STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ZINA Y. JOHNSON,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 10-0955
	)	
WORKFORCE ESCAROSA, INC.,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

A hearing was held pursuant to notice, on November 16 and 17, 2010, in Pensacola, Florida, before the Division of Administrative Hearings by its designated Administrative Law Judge, Barbara J. Staros.

APPEARANCES

For Petitioner: Zina Y. Johnson, pro se
1365 A Pinnacle Drive
Pensacola, Florida 32504

For Respondent: Erick M. Drlicka, Esquire
Emmanuel, Sheppard & Condon
30 South Spring Street
Pensacola, Florida 32501

STATEMENT OF THE ISSUE

Whether Respondent violated the Florida Civil Rights Act of 1992, as alleged in the Employment Complaint of Discrimination filed by Petitioner on June 18, 2009.

PRELIMINARY STATEMENT

On June 18, 2009, Petitioner, Zina Y. Johnson, filed an Employment Complaint of Discrimination with the Florida Commission on Human Relations (FCHR) which alleged that Workforce Escarosa violated section 760.10, Florida Statutes, by discriminating against her on the basis of race and retaliation, which resulted in her termination. The Employment Complaint of Discrimination alleged that Petitioner was unfairly disciplined and harassed on the job; and that when she complained about her concerns, she was terminated.

The allegations were investigated, and on December 9, 2009, FCHR issued its Determination: Cause. A Petition for Relief was filed by Petitioner on January 11, 2010.

FCHR transmitted the case to the Division of Administrative Hearings on or about February 23, 2010. A Notice of Hearing was issued setting the case for formal hearing on June 16 and 17, 2010. The hearing date was continued three times for good cause and was ultimately heard on November 16 and 17, 2010.

At hearing, Petitioner testified on her own behalf. Petitioner did not present any documents into evidence. Respondent presented the testimony of Maggie Thomas, Julia Lockhart, Susan Nelms, Julie Vick, and Holley McCloud. Respondent's Exhibits 1 through 5 were admitted into evidence.

A two-volume Transcript was filed on December 15, 2010. The parties timely filed Proposed Recommended Orders, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is an African-American female who was employed by Respondent from June 16, 2008, until her termination on December 10, 2008. Prior to that, Petitioner worked for the Welfare Transition Program which was taken over by Respondent. When she began her employment with Respondent, she was hired to be a customer service representative wherein she continued doing essentially the same job she was doing before Respondent took over.

2. Respondent, Workforce Escarosa, Inc. (Workforce), is an employer within the meaning of the Florida Civil Rights Act. Workforce is one of 24 local workforce investment boards in Florida and is responsible for Escambia and Santa Rosa Counties. Workforce oversees federal employment and training programs including the Workforce Investment Act, Welfare Transition Program, Disabled Veterans Program, Wagner Peyser Program, and other federal programs. Part of Workforce's responsibility is to train people for new jobs and careers, and to assist them in attaining economic self-sufficiency through employment.

3. Maggie Thomas is the Assistant Director of Workforce's Welfare Transition Program and was Petitioner's supervisor. Ms. Thomas hired Petitioner in June 2008 to be part of the "Core Team." The Core Team consisted of four persons: Julie Vick, Tesha Stallworth, Julia Lockhart, and Petitioner.

4. The Core Team provided administrative support and was responsible for front desk operations. Often, 70 or 80 people were in the waiting area near the front desk.

5. In July 2008, Ms. Thomas counseled Petitioner following an incident that occurred when Ms. Thomas and Ms. Thomas' administrative assistant, Julie Vick, offered assistance to Petitioner regarding an overhead projector and screen. Ms. Thomas described Petitioner's response as "a real rude rebuff." Ms. Thomas also learned that there was tension between Petitioner and Ms. Vick. Ms. Thomas brought both Petitioner and Ms. Vick into her office emphasizing that staff needed to get along and that "staff should not treat staff in that abrupt rude manner."

6. Later in July 2008, Ms. Thomas was approached by a career advisor who complained about Petitioner's demeanor with customers and staff. Ms. Thomas again counseled Petitioner regarding the importance of getting along with fellow staff members and treating customers with respect.

