STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DORINE ALEXANDER,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 10-1818
	)	
BAR-B-QUE MANAGEMENT INC., d/b/a SONNY'S REAL PIT BAR-B-Q,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

A formal hearing was conducted in this case on June 7, 2010, in Ocala, Florida, before Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Dorine Alexander, pro se
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Ocala, Florida 34473

For Respondent: Joanne B. Lambert, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Respondent, Bar-B-Que Management, Inc. d/b/a Sonny's Real Pit Bar-B-Q (Respondent), discriminated against Petitioner, Dorine Alexander (Petitioner), based on an alleged disability and her race.

PRELIMINARY STATEMENT

On or about August 31, 2009, Petitioner filed an Employment Complaint of Discrimination against Respondent. The complaint alleged that Respondent failed to accommodate her alleged disability, and discriminated against her based on race and by constructively discharging her.

The Florida Commission on Human Relations (FCHR) issued a Determination: No Cause on March 3, 2010. Petitioner filed a Petition for Relief with FCHR on April 1, 2010. FCHR referred the case to the Division of Administrative Hearings on April 5, 2010.

A Notice of Hearing dated April 19, 2010, scheduled the hearing for June 7 and 8, 2010.

When the hearing commenced, Petitioner testified on her own behalf. She did not present the testimony of any other witnesses or offer any exhibits as evidence.

Respondent presented the testimony of six witnesses. Respondent offered 55 exhibits that were accepted as evidence.

The Transcript of the proceeding was filed on July 13, 2010. Petitioner's Proposed Recommended Order was filed on July 21, 2010. Respondent's Proposed Findings of Fact and Conclusions of Law were filed on August 2, 2010.

Except as otherwise noted, all references hereinafter shall be to Florida Statutes (2009).

FINDINGS OF FACT

1. Respondent is a management company with employees at 16 franchise-owned restaurants in central and north-eastern Florida. Respondent has employment policies that prohibit discrimination on the basis of race and disability. It also has policies that provide for reasonable accommodation of employees with disabilities.

2. Respondent's policies inform employees about the procedure to be followed in reporting perceived race or disability discrimination. The policies prohibit retaliation against employees who report perceived discrimination.

3. Petitioner is an African-American female. Respondent employed her as a cashier in its Belleview, Florida, location from July 14, 2008, to April 5, 2009.

4. At the beginning of her employment, Petitioner was aware of Respondent's policies relative to discrimination. Respondent provided her with a copy of its Team Member Handbook containing the policies.

5. Petitioner's duties included working as a cashier in both the drive-thru and at the front counter. She also was responsible for stocking all takeout areas and completing side work.

6. Initially, Petitioner's job required her to perform deck scrubbing. However, when Petitioner notified her manager

that deck scrubbing made it difficult for her to breathe, she no longer had to perform that task. Petitioner never complained that she continued to have breathing difficulties even when others were performing deck scrubbing.

7. Respondent accommodated Petitioner's alleged breathing problem even though Petitioner never provided Respondent with requested medical documentation indicating that she had asthma or any other respiratory difficulties. There is no competent evidence to show that Petitioner is disabled.

8. In the Fall of 2008, Respondent demoted the general manager at the restaurant where Petitioner worked. The demotion was based on poor performance, including not enforcing company policies and failing to hold employees accountable for compliance with company policies and performance standards.

9. Respondent directed the new management team to enforce company policies and to issue discipline when appropriate. The directive was communicated to the restaurant's employees.

10. After the change in management, Petitioner received numerous disciplinary write-ups. The write-ups included the following: (a) violation of Respondent's policy against use of cell phones during working hours; (b) violation of Respondent's policy against smoking on the premises and/or parking lot while in uniform during working hours; (c) violation of Respondent's attendance policy, requiring employees to arrive at work on time

and to attend mandatory meetings unless excused; (d) violation of Respondent's cash-handling policy, resulting in cash overages and shortages; and (d) violation of Respondent's work performance standards by failing to stock supplies and complete other side work duties.

11. Non-black employees received written discipline for the same violations as Petitioner. At least one white employee was terminated for violating the cell phone usage policy.

12. Prior to February 2009, Petitioner worked an average of 25 hours per week. The fewest number of weekly hours worked by Petitioner after February 2009 was 19 hours. Petitioner worked 19 hours for only two weeks.

