STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARY LYNN JONES,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 08-5579
	)	
DEPARTMENT OF REVENUE,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

This cause came on for final hearing before Harry L. Hooper, Administrative Law Judge with the Division of Administrative Hearings, on January 27, 2009, in Pensacola, Florida.

APPEARANCES

For Petitioner: Mary Lynn Jones, pro se
6501 Robar Tesora Street
Navarre, Florida 32566

For Respondent: Cindy Horne, Esquire
Department of Revenue
Carlton Building, Room 304
501 South Calhoun Street
Tallahassee, Florida 32399

STATEMENT OF THE ISSUE

The issue is whether Respondent engaged in an unlawful employment practice.

PRELIMINARY STATEMENT

Petitioner Mary L. Jones (Ms. Jones) signed an Employment Complaint of Discrimination on May 21, 2001, that alleged discrimination by the Florida Department of Revenue (Department). She filed it with the Florida Commission on Human Relations (Commission). She alleged disparate treatment based on race and also alleged retaliation. On September 30, 2008, the Commission filed its "Notice of Determination: No Cause," subsequent to making the determination that there is no reasonable cause to believe that an unlawful employment practice occurred.

Thereafter, Ms. Jones filed a Petition for Relief with the Commission on November 3, 2008. The matter was forwarded to the Division of Administrative Hearings and filed on November 5, 2008. It was set for hearing on January 27, 2009, and heard as scheduled.

Ms. Jones presented the testimony of six witnesses and offered four exhibits. Two of Petitioner's exhibits were admitted. The Department presented the testimony of three witnesses and had four exhibits admitted.

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

FINDINGS OF FACT

1. Ms. Jones is a person of the African-American race. She worked in Pensacola, Florida, for Attorney Walter Steigleman, who was a contract provider for the Department's Child Support Enforcement (CSE) program. In the Spring of 2007, the Department terminated its contract with Mr. Steigleman and set up its own Child Support Enforcement Program. This program was referred to as the Legal Services Unit (LSU). Thereafter, the Department employed Ms. Jones pursuant to a contract executed June 25, 2007.

2. The Department viewed this new LSU as a "pilot" project and, accordingly, did not wish to establish full-time equivalents pursuant to the state employment system. Therefore, the contract entered into with Ms. Jones was an "at will" employment contract and provided that she could be terminated upon two weeks' notice. Because Petitioner was not a statutory state employee, she had no right to appeal any termination or layoff.

3. Staff hired for the project included Katherine Wright, an African-American attorney; Shayna Marstellar, a Caucasian attorney; Andrew Wood, a Caucasian attorney; Ms. Jones, a legal assistant; Megan McClinnis, a Caucasian legal assistant; Ruth Taylor, a Caucasian legal assistant; Marquieta Howard, a Caucasian legal assistant; Janet Thornhill, a Caucasian legal

assistant; and Jacqueline McBride, an African-American senior clerk.

4. Ms. Rhonda O'Kelley was the Regional Manager in overall charge of the Department's operations in the area. Priscilla Phipps, a Revenue Administrator III and veteran of 22 years with the Department, was in charge of the LSU.

5. Ms. Phipps understands that it is in the Department's interest to make accommodations for employees in order to retain them. She has adjusted the hours of employees many times in her career and at some point put Ms. Jones on a flex schedule at Ms. Jones' request.

6. Ms. Jones compared herself with Megan McClinnis. Ms. McClinnis had a young child and was allowed absences so long as she subsequently made up the missed time. Ms. McClinnis often called in late, but was allowed to make up for missed work. Ms. McClinnis was provided cross-training and Ms. Jones was not. However, the extant plan in the LSU was to eventually provide the same cross-training to Ms. Jones. Ms. McClinnis on occasion had quality of work issues.

7. Ms. Jones was paid $17.00 per hour, and Ms. McClinnis was paid $15.00 per hour.

8. Each LSU team member had specialized duties. Ms. Jones and Ms. McClinnis prepared dockets for court and prepared pleadings, and Ms. Jones often attended court proceedings.