7. Ms. Thomas counseled Petitioner on a third occasion after receiving complaints from another career advisor, Tarae Donaldson, who is African-American. Ms. Donaldson requested that she not have to work with Petitioner on a project because of Petitioner's attitude and demeanor. Ms. Thomas counseled Petitioner that Petitioner's attitude and demeanor in the workplace was affecting office morale, reminded Petitioner that this was the third time that Ms. Thomas had to counsel her about this, and advised Petitioner that she needed to take this matter seriously.

8. In early November 2008, Petitioner had a confrontation with a co-worker, Julia Lockhart, who is white. Petitioner and Ms. Lockhart were co-workers and friends, who socialized after work and "hung out" together. That day, Ms. Lockhart was responsible for the front counter. A workforce client, Katrina Harmon, was working the front counter as part of the Community Work Experience Program (CWEP). Ms. Lockhart counseled Ms. Harmon about using "Mr.", "Mrs.", or "Ms." when addressing the Workforce clients rather than just calling out their last names. Ms. Lockhart described Ms. Harmon's actions toward the clients as unprofessional and that it "kind of reminded me of a drill sergeant." Ms. Harmon, who is African-American, later complained to Petitioner about Lockhart's counseling her. Petitioner and Ms. Lockhart then discussed the situation.

9. Petitioner believes that Ms. Lockhart was upset with Ms. Johnson for siding with Ms. Harmon because Ms. Harmon is African-American. However, Petitioner acknowledged that this was her opinion based on her personal perception. Moreover, even if Ms. Lockhart was upset with Ms. Johnson, being upset with a co-worker does not establish racial discrimination.

10. In early December 2008, another staff member, Tesha Stallworth, approached Ms. Thomas complaining about Petitioner's demeanor. Ms. Thomas learned more about the incident involving Ms. Harmon during this meeting with Ms. Stallworth. Ms. Thomas decided to transfer Ms. Harmon from the front desk to the Internet Café. About three weeks later, Ms. Thomas was called by Ms. Stallworth. During this call, Ms. Thomas learned that Ms. Stallworth threatened to quit because of Petitioner. During this three-week period, Ms. Thomas also heard complaints regarding Petitioner's office demeanor from Ms. Lockhart. Ms. Thomas considers Ms. Stallworth and Ms. Lockhart to be "very reliable employees."

11. Ms. Thomas decided to have another counseling session with Petitioner. The fourth counseling session took place on December 8, 2008. Ms. Thomas felt that Petitioner's job was in jeopardy but wanted to give Petitioner one more chance. Additionally, Ms. Thomas found Petitioner's job performance to be otherwise good. Ms. Thomas described Petitioner as very

defensive and that she did not take responsibility for any of her actions. Ms. Thomas presented Petitioner with a memorandum entitled, "Counseling on Unprofessional Behavior and Disrespect of other employees." Petitioner refused to sign the counseling memorandum.

12. Following that meeting, Ms. Thomas went to Susan Nelms, Executive Director of Workforce. Ms. Thomas conveyed to Ms. Nelms her concerns, that she did not hold out any hope that the situation would be resolved, and that Petitioner was affecting morale. Ms. Nelms made the decision to terminate Petitioner. Ms. Thomas did not convey anything to Ms. Nelms that would indicate that there were any racial issues surrounding Petitioner's termination from employment.

13. Ms. Thomas then went to Landrum to get advice on how to proceed. Ms. Thomas again met with Petitioner on December 10, 2008, and told her that her employment would be terminated. Ms. Thomas relates the following about the December 10 meeting:

> Q: And that's when the decision was made by Ms. Nelms to terminate Ms. Johnson?
>
> A: Yes.
>
> Q: And then was that then conveyed to Ms. Johnson?
>
> A: No. After December 8th, after Susan [Nelms] gave me the go ahead, I wanted a day to go to Landrum to make sure that I would do this in the proper manner.

Q: So you got advice from Landrum?

A: I did get advice from Landrum.

Q: And then after that, did you meet with Ms. Johnson?

A: I met with Ms. Johnson on December 10th.

Q: All right. And conveyed that her position would be terminated?

A: That is correct. And it is at that time, I'm positive about this, that she first brought up that it was a black/white issue against her. After she knew that she was being terminated and the reason I know-- I am absolutely positive about this, is because the day before when I visited Landrum, we were sitting there talking about the proper procedure and I remember asking-- I said, you know, what if she brings up that she thinks this is a black/white issue? I said, you know, how do I respond to that? I mean, she hasn't up to this point, but I asked and they just said, you should just say you don't want to go there.

