

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JESSICA A. LAMARRE,)
)
 Petitioner,)
)
 vs.) Case No. 10-9511
)
 THE RICHMAN GROUP,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case before J. D. Parrish, a duly-designated administrative law judge of the Division of Administrative Hearings, on December 16, 17, and 20, 2010, in Brevard County, Florida.

APPEARANCES

For Petitioner: John M. Finnigan, Esquire
Finnigan Law Firm
1700 Maitland Avenue
Maitland, Florida 32751

For Respondent: Thomas A. Groendyke, Esquire
Douberley & Cicero
1000 Sawgrass Corporate Parkway
Suite 590
Sunrise, Florida 33323

STATEMENT OF THE ISSUES

Whether Respondent, Richman Property Services, Inc. (Respondent), committed an unlawful employment practice as alleged in the Amended Petition for Relief filed with the Florida Commission on Human Relations (FCHR), and, if so, what

relief should Petitioner, Jessica A. Lamarre (Petitioner), be granted.

PRELIMINARY STATEMENT

On October 8, 2010, the FCHR transmitted Petitioner's Amended Petition for Relief to the Division of Administrative Hearings (DOAH) for formal proceedings. Petitioner claimed that Respondent discriminated against her on account of her race (Black). More specifically, Petitioner maintained that she was wrongfully terminated from her employment and replaced with a person who had less experience, but who was Caucasian. Respondent asserted it acted appropriately, and that a factual basis supported the decision to terminate Petitioner. Respondent maintained that Petitioner's race was inconsequential to the decision.

At the hearing, Petitioner testified on her own behalf and presented testimony from Patricia Card, Respondent's former employee who worked with Petitioner. Respondent presented testimony from Heather Garden, Gilda Fernandez, Judy Roberts, Christy Starr, Marlene Williams, James Dollard, and Marie Lauture. Exhibits received in evidence are included in the record being returned to FCHR.

A transcript of the proceeding has not been filed. The parties were granted leave until January 18, 2011, to file Proposed Recommended Orders. Both parties timely submitted

orders that have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is an African-American, who denotes her race as Black. At all times material to the allegations of this case, Petitioner was employed by Respondent in Brevard County, Florida.

2. Respondent is a property management company doing business in Florida. Respondent manages an apartment complex identified in this record as Manatee Cove Apartments (Manatee Cove) located in Melbourne, Florida.

3. In November of 2008, Respondent's regional manager, Gilda Fernandez, interviewed Petitioner for the job of property manager for Manatee Cove. Petitioner had several years of experience as a property manager in South Florida and was interested in the position at Manatee Cove.

4. Although Heather Garden, Respondent's Senior Vice President, normally interviewed prospective property managers, her schedule did not allow her to personally interview Petitioner. Instead, Ms. Garden interviewed Petitioner by telephone. At the time of the telephone interview, Ms. Garden did not know Petitioner's race.

5. Although Petitioner had hoped to give her employer at the time more notice, Respondent required that Petitioner begin

her duties at Manatee Cove early. Instead of starting December 1, 2008, Petitioner agreed to begin work at Manatee Cove in November 2008. Before Petitioner started, Ms. Fernandez told Petitioner that the regional manager for Manatee Cove would be another supervisor, Marlene Williams.

6. Ms. Williams was a newly hired regional manager for Respondent, who did not participate in the hiring of Petitioner. From the outset, Ms. Williams and Petitioner did not have a sound working relationship.

7. Despite the fact that Ms. Williams initially advised Ms. Fernandez that she liked Petitioner, the relationship between Ms. Williams and Petitioner deteriorated over time.

8. At the time of Petitioner's hire, Respondent's employee handbook required training and mentoring for new employees of the company. Although Petitioner had several years of leasing experience in similar apartment complexes, she was not fully trained in the Respondent's way of doing business.

9. Respondent did not exhaust training procedures with Petitioner, nor did they initially provide her with trained support staff to help her tackle the problems at Manatee Cove. Prior to Petitioner's arrival at Manatee Cove, the complex experienced a low rate of occupancy that Respondent asked Petitioner to address. Additionally, Manatee Cove had a number of delinquent leases that Respondent expected Petitioner to

resolve. To Petitioner's credit, both areas of concern were addressed and improvements were made.

10. More critical to the company, however, was an upcoming audit that Manatee Cove faced. A third party was scheduled to audit Manatee Cove for compliance with regulations related to affordable income properties. Because Manatee Cove participated in the program, Respondent was required to maintain records pertaining to the program guidelines.

