

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CIRA CAIMINTI,)
)
 Petitioner,)
)
 vs.) Case No. 09-3961
)
 THE FURNITURE ENTERPRISES, LLC,)
 d/b/a LANE HOME FURNITURE and)
 THE LEATHER GALLERIES, INC.,)
)
 Respondents.)
 _____)

RECOMMENDED ORDER

A formal hearing was conducted in this case on October 29, 2009, by video teleconference with hearing sites located in Tallahassee, Florida, and Daytona Beach, Florida, before Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: David W. Glasser, Esquire
Glasser and Handel
116 Orange Avenue
Daytona Beach, Florida 32114

For Respondents: Dominic Persampiere
Corporate Representative
485 Suncrest Court
Oviedo, Florida 32765

STATEMENT OF THE ISSUES

The issues are as follows: (a) whether Respondents committed an unlawful employment practice by discriminating

against Petitioner based on her sex and national origin;
(b) whether Respondents retaliated against Petitioner for
complaining about the alleged discrimination; and, if so,
(c) what relief should be granted.

PRELIMINARY STATEMENT

On or about December 15, 2008, Petitioner Cira Caiminti (Petitioner) filed an Employment Charge of Discrimination with the Florida Commission on Human Relations (FCHR). The charge listed the names of the Respondents as "The Furniture Enterprises, LLC, d/b/a Lane Home Furnishings and d/b/a Leather Galleries, Inc." The charge listed Respondents' address as 4200 Church Street, Suite 1030, Sanford, Florida.

Petitioner's charge alleged that Respondents had discriminated against her based on her sex and national origin. The charge also alleged that Respondents had retaliated against her by terminating her employment.

On or about June 16, 2009, FCHR issued a Determination: Cause. The Determination: Cause named "The Furniture Enterprises, LLC DBA Lane Home Furn" as Respondent and Dominic Persampiere as Respondent's owner. The Determination: Cause was sent to Mr. Persampiere, at 485 Suncrest Court, Oviedo, Florida.

On July 21, 2009, Petitioner filed a Petition for Relief with FCHR. Petitioner listed "The Furniture Enterprises, LLC, d/b/a Lane Home Furniture DBA Leather Galleries, Inc." as

Respondents. The petition listed Respondents' address as 485 Suncrest Court, Oviedo, Florida.

FCHR referred the case to the Division of Administrative Hearings on July 24, 2009. FCHR's Transmittal of Petition listed "The Furniture Enterprises, LLC D/B/A Lane Home Furniture" as Respondent. The transmittal was sent to Dominic Persampiere at 485 Suncrest Court, Oviedo, Florida.

The record clearly shows that Petitioner intended to name both Respondents in her charge and petition and that the managing partners/owners/ officers/ directors of both Respondents received sufficient notice of Petitioner's discrimination claims and of the hearing date. In fact, Dominic Persampiere appeared at the hearing to speak on behalf of both Respondents, claiming that both companies had been dissolved and that they had no assets. Therefore, the style of the case is hereby changed to name Respondents "The Furniture Enterprises, LLC d/b/a Lane Home Furnishings, and The Leather Galleries, Inc." (hereinafter collectively referred to as Respondents).

The Division of Administrative Hearings initially assigned the case to Administrative Law Judge Ella Jane P. Davis. On August 27, 2009, Mr. Persampiere sent a letter to Judge Davis' secretary without serving it on Petitioner. On August 28, 2009, Judge Davis issued a Notice of Ex-Parte Communication.

On September 16, 2009, Judge Davis issued an Amended Notice of Hearing by Video Teleconference. The notice scheduled the hearing for October 29 and 30, 2009. Subsequently, the Division of Administrative Hearings transferred the case to the undersigned.

During the hearing, Petitioner presented the testimony of two witnesses. Petitioner offered six exhibits that were accepted as evidence. Copies of Petitioner's exhibits are attached to Petitioner's Proposed Recommended Order.

Respondents presented the testimony of one witness. Respondents offered one exhibit that was accepted as evidence.

A transcript of the hearing was not filed with the Division of Administrative Hearings. Petitioner filed a Proposed Recommended Order on November 10, 2009. As of the date that this Recommended Order was issued, Respondents had not filed proposed findings of fact and conclusions of law.

All references to Florida Statutes are to the 2007 codification, unless otherwise indicated.

FINDINGS OF FACTS

1. Petitioner is a female of Hispanic origin. She came to the United States from Cuba.

2. Respondents are employers within the meaning of the Florida Civil Rights Act of 1992, as amended, Section 760.10, Florida Statutes.