So after I handed her the termination, and she brought up that she thought it was a black and white issue against herself, that's when I said, I don't want to go there, because that's what I had been advised to say.

Now, her memory on December 8th might have been that she brought up the black/white issue about Katrina [Harmon], but it was not about herself. I'm absolutely positive on that point.

14. Ms. Thomas' testimony in that regard was credible and is accepted. That is, that Petitioner first mentioned to Ms. Thomas that the Lockhart/Harmon was a racial issue, somehow related to her, on December 10, 2008.

15. On December 16, 2008, Petitioner wrote Ms. Nelms regarding her termination. The letter does not contain any allegation of race discrimination or that her termination was in retaliation for reporting race discrimination.

16. On December 29, 2008, Petitioner spoke with Holly McLeod, a human resource manager with Landrum Professional Employer Service (Landrum). Petitioner did not complain to Ms. McLeod about any race discrimination or allege that her termination was in retaliation for complaining about race discrimination.

17. On or about January 8, 2009, Petitioner filed a complaint with the Escambia-Pensacola Human Relations Commission concerning her termination from Workforce. The letter of complaint does not allege race discrimination or retaliation. Instead, the letter alleges that she was involved in a disagreement with a co-worker; that she became a victim on a "malicious vendetta" by this co-worker; that this co-worker manipulated and influenced another co-worker and their supervisor; and that the circumstances surrounding her termination were "irrational, irresponsible, and deceitful." At the time that letter was written, Petitioner believed that Ms. Thomas made the decision to fire her.

18. Petitioner alleged in her Employment Complaint of Discrimination that she "became the subject of racial jokes and harassment by a co-worker, Ms. Julia Lockhart (white)." Petitioner's allegations in this regard are not precise in that she initially referenced four occasions of racial jokes but then characterized that as a "guesstimation." In her Proposed Recommended Order, Petitioner asserts that the number and frequency of the jokes are not known.

19. There is testimony regarding the content of only one joke. Ms. Lockhart acknowledges that on one occasion, she told a joke when she and Ms. Johnson were outside smoking a cigarette together. Petitioner pointed out a black woman to Ms. Lockhart and commented that the woman had the biggest lips she had ever seen. In response, Ms. Lockhart then told a joke regarding African-Americans.[1/] Petitioner laughed at the joke and did not indicate that she was offended.

20. In response to a question as to whether she found the alleged jokes to be offensive, Petitioner replied, "I don't even remember what the jokes were, so how can I tell you if that they were offensive or not." Petitioner is not certain as to whether Ms. Lockhart meant to be offensive. The preponderance of the evidence suggests that Petitioner only stopped socializing with Ms. Lockhart after the incident involving Ms. Harmon, not because of any joke(s).

21. Workforce has an open door policy for reporting discrimination. Petitioner received a copy of this policy, but did not complain to Workforce or Landrum about Ms. Lockhart's joke(s).

CONCLUSIONS OF LAW

22. The Division of Administrative Hearings has jurisdiction over the parties and subject matter in this case. §§ 120.569 and 120.57, Fla. Stat. (2010).

23. Section 760.10(1) and (7), Florida Statutes (2009),[2/] states that it is an unlawful employment practice for an employer to discharge or otherwise discriminate against an individual on the basis of race, or to discriminate against a person who has made a charge of an unlawful employment practice.

24. FCHR and Florida courts have determined that federal discrimination law should be used as guidance when construing provisions of section 760.10. See Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17 (Fla. 3d DCA 2009); Brand v. Fla. Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994).

25. In her Employment Complaint of Discrimination, Petitioner alleged that she was unfairly disciplined and harassed because of her race; was discharged in retaliation for complaining about the discriminatory practices; and became the subject of racial jokes and harassment by a co-worker.

26. Discriminatory intent can be established through direct or circumstantial evidence. Schoenfeld v. Babbitt, 168 F.3d 1257, 1266 (11th Cir. 1999). Direct evidence of discrimination is evidence that, if believed, establishes the existence of discriminatory intent behind an employment decision without interference or presumption. Maynard v. Bd. of Regents, 342 F.3d 1281, 1289 (11th Cir. 2003).

