STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEVON A. ROZIER,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 10-2328
	)	
SOUTHGATE CAMPUS CENTRE,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

A final hearing was held in this matter before Robert S. Cohen, Administrative Law Judge with the Division of Administrative Hearings, on August 10, 2010, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Devon A. Rozier, pro se
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For Respondent: Desiree C. Hill-Henderson, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Respondent engaged in an unlawful employment practice by subjecting Petitioner to gender discrimination and retaliation in violation of the Florida Civil Rights Act.

PRELIMINARY STATEMENT

Respondent, Southgate Campus Centre (Southgate), is a student housing and dining facility located in Tallahassee, Florida, near the campuses of Florida State University, Florida A&M University, and Tallahassee Community College.

Petitioner was employed as a dishwasher in the Southgate cafeteria dish room. At the beginning of his employment, Petitioner performed well. As time progressed and Petitioner became older, his performance declined, and he became disrespectful to management. On April 30, 2009, Petitioner got into an argument with his supervisor, and Petitioner left the facility. Petitioner was told by his supervisor that leaving his post would constitute job abandonment. Petitioner left nonetheless.

Petitioner attempted to return to work, but his supervisors chose not to re-hire Petitioner due to his prior actions and his failure to exhibit improvement. Petitioner filed a Charge of Discrimination with the Florida Commission on Human Relations (FCHR) alleging gender discrimination and retaliation. After investigating the charge, FCHR issued a no cause determination. Petitioner elected to proceed to an administrative hearing by filing a Petition for Relief on April 27, 2010.

A final hearing was scheduled for June 22 and 23, 2010, in Tallahassee, Florida. After a Motion for Continuance was filed

by Respondent and granted by the undersigned to allow Respondent to receive responses to its discovery requests, the final hearing was held in Tallahassee on August 10, 2010.

At the hearing, Petitioner testified on his own behalf and presented the testimony of Jennifer Rozier, Jodece Yant, and Darnell Rozier. Respondent presented the testimony of Kenneth S. Mills, Rasheik Campbell, and Jason McClung. Respondent offered 12 exhibits into evidence.

After the hearing, a transcript of the proceedings was filed on September 27, 2010. Petitioner and Respondent also filed their proposed findings of fact and conclusions of law on September 27, 2010. The post-hearing submissions by the parties have been duly considered in the writing of this Recommended Order.

References to statutes are to Florida Statutes (2009) unless otherwise noted.

FINDINGS OF FACT

1. Southgate is a student housing and dining facility located in Tallahassee, Florida, near the campuses of Florida State University, Florida A&M University, and Tallahassee Community College.

2. On September 16, 2004, Southgate hired Petitioner Devon Rozier as a dishwasher in the cafeteria dish room. The

cafeteria is open seven days a week and currently employs approximately 34 employees, some part-time and some full-time.

3. Petitioner had just turned 16 years old when Ken Mills hired him based upon a long-standing relationship with Petitioner's father, who had worked at Southgate for many years and was an exemplary employee.

4. Petitioner worked as a part-time employee on the night shift, 3:30 p.m. until 8:00 p.m., for a total of 20-25 hours per week.

5. Petitioner later received a promotion out of the dish room to the grill, and also worked other positions such as attendant and greeter. Petitioner also worked in various positions to assist as needed, as did other employees in the cafeteria.

6. At the beginning of his employment, Petitioner exhibited good performance. As time progressed, Petitioner's performance began to decline, and he openly disrespected management.

7. Various disciplinary techniques were employed by his supervisors in efforts to improve his performance, but the improvements always proved to be short-lived.

8. On April 30, 2009, Petitioner and his supervisor, Rasheik Campbell, had an altercation, and Petitioner left the facility. Mr. Campbell warned Petitioner before he left the

facility that such action would constitute job abandonment. Despite Mr. Campbell's warning, Petitioner left the facility.

9. Mr. Campbell took the position that Petitioner abandoned his employment with Southgate. Petitioner was no longer placed on the schedule. On May 4, 2009, Southgate sent Petitioner a letter confirming his resignation.

10. As months passed, Petitioner made attempts to regain his position with Southgate by calling his supervisors Mr. Campbell and Mr. Jason McClung. When his attempts were met with resistance by his supervisors, Petitioner bypassed them and went directly to Ken Mills, Southgate's General Manager and Petitioner's former supervisor.

11. Petitioner presented his case to Mr. Mills in July and August 2009, regarding his desire to return to work. Mr. Mills had previously intervened on Petitioner's behalf, out of respect for Petitioner's father, to help him keep his job when difficulties with management had arisen. This time, Mr. Mills instructed Petitioner that Mr. McClung and Mr. Campbell were his direct supervisors and that they had ultimate responsibility regarding his desired return to work at Southgate.

