

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MELISSA DRAYTON,)
)
 Petitioner,)
)
 vs.) Case No. 11-5266
)
 LOWE'S HOME CENTERS, INC.,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

On December 1, 2011, a duly-noticed hearing was held in Ocala, Florida, before F. Scott Boyd, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Melissa Drayton, pro se
1421 Southwest 27th Avenue, No. 2106
Gainesville, Florida 34471

For Respondent: Charles E. Williams, Esquire
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STATEMENT OF THE ISSUE

The issue is whether the Respondent committed an unlawful employment practice under section 760.10, Florida Statutes (2010), by discriminating against Petitioner on the basis of race, color, or sex, and if so, what remedy should be ordered.

PRELIMINARY STATEMENT

On June 7, 2011, Petitioner filed a complaint with the Florida Human Relations Commission (Commission), alleging that Lowe's Home Centers, Inc., had discriminated against her based upon her race, color, and sex. On September 23, 2011, the Commission issued a Notice of Determination of No Cause, and on October 12, 2011, Petitioner filed a Petition for Relief. On October 12, 2011, the matter was referred to the Division of Administrative Hearings for assignment of an administrative law judge.

The case was noticed for hearing on December 1, 2011, in Ocala, Florida. Petitioner testified and offered six exhibits. Petitioner's Exhibits 1 through 3 as well as 5 and 6 were admitted into evidence. Petitioner's Exhibit 4, a Decision of Appeals Referee, was found not relevant and was not admitted. Respondent presented the testimony of three witnesses and offered seven exhibits. Respondent's Exhibits 1 through 4 as well as 6 and 7 were admitted. Respondent's Exhibit 5, a memorandum regarding Petitioner's conduct, was not admitted because Petitioner had not seen it before and it had not been provided to Petitioner as provided in the Order of Pre-hearing Instructions.

The one-volume Transcript of the proceedings was filed with the Division on December 13, 2011. Both parties timely submitted Proposed Recommended Orders, which were considered.

FINDINGS OF FACT

1. Lowe's Home Centers, Inc. (Lowe's) is a retail sales corporation that does business in Florida and employs over 15 employees.

2. Melissa Drayton, Petitioner in this case, is an African-American woman who began working for Respondent as a part-time cashier in February of 2008.

3. At the time she was hired, Petitioner was made aware of Lowe's policies prohibiting discrimination and various methods to report it, including direct communications to management, to human resources personnel, through a toll-free telephone line, and through a website.

4. Petitioner worked for the Respondent in a part-time capacity for a period of approximately two years without any "write-ups" or disciplinary action of any kind.

5. Petitioner received positive "star development" performance reviews between 2008 and 2010, and received pay increases.

6. At some point between 2008 and 2010, Petitioner also received a "corporate compliment" for excellent performance.

7. Petitioner submitted a "request for consideration" form asking to be transferred from cashier to a sales position in home décor or other department in the store.

8. Petitioner talked with Mr. Lee Walker, the Store Manager, about her desire to move to the home décor department. Mr. Walker told Petitioner that he would "give her the opportunity providing we followed the steps and went from there."

9. At a meeting with Petitioner present, Mr. Walker told the Assistant Manager responsible for the paint and home décor department that Petitioner would soon be moving to home décor.

10. At a later point, Mr. Walker told Petitioner that Lowe's was shorthanded at the front of the store and that they needed to keep her up front. He told her that provided they got everything filled in time, they could get her moved over.

11. On April 6, 2010, Petitioner was advised by Ms. Benjamin, the Human Resources Manager at the store throughout the time of Petitioner's employment, that Petitioner was not on the schedule to be transferred to home décor, but would remain a cashier. Ms. Benjamin explained to Petitioner that Lowe's was short on cashiers. Ms. Benjamin testified that Petitioner was then very upset when she went out on to the floor. Almost immediately thereafter, Petitioner displayed rude and unfriendly behavior to a customer.

12. On April 13, 2010, Respondent "wrote up" Petitioner for the incident by preparing an unfavorable Employee Performance Report with the "initial" block checked. The report was prepared based upon Respondent's belief that on April 6, with unloaded items at her register which she had begun to ring up, Petitioner suddenly said, "I can't do this" and just walked away, leaving the customer standing at the register. Petitioner was given an opportunity to make written comments. Petitioner wrote:

The day of the Report I told Linda I needed to go to the back. I went to the back, and Sally came into the bathroom and I told her I needed to go home because I can't perform today. She would not let me go home. On back. I do not try to bring my personal issues at work, at that point and time I became overwhelmed and was not able to perform as I usually do. Was not allowed to leave by my supervisor Sally due to her concern for me.

Petitioner testified at hearing that there was a page missing from this document, on which Petitioner had described issues she was having with management. This testimony is not credible. At the end of the comment block on the first page, Petitioner indicated "on back." The back page writing begins at the top of the page, continues the same topic begun on the first page, and ends with ample space remaining. It is not reasonable to conclude that Petitioner submitted an additional page on a different topic into the middle of her other narrative or would

have begun a new page without first using up the available space on the back of the form. Ms. Benjamin also testified that there were no missing pages to the report, testimony which is credited.

13. Petitioner also testified at one point during the hearing that the write-ups started shortly after she began complaining about issues that she was having with her employment. She testified at another point that she began complaining about these issues as soon as she started working at Lowe's in 2008. Yet the evidence clearly indicates that Petitioner had no write-ups for a period in excess of two years, because her first write-up did not occur until April 6, 2010. Therefore both of Petitioner's statements cannot be true. Petitioner's testimony suggesting that the write-ups occurred as a response by Lowe's to her complaints about several management issues is rejected as not credible. Petitioner's testimony that she had no write-ups for two years and that the first write-up occurred on the same day that she learned she was not scheduled to be moved to home décor is much more credible, is corroborated by the testimony of Ms. Benjamin, is further corroborated by Lowe's employee records, and is accepted as true.