27. "Racially derogatory statements can constitute direct evidence of discrimination if the comments were (1) made by the decisionmaker responsible for the alleged discrimination and (2) made in the context of the challenged decision. However, if an alleged statement fails either prong it is considered a 'stray remark' and does not constitute direct evidence of discrimination." Vickers v. Fed. Express Corp., 132 F. Supp. 2d 1371 (S.D. Fla. 2000), citing Wheatley v. Baptist Hosp. of Miami, 16 F. Supp. 2d 1356, 1359-60, aff'd 172 F.3d 882 (11th Cir. 1999).

28. "For statements of discriminatory intent to constitute direct evidence of discrimination, they must be made by a person involved in the challenged decision." Wheatley, supra at 1360, quoting Trotter v. Bd. of Tr. of Univ. of Ala., 91 F.3d 1449, 1453-54 (11th Cir. 1996).

29. Ms. Lockhart told the racially insensitive joke to Petitioner. While Ms. Lockhart was one of the staff members who spoke to Ms. Thomas about Petitioner's office behavior, Ms. Lockhart was a co-worker of Petitioner and not a decision maker. Ms. Nelms was the decision-maker and there is no evidence that she, or Ms. Thomas, who made the recommendation to Ms. Nelms, was aware that a racially insensitive joke took place. Thus, it is concluded that Ms. Lockhart's joke was a "stray remark" and that Petitioner has not presented direct evidence of racial discrimination. See Vickers v. Fed. Express Corp., supra.

30. Having failed to produce direct evidence of racial discrimination, Petitioner may attempt to establish her case through inferential and circumstantial proof. Kline v. Tenn. Valley Auth., 128 F.3d 337, 348 (6th Cir. 1997). Petitioner bears the burden of proof established by the United States Supreme Court in McDonnell Douglas v. Green, 411 U.S. 792 (1973), and Texas Dep't of Cmty. 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. 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 Dep't of Corr. 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. Id. Alexander v. Fulton Cnty., Ga., 207 F.3d 1303 (11th Cir. 2000). The employee must then come forward with specific evidence demonstrating that the reasons given by the employer are a pretext for discrimination. Schoenfeld v. Babbitt, supra at 1267. "The employee must satisfy this burden by showing directly that a discriminatory reason more likely than not motivated the decision, or indirectly by showing that the proffered reason for the employment decision is not worthy of belief." Dep't. of Corr. v. Chandler, supra at 1186; Alexander v. Fulton Cnty., Ga., supra. Petitioner has not met this burden.

31. "Although the intermediate burdens of production shift back and forth, the ultimate burden of persuading the trier of fact that the employer intentionally discriminated against the [Petitioner] remains at all times with the [Petitioner]." EEOC v. Joe's Stone Crabs, Inc., 296 F.3d 1265, 1273 (11th Cir. 2002); see also Byrd v. RT Foods, Inc., 948 So. 2d 921, 927 (Fla. 4th DCA 2007) ("The ultimate burden of proving intentional

discrimination against the plaintiff remains with the plaintiff at all times.")

32. To establish a prima facie case of race discrimination, Petitioner must prove that (1) she is a member of a protected class (e.g., African-American); (2) she was subject to an adverse employment action; (3) her employer treated similarly situated employees, who are not members of the protected class, more favorably; and (4) she was qualified for the job or benefit at issue. See McDonnell, supra; Gillis v. Ga. Dep't of Corr., 400 F.3d 883 (11th Cir. 2005).

33. Petitioner has met the first and second elements to establish a prima facie case of discrimination in that she is a member of a protected class and was subject to an adverse employment action.

34. However, she has not proven the third element, that her employer treated similarly situated employees who are not members of the protected class more favorably. No evidence was presented to establish that other employees had been counseled repeatedly for the same conduct and were then treated differently. See McCann v. Tillman, 526 F.3d 1370, 1373 (11th Cir. 2008) ("In order to determine whether other employees were similarly situated to [Petitioner], we evaluate 'whether the employees are involved in or accused of the same or similar

conduct and are disciplined in different ways.' (citation omitted)".