11. Much of Petitioner's effort during her time at Manatee Cove related to preparing for the audit. When the audit was passed with flying colors, Petitioner was praised for her work.

12. After Ms. Williams became Petitioner's supervisor, several issues with Petitioner's performance were identified by Respondent. For example, Petitioner was required to open the office at a certain time. When Petitioner worked late into the night she failed, on a couple of occasions, to open the office on time. Respondent's exaggeration of this alleged problem was unwarranted.

13. Respondent also claimed that Petitioner did not submit end-of-the-year invoices timely. Petitioner was timely with the invoices. Any error in not timely filing invoices for the security vendor was attributable to other employees.

14. Despite requests for additional training and assistance, Respondent gave Petitioner only a cursory training

opportunity. In contrast, Respondent trained Petitioner's successor, a Caucasian female, more thoroughly.

15. Further, the person Respondent allegedly sent to assist Petitioner did little to actually help her. Instead, she spent her time compiling minute details of how Petitioner did not do things the Respondent's way.

16. At one point, when advised of the alleged problems at Manatee Cove, Ms. Garden advised Ms. Williams to fire all of the employees there. Curiously, only Petitioner was terminated.

17. On February 9, 2009, Ms. Williams discharged Petitioner without specifying grounds for the action. Later, Ms. Williams claimed Petitioner's failure to timely pay invoices was the basis for the action. To the contrary, Petitioner timely presented for payment all invoices over which she had control. The invoices that were unpaid were for a vendor (the security company), who was hired before Petitioner came on the property, for whom the appropriate information had not been put into the system, and for whom the Respondent failed or refused to assist Petitioner input the appropriate data. Simply stated, the failure to timely pay the security vendor was not Petitioner's error.

18. Respondent replaced Petitioner with a less experienced Caucasian female.

19. Petitioner was hired at a salary of \$40,000, with a free apartment as additional compensation. When she was terminated, Petitioner was advised to vacate her apartment at Manatee Cove.

20. Petitioner worked to improve the leasing productivity at Manatee Cove. She was professional and experienced in her job.

21. The women who conspired to terminate Petitioner's employment with the company did so without considering the positive contributions Petitioner made to the Manatee Cove property.

22. Respondent did not have a sound business reason for terminating Petitioner. Instead, Respondent terminated Petitioner because she did not fit the corporate image. Ms. Williams and Ms. Garden wanted Petitioner to do everything the Respondent's way. When Petitioner showed success managing the complex her way, trouble ensued.

23. Less than one percent of the over 300 employees Ms. Garden supervises are Black managers. Ms. Garden did not sit down with Petitioner to train her; did not verify others had appropriately trained her; and did not include Petitioner in what could have been constructive conversations regarding Petitioner's work. Instead, she and Ms. Williams along with Ms. Christy Starr (Petitioner's eventual replacement), spent

their time chronicling superficial errors and complaints against Petitioner.

24. Petitioner had been employed less than a month when Respondent's employees started writing negative comments regarding Petitioner's work performance. Many of the comments were generated during a time when Petitioner had little or no help to run the office, and little or no training. All of the negative comments started after Ms. Garden met Petitioner (and obviously observed her ethnicity).

25. The table below demonstrates the time frame for Petitioner's first month of employment with Respondent:

| Date: | Event: |
|-------------------------|--|
| November 2008 | Petitioner interviewed for job by Ms. Fernandez. |
| November 2008 | Petitioner interviewed by phone for job by Ms. Garden. |
| December 1, 2008 | Date Petitioner was to start job; per employment agreement. |
| November 24, 2008 | Date Petitioner started job to accommodate Respondent; Ms. Fernandez met with Petitioner approximately 1-2 hours to get her started. |
| Early December 2008 | Ms. Fernandez and Ms. Garden visit Petitioner; Ms. Garden meets her for first time in person; Ms. Garden initially likes Petitioner. |
| December 12, 2008 | Petitioner meets Ms. Williams for first time; Petitioner expresses need for help; Ms. Williams tells Ms. Fernandez she likes Petitioner. |
| After December 12, 2008 | Ms. Williams e-mails Ms. Fernandez to state she |