Ms. Howard prepared petitions. Ms. McBride put the files in order, prepared notices, and acted as a courier. Ms. Taylor worked on judges' cases.

9. Ms. McClinnis was provided cross-training in these activities, and Ms. Jones was not. However, as previously stated, the extant plan in the LSU was to eventually provide the same cross-training to Ms. Jones and other members of the team. In any event, there was no testimony that cross-training was a benefit.

10. PAILS is an acronym for a CSE, computer-based, tracking system. Both Ms. Jones and Ms. McClinnis were trained to use this system, and both could use it, but Ms. McClinnis, according to Ms. Phipps, was faster. Consequently, Ms. Phipps directed Ms. McClinnis, rather than Ms. Jones, to use the machine. There is no benefit to using the PAILS program.

11. By August 2007, Ms. O'Kelley concluded that there were performance problems with the LSU. In order to improve the operation, she made personnel reassignments. Among other moves, she discontinued the practice of having Ms. Jones attend court. She assigned additional people to work on dockets.

12. In September 2007, Ms. Phipps held a meeting with personnel involved with CSE. At the meeting were four African-Americans (Ms. Jones was one of them), one Hispanic, and the remainder were Caucasian. During the meeting there was a

discussion regarding the timeliness of the cases set on the docket and the number of cases required to be re-set. During this discussion, Ms. Jones stood up and loudly protested some of the remarks made by certain attendees.

13. This outburst startled some of the attendees and some thought it unlike Ms. Jones to engage in such behavior. Nothing occurring during the meeting was connected in any way to race. Subsequent to the meeting, Ms. Phipps remarked that she was surprised Ms. Jones had acted in an unprofessional manner.

14. The mother of Ms. McClinnis worked for the Department for many years, and was working there when her daughter was employed. Although witnesses denied Ms. McClinnis received special treatment, it was clear that everyone in the office was aware of the relationship, and the relationship had some effect on Ms. McClinnis' privileges. For instance, Ms. McClinnis ignored call-in procedures with impunity.

15. Ms. Jones told Ms. Walker and Ms. O'Kelley that she believed Ms. McClinnis was benefiting from nepotism. Ms. O'Kelley discussed the complaint with regard to nepotism with Ms. Phipps. Ms. Jones never, during the entire term of her employment, made any claim of disparate treatment based on race.

16. The procedure for handling complaints of racial discrimination is to report the complaint to the inspector general. Ms. O'Kelley and Ms. Phipps made no report to the

inspector general with regard to complaints by Ms. Jones because her complaints with regard to favoritism did not involve race.

17. Ms. Jones reported to work on time and was present when she was supposed to be present. Her co-workers believed her to be a good worker. However, Ms. Jones and almost all of the workers in the LSU had quality of work issues. All of them had work returned from the attorneys for corrections. When Ms. McClinnis was counseled with regard to errors, she accepted the correction in good faith. When Ms. Jones was counseled with regard to errors, she became defensive.

18. The Department was generally displeased with the staff of the LSU. Ms. Bradford (African-American) was terminated in accordance with the provisions of her contract in March 2008. During May and June 2008, contract employees Wright (African-American), Ms. Wood (Caucasian), Ms. Marsteller (Caucasian), Ms. Taylor (Caucasian), Ms. McClinnis (Caucasian), and Ms. Jones (African-American), were terminated. Ms. Howard (Caucasian) and Ms. McBride (African-American) were retained.

19. Disparate treatment by anyone involved with Ms. Jones because of race did not occur. The evidence of record reveals no evidence of any racial bias by anyone.

CONCLUSIONS OF LAW

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

21. 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.

22. Federal discrimination law may be used to evaluate the merits of claims arising under the Florida Civil Rights Act. Brand v. Fla. Power Corp., 633 So. 2d 504 (Fla. 1st DCA 1994).

23. Racial discrimination generally may be proven by evidence of a hostile work environment or by proof of disparate treatment. Ms. Jones asserted that the Department discriminated against her through disparate treatment. Ms. McClinnis was posed as her comparator. Petitioner provided no direct evidence of discrimination based on disparate treatment.