35. As for the fourth element, the preponderance of the evidence establishes that Petitioner was qualified for the job. Ms. Thomas testified that she was satisfied with Petitioner's job performance, and that she recommended that Petitioner be terminated only because of her behavior and demeanor in the workplace.

36. Applying the McDonnell analysis, Petitioner did not meet her burden of establishing a prima facie case of discriminatory treatment. Even assuming that Petitioner had demonstrated a prima facie case of discriminatory conduct, Respondent demonstrated a legitimate, non-discriminatory reason for Petitioner's termination. That is, Petitioner was fired because of inappropriate behavior toward co-workers and in the presence of customers.

37. Even if it were necessary to go to the next level of the McDonnell analysis, Petitioner did not produce any evidence that Respondent's legitimate reasons were pretext for discrimination. Therefore, Petitioner has not met her burden of showing that a discriminatory reason more likely than not motivated the actions of Respondent toward Petitioner or by showing that the proffered reason for the employment decision is not worthy of belief. Dep't of Corr. v. Chandler, supra,

Alexander v. Fulton Cnty., Ga., supra. "Would the proffered evidence allow a reasonable factfinder to conclude that the articulated reason for the decision was not the real one." Walker v. Prudential, 286 F. 3d 1270 (11th Cir. 2002). Consequently, Petitioner has not met her burden of showing pretext.

38. In summary, Petitioner has failed to carry her burden of proof that Respondent engaged in racial discrimination toward Petitioner when it terminated her.

39. In her Employment Complaint of Discrimination, Petitioner alleges that she became the subject of racial jokes and harassment by a white co-worker, Ms. Lockhart. There is no evidence that Petitioner was the subject of the only joke about which evidence was introduced. The joke told by a co-worker, Ms. Lockhart, which constitutes a stray remark under the above case analysis, does not establish that she was subject to a hostile work environment. Without restating the above analysis and discussion regarding race discrimination, the joke(s) told by Ms. Lockhart, a co-worker, were not sufficiently severe or pervasive to alter the terms and conditions of employment. See Thompson v. Carrier Corp., 2009 U.S. App. LEXIS 28245 (11th Cir. 2009) citing Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (2002)("A hostile work environment is one 'permeated with discriminatory intimidation, ridicule, and insult, that is

sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'")

40. Petitioner also alleged that she was discharged in retaliation for complaining about discriminatory practices. To make a prima facie case of retaliation, Petitioner must show that she engaged in protected activity, that she suffered adverse employment action, and that there is some causal relation between the protected activity and the adverse employment action. Casiano v. Gonzales, 2006 U.S. Dist. Lexis 3593 (N.D. Fla. 2006); Jeronimus v. Polk Cnty. Opportunity Council, Inc., 2005 U.S. App. Lexis 17016 (11th Cir. 2005).

41. Ms. Thomas' testimony that Petitioner first told her about the Lockhart/Harmon incident on December 10, 2008, was accepted as credible. Further, that incident involved persons other than Petitioner. That is, even if Petitioner had complained to Ms. Thomas about the Lockhart/Harmon incident on December 8, 2008, Ms. Lockhart's instructions to Ms. Harmon did not directly have anything to do with Petitioner. The perceived connection to Petitioner was simply as to who was taking whose side in what amounted to an office spat. In any event, the decision to terminate Petitioner was made prior to the December 10, 2008, meeting between Ms. Thomas and Petitioner.

42. Therefore, it is concluded that Petitioner did not engage in a protected activity to substantiate a claim of illegal retaliation. And, there was no causal connection between Petitioner's informing Ms. Thomas that she believed that incident involving Ms. Lockhart was a black/white issue and Petitioner's termination. Ms. Thomas' decision to terminate Petitioner was made after four counseling sessions with Petitioner, after receiving complaints from several employees, including an African-American. The decision to terminate Petitioner had nothing to do with race, but was rather based on a series of issues regarding Petitioner's office demeanor.

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 Employment Charge of Discrimination and Petition for Relief.

DONE AND ENTERED this 28th day of January, 2011, in Tallahassee, Leon County, Florida.

BARBARA J. STAROS
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of January, 2011.

ENDNOTES

1/ The joke as related by Ms. Lockhart: "Hey, do you know why black people don't drive convertibles? And she said, No, why? And I said, because their lips are big and they flap in the wind and they can't see."

2/ All future references to Florida Statutes will be to 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.