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|------------------------------------|--|
| | has issues with Petitioner. |
| Mid December 2008 | Respondent tells Petitioner to get invoices in to be paid by end-of-year. |
| Mid December to late December 2008 | Petitioner asks for assistance with invoices; specifically with regard to security vendor for whom paperwork incomplete. |

26. During the first month, Petitioner worked the property without great assistance from the Respondent. The following chart depicts the remainder of Petitioner's employment with the company:

| | |
|--|---|
| On or about January 6, 2009 | Ms. Card hired to be Petitioner's assistant. |
| Early January, shortly after she was hired | Ms. Card sent for "training" at another property managed by Respondent; training turned out to be a session to allow Respondent's employees to criticize Petitioner's work. |
| January 14, 2009 | Ms. Garden wrote to express disappointment that Petitioner had not reached an occupancy goal despite improvement. |
| January 15, 2009 | Ms. Garden complains that Petitioner does not answer e-mail quickly enough. |
| January 19-21, 2009 | Ms. Starr sent to Manatee Cove to assist; instead does little and produces a report critical of Petitioner. |
| January 21, 2009 | Ms. Garden advises Ms. Williams should look for whole new staff for Manatee Cove. |
| On or about January 21, 2009 | Ms. Williams suggests Ms. Garden consider Ms. Starr for Petitioner's job. |
| January 26, 2009 | Ms. Williams issues a disciplinary report to |

| | |
|---------------------|---|
| | Petitioner; report allegedly written in December 2008, but Ms. Williams claimed she could not print it until this date. |
| January 26, 2009 | Petitioner given a copy of the job description for manager. |
| January 30, 2009 | Petitioner handles the audit conducted by third party and passes without any violations or issues. |
| Subsequent to audit | Petitioner praised for good work on audit. |
| Early February 2009 | Ms. Williams discovers security company not paid before new year. |
| February 9, 2009 | Ms. Williams fires Petitioner. |

27. On February 10, 2009, Ms. Starr replaced Petitioner as manager at Manatee Cove.

28. Petitioner has been unemployed since her termination from Manatee Cove. Although qualified, Petitioner has not actively pursued job opportunities outside the Central Florida market. Instead, Petitioner enrolled as a full-time student.

29. Petitioner filed a Complaint of Discrimination on or about December 2, 2009. Subsequently, Petitioner retained counsel and filed the instant administrative petition on or about October 8, 2010.

CONCLUSIONS OF LAW

30. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of these proceedings. §§ 120.57(1) and 760.11, Fla. Stat. (2009).

31. The Florida Civil Rights Act of 1992 (the Act) is codified in sections 760.01 through 760.11, Florida Statutes. "The Act, as amended, was [generally] patterned after Title VII of the Civil Rights Acts of 1964 and 1991, 42 U.S.C. § 2000, et seq., as well as the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623. Federal case law interpreting [provisions of] Title VII and the ADEA is [therefore] applicable to cases [involving counterpart provisions of] the Florida Act." Fla. St. Univ. v. Sondel, 685 So. 2d 923, 925 (Fla. 1st DCA 1996); see also Joshua v. City of Gainesville, 768 So. 2d 432, 435 (Fla. 2000) ("The [Act's] stated purpose and statutory construction directive are modeled after Title VII of the Civil Rights Act of 1964.").

32. The Act makes certain acts prohibited "unlawful employment practices," including those described in section 760.10, which provides:

(1) It is an unlawful employment practice for an employer:

(a) To discharge or to fail or refuse to hire any individual, or otherwise to discriminate 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.

(b) To limit, segregate, or classify employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment

opportunities, or adversely affect any individual's status as an employee, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.

33. The Act gives the FCHR the authority to issue an order prohibiting the practice and providing affirmative relief from the effects of the practice, including back pay, if it finds following an administrative hearing that an unlawful employment practice has occurred. See § 760.11, Fla. Stat. To obtain relief from the FCHR, a person who claims to have been the victim of an "unlawful employment practice" must, "within 365 days of the alleged violation," file a complaint ("contain[ing] a short and plain statement of the facts describing the violation and the relief sought") with the FCHR. § 760.11(1), Fla. Stat. It is concluded, Petitioner filed a complaint within the statutory time limitation.

34. Petitioner's complaint alleged that she was subjected to discrimination based upon her race. Petitioner established she is a member of a protected class of minorities. Petitioner is Black.

35. Secondly, Petitioner established she was terminated from her employment with Respondent.

36. Additionally, Petitioner proved she was qualified for the job from which she was terminated, and replaced with a less qualified Caucasian female.

