disciplinary Document where the employee's signature is indicated; but, he (Mr. Meikle) noted on it, "Refuse to sign because I did what I was told," and signed his name under the statement.

18. Each Disciplinary Document indicated that Mr. Meikle's termination was effective "2/29/08." Mr. Brown did not indicate a date for termination on any Disciplinary Document and could offer no explanation as to why or how each Disciplinary Document contained such information. Furthermore, no testimony was presented as to why or how each Disciplinary Document contained such notation.

19. Mr. Brown contacted Ms. Gray, recommending the termination of Mr. Meikle. Ms. Gray did not approve the recommendation; she wanted to continue to work with Mr. Meikle.

20. On February 25, 2008, a letter, bearing the same date, from Mr. Meikle was faxed to Hotels Unlimited's Human Resources.

Among other things, Mr. Meikle notified Human Resources that he was working in a hostile work environment created by Mr. McPhun, providing examples of what he considered inappropriate action and conduct by Mr. McPhun; that Mr. McPhun "strongly dislike[s]" him "for whatever the reason"; that Mr. McPhun was taking food from the hotel and that he (Mr. Meikle) had reported it to the general manager; that all of his (Mr. Meikle's) current problems at work stemmed from Mr. McPhun, providing examples of the problems that he (Mr. Meikle) had encountered²; that Mr. McPhun was the cause of all of his problems at work; that he (Mr. Meikle) had no one to ask for help; that Mr. McPhun was out to get him (Mr. Meikle) fired; that everyone was biased against him (Mr. Meikle) because of Mr. McPhun; and that a copy of the letter would be forwarded to the EEOC and the FCHR.

21. Ms. Gray was notified by her superior that Human Resources had received a letter from Mr. Meikle, but she was not notified of the content of the letter nor did she receive or view a copy of the letter. Her superior told her to talk with Mr. Meikle and resolve the problem.

22. Hotels Unlimited's Employee Handbook, Employment Policies & Practices section, provides in pertinent part:

Equal Employment

* * *

If you suspect discriminatory or harassing actions on the part of the Company or any other employee, you should immediately notify your General Manager or Corporate Department Head, as applicable, or, if you prefer, a Company Officer. Such notification will be held in confidence to the extent possible. Discriminatory behavior or action by any employee is cause for discharge.

* * *

Sexual and Other Forms of Harassment Policy Statement:

Hotels Unlimited, Inc. is committed to a work environment in which all employees are treated with respect and dignity. It is the policy of Hotels Unlimited, Inc. to provide a work environment that is free from discrimination and harassment. Action, words or comments based on an individual's sex, race, color, religion, sexual orientation, national origin, age, disability, marital status, citizenship or any other characteristic protected by law - either overt or subtle - are demeaning to another person and undermine the integrity of the employment relationship. . . .

* * *

Harassment on the basis of any other protected characteristic is also strictly prohibited. Such harassment is defined as verbal or physical conduct that denigrates or shows hostility toward an individual because of his/her race, color religion, sex, sexual orientation, national origin, age, disability, marital status, citizenship or any other characteristic protected by law, and that has the purpose or effect of creating an intimidating, hostile or

offensive work environment; has the purpose or effect of unreasonably interfering with an individual's work performance; or otherwise adversely affects an individual's employment opportunity.

* * *

Administration of Policy:

* * *

It is unlawful to retaliate in any way against anyone who has complained about harassment. Any incident of retaliation should be reported in the same manner as an incident of harassment. Any employee who engages in such retaliation will be subject to disciplinary action up to and including discharge.

All allegations of discrimination, harassment, or retaliation will be subject to prompt, thorough and confidential investigation. All investigations will be designed to protect the privacy of, and minimize suspicion toward, all parties involved. . . .

23. The Employee Handbook provided protection against employment practices for statuses beyond those set forth by law.³

24. In the early morning hours of February 29, 2008, Mr. Meikle was awoken by a telephone call from a co-worker inquiring as to why he (Mr. Meikle) was not at work. Mr. Meikle informed his co-worker that he was off that day, but his co-worker advised that he (Mr. Meikle) was scheduled to work. Mr. Meikle telephoned Mr. Brown, who informed Mr. Meikle to be

at work. Mr. Meikle reported to work, but failed to report for his shift as scheduled.

