STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DOUGLAS FOREMAN, JR.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 09-4807
	)	
DAYTONA IHOP, INC.,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

A final hearing was conducted in this case on November 13, 2009, by video teleconference at 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: Sebrina L. Wiggins, Esquire
Landis Graham French, P.A.
135 East Rich Avenue, Suite C
Deland, Florida 32721

For Respondent: Scott Studner
Corporate Representative
Daytona IHOP, Inc.
124 North Nova Road, Suite 112
Ormond Beach, Florida 32174

STATEMENT OF THE ISSUES

The issues are whether Respondent discriminated against Petitioner based on his race, and if so, what relief should be granted.

PRELIMINARY STATEMENT

On or about February 20, 2009, Petitioner Douglas Foreman, Jr. (Petitioner) filed a Charge of Discrimination with the Florida Commission on Human Relations (FCHR). The charge alleged that Respondent Daytona IHOP, Inc. (Respondent) had discriminated against him based on his race.

On August 6, 2009, FCHR issued a Determination: No Cause. On September 2, 2009, Petitioner filed a Petition for Relief with FCHR. The Petition for Relief was referred to the Division of Administrative Hearings on September 4, 2009.

A Notice of Hearing by Video Teleconference dated September 14, 2009, scheduled the hearing for November 13, 2009.

During the hearing, Petitioner testified on his own behalf. Petitioner did not offer any exhibits for admission into the record as evidence.

Respondent presented the testimony of four witnesses. Respondent did not offer any exhibits for admission into the record as evidence.

On November 19, 2009, Respondent's attorney filed a Notice of Appearance.

On November 20, 2009, Respondent filed an Agreed Motion for Extension of Time to File and Serve Proposed Recommended Order. An Order Granting Extension of Time was issued that same day.

The parties declined to file a hearing transcript. Respondent filed its Proposed Recommended Order on December 2, 2009. Petitioner filed his Proposed Recommended Order on December 3, 2009.

Unless otherwise noted, citations are to Florida Statutes (2007).

FINDINGS OF FACT

1. Respondent is a Florida corporation with its principal business location in Ormond Beach, Florida. Respondent operates a restaurant in Daytona Beach, Florida, known as IHOP 35. At all times material here, IHOP 35 had a racially-diverse workforce.

2. Scott Studner is Respondent's President. Mr. Studner has direct supervisory authority over Respondent's management employees and ultimate supervisory authority over the non-management employees at IHOP 35. Mr. Studner is responsible for making all decisions relating to promotions and terminations of employees.

3. Petitioner is a single African-American male with a minor son. Respondent hired him as a line cook in January 2007. At that time, Petitioner did not have any management experience.

Petitioner worked as a cook on the day shift for approximately 15 months before Respondent terminated his employment.

4. Petitioner began working 40-hour weeks for $9.00 per hour. He received at least five raises over a 12-month period, increasing his hourly wage to $10.00. Petitioner and all of the staff had to work some overtime during busy periods like "Race Week."

5. Shortly after Petitioner began working, Mr. Studner asked Petitioner if he had any interest in a future management position. Mr. Studner routinely asks this question of all newly hired cooks. Mr. Studner told Petitioner about Chester Taylor, an African-American male, who began working for Mr. Studner as a dish washer and now owns and operates two IHOP restaurants of his own. Mr. Studner never made any representation or promise regarding Petitioner's potential advancement into a management position at IHOP 35.

6. Shortly after he was hired, Petitioner began to demonstrate poor performance traits. He frequently arrived late to work. Occasionally Petitioner called to say that he could not work due to personal reasons.

7. While working for Respondent, Petitioner reported several specific instances of racial hostility in the workplace to the general manager, Kathy, who tried to correct each problem

as it arose. On one occasion, Petitioner discussed one incident with Mr. Studner, months after it occurred.

8. In February 2007, Petitioner reported to Kathy that a white server named Sharon Blyler had made an inappropriate comment. Specifically, Petitioner accused Ms. Blyler of stating that she would get her orders out faster if she was black like a server named Angela. Kathy wrote Ms. Blyler up on a disciplinary form, advising her that comments about someone's race or color would not be tolerated. Mr. Studner was never informed about this incident.