3. Respondent Furniture Enterprises, LLC (Furniture Enterprises) is a Florida limited liability company. Its mailing address is 4200 Church Street, Suite 1030, Sanford, Florida. The managing partners of Furniture Enterprises are Dominic Persampiere, and his father, Anthony Persampiere.

4. During the hearing, Dominic Persampiere testified that Furniture Enterprises, LLC, had no assets. In support of this testimony, Respondents offered a copy of an Order Authorizing Possession of Collateral that was entered on January 15, 2009, in Lane Furniture Industries, Inc. a/k/a Lane Home Furnishings Retail, Inc. v. Furniture Enterprises, L.L.C., in Case No. 08-CA-6968-16-W in the Circuit Court of the 18th Judicial Circuit, in and for Seminole County, Florida.

5. Mr. Persampiere also testified that Furniture Enterprises conducted its last day of business on November 30, 2008, and was subsequently dissolved. However, there is no competent evidence that Furniture Enterprises was dissolved pursuant to Chapter 608, Florida Statutes, so as to discharge it from liability for all known and unknown claims, including the one at issue here.

6. At all times relevant here, Furniture Enterprises conducted business in the fictitious name of Lane Home Furnishings. Furniture Enterprises was a licensed retailer for

Lane Furniture Industries, Inc. a/k/a Lane Home Furnishings Retail, Inc.

7. Respondent, The Leather Galleries, Inc. (Leather Galleries), is a Florida for-profit corporation. Its mailing address is 4200 Church Street, Suite 1030, Sanford, Florida 32771. Dominic and Anthony Persampiere are the officers/directors of Leather Galleries. Persuasive evidence indicates that Leather Galleries was dissolved effective September 30, 2008. However, there is no competent evidence that Leather Galleries was dissolved pursuant to Chapter 607, Florida Statutes, so as to discharge it from liability for all known and unknown claims, including the one at issue here.

8. T.L.G. Furniture, Inc., is a Florida for-profit corporation that is located at 4200 Church Street, Suite 1030, Sanford, Florida. T.L.G Furniture, Inc., owns Leather Galleries. Dominic and Anthony Persampiere are the owners/officers/directors of T.L.G. Furniture, Inc. Persuasive evidence indicates that T.L.G. Furniture, Inc. was voluntarily dissolved effective September 30, 2008. However, there is no competent evidence that Leather Galleries was dissolved pursuant to Chapter 607, Florida Statutes, so as to discharge it from liability for all known and unknown claims, including the one at issue here.

9. Furniture Enterprises and Leather Galleries had common management, ownership, and financial control. They shared a centralized control of labor relations. Even so, the two business organizations do not constitute an integrated enterprise because they sold different merchandise, kept separate books, filed their taxes using different FEIN and sales tax numbers and, most importantly, maintained separate operations, including using separate delivery trucks. There is no competent evidence to show that merchandise was moved from one entity to the other.

10. Petitioner interviewed with Anthony Persampiere at 4200 Church Street, Suite 1030, Sanford, Florida, for a job as a retail sales consultant for Furniture Enterprises. In September 2007, Anthony Persampiere hired Petitioner to work for Furniture Enterprises in the Lane Home Furnishings store located in Kissimmee, Florida.

11. A person by the name of Todd was the manager of the Kissimmee store. Petitioner had no trouble getting along with the manager and sales staff in Kissimmee. There is no competent evidence to the contrary.

12. After several weeks, Anthony Persampiere gave Petitioner the opportunity to transfer to another Lane Home Furnishings store. Petitioner subsequently began working at the Lane Home Furnishings store located in Altamonte Springs,

Florida. The Altamonte Springs store was closer to Petitioner's home.

13. Al Persampiere, the brother of Dominic Persampiere and son of Anthony Persampiere, was the manager of the Lane Home Furnishings Store in Altamonte Springs. Petitioner wrote two memoranda to Al Persampiere to complain about the "mishandling of the up-list" by sales consultants Gary David and Charles McCormick. The up-list is a rotating list of names that determines which salesperson gets the next customer.

14. Petitioner later referred to her co-workers at the Lane Home Furnishings store in Altamonte Springs as a "rebellious duo." She referred to Gary David as "poisonous and distant" after Al attempted to correct the "list trickery."

