STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JANICE JENNINGS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 10-0958
	)	
SUPERIOR OPTICAL SHOP,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

An administrative hearing was conducted in this case on May 24, 2010, in Lake City, Florida, before James H. Peterson, III, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: John F. Mayo, Qualified Representative
Post Office Box 912
Lake City, Florida 32056

For Respondent: M. Todd Hingson, Esquire
Avera & Smith, LLP
248 North Marion Avenue, Suite 102
Lake City, Florida 32055

STATEMENT OF THE ISSUE

Whether Respondent, Superior Optical Shop (Respondent), violated the Florida Civil Rights Act of 1992, Sections 760.01–760.11 and 509.092, Florida Statutes, by subjecting Petitioner, Janice Jennings (Petitioner), to discrimination in employment

and by discharging Petitioner in retaliation for Petitioner's opposition to Respondent's discriminatory employment practices.

PRELIMINARY STATEMENT

On October 11, 2009, Petitioner filed a charge of discrimination with the Florida Commission on Human Relations (the Commission), Charge No. 2009022897 (Charge of Discrimination). In the Charge of Discrimination, Petitioner alleges that she was subjected to different terms and conditions of employment, denied proper training, and harassed because of her race during her employment with Respondent. The Charge of Discrimination further alleges that Petitioner was discharged from her employment with Respondent in retaliation for opposing Respondent's discriminatory practices.

After investigating Petitioner's allegations, on January 18, 2010, the Commission issued a Determination of No Cause, signed by the Commission's Executive Director, finding that, based upon the report of investigation, no reasonable cause exists to believe that an unlawful employment discrimination practice occurred. The Determination of No Cause also notified Petitioner of her right to file a Petition for Relief for a formal administrative proceeding within 35 days of the Notice. On February 17, 2010, Petitioner filed a Petition for Relief and, on February 22, 2010, the Commission forwarded the petition to the Division of Administrative Hearings for the

assignment of an administrative law judge to conduct an administrative hearing.

At the administrative hearing held on May 24, 2010, Petitioner testified on her own behalf, and called three witnesses. Petitioner did not offer any exhibits into evidence. Respondent presented the testimony of the same three witnesses called by Petitioner and offered three exhibits which were received into evidence as Respondent's Exhibits "R-1" through "R-3."

The proceedings were recorded and a transcript was ordered. The parties initially were given 10 days from the filing of the transcript within which to submit their respective Proposed Recommended Orders. Following the filing of the transcript on June 9, 2010, by order granting Respondent's request for additional time, the time within which to file Proposed Recommended Orders was extended until June 29, 2010. Respondent timely filed its Proposed Recommended Order on June 29, 2010. Although not filing a proposed recommended order, on June 3, 2010, Petitioner filed a written document entitled "Closing Statement." Respondent's Proposed Recommended Order and Petitioner's written Closing Statement were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is an African-American female.

2. Respondent is a corporation with its corporate headquarters located in Ocean Springs, Mississippi. Respondent operates an optical shop in a Veteran's Administration (V.A.) Hospital located in Lake City, Florida.

3. At its Lake City location, Respondent fills prescriptions written by eye physicians at the V.A. Hospital, assists patients with choosing frames, and fits patients with their prescription eye glasses.

4. Respondent's optical shop in Lake City is fast-paced, with a constant stream of patients, averaging 50-to-60 patients a day. If the optical shop is running behind schedule, it is problematic because often physicians at the V.A. Hospital are waiting to see the patients served by the optical shop.

5. In 2009, Petitioner interviewed for a position at Respondent's optical shop in Lake City, Florida. During her interview, Petitioner advised Respondent that she had competent computer skills and significant experience working in an office environment and with eye doctors.

6. On May 27, 2009, Respondent hired Petitioner as a part-time clerk at the optical shop. Petitioner was terminated prior to working 90 days for Respondent. When Petitioner was hired,

two full-time employees worked at the optical shop: office supervisor, Jean Hartup, and optician, Kathleen Denton.

7. Ms. Hartup has been employed with Respondent for approximately five years. Ms. Denton has been with the optical shop for approximately two and a-half years.

8. As office supervisor, Ms. Hartup can be distant with employees and “hard” at times. She can also be “direct” when speaking to employees. Ms. Hartup demonstrates these traits with all of the employees at the optical shop.

9. Ms. Hartup has written up Ms. Denton in the past and the two have had personality conflicts.

10. Both Ms. Hartup and Ms. Denton assisted with training Petitioner. Evidence indicated that Petitioner received adequate training to perform the tasks she was assigned to perform as a clerk. She often had to be re-trained on the same tasks.