37. Petitioner has the burden of proving the allegations asserted. "Discriminatory intent may be established through direct or indirect circumstantial evidence." Johnson v. Hamrick, 155 F. Supp. 2d 1355, 1377 (N.D. Ga. 2001).

38. "Direct evidence is evidence that, if believed, would prove the existence of discriminatory intent without resort to inference or presumption." See Wilson v. B/E Aero., Inc., 376 F.3d 1079, 1086 (11th Cir. 2004) ("Direct evidence is 'evidence, that, if believed, proves [the] existence of [a] fact without inference or presumption.'"). "If the [complainant] offers direct evidence and the trier of fact accepts that evidence, then the [complainant] has proven discrimination." Maynard v. Bd. of Regents, 342 F.3d 1281, 1289 (11th Cir. 2003). In this case, the Petitioner established that the termination was not supported by a legitimate business decision. The only inference that can be drawn from the facts of this case verifies that Respondent used Petitioner's business expertise as long as it favored them (to get through the audit), then replaced her with a less qualified Caucasian employee. Thus, Petitioner established a prima facie case of discrimination.

39. Victims of discrimination may be "permitted to establish their cases through inferential and circumstantial proof," Petitioner presented credible testimony from both Ms. Card and Mr. Dollard, Respondent's former employees who

spent more time at Manatee Cove with Petitioner than any of Respondent's witnesses, to establish she was thorough, professional, and efficient. If Petitioner's conduct was as represented by these witnesses, what was the basis for Respondent's decision to fire her? The inference of discrimination is the obvious answer. See Kline v. Tenn. Valley Auth. 128 F.3d 337, 348 (6th Cir. 1997).

40. Because Petitioner established a prima facie case of discrimination, the burden of proof in this cause shifted to the Respondent to articulate a legitimate, non-discriminatory reason for its action. In this case, Respondent failed to do so. If an employer successfully articulates a reason for its action, then the burden shifts back to the complainant to establish that the proffered reason was a pretext for the unlawful discrimination. See Malu v. City of Gainesville, 270 Fed. Appx. 945; 2008 U.S. App. LEXIS 6775 (11th Cir. 2008). In this case, the persuasive evidence established that Respondent did not have grounds for terminating Petitioner. Each of the grounds that Respondent alleged supported the action were constructed from insignificant complaints. The only substantial allegation (that Petitioner failed to timely remit payment on a vendor invoice), was attributable to error committed by another employee.

41. Petitioner did not exert aggressive effort to obtain employment subsequent to her job loss. She should have pursued

all job leads to any venue in order to obtain employment. Instead, Petitioner became a full-time student. In order to claim back pay, Petitioner was required to mitigate damages as a result of her wrongful termination. Petitioner was required to make a meaningful, good-faith effort to secure employment. In this context, Petitioner failed. Petitioner applied for only a few jobs, and most were within the greater Orlando area. Just as she had relocated from South Florida to Brevard County to obtain the manager job with Respondent, Petitioner was required to look more broadly for employment.


42. The purpose of relief in a discrimination case, such as this is to recreate the conditions and relationships that would have been had there been no unlawful discrimination; that is to say, make the party whole. See United States v. City of Miami, 195 F.3d 1292 (11th Cir. 1999). Nevertheless, such party must mitigate damages through reasonably diligent efforts to seek employment that is substantially equivalent. See Lathem v. Dep't of Child. & Youth Servs., 172 F.3d 786 (11th Cir. 1999). In this case, Petitioner did not make serious efforts to obtain substantially equivalent employment, and, thereby, mitigate her loss of income. Further, once she became a full-time student, Petitioner effectively opted for a potentially more successful future that would be based upon her academic standing.

Accordingly, an award of back pay must be limited to no more than six months.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations issue a final order finding cause for an unlawful employment practice as alleged by Petitioner, and awarding Petitioner no more than six months back pay.

DONE AND ENTERED this 6th day of April, 2011, in Tallahassee, Leon County, Florida.



J. D. PARRISH
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 6th day of April, 2011.

COPIES FURNISHED:

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

Thomas A. Groendyke, Esquire
Douberley & Cicero
1000 Sawgrass Corporate Parkway, Suite 590
Sunrise, Florida 33323

John M. Finnigan, Esquire
Finnigan Law Firm
1700 Maitland Avenue
Maitland, Florida 32751

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.