9. In April 2007, a white co-worker named Kevin called Petitioner a "monkey" several times. The name calling initially arose as a result of someone in the kitchen requesting a "monkey dish," which is a term commonly used in restaurants to describe a small round bowl for side items such as fruit. Petitioner reported Kevin's inappropriate comments to Kathy, who wrote Kevin up on a disciplinary form and suspended him for a week.

10. Apparently, Kevin continued to work in one of Mr. Studner's restaurants but did not return to work at IHOP 35. Three or four months after Kevin was suspended, Mr. Studner asked Petitioner if Kevin could return to work at IHOP 35. When Petitioner objected, Mr. Studner said he would put Kevin on the night shift. During the conversation, Mr. Studner told

Petitioner that he should have punched Kevin in the face for calling him a monkey.

11. In the summer of 2007, there was an ordering mix-up involving a Caucasian server named Tiffany. When Tiffany became upset, Petitioner told her to calm down. Tiffany then called Petitioner a "fucking nigger." Kathy immediately had a talk with Tiffany, who then quit her job. Mr. Studner was never informed that Tiffany used a racial slur in reference to Petitioner.

12. In August 2007, Petitioner received a formal verbal warning that was memorialized on a disciplinary form. The warning related to Petitioner's tardiness for work and for not maintaining his work area.

13. When Kathy left her job as general manager of IHOP 35 in October 2007, there was no one person in charge of the kitchen. Petitioner and the other cooks continued to do their previously assigned jobs.

14. On one occasion, Petitioner and another African-American male cook got into an argument. Someone at the restaurant called the police to intervene. Petitioner denies that he picked up a knife during the confrontation.

15. At some point, Mr. Studner began working in the kitchen with Petitioner. Mr. Studner worked there for approximately five straight weeks.

16. While Mr. Studner was working in the kitchen, he never saw any signs of racial hostility. However, Mr. Studner was aware that Petitioner could not get along with the rest of the staff. Mr. Studner realized that the staff resented Petitioner's habit of talking on his cell phone and leaving the line to take breaks during peak times.

17. Respondent had an established and disseminated work policy that employees are not allowed to take or make cell phone or other telephone calls during work hours except in emergencies. Compliance with the policy is necessary because telephone calls to or from employees during paid working time disrupt the kitchen operation. Petitioner does not dispute that he made and received frequent calls on company time for personal reasons.

18. Sometimes Mr. Studner would enter the restaurant and see Petitioner talking on the phone. Mr. Studner would reprimand Petitioner, reminding him that phone calls on company time were restricted to emergency calls only.

19. Mr. Studner had video surveillance of the kitchen at IHOP 35 in his corporate office in Ormond Beach, Florida. Mr. Studner and his bookkeeper, Steven Skipper, observed Petitioner talking on his cell phone when Mr. Studner was not in the restaurant.

20. Eventually, Mr. Studner decided to transfer Petitioner to another one of his restaurants to alleviate the tension caused by Petitioner at IHOP 35. After one day at the other restaurant, Mr. Studner reassigned Petitioner to IHOP 35 because he realized that Petitioner was unable to get along with the staff at the new location.

21. Respondent never gave Petitioner any managerial responsibilities. Petitioner did not approach Mr. Studner or otherwise apply for the position of Kitchen Manager or any position other than cook. Respondent never denied Petitioner a promotion.

22. In December or January 2007, Respondent hired Larry Delucia as the Kitchen Manger at IHOP 35. Mr. Delucia had not previously worked with Respondent, but he had extensive management experience at three different restaurants.

23. When Mr. Delucia began working at IHOP 35, Petitioner and the other cooks were asked to help familiarize him with the menu and the set-up of the kitchen and coolers. They were not asked to train Mr. Delucia, whose job included scheduling and working on the computer, as well as supervising the kitchen.

24. In February 2008, Petitioner told a white busboy named John to bring him some plates. John then told Petitioner that he was not John's boss and called Petitioner a "fucking nigger." The front-end manager, Pam Maxwell, immediately suspended John

for a week but allowed him to return to work after two days. Mr. Studner was not aware of the incident involving John.