13. Petitioner asserts that she was not allowed to "pick up" extra shifts when another cashier went on vacation for five days. Scheduling requests had to be submitted by Tuesday for the next week's schedule. Petitioner failed to timely request any of the extra available shifts. Instead, she approached the scheduling manager after the schedule was already completed. Despite the lateness of her request, the scheduling manager revised the schedule to assign Petitioner one extra shift.

14. Beginning in January 2009, Respondent's schedules were created and posted on-line through a computer program called Hot Schedules. At all times relevant here, the schedule was posted

late only three times. The late posting affected all employees, not just Petitioner.

15. Petitioner asserts that she was assigned to work the drive-thru more than white employees. This assertion is without merit as shown by the following statistics.

16. Petitioner worked 59 shifts between January 1, 2009, and her resignation on April 5, 2009. Respondent assigned Petitioner to work in the drive-thru on 23 of those shifts, approximately 39 percent of the total shifts. Petitioner worked at the front counter for the remainder of her shifts, approximately 61 percent of the total shifts.

17. Two white cashiers, Brittany Knaul and Sarah Liles, worked a comparable number of shifts between January 1, 2009, and April 5, 2009. During that time, Ms. Knaul worked 54 shifts, with 25 shifts or 46 percent assigned to the drive-thru. Of the 86 shifts worked by Ms. Liles, 33 shifts or 38 percent were in the drive-thru. On the other hand, Beatrice McKoy, a black cashier, worked almost exclusively at the front counter between January 1, 2009, and April 5, 2009.

18. Petitioner sought out and spoke with Respondent's Director of Operations, Josh McCall, on several occasions during her employment. The conversations involved her requested accommodation and complaints about the disciplinary write-ups. Petitioner never reported any perceived race discrimination.

19. On one occasion, Mr. McCall asked Petitioner if she believed she was being discriminated against based on her race. Petitioner denied that she was being treated differently from non-black employees.

20. Petitioner submitted a letter of voluntary resignation on March 30, 2009. Her last day at work was April 5, 2009.

21. Petitioner asserts that she was constructively discharged. However, Petitioner failed to notify Respondent of the alleged discrimination until she spoke with Respondent's Area Manager on April 6, 2009, after her resignation and last day at work.

22. Shortly after her last day at work for Respondent, Petitioner voluntarily resigned her other job with Internet Access. Petitioner resigned that job due to a dispute with her manager.

23. Petitioner obtained subsequent employment which ended when that company closed in June 2009. Petitioner remained unemployed until February 2010. The only employment she held in the intervening six months was occasional work assisting her sister, who is a home health aide.

CONCLUSIONS OF LAW

24. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this

proceeding pursuant to Sections 120.569, 120.57(1), and 760.11, Florida Statutes.

25. It is unlawful for an employer to discriminate against an individual based on the individual's race or disability. See § 760.10(1)(a), Fla. Stat.

26. 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. Section 2000e et seq. 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. 3d DCA 1999); Florida State Univ. v. Sondel, 685 So. 2d 923 (Fla. 1st DCA 1996).

27. Florida courts also have recognized that actions under the FCRA are analyzed under the same framework as the Americans with Disabilities Act, 42 U.S.C. Section 12101, et seq. See Chanda v. Engelhard/ICC, 234 F.3d 1219, 1221 (11th Cir. 2000).

28. Petitioner can establish a case of discrimination through statistical, direct, or circumstantial evidence. See Holifield v. Reno, 115 F.3d 1555, 1561-1562 (11th Cir. 1997). In this case, Petitioner presented no statistical or direct evidence of discrimination.

29. An employment discrimination case based on circumstantial evidence involves the following burden-shifting

analysis: (a) the employee must first establish a prima facie case of unlawful discrimination; (b) if a prima facie case is proven, the employer may articulate a legitimate, non-discriminatory reason for the alleged unlawful conduct; and (c) the burden then shifts to the complainant to prove that the employer's reasons are a mere pretext for intentional discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Texas Dep't of Community Affairs v. Burdine, 450 U.S 248 (1981).

30. Throughout the burden-shifting analysis, the burden of proving intentional discrimination remains at all times with the complainant. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 510 (1993).

Disability Discrimination

31. To prevail on a case involving a failure to accommodate a disability, Petitioner must show the following: (a) that she is disabled; (b) that she is qualified for the job, with or without a reasonable accommodation; and (3) that she was denied a reasonable request for accommodation. See Lucas v. W. W. Grainger, Inc., 257 F.3d 1249 (11th Cir. 2001); Willis v. Conopco, Inc., 108 F.3d 282 (11th Cir. 1997).