12. In August 2009, at the request of Mr. Mills, once again doing a favor for Petitioner based upon the long-standing work history of Petitioner's father at Southgate, Mr. Mills, Mr. McClung, and Mr. Campbell met with Petitioner and his

mother, Jennifer Rozier. At the meeting, they discussed Petitioner's request to return to work at Southgate.

13. During the meeting, Mr. McClung and Mr. Campbell did not feel that Petitioner exhibited any improvement in his behavior and respect for authority. As a result, Mr. McClung and Mr. Campbell chose not to re-hire Petitioner.

14. Petitioner claims the following conduct he witnessed while working at Southgate was discriminatory: a) females were allowed to sit down at tables and eat while on the clock; b) females were allowed to use the computer while on the clock; and c) Petitioner was required to perform the females' work when they failed to show up or wanted to leave early.

15. Petitioner further claims that his firing was retaliatory based upon one complaint he made to Mr. Campbell in February 2009 about having to perform the tasks of others who failed to come to work.

16. Other employees, including Jodece Yant, Petitioner's girlfriend, and Darnell Rozier, Petitioner's own brother, testified that both males and females could be seen eating or using the computer while on the clock, and all were told to perform others' tasks when they failed to come to work or left early.

17. Petitioner conceded that on occasion he engaged in the same behaviors he alleges to be discriminatory.

18. Petitioner obtained a full-time job at Hobbit American Grill on January 21, 2010, and, as of the date of the hearing, continued to work there. His rate of pay at Hobbit American Grill is currently $7.25 per hour, and he testified he is better off there than at his former employer, Southgate.

19. Petitioner is currently earning the same hourly wage ($7.25) as he was earning when employed at Southgate.

20. Southgate had policies and procedures in force that prohibited, among other things, discrimination on the basis of gender or any other protected characteristics. Southgate's policies and procedures also prohibited retaliation.

21. Petitioner received a copy of the employee handbook, which contained Southgate's anti-discrimination policies and was aware that Southgate had such policies in place.

CONCLUSIONS OF LAW

22. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. §§ 120.569, 120.57(1), and 760.11, Fla. Stat.

23. Petitioner is an "aggrieved person," and Respondent an "employer" within the meaning of Subsections 760.02(10) and (7), Florida Statutes, respectively. Section 760.10, Florida Statutes, makes it unlawful for Respondent to discharge or otherwise discriminate against Petitioner based upon an employee's race or sex.

24. The Florida Civil Rights Act of 1992 (the "Act") makes certain acts "unlawful employment practices" and gives FCHR the authority, following an administrative hearing conducted pursuant to Sections 120.569 and 120.57, Florida Statutes, to issue an order "prohibiting the practice and providing affirmative relief from the effects of the practice, including back pay," if it finds that such an "unlawful employment practice" has occurred. §§ 760.10 and 760.11(6), Fla. Stat.

25. Pursuant to Subsection 760.10(1), it is unlawful for an employer to discharge, refuse to hire, or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment, based on the employee's race, gender, or national origin.

26. Federal discrimination law may properly be used for guidance in evaluating the merits of claims arising under Section 760.10. See Brand v. Fla. Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994); Fla. Dep't of Cmty. Affairs v. Bryant, 586 So. 2d 1205, 1209 (Fla. 1st DCA 1991).

27. In McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973), the Supreme Court articulated a burden of proof scheme for cases involving allegations of discrimination under Title VII, where the plaintiff relies upon circumstantial evidence. The McDonnell Douglas decision is persuasive in this case, as is St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502,

506-07 (1993), in which the Court reiterated and refined the McDonnell Douglas analysis.

28. Pursuant to this analysis, the plaintiff (Petitioner herein) has the initial burden of establishing by a preponderance of the evidence a prima facie case of unlawful discrimination. Failure to establish a prima facie case of discrimination ends the inquiry. See Ratliff v. State, 666 So. 2d 1008, 1012 n.6 (Fla. 1st DCA 1996), aff'd, 679 So. 2d 1183 (1996) (citing Arnold v. Burger Queen Sys., 509 So. 2d 958 (Fla. 2d DCA 1987)).

29. If, however, the plaintiff succeeds in making a prima facie case, then the burden shifts to the defendant (Respondent herein) to articulate some legitimate, nondiscriminatory reason for its complained-of conduct. If the defendant carries this burden of rebutting the plaintiff's prima facie case, then the plaintiff must demonstrate that the proffered reason was not the true reason, but merely a pretext for discrimination. McDonnell Douglas, 411 U.S. at 802-03; Hicks, 509 U.S. at 506-07.

30. In Hicks, the Court stressed that even if the trier-of-fact were to reject as incredible the reason put forward by the defendant in justification for its actions, the burden nevertheless would remain with the plaintiff to prove the ultimate question of whether the defendant intentionally had discriminated against him. Hicks, 509 U.S. at 511. "It is not

enough, in other words, to disbelieve the employer; the fact finder must believe the plaintiff's explanation of intentional discrimination." Id. at 519.