25. Regarding Mr. Meikle's failure to report to work on time for his scheduled shift, all work schedules for Food and Beverage, during Mr. Brown's tenure, were typed and posted, one week in advance. The work week for Food and Beverage was Monday through Sunday. The posted work schedule for the week of February 25, 2008, was prepared, typed, and posted by Mr. Brown and indicated that Mr. Meikle was required to work on Monday, February 25, 2008, and Tuesday, February 26, 2008; was not required to work on Wednesday, February 27, 2008, and Thursday, February 28, 2008; but, was required to work on Friday, February 29, 2008, specifically, from 5:00 a.m. to 2:00 p.m.

26. Mr. Meikle reviewed a work schedule for the week of February 25, 2008, that was typed and hand-written. The work schedule indicated that it was prepared by Mr. McPhun and that he (Mr. Meikle) was not required to work on Friday, February 29, 2008. Based on that work schedule, Mr. Meikle did not believe that he had to report to work on February 29, 2008.

27. However, Mr. Meikle was required to report to work on February 29, 2008, and work from 5:00 a.m. to 2:00 p.m. He failed to report to work for his shift as scheduled.⁴

28. No dispute exists that, at no time previously, had Mr. Meikle failed to report to work for his shift as scheduled.

29. On February 29, 2008, Mr. Meikle was terminated for failing "to be at work on time for [his] schedule [sic] shift." A Termination Report dated February 29, 2008, was signed by Mr. Brown, by Mr. Meikle, and Ms. Gray.

30. Mr. Brown made the determination to terminate the employment of Mr. Meikle, and Ms. Gray agreed.

31. Mr. McPhun did not participate with Mr. Brown and Ms. Gray in the determination to terminate the employment of Mr. Meikle.

32. At the time of Mr. Meikle's termination, Mr. Brown was not aware of Mr. Meikle's letter to Hotels Unlimited's Human Resources.

CONCLUSIONS OF LAW

33. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the parties thereto, pursuant to Sections 760.11 and 120.569, Florida Statutes (2009), and Subsection 120.57(1), Florida Statutes (2009).

34. The standard of proof is preponderance of the evidence. § 120.57(1)(j), Fla. Stat. (2009).

35. These proceedings are de novo. § 120.57(1)(k), Fla. Stat. (2009).

36. Section 760.10, Florida Statutes, provides in pertinent part:

(1) It is an unlawful employment practice for an employer:

(a) To discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.

(b) To limit, segregate, or classify employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities, or adversely affect any individual's status as an employee, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.

* * *

(7) It is an unlawful employment practice for an employer . . . to discriminate against any person because that person has opposed any practice which is an unlawful employment practice under this section, or because that person has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section.

37. Mr. Meikle withdrew his claim of age discrimination, leaving his claim of retaliation remaining.

38. Because the provision of Section 760.10(7), Florida Statutes, is "almost identical to its federal counterpart, 42 U.S.C. § 2000e-3(a), Florida courts generally follow federal

case law when examining similar state claims. Hinton v. Supervision Int'l, Inc., 942 So. 2d 986, 989 (Fla. 5th DCA 2006).” Blizzard v. Appliance Direct, Inc., 16 So. 3d 922, 926 (Fla. 5th DCA 2009).

39. To establish a prima facie case of retaliation under Section 760.10(7), Florida Statutes, “a plaintiff must demonstrate: (1) that he or she engaged in statutorily protected activity; (2) that he or she suffered adverse employment action; and (3) that the adverse employment action was causally related to the protected activity. See Harper v. Blockbuster Entm't Corp., 139 F.3d 1385 (11th Cir.), cert. denied, 525 U.S. 1000, 119 S. Ct. 509, 142 L. Ed. 2d 422 (1998). Once the plaintiff makes a prima facie showing, the burden shifts and the defendant must articulate a legitimate, nondiscriminatory reason for the adverse employment action. Wells v. Colorado Dep't of Transp., 325 F.3d 1205, 1212 (10th Cir. 2003). The plaintiff must then respond by demonstrating that defendant's asserted reasons for the adverse action are pretextual. Id.” Blizzard at 926.