11. Respondent’s optical shop in Lake City is a very small room, approximately ten-feet by ten-feet square inside the V.A. Hospital. There are two small desks in the shop and it is very crowded.

12. Petitioner was aware of the small working environment at the time she accepted employment with Respondent as a part-time clerk.

13. Past and present employees at the optical shop have had to share desk space. Sometimes work has to be performed in the hallway because of the small office space.

14. All new hires for Respondent are subjected to a 90-day probationary period. As explained in Respondent's "Employee Handbook of Office Policies and Benefits," of which Petitioner was aware:

> There will be a 90-day probationary period during which time the employer may terminate the employee at any time for any reason or for no reason regardless of any other provision of these policies. Sick leave and personal days are accrued but cannot be used during this period.

15. Respondent's Employee Handbook of Office Policies and Benefits also provides:

> [Respondent] does not and will not tolerate any employee discriminating against their work peers for any reason i.e., race, color, religion, sex, national origin or handicap. Any known verifiable discrimination will be grounds for immediate termination.

16. Once on the job, Petitioner was not proficient on the computer and, despite repeated training, failed to show any improvement and was slow in performing her job duties. Because of this, service to patients at the optical shop slowed down and the optical shop was frequently behind, resulting in physicians having to wait for patients being served by the optical shop.

17. Ms. Hartup became frustrated with Petitioner's unsatisfactory job performance and the resulting delays. In addition, Petitioner began to show a lack of interest in her job and even stated that she "didn't really need a job; she just wanted to be out of the house."

18. Despite repeated training and opportunities to improve her work performance, Petitioner failed to improve. Petitioner was given a notebook with information from the American Board of Opticians for review but she failed to read it or return it to Respondent.

19. Prior to the end of her employment with Respondent, Petitioner called Respondent's corporate headquarters in Mississippi and spoke to Mary Walker. Petitioner complained to Ms. Walker that Ms. Hartup was being too hard, was impatient, and was expecting too much of her. Petitioner did not raise concerns with Ms. Walker that she was being discriminated against based on her race, or that she had been subjected to a hostile work environment because of her race. In fact, there is no evidence that Petitioner ever complained of race discrimination or a hostile work environment based on race discrimination while she was still employed by Respondent.

20. During that first telephone conversation with Petitioner, Ms. Walker suggested to Petitioner that she should

talk to Ms. Hartup about the problems. Petitioner assured Ms. Walker that she would.

21. Two days later, Ms. Walker called Ms. Hartup and inquired whether Petitioner had discussed her concerns with Ms. Hartup. Petitioner, however, had not spoken to Ms. Hartup about her complaint.

22. Ms. Walker gave Ms. Hartup the authority to run the optical shop at Lake City, including making hiring and firing decisions. Ms. Walker did not discipline Ms. Hartup because of Petitioner's complaints. Rather, Ms. Walker told Ms. Hartup to handle the situation regarding Petitioner's complaints.

23. Ms. Hartup then met with Petitioner and they spoke about Petitioner's concerns that Ms. Hartup was being too harsh and about Petitioner's poor work performance. As a result of that meeting, Ms. Hartup felt the situation had been resolved.

24. Petitioner subsequently advised both Ms. Denton, as well as Ms. Walker at Respondent's headquarters, that the conversation with Ms. Hartup had gone well and that their issues had been resolved.

25. Petitioner's work performance, however, did not improve. Prior to the end of her 90-day probationary period of employment, Respondent terminated Petitioner from employment for poor work performance, for failing to reach her capabilities as

an employee, and because her poor work performance was a detriment to Respondent's Lake City optical shop.

26. Petitioner testified that, from her point of view, she truly felt as though she had been discriminated against because of her race. That testimony, however, was without further support and was unpersuasive, especially in view of the fact that there is no evidence that Petitioner ever mentioned to anyone during her employment with Respondent that she believed she was being discriminated against.

27. There was otherwise no evidence presented at the final hearing that would support a finding that Respondent's decision to terminate Petitioner was in retaliation for Petitioner's complaint against Ms. Hartup. Further, the evidence produced at final hearing does not support a finding that either the manner in which Petitioner was treated during her employment with Respondent, or her termination from that employment, was based on Petitioner's race.

28. Respondent filled the position of part-time clerk left vacant after Petitioner's termination by hiring a Native-American male.

CONCLUSIONS OF LAW

29. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to Section 120.569 and Subsection 120.57(1),

Florida Statutes (2009),[1/] and Florida Administrative Code Rule 60Y-4.016(1).