31. In order to prove intentional discrimination, Petitioner must prove that Respondent intentionally discriminated against him. It is not the role of this tribunal (or any court, for that matter) to second-guess Respondent's business judgment. As stated by the court in Chapman v. AI Transp., 229 F.3d 1012, 1031 (11th Cir. 2000), "courts do not sit as a super-personnel department that reexamines an entity's business decisions. No matter how mistaken the firm's managers, the [Civil Rights Act] does not interfere. Rather, our inquiry is limited to whether the employer gave an honest explanation of its behavior (citations omitted). An employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason."

32. At the administrative hearing held in this case, Petitioner had the burden of proving that he was the victim of a discriminatorily motivated action. See Dep't of Banking & Fin., Div. of Sec. & Investor Prot. v. Osborne Stern and Co., 670 So. 2d 932, 934 (Fla. 1996) ("The general rule is that a party asserting the affirmative of an issue has the burden of presenting evidence as to that issue."); Fla. Dep't of Health &

Rehabilitative Servs. v. Career Serv. Comm'n, 289 So. 2d 412, 414 (Fla. 4th DCA 1974) ("The burden of proof is 'on the party asserting the affirmative of an issue before an administrative tribunal.'").

33. Petitioner presented no evidence that he was subjected to an adverse employment action. He claims that managers allowing females to sit at tables while on the clock, use computers while on the clock, and forcing Petitioner to do females' work when they failed to show for work or wanted to leave early constituted an adverse employment action.

34. An "adverse employment action" is an ultimate employment decision, such as a discharge "or other conduct that alters the employee's compensation, terms, conditions, or privileges of employment, deprives him of employment opportunities, or adversely affects his status as an employee." Gupta v. Fla. Bd. of Regents, 212 F.3d 571, 587 (11th Cir. 2000). However, not all conduct taken by an employer which causes a negative effect on an employee constitutes adverse employment action. Davis v. Town of Lake Park, 245 F.3d 1232 (11th Cir. 2001). In determining whether a "serious and material" change in the terms, conditions, or privileges of employment has been established, Davis instructs the court to disregard the plaintiff's subjective view of the significance and adversity of the employer's action: "[T]he employment

action must be materially adverse as viewed by a reasonable person in the circumstance." Id. at 1239.

35. Although Petitioner feels this alleged conduct amounts to an adverse employment action, his subjective view is not controlling since the conduct he alleges must be materially adverse as viewed by a reasonable person in the circumstances. Davis, 245 F.3d at 1239. Petitioner suffered no serious or material change in the "terms, conditions, or privileges of employment." Courts have held that "trivial harms" and "petty slights" do not constitute adverse employment actions. See Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68-69 (2006). The conduct which is the subject of Petitioner's claim of discrimination is nothing more than "trivial harms" and "petty slights," if anything at all. Consequently, because adverse employment action is an indispensable element of Petitioner's claim, Petitioner's failure to present sufficient evidence is fatal to his claim.

36. "To show that employees are similarly-situated the Petitioner must show that the 'employees are similarly-situated in all relevant aspects.'" Knight v. Baptist Hosp. of Miami, Inc., 330 F.3d 1313, 1316. "The comparator must be nearly identical to the petitioner, to prevent courts from second-guessing a reasonable decision by the employer." Wilson v. B/E Aero., Inc., 376 F.3d 1079, 1091 (11th Cir. 2004). In other

words, Petitioner must be "matched with persons having similar job-related characteristics who were similarly situated" to Petitioner. MacPherson v. Univ. of Montevello, 922 F.2d 766, 775 (11th Cir. 1991).

37. Simply put, in order to establish the third element of the prima facie case, Petitioner must produce evidence that would permit the trier of fact to conclude that Respondent treated employees of a different gender more favorably than Petitioner. See Lathem v. Dep't of Children & Youth Servs., 172 F.3d 786, 793 (11th Cir. 1999).

38. Petitioner cannot meet this burden because he admittedly has no competent evidence of any similarly-situated employees outside of his protected class being treated more favorably. Testimony by Petitioner's girlfriend and his own brother, both employees of Southgate, identified both men and women subjected to the alleged disparate conduct of Petitioner's claim. Each testified that men and women sat to eat while on the clock, used the computer while on the clock, and were forced to pick up others' work when they failed to show or left early. Petitioner conceded that he had seen such behaviors in the past. Since Petitioner cannot demonstrate other instances of discrimination, his Petition for Relief must be denied. See Lathem, 172 F.3d at 793; see also Holifield v. Reno, 115 F.3d 1555 (11th Cir. 1997).