15. Petitioner was the top salesman in the Lane Home Furnishings Altamonte Springs store at one point in December 2007. Nevertheless, Anthony Persampiere transferred Petitioner to the Leather Galleries in January 2008 in part as a result of her complaints and her inability to get along with her co-workers. Petitioner's testimony to the contrary is not persuasive because her testimony is inconsistent with her statements in Petitioner's Exhibit P3.

16. Petitioner did not have to fill out any papers to make the transfer to Leather Galleries. She continued to receive her paychecks prepared by PBS (Paycheck Business Systems) of Central

Florida, Inc. The paychecks from Furniture Enterprises and Leather Galleries had different employer identification numbers.

17. The Leather Galleries store was located across the street from the Lane Home Furnishings store in Altamonte Springs. A person named Dan was the manager at the Leather Galleries. A person named Ben was a male Caucasian sales consultant.

18. On or about February 8, 2008, Ben called Petitioner stupid because she came from an island. He stated that all such people are stupid and ignorant and that everyone should speak Spanish to Petitioner. Ben also spoke about the size of his penis, telling Petitioner and a co-worker named Brenda what he had done with it.

19. Dan was present at the time of the verbal abuse on February 8, 2008, but said nothing to Ben. When Petitioner complained, Dan stated, "I told you Ben was like that. One minute he is nice and the next minute he changes. . . ."

20. On February 9, 2008, Brenda and Petitioner went to Dan to complain and make Dan aware about Ben's use of the "f" word. Petitioner wanted Dan to make Ben stop embarrassing her in front of other associates and customers.

21. On February 11, 2008, Petitioner wrote Dan a memorandum describing Ben's constant harassing behavior as set forth above. Petitioner requested that Dan take care of the

matter without delay. There is no evidence that Dan took any corrective action.

22. On the morning of February 15, 2008, Petitioner was at work by 9:35 a.m., ready to take the first customer. Ben signed in as the second salesperson on the up-list.

23. The first customer to arrive wanted to speak to the manager. Petitioner then decided to take the second customer. Ben immediately began accusing Petitioner of taking his customer.

24. Ben began cursing Petitioner, saying the "f" word, stating she was a piece of "s," and claiming that he was going to kick her ass. Ben told Petitioner that she would see who would leave first because she was a troublemaker that no one, including Al and Todd, wanted.

25. Petitioner immediately went to Dan's office and found the room empty. Realizing that she was alone with Ben, Petitioner called the corporate office located at 4200 Church Street, Suite 1030, Sanford, Florida. She also called the police and filed an electronic complaint against Ben. Petitioner then waited outside for the police to arrive.

26. When the police arrived, Al came across the street from the Lane Home Furnishings store to speak to them. Al represented himself as manager of the Leather Galleries. Al told the police that he had problems with Petitioner in the

past. Al then sent Petitioner home, telling her to "go home, take a bubble bath, and relax."

27. On February 15, 2008, Petitioner wrote a memorandum to Dominic, Anthony, and Al Persampiere regarding the police report dated that same day. In the statement, Petitioner reviewed the facts of the incident with Ben earlier that day and other incidences involving Ben's inappropriate behavior.

28. Petitioner's memorandum stated that she was a threat to Ben, who wanted her out. Petitioner complained that she, and not Ben, had been sent home. Petitioner also wanted Dominic, Anthony, and Al to remove Al's comment, about her being a problem in past, from the police report. Petitioner faxed the memorandum to the corporate office at 4200 Church Street, Sanford, Florida.

29. The next day, Petitioner went to work at the Leather Galleries. Dan and all the other sales associates, including Ben, were at the store. Petitioner was waiting for a customer when she got a telephone call from Anthony Persampiere, telling her that she was terminated. Ben was not disciplined for his inappropriate behavior on February 15, 2008.

30. Petitioner has not been able to find a job after being terminated by Leather Galleries. She has looked for jobs in retail sales and telemarketing. She has applied for 20-to-30 jobs a week, receiving no interviews or call backs.

31. While Petitioner was employed with Respondents, she earned a draw of \$300 per 40-hour week plus commissions in excess of the draw. She has suffered a minimum of \$26,400 in lost wages.

CONCLUSIONS OF LAW

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

33. 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 sex/gender or national origin.

34. Section 760.10(7), Florida Statutes, states that 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"

35. 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).

36. Discriminatory intent can be established through direct or circumstantial evidence. See Schoenfeld v. Babbitt,

168 F.3d 1257, 1266 (11th Cir. 1999). "Direct evidence of discrimination is evidence, that, 'if believed, proves [the] existence of [a] fact in issue without inference or presumption.'" See Id. (quoting Burrell v. Bd. of Trustees of Ga. Military College, 125 F.3d 1390, 1393 (11th Cir. 1997)).