40. Section 760.10(7), Florida Statutes, has “historically . . . been divided into the ‘opposition clause’ and the ‘participation clause.’” Blizzard v. Appliance Direct, Inc., 16 So. 3d 922, 926 (Fla. 5th DCA 2009). Mr. Meikle’s claim falls under the participation clause. See Blizzard at 926.

41. As to the first element of a prima facie case, Mr. Meikle's letter to Hotels Unlimited's Human Resources must be examined. In the letter, Mr. Meikle charges Mr. McPhun with harassment and creating a hostile work environment and reports it to Hotels Unlimited, in accordance with Hotels Unlimited's Employee Handbook. In the letter, Mr. Meikle asserts what he believes to be harassment against him, rising to the level of creating a hostile work environment, and, also, indicates that a copy of the letter would be forwarded to the EEOC and the FCHR. Based on the Employee Handbook, Mr. Meikle had "a good faith, reasonable belief" that Mr. McPhun was engaged in an unlawful employment practice—harassment and creating a hostile work environment. See Harper v. Blockbuster Entertainment Corporation, 139 F.3d 1385, 1388 (11th Cir. 1998). But nowhere in the letter does Mr. Meikle assert discrimination based on age or any other statutorily protected status.

42. The second element, an adverse employment action, is demonstrated in that Mr. Meikle was terminated.

43. The third element, adverse employment action's causal relationship to the protected activity, is demonstrated in that Mr. Meikle was terminated after he complained to Hotels Unlimited's Human Resources.

44. Therefore, Mr. Meikle demonstrated a prima facie case.

45. Shifting the burden to Hotels Unlimited, as to articulating a legitimate, non-discriminatory reason for terminating Mr. Meikle, Hotels Unlimited has met its burden. The evidence demonstrates that Mr. Meikle failed to report for his shift as scheduled on February 29, 2008, and that Mr. Brown, not Mr. McPhun, with the approval of Ms. Gray, terminated Mr. Meikle.

46. Now, shifting the burden to Mr. Meikle, as to Mr. Meikle's demonstrating that Hotels Unlimited's asserted reason for terminating him was pretextual, Mr. Meikle has failed to meet his burden. The evidence demonstrates that Mr. Brown, not Mr. McPhun, had disciplined Mr. Meikle several times within the month of February 2008; and that, when Mr. Meikle failed to report for his shift as scheduled on February 29, 2008, Mr. Brown, not Mr. McPhun, with the approval of Ms. Gray, terminated Mr. Meikle.

47. Hence, Mr. Meikle has failed to demonstrate that Hotels Unlimited retaliated against him.

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 finding that Hotels Unlimited/Double Tree

did not retaliate against Marshall Meikle in violation of the Florida Civil Rights Act of 1992, as amended and dismissing his petition for relief.

DONE AND ENTERED this 23rd day of November, 2009, in Tallahassee, Leon County, Florida.

Errol H. Powell

ERROL H. POWELL
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 23rd day of November, 2009.

ENDNOTES

^{1/} Respondent's Exhibit numbered 1 was pre-marked as Respondent's Exhibit numbered 2; Respondent's Exhibit numbered 2 was pre-marked as Respondent's Exhibit numbered 3; Respondent's Exhibit numbered 3 was pre-marked as Respondent's Exhibit numbered 4; Respondent's Exhibit numbered 4 was pre-marked as Respondent's Exhibit numbered 5; Respondent's Exhibit numbered 5 was pre-marked as Respondent's Exhibit numbered 6; Respondent's Exhibit numbered 6 was pre-marked as Respondent's Exhibit numbered 10; and Respondent's Exhibit numbered 7 was pre-marked as Respondent's Exhibit numbered 15.

^{2/} The examples of the problems were the disciplinary actions taken against Mr. Meikle by Mr. Brown.

^{3/} See Conclusion of Law 36.

^{4/} There is no doubt that Mr. Meikle believed that he was not required to report to work on February 29, 2008. However, considering the burden of proof and the standard of proof, the evidence fails to demonstrate that it was reasonable for Mr. Meikle to rely upon the work schedule that he reviewed.

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.