39. Petitioner also claims that Southgate retaliated against him when he was terminated as a result of one complaint to Mr. Campbell in February 2009 of being forced to do other employees' job duties. Under Title VII, "[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because . . . [h]e has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this subchapter. 42 U.S.C. §2000e-3(a). Because Petitioner alleges a retaliation claim based upon circumstantial evidence, the burden shifting framework in McDonnell Douglas applies.

40. To establish a prima facie case of retaliation, Petitioner must show that: 1) he was engaged in an activity protected under Title VII; 2) he suffered an adverse employment action; and 3) there was a causal connection between the protected activity and the adverse employment action. See Pennington v. City of Huntsville, 261 F.3d 1262, 1266 (11th Cir. 2001). To satisfy the causal connection requirement, Petitioner must establish that the protected activity and the alleged retaliatory action are not completely unrelated. Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1453, 1457 (11th Cir. 1998). Notably, the person engaged in the alleged conduct must be aware of the protected activity. Gupta v. Fla. Bd. of Regents, 12 F.3d at 571 (11th Cir. 2000).

41. The first element of Petitioner's prima facie case of retaliation requires him to establish that he engaged in statutorily protected activity. To do so, Petitioner must show that he opposed conduct by the employer based upon an objectively reasonable belief that Southgate was engaged in unlawful employment practices. See Harper v. Blockbuster Ent. Corp., 139 F.3d 1385, 1388 (11th Cir. 1998); Brown v. Sybase, Inc., 287 F. Supp. 2d 1330, 1345 (S.D. Fla. 2003). Petitioner's claim of protected activity is his complaint to Mr. Campbell in February 2009 that he was being forced to do other employees' job duties. No evidence was produced by Petitioner that he expressly complained about gender discrimination. Courts have consistently required that an employee's complaints must clearly put an employer on notice of a violation of the law. See Johnson v. Fla. Dep't of Elder Affairs, No. 4:09-CV-306/RS/WCS, 2010 U.S. Dist. LEXIS 42784 (N.D. Fla. Mar. 20, 2010). Petitioner's February 2009 complaint did not put Southgate on notice that he was opposing discrimination or that he was making a formal complaint. Therefore, Petitioner's complaint does not constitute protected activity.

42. Moreover, Petitioner's allegations of suspension and termination are unfounded. After his April 30, 2009, altercation with Mr. Campbell, Petitioner was told that if he left the premises at that time, Mr. Campbell would consider him

to have abandoned his job. An employee who voluntarily resigns cannot claim that he suffered an adverse employment action under Title VII. See Fannin v. Lemcko Fla., Inc., No. 8:05-CV-2303-T-27TBM, 2007 U.S. Dist. LEXIS 1267 (M.D. Fla. Jan. 5, 2007); Hammon v. DHL Airways, Inc., 165 F.3d 441, 447 (6th Cir. 1999).

43. Even assuming that Petitioner suffered an adverse employment action, no causal connection exists. Petitioner cannot even make the minimum showing to establish a causal element of a prima facie claim of retaliation, i.e., that the employer was actually aware of the protected expression at the time it took the adverse employment action in April 2009. A court will not presume that a decision-maker was motivated to retaliate by something unknown to him or her. Brungart v. BellSouth Telecomms., Inc., 231 F.3d 791, 799-800 (11th Cir. 2000); Holifield v. Reno, 115 F.3d at 1566. As noted above, Petitioner's conduct cannot as a matter of law be deemed to have put Southgate on notice that he was engaging in protected activity, and Southgate cannot be deemed to have been aware of any other type of protected activity by Petitioner at the time of the complained-of employment action in April 2009.
Mr. Mills, Mr. McClung, and Mr. Campbell testified that none of them had any knowledge of Petitioner's claims of discrimination until he filed his charge of discrimination on October 27, 2009. Consequently, there is no evidence of a causal link between the

complained-of employment action and Petitioner's alleged protected conduct, and, based upon the facts and circumstances of this case, no inference of a causal link could ever arise. Since Petitioner cannot even clear the first hurdle, that of a prima facie case, his claim must fail.

44. The evidence produced at hearing failed to prove, by a preponderance of the evidence, that Petitioner suffered discrimination in his employment on the basis of his gender. Respondent articulated legitimate, non-discriminatory reasons for its actions and decisions regarding Petitioner. The preponderance of the evidence clearly supports that Respondent did not commit an unlawful employment practice.

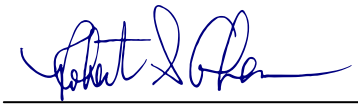
45. Based upon the evidence and testimony offered at hearing, Respondent is not found to have committed an unlawful employment practice as alleged by Petitioner in his Petition for Relief. Therefore, his Petition should be dismissed.

RECOMMENDATION

Based upon the 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 10th day of November, 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.