24. To prove racial discrimination by disparate treatment when there is an absence of direct evidence, Ms. Jones must proceed using the McDonnell Douglas framework to establish a prima facie case. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

25. To prove a prima facie case, Ms. Jones must prove that: (1) she is a member of a protected class; (2) she was subjected to an adverse employment action; (3) she was treated differently than a similarly situated employee of a different race; and (4) she was qualified for the position.

26. Ms. Jones established that she was a member of a protected class, African-American; and that she was subjected to an adverse employment action, termination of her contract in accordance with the terms of her contract. She was qualified for the position she held. She was not, however, treated differently from a similarly situated employee of a different race. Specifically, she was not treated differently from Ms. McClinnis.

27. Ms. Jones did not demonstrate that Ms. McClinnis was treated more favorably. Ms. McClinnis was tardy on occasion and was allowed to make up the missed time. Ms. Jones was never tardy and, therefore, never had occasion to ask to make up time. Ms. McClinnis received some cross-training and was asked to work on PAILS. Ms. Jones did not receive cross-training, although the unit planned to provide her with it, and Ms. Jones was not as fast as Ms. McClinnis with regard to making entries into PAILS. In any event, there was no benefit to receiving cross-training or to working on PAILS. Ms. McClinnis was permitted to

work on an office decoration committee. Ms. Jones could have, but did not volunteer to do this.

28. Ms. Jones may not refuse to avail herself of the leniency extended to Ms. McClinnis and then claim racial discrimination for not receiving it. If Ms. McClinnis received favorable treatment, it was likely a result of her being the daughter of a Department manager, rather than race. Accordingly, Ms. Jones failed to prove a prima facie case under the McDonnell Douglas framework

29. If Ms. Jones had met the burden of proving a prima facie case, and, as noted, she did not, then the Department would have the burden of articulating a legitimate, non-discriminatory reason for the employment action. Dept. of Corrections v. Chandler, 582 So. 2d 1183 (Fla. 1st DCA 1991). In fact, the Department proved beyond any doubt that nine other employees of various racial groups, including Ms. Jones, were terminated in accordance with the contract because the pilot project of which they were a part did not meet expectations. This was a legitimate non-discriminatory reason for the employment action.

30. This burden was met. Therefore, Ms. Jones was required to prove that the Department's proffered reason for its action was a pretext for discrimination. She failed to offer

any evidence that would prove that the Department's actions were pretextual.

31. Subsection 760.10(7), Florida Statutes, prohibits retaliation against any person who opposes an unlawful employment practice or because a person complains about an employment practice.

32. To prove a prima facie case of retaliation, Ms. Jones must prove: (1) she engaged in a statutorily protected expression; (2) she suffered an adverse employment action; and (3) the adverse employment action was causally related to the protected activity. Harper v. Blockbuster Entertainment Corp., 139 F. 3d 1385 (11th Cir. 1998).

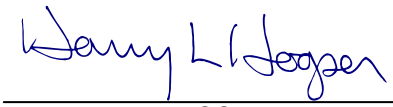
33. Simply put, the first complaint concerning racial discrimination Ms. Jones expressed was when she filed her Employment Complaint of Discrimination with the Commission. Evidence of retaliatory action by the Department is remarkable for its total absence.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Florida Commission on Human Relations Dismiss the Petition for Relief filed by Mary Lynn Jones.

DONE AND ENTERED this 25th day of February, 2009, in Tallahassee, Leon County, Florida.



HARRY L. HOOPER
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 25th day of February, 2009.

COPIES FURNISHED:

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

Cindy Horne, Esquire
Department of Revenue
Carlton Building, Room 304
501 South Calhoun Street
Tallahassee, Florida 32399

Robert Framingham
Department of Revenue
Post Office Box 10410
Tallahassee, Florida 32302

Mary Lynn Jones
6501 Robar Tesora Street
Navarre, Florida 32566

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.