30. The State of Florida, under the legislative scheme contained in Sections 760.01–760.11 and 509.092, Florida Statutes, known as the Florida Civil Rights Act of 1992 (the Act), incorporates and adopts the legal principles and precedents established in the federal anti-discrimination laws specifically set forth under Title VII of the Civil Rights Act of 1964, as amended. 42 U.S.C. § 2000e, et seq.

31. The Florida law prohibiting unlawful employment practices is found in Section 760.10, Florida Statutes. This section prohibits discrimination "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." § 760.10(1)(a), Fla. Stat.

32. Florida courts have held that decisions construing Title VII of the Civil Rights Act of 1964, as amended, should be used as guidance when construing provisions of the Act. See, e.g., Florida Department of Community Affairs v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991).

33. Generally, for discrimination in employment claims, the federal courts have utilized a three-part "burden of proof"

pattern developed in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973). Under that pattern:

> First, [Petitioner] has the burden of proving a prima facie case of discrimination by a preponderance of the evidence. Second, if [Petitioner] sufficiently establishes a prima facie case, the burden shifts to [Respondent] to "articulate some legitimate, nondiscriminatory reason" for its action. Third, if [Respondent] satisfies this burden, [Petitioner] has the opportunity to prove by a preponderance that the legitimate reasons asserted by [Respondent] are in fact mere pretext.

McDonnell Douglas, 411 U.S. at 802, 804, 93 S. Ct. at 1824, 1825.

34. Therefore, in order to prevail in her claim against Respondent, Petitioner must first establish a prima facie case by a preponderance[2/] of the evidence. McDonnell Douglas, 411 U.S. at 802; § 120.57(1)(j), Fla. Stat.

35. To establish a prima facie case, 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 Douglas, supra.

36. Although, as an African-American, Petitioner is a member of a protected class, Petitioner failed to show by a

preponderance of the evidence the other elements required to present a prima facie case.

37. Although alleged in Petitioner's Charge of Discrimination, the evidence failed to show that Petitioner was subjected to different terms and conditions of employment, denied proper training, or subjected to harassment or adverse employment action because of her race. Further, considering evidence that Petitioner was unable to timely perform the duties for which she was hired, Petitioner also failed to show that she was qualified for the job.

38. In addition, other than her own speculative belief, Petitioner submitted no evidence to support her contention that she was discriminated against because of her race. Mere speculation or self-serving belief on the part of a complainant concerning the motives of a respondent is insufficient, standing alone, to establish a prima facie case of intentional discrimination. See Lizardo v. Denny's, Inc., 270 F.3d 94, 104 (2d Cir. 2001)("Plaintiffs have done little more than cite to their mistreatment and ask the court to conclude that it must have been related to their race. This is not sufficient.").

39. In sum, Petitioner failed to present a prima facie case. "Failure to establish a prima facie case of race discrimination ends the inquiry." Ratliff v. State, 666 So. 2d, 1008, 1013 n.6 (Fla. 1st DCA 1996)(citations omitted).

40. While perhaps appropriate to apply in some contexts, in this case, as Petitioner has failed to make out even a prima facie case, the shifting of burden pattern has not been further applied or elaborated in this Recommended Order.

41. Petitioner failed to prove her Charge of Discrimination and it is otherwise concluded, based upon the evidence, that Respondent, Superior Optical Shop, did not violate the Florida Civil Rights Act of 1992, Sections 760.01–760.11 and 509.092, Florida Statutes, and is not liable to Petitioner, Janice Jennings, for discrimination in employment, or retaliatory discharge while she was employed by Respondent.

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 dismissing Petitioner’s Charge of Discrimination and Petition for Relief consistent with the terms of this Recommended Order.

DONE AND ENTERED this 29th day of July, 2010, in Tallahassee, Leon County, Florida.

JAMES H. PETERSON, III
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 29th day of July, 2010.

ENDNOTES

[1/] Unless otherwise indicated, all references to the Florida Statutes are to the 2009 version. All references to Florida Administrative Code or federal statutes and rules are to their current, effective versions.

[2/] A preponderance of the evidence is "the greater weight of the evidence," or evidence that "more likely than not" tends to prove her case. See Gross v. Lyons, 763 So. 2d 276, 280 n.1 (Fla. 2000).

COPIES FURNISHED:

John F. Mayo, Qualified Representative
Post Office Box 912
Lake City, Florida 32056

M. Todd Hingson, Esquire
Avera & Smith, LLP
248 North Marion Avenue, Suite 102
Lake City, Florida 32055

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

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.