32. Petitioner cannot establish the first or third prong of her prima facie case. As to the first prong, Petitioner never provided Respondent with requested medical documentation

of her alleged disability. Additionally, the only evidence presented during the hearing indicated that Petitioner was not disabled.

33. Petitioner did not prove the third prong of her prima facie case because Respondent relieved her of her deck scrubbing duties immediately upon her request. This was the only accommodation that Petitioner ever requested. Petitioner's testimony to the contrary is not persuasive.

34. "Failure to establish a prima facie case of discrimination ends the inquiry." See Ratliff v. State, 666 So. 2d 1008, 1012 n.6, aff'd, 679 So. 2d 1183 (1996)(citing Arnold v. Burger Queen Systems, 509 So. 2d 958 (Fla. 2d DCA 1987)). Petitioner did not meet her burden of proving a prima facie case of discrimination based on an alleged disability.

Race Discrimination

35. To establish a prima facie case of race discrimination, Petitioner must show the following: (a) that she is a member of a protected class; (b) that she was qualified for the position; and (c) that similarly-situated employees outside the protected group did not suffer the same adverse action. See Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997).

36. Petitioner first claims that she received written discipline for performance and policy violations for which non-

black employees were not disciplined. There is no merit to her claim because the overwhelming and undisputed evidence is that white and Hispanic employees were issued disciplinary write-ups for the very same performance and policy violations. Clearly, Petitioner was not treated less favorably than employees outside of her protected class with respect to written discipline.

37. Petitioner further asserts that her hours were reduced beginning in February 2009. Petitioner's testimony regarding the alleged reduction in hours is contradicted by persuasive evidence showing that Respondent scheduled black and white cashiers to work without consideration of race.

38. Petitioner next claims that she was not allowed to "pick up" extra shifts when another cashier went on vacation for five days. The most persuasive evidence indicates that Petitioner failed to timely request extra shifts. Even so, the scheduling manager revised the schedule to assign Petitioner one extra shift.

39. Petitioner also alleges that work schedules were posted late, causing her difficulty with her second job. The evidence shows that the late posting of schedules affected all employees equally. Therefore, Petitioner did not and could not show any differential treatment between black and white employees in this regard.

40. Finally, Petitioner contends that she was assigned to work in the drive-thru more often that her non-black co-workers. This contention is without merit because Petitioner worked in the drive-thru the same or less than her white counterparts.

41. Even if Petitioner had established a prima facie case of race discrimination, Respondent provided evidence of legitimate, non-discriminatory reasons for each action it took. With regard to Petitioner's disciplinary write-ups, Respondent established that Petitioner violated its written policies and procedures. Petitioner admits most of the violations.

42. As to the alleged reduction in hours, the alleged failure to schedule extra shifts, and the late posting of schedules, Respondent presented evidence that its scheduling manager made all decisions in accordance with Respondent's anti-discrimination policy. There is no evidence of race discrimination as to these claims.

43. Petitioner has provided no evidence that Respondent’s reasons for its actions were a pretext for racial discrimination. Petitioner has not met her ultimate burden of proof on this issue.

Constructive Discharge

44. To prove constructive discharge, a claimant must demonstrate that "working conditions were so intolerable that a reasonable person in the plaintiff's position would have felt

compelled to resign." Durley v. APAC, Inc., 236 F.3d 651, 658 (11th Cir. 2000). Reasonable conduct involves notifying the employer of improper behavior, and affording the employer an opportunity to correct the situation. See Slattery v. Neumann, 200 F. Supp. 2d 1367 (S.D. Fla. 2002).

45. In this case, Petitioner did not produce any evidence to show that her working conditions were intolerable to the degree required to prove a constructive discharge claim. The issuance of disciplinary write-ups alone is insufficient to prove constructive discharge. See Hill v. Winn-Dixie Stores, Inc., 934 F.2d 1518, 1527 (11th Cir. 1991). There is no persuasive evidence of any other adverse employment action suffered by Petitioner.

46. Petitioner's claim of constructive discharge also fails because she never reported the need for further accommodation and never reported the alleged race discrimination. Petitioner was not constructively discharged.

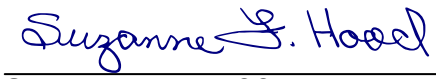
RECOMMENDATION

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 the Petition for Relief.

DONE AND ENTERED this 13th day of August, 2010, 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.