25. Petitioner then asked Mr. Delucia and Ms. Maxwell for the telephone number of Bob Burns, the district manager for the International House of Pancakes, Inc. Mr. Studner was not aware of Petitioner's request for Mr. Burns' telephone number.

26. Days later, Mr. Studner instructed Mr. Delucia to terminate Petitioner's employment. The greater weight of the evidence indicates that Mr. Studner decided to terminate Petitioner solely because of his continued cell phone usage on company time as observed in person and on surveillance tapes.

27. At first, Petitioner did not realize he had been permanently terminated. During the hearing, Petitioner testified that he tried to return to work by talking to Mr. Delucia, who told him to call Mr. Studner. Mr. Studner did not return Petitioner's calls.

28. For years, Mr. Studner has employed African-Americans to work as servers, cooks, hostesses, kitchen managers, front-end managers, and general managers. Mr. Studner owns five other restaurants, including two other IHOPs. Over the last two years, Mr. Studner has hired three African-American general managers.

CONCLUSIONS OF LAW

29. 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).

30. It is unlawful for an employer to discriminate against any individual based on such individual's race. See § 760.10(1)(a), Fla. Stat.

31. The Florida Civil Rights Act (FCRA), Sections 760.01 through 760.11, Florida Statutes, as amended, was patterned after Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. 2000e et seq., and federal case law interpreting Title VII is applicable to cases arising under the FCRA. See Green v. Burger King Corp., 728 So. 2d 369, 370-371 (Fla. 3rd DCA 1999); Florida State Univ. v. Sondel, 685 So. 2d 923 (Fla. 1st DCA 1996).

32. Petitioner has the burden of proving by a preponderance of the evidence that Respondent discriminated against him. See Florida Dep't of Transportation v. J.W.C. Company, Inc. 396 So. 2d 778 (Fla. 1st DCA 1991).

33. Petitioner can establish a case of discrimination through direct evidence, statistical evidence, or circumstantial evidence. See Holifield v. Reno, 115 F.3d 1555, 1561-1562 (11th Cir. 1997). Petitioner has not presented any statistical evidence.

34. Petitioner also failed to produce any direct evidence of race discrimination. Direct evidence of discrimination is evidence that, if believed, establishes the existence of discriminatory intent behind an employment decision without any inference or presumption. See Maynard v. Board of Regents of the Division of Universities of the Florida Department of Education, 342 F.3d 1281, 1289 (11th Cir. 2003); Merritt v. Dillard Paper Co., 120 F.3d 1181, 1189 (11th Cir. 1997); Chambers v. Walt Disney World Co., 132 F. Supp. 2d 1356 (M.D. Fla. 2001). Evidence that only suggests discrimination, or that is subject to more than one interpretation, does not constitute direct evidence of discrimination. Id.

35. Additionally, in order for a statement to constitute direct evidence of discrimination, it must be made by the employer or its agents, must specifically relate to the challenged employment decision and must reveal blatant discriminatory animus. See Jones v. Bessemer Carraway Medical Center, 151 F.3d 132 (11th Cir. 1998).

36. In this case, the racial slurs were made by co-workers with no supervisory authority. Mr. Studner was aware of only one such comment months after it happened. Each of the co-workers was disciplined for his or her highly offensive remarks that were unrelated to any adverse employment decision by Mr. Studner. Petitioner failed to show direct evidence of

discrimination. To the contrary, Petitioner received raises based on objective measures.

37. In a case lacking direct evidence of discrimination, the burden of proof is allocated as set forth in McDonnell Douglas Corp. v. Green, 441 U.S. 792, 802-805 (1973). That case states that an employment discrimination case based on circumstantial evidence involves the following analysis: (a) the employee must first establish a prima facie case of discrimination; (b) the employer may then rebut the prima facie case by articulating a legitimate, nondiscriminatory reason for the employment action in question; and (c) the employee then bears the ultimate burden of persuasion to establish that the employer's proffered reason for the action taken is merely a pretext for discrimination.

Failure to Promote

38. To establish a prima facie case of discrimination for failure to promote, Petitioner must show the following: (a) he is a member of a protected group; (b) he was qualified and applied for the promotion; (c) he was rejected despite his qualifications; and (d) other equally or less qualified employees who were not members of the protected class were promoted. See Welch v. Mercer Univ., 2008 U.S. App. LEXIS 26291 (11th Cir. Dec. 24, 2008).