37. 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). Under this well-established model of proof, the complainant bears the initial burden of establishing a prima facie case of discrimination.

38. 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. See Id., Alexander v. Fulton County, Georgia, 207 F.3d 1303 (11th Cir. 2000).

39. The employee must then come forward with specific evidence demonstrating that the reasons given by the employer

are a pretext for discrimination. In other words, the employee must that the employer intentionally discriminated against him or her. See St. Mary's Honor Center, et al. v. Hicks, 509 U.S. 502 (1993); Department of Corrections v. Chandler, supra at 1186; Alexander v. Fulton County, Georgia, supra.

Direct Evidence

40. Here, Petitioner presented evidence of direct discrimination based on sex/gender and national origin. Petitioner complained to Dan, the manager of Leather Galleries, that Ben was making blatant inappropriate sexual comments and was embarrassing her in front of customers and co-workers by disparaging her ethnic heritage. There is no evidence that Leather Galleries ever took corrective action. Instead, Al, the manager of a Lane Home Furnishing store, acting in the capacity of a manager of Leather Galleries, subsequently made an offensive remark related to Petitioner's gender when he told her to go home and take a bubble bath.

Disparate Treatment

41. To establish a prima facie case regarding Petitioner's allegation that Respondents unlawfully discharged her based on her sex/gender or national origin, Petitioner must prove that: (1) she is a member of a protected class; (2) she was qualified for the job; (3) she was subjected to an adverse employment action; and (4) similarly situated employees outside

Petitioner's protected class were treated more favorably. See Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997).

42. Petitioner is a female of Hispanic origin who was qualified for the position of sales consultant. She was discharged while Ben, a male Caucasian sales consultant, was not disciplined for his inappropriate behavior on February 15, 2008. Therefore, Petitioner has established a prima facie case of disparate treatment against Leather Galleries.

43. During its case-in-chief, Leather Galleries presented no competent evidence regarding the reason it discharged Petitioner. Instead, Mr. Persampiere testified that Furniture Enterprises and Leather Galleries were dissolved business organizations with no assets.

44. Leather Galleries presented no competent evidence to refute Petitioner's allegations or to explain why she was terminated. Thus, Petitioner has met her ultimate burden of proving discrimination based on her sex/gender and national origin.

Retaliation

45. To prove a prima facie case of retaliation, Petitioner must show the following: (a) she engaged in a protected activity; (b) she suffered an adverse employment action; and (c) that there is some causal link between her protected activity and the adverse employment action. See Holifield v.

Reno, 115 F.3d at 1566. "To meet the causal link requirement, the plaintiff 'merely has to prove that the protected activity and the negative employment action are not completely unrelated.'" See Holifield v. Reno, 115 F.3d at 1566 (quoting E.E.O.C. v. Reichhold Chemicals, Inc., 988 F.2d 1564, 1571-72 (1st Cir. 1993)).

46. Petitioner engaged in a protected activity when she complained verbally and in writing about Ben's inappropriate and discriminatory behavior. She was fired without explanation on February 16, 2008, the day after she called the police and sent a facsimile transmission to the Persampieres, complaining once again about Ben's behavior.

47. Leather Galleries presented no evidence to show that it fired Petitioner for reasons unrelated to her allegations in this case. Petitioner has established a causal link between her complaints about Ben and her termination. She has proved that Leather Galleries unlawfully retaliated against her.

48. Petitioner is entitled to a minimum of \$26,400 in lost wages. There is no evidence to the contrary.

49. Petitioner seeks an award of attorney's fees pursuant to Section 760.11(6), Florida Statutes, which gives FCHR discretion to award a reasonable attorney's fee to a prevailing party. Thus, an administrative law judge does not have jurisdiction to consider any such award.

50. Petitioner was not working for Furniture Enterprises when any of the above-referenced unlawful employment practices occurred. Because Furniture Enterprises and Leather Galleries are not integrated business organizations, only Leather Galleries is liable to Petitioner.

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 against Respondent Furniture Enterprises, LLC, granting the Petition for Relief against Leather Galleries, Inc., and awarding Petitioner lost wages in the amount of \$26,400.

DONE AND ENTERED this 16th day of December, 2009, in Tallahassee, Leon County, Florida.



SUZANNE F. HOOD
Administrative Law Judge
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Filed with the Clerk of the
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this 16th day of December, 2009.

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.