14. Ms. Benjamin testified she could not recall any complaints or issues from Petitioner related to race, color, or gender. She testified that Petitioner never came to Human

Resources to complain about discrimination. Ms. Benjamin also stated she was unaware of any complaints of discrimination that had been filed through the toll-free number and that she would have been aware if complaints had been filed. Ms. Benjamin testified that although complaints filed on the website about the store were anonymous, to her knowledge no "ethics points" calls regarding the store had ever been filed by any person during the period of Petitioner's employment. She testified that had Petitioner made any complaints to her, they would have been investigated. Ms. Benjamin was credible and her testimony on these points is accepted.

15. Petitioner testified that she complained to Lowe's about numerous issues. She testified that she saw individuals "hired off the street" who were white or Hispanic that were put into some sales positions, but that despite Mr. Walker's promise, she was not transferred to a sales position, but remained a cashier. She stated she had been called "nigger" by customers, while conceding that no employee ever used any derogatory racial slur towards her. She also stated that she had been "cussed out" by different employees. She had several concerns about the way the cashiers were managed. In particular, she felt some senior employees took more breaks than regular employees were allowed to take. Others were permitted to take longer breaks, lasting 20 to 30 minutes, rather than

only 15 minutes. Petitioner testified that one employee named "Vanessa," whose last name was unknown, was particularly likely to take long breaks and was "allowed to do whatever she wanted" by Lowe's. There was no evidence presented as to whether Vanessa was ever disciplined or was ever moved to a sales position.

16. The derogatory comments relating to race made by customers were abusive and were demeaning to Petitioner. The instances in which customers used racial epithets were isolated events, however.

17. Petitioner discussed her concerns about the way the cashiers were managed with her supervisor, Ms. Sally Deckle, but no changes were made. Petitioner became frustrated and felt that despite Lowe's "open door" policies, her concerns were ignored. She believed that Lowe's failed to work with the employees that worked there.

18. When Petitioner stated to Ms. Deckel that the management at Lowe's was "hypocritical," Petitioner testified that Ms. Deckel told Petitioner to "kiss my ass" or words to that effect.

19. Petitioner testified that she went to the Assistant Store Manager in charge of the cashiers, Ms. Kelly Young, and subsequently to the store manager, Mr. Lee Walker, about Ms. Deckle's use of profanity. Petitioner testified that

Mr. Walker only "rolled his eyes" in response and that no action was ever taken. Mr. Walker did not remember this complaint.

20. The facts do not support the conclusion that Respondent discriminated against Petitioner on the basis of race, color or gender based upon Lowe's failure to respond to Petitioner's complaints.

21. Around the time of Petitioner's first adverse Employee Performance Report in April, Lowe's changed the process for an employee to request placement in a new position. The form that had previously been used was discontinued, and was no longer used. Under the new system, available positions were posted on the website, and employees would apply online. Employees were informed of the new system through postings in the break room, discussions in morning meetings, articles in the newsletter, and the information on the website itself. Petitioner knew or should have known of the new procedures. Petitioner never applied to be moved to a sales position through the new system.

22. On June 5, 2010, Petitioner failed to deactivate an alarm on one of the items she rang up, because she claimed she was too tired to lift the box. On June 6, 2010, Respondent received a complaint from a customer who had accidentally processed the wrong form of payment by using a credit card when he wanted to use a debit card, or vice versa. The complaint stated that Petitioner was rude and unfriendly to the customer

and refused to help him correct his mistake. On June 7, 2010, Petitioner displayed uncooperative behavior towards co-workers while she was working returns and waiting for her relief. She also refused to do a refund for a customer, stating she did not have enough money in her register, although she had \$600. Respondent did not discuss these incidents with Petitioner at the time they occurred. A second unfavorable Employee Performance Report was prepared on June 12, 2010, with the "written" block checked, that documented these incidents, which was the first time Respondent confronted Petitioner regarding the incidents. Petitioner was given an opportunity to make written comments. Petitioner wrote. "I'm tired of all the issues that's going on up front as a front end cashier. Issues need to be addressed."

23. On September 24, 2010, Petitioner received an Employee Performance Report with the "written" block checked, for poor attendance. Again, as was the practice with all "write-ups" given to Petitioner in this case, the incidents were not discussed with Petitioner at the time they occurred, but only at the time of the report. The report noted Petitioner had been called in six times since February. Petitioner made no written comments on this report.

24. On December 24, 2010, Petitioner received an Employee Performance Report with the "final notice" block checked for refusing to cover the return desk as requested by a head cashier to allow another employee to take a restroom break. Petitioner refused because she was scheduled to leave at 3:00 p.m. and the request was made ten minutes before this time. Mr. Walker testified that he always personally advises employees at a "final warning" that their employment at Lowe's is subject to termination if there are any further policy violations. Mr. Walker testified he personally made this quite clear to Petitioner. Petitioner made no comments on the report.

25. On February 2, 2011, a customer approached Petitioner's cash register asking her to check a price. Petitioner told the customer that she could not check the price because she had to go, and instructed the customer to go to another associate. On February 4, 2011, a customer came to Petitioner's register to check out. The customer had several nuts and bolts and Petitioner sent the customer back to the department to get the item numbers instead of looking them up in the book.

26