STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARY COTTRELL,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 11-4572
	)	
CONCORD CUSTOM CLEANERS,	)	
	)	
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 November 8, 2011, by video teleconference at sites located in Tallahassee and Pensacola, Florida.

APPEARANCES

For Petitioner: Mary Cottrell, pro se
776 Backwoods Road
Century, Florida 32535

For Respondent: Christopher J. Rush, Esquire
Christopher J. Rush & Associates, P.A.
1880 North Congress Avenue, Suite 206
Boynton Beach, Florida 33426

STATEMENT OF THE ISSUE

The issue is whether Respondent committed an unlawful employment practice by discriminating against Petitioner based upon her race.

PRELIMINARY STATEMENT

Petitioner, Mary Cottrell, filed an Employment Complaint of Discrimination with the Florida Commission on Human Relations (FCHR) against Concord Custom Cleaners on February 16, 2011, claiming she was the victim of discrimination based upon her race. Following an investigation of Petitioner's allegations, FCHR issued a Determination: No Cause on August 11, 2011.

On September 12, 2011, Petitioner filed a Petition for Relief with FCHR challenging its Determination: No Cause. The petition was forwarded to the Division of Administrative Hearings.

Pursuant to notice, this matter was set for hearing before Administrative Law Judge Robert S. Cohen, on November 8, 2011, in Tallahassee, Florida. Petitioner filed a request to set the hearing by video teleconferencing between sites in Pensacola and Tallahassee, Florida. The hearing remained scheduled for November 8, 2011, and was reset by video teleconference at sites in Pensacola and Tallahassee, Florida.

At the hearing, Petitioner testified on her own behalf, and presented the testimony of Anastarsia Martinez, Petitioner's daughter and also a former employee of Respondent. Petitioner offered one exhibit, which was admitted into evidence. Respondent presented the testimony of Jerry Wienhoff and offered seven exhibits, all of which were admitted into evidence.

A transcript of the final hearing was not ordered by either party. After the hearing, Respondent filed a Motion for Extension of Time for Filing Proposed Recommended Order, which was granted. Petitioner filed a post-hearing response on December 6, 2011. Respondent filed its Proposed Recommended Order on December 9, 2011.

References to statutes are to Florida Statutes (2011) unless otherwise noted.

FINDINGS OF FACT

1. Respondent is an "employer" within the meaning of section 760.02(7), Florida Statutes.

2. Petitioner, an African-American female, submitted an application for employment directly with the store manager, Jerry Wienhoff. Mr. Wienhoff personally interviewed Petitioner and hired her within 48 hours of her application for the afternoon clerk position. She began working for Respondent on July 21, 2009.

3. Petitioner received a notice of a disciplinary issue on March 9, 2010. Respondent cited Petitioner for failure to complete her work in a timely manner. Petitioner was warned that if her work did not improve, her employment would be terminated.

4. Not long after issuance of this disciplinary notice, Mr. Wienhoff, the store manager and Pensacola Regional Manager

for 17 years, began receiving complaints about Petitioner's behavior. One complaint came from a long-time customer, while another came from a co-employee. The complaints were that Petitioner treated them rudely.

5. During her employment, Petitioner complained that her work duties were heavier than those of the morning clerk. Mr. Wienhoff relieved Petitioner of certain duties related to tagging each garment dropped off during the afternoon shift. None of the other stores out of the four area stores had similar requests to remove this duty.

6. Petitioner testified that the morning clerk, a white female, Amanda Sidner, was given a lighter workload. Petitioner further testified that Ms. Sidner was given additional hours during Petitioner's vacation, yet Petitioner was not given additional hours during Ms. Sidner's vacation.

7. Mr. Wienhoff testified and Petitioner admitted that she took vacation days during the same week that Ms. Sidner took vacation days. Further, Petitioner was given additional hours during the days Ms. Sidner was on vacation, and the balance of those hours that Petitioner was not interested in working went to Petitioner's daughter, Anastarsia Martinez, also an African-American female.

8. On December 14, 2010, Petitioner was issued her second and final corrective action report by Mr. Wienhoff. At that

time, Mr. Wienhoff terminated Petitioner due to the ongoing complaints about her behavior in the workplace.

9. Respondent also established the racial composition of every employee under Mr. Wienhoff's supervision. The company profile in Pensacola shows a racially diverse mix of employees.

10. Petitioner candidly testified that she never heard Mr. Wienhoff make racially insensitive comments to her or any other employee. Her claim of discrimination is based upon favoritism. She believes that other employees were treated better than she, but did not tie this perceived favorable treatment to their race.

CONCLUSIONS OF LAW

11. 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(4)(b), Fla. Stat.

12. Section 760.10(1)(a), Florida Statutes, states:

> (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.

13. Petitioner is an "aggrieved person," and Respondent is an "employer" within the meaning of section 760.02(10) and (7), respectively.