39. Petitioner presented no evidence to show that he requested consideration for the position of kitchen manager or that he had the necessary experience for the job. He certainly did not prove that Mr. Delucia was equally or less qualified. There is no merit to Petitioner's claim that Respondent unlawfully failed to promote him.

Termination

40. To establish discrimination in discipline, Petitioner must show the following: (a) he belongs to a protected group such as a minority race; (b) he was qualified for the job; (c) he was subjected to an adverse employment action; and (c) a similarly-situated employee engaged in the same or similar misconduct but did not receive similar discipline or termination. See Nicholas v. Board of Trustees, 251 Fed Appx. 637, 642 (11th Cir. 2007).

41. To determine whether employees are similarly situated, one must consider whether "the employees are involved in or accused of the same or similar conduct and are disciplined in different ways." See Maniccia v. Brown, 171 F.3d 1364, 1368 (11th Cir. 1999).

42. In order to make that determination, courts "require that the quantity and quality of the comparator's misconduct be nearly identical to prevent . . . second-guessing employers'

reasonable decisions and confusing apples with oranges." Id. at 1368.

43. Petitioner failed to present evidence that he was similarly situated with any other employee relative to his cell phone use on company time. Therefore, he has not proven his prima facie case of unlawful termination.

44. Moreover, Respondent had a legitimate non-discriminatory reason for terminating Petitioner's employment. That reason was Petitioner's refusal to follow the policy prohibiting personal calls on company time. Petitioner has not proved that Respondent's reason for terminating him was a pretext for discrimination.

Hostile Work Environment

45. To prove a case of hostile work environment, Petitioner must establish the following: (a) he belongs to a protected group; (b) he was subjected to unwelcome harassment; (c) the harassment was based on the protected characteristic of race; (d) the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and thus, create a discriminatorily abusive work environment; and (e) the employer is responsible for that environment under a theory of either direct or vicarious liability. Miller v. Kenworth of Dothan, 277 F.3d (11th Cir. 2002).

46. In this case, Petitioner has not shown that his co-workers' conduct was so severe or pervasive to create an objectively hostile or abusive work environment. See Watkins v. Bowden, 105 F.3d 1344, 1355 (11th Cir. 1997).

47. In determining whether harassment objectively alters an employee's terms or conditions of employment, the following factors must be considered: (a) the frequency of the conduct; (b) the severity of the conduct; (c) whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and (d) whether the conduct unreasonably interferes with the employee's job performance. See Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993).

48. Here, the alleged harassment occurred in isolated incidences over a 15-month period and was intermittent at most. It was Petitioner's habit of talking on his cell phone and taking breaks at peak times and not his co-workers' name calling that interfered with his job performance and harmony in the kitchen.

49. Furthermore, Petitioner has not shown that Respondent is liable for the co-workers' statements. If an alleged harasser is not the employee's supervisor, then the employer may only be held liable for the harasser's conduct if the employer knew or should have known of the harassment and failed to take

prompt remedial action. See Watson v. Blue Circle, Inc., 324 F.3d 1252, 1259 (11th Cir. 2003).

50. Remedial action that results in the cessation of harassment precludes any recovery by an employee. See Bryant v. School Bd. of Miami Dade County, 142 Fed. Appx. 382, 385 (11th Cir. 2005).

51. In this case, Petitioner's co-workers did not have power to take any tangible, adverse employment action against Petitioner. Petitioner's supervisors always took action to correct problems as they arose. There is no persuasive evidence that Petitioner's co-workers continued to use racial slurs when referring to Petitioner after receiving appropriate discipline.

52. Mr. Studner was only aware of one racial slur involving Kevin. Mr. Studner removed Kevin from IHOP 35 and bought him back months later to the night shift because Petitioner objected to working with Kevin on the day shift again.

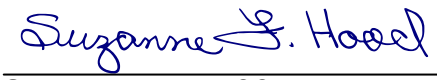
53. Finally, Petitioner was eager to return to his job after being told to go home in February 2008. He has not proved that he worked in a hostile environment, subjectively or objectively.

RECOMMENDATION

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

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

DONE AND ENTERED this 31st day of December, 2009, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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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.