14. The Florida Civil Rights Act (FCRA), sections 760.01 through 760.11, as amended, was patterned after Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000 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, 370-71 (Fla. 3d DCA 1999); Fla. State Univ. v. Sondel, 685 So. 2d 923 (Fla. 1st DCA 1996).

15. Petitioner has the burden of proving by a preponderance of the evidence that Respondent has discriminated against her. See Fla. Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

16. The United States Supreme Court has established an analytical framework within which courts should examine claims of discrimination. In cases alleging discriminatory treatment, Petitioner has the initial burden of establishing, by a preponderance of the evidence, a prima facie case of discrimination. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993); Combs v. Plantation Patterns, 106 F.3d 1519 (11th Cir. 1997).

17. To establish a prima facie case of discrimination, Petitioner must establish the following: (1) she is a member of

a protected class; (2) she suffered an adverse employment action; (3) that she received disparate treatment from other similarly-situated individuals in a non-protected class; and (4) that there is sufficient evidence of bias to infer a causal connection between her race and the disparate treatment.

18. Petitioner proved that she is a member of a protected class as an African-American female and that she suffered an adverse employment action, i.e., her employment was terminated, she failed to prove that Respondent subjected her to different terms and conditions due to her race. Petitioner was not able to prove she received disparate treatment from other similarly-situated individuals in a non-protected class, and she offered no evidence of sufficient bias to infer a causal connection between her race and her alleged disparate treatment.

19. Petitioner alleges disparate treatment based upon her race. Her allegations were: 1) she was terminated due to customer complaints and performance issues while a white employee violated a work rule related to donation of abandoned clothes and was not terminated; 2) she was given a heavier workload than her white counterpart; and 3) she did not receive additional hours during her white counterpart's vacations. However, Petitioner conceded in her testimony that Ms. Sidner, the white co-employee, did not violate the work rule regarding abandoned clothes, nor any other work rule. Thus, Petitioner

failed to prove or provide any evidence of unequal application of work rules. Since Petitioner failed to prove by a preponderance of the evidence that Respondent subjected her to any different standard than that of other similarly situated employees, this claim must fail. See Horn v. United Parcel Serv., Inc., 433 F. App'x 788, 2011 U.S. App. LEXIS 13973 (11th Cir. 2011); Jones v. Bessemer Carraway Med. Ctr., 137 F.3d 1306 (11th Cir. 1998).

20. Petitioner testified her workload was heavier than the morning shift white co-employee Ms. Sidner, yet she admitted that the morning shift employee had some duties she did not have on the afternoon shift. Even if true, this allegation does not constitute an adverse employment action. Hart v. U.S. Attorney Gen., 433 F. App'x 779, 2011 U.S. App. LEXIS 14075 (11th Cir. 2011); Davis v. Town of Lake Park, 245 F.3d 1332 (11th Cir. 2001). Petitioner also conceded that her manager relieved her of the obligation to tag all of the garments delivered in the afternoon. In any event, any variations between the morning and afternoon workloads were due to business needs or fluctuations. Moreover, Petitioner offered no evidence to prove her manager intentionally assigned her a heavier workload due to her race. In fact, her testimony supported the fact that Petitioner's manager lightened her workload at her request. Therefore, Petitioner failed to prove by a preponderance of the evidence

that her manager assigned her a heavier workload based upon her race.

21. Petitioner conceded that she did not want all of Ms. Sidner's vacation hours and, in fact, took two vacation days of her own during the five vacation days reserved by Ms. Sidner. Accordingly, Petitioner voluntarily took fewer hours than might otherwise have been available to her. Regardless, the evidence proved there was no significant difference between the actual number of hours provided to Ms. Sidner during Petitioner's vacation and those worked by Petitioner during Ms. Sidner's vacation. Here too, Petitioner failed to prove by a preponderance of the evidence that she suffered disparate treatment on the basis of her race; nor did she prove an adverse employment action. See Hart and Davis, supra.

22. Finally, Respondent terminated Petitioner based upon a legitimate, nondiscriminatory basis. Mr. Wienhoff hired Petitioner almost immediately following a personal interview. Mr. Wienhoff warned Petitioner both verbally and in writing about her performance issues. When both an employee and a long-time customer complained of Petitioner's workplace rudeness, Mr. Wienhoff terminated Petitioner's employment. The record establishes that Mr. Wienhoff harbored no racial animus against Petitioner and, given his hiring record, against African-Americans generally.

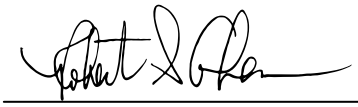
23. Based upon the evidence and testimony offered at hearing, Petitioner failed to establish a prima facie case against Respondent for racial discrimination. Further, Respondent articulated a clear nondiscriminatory reason for Petitioner's termination from employment. Accordingly, Respondent cannot be found to have committed the "unlawful employment practice" alleged in the employment discrimination charge, which is the subject of this proceeding. Therefore, the employment discrimination charge 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 finding that no act of discrimination was committed by Respondent and dismissing the Petition for Relief.

DONE AND ENTERED this 27th day of January, 2012, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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this 27th day of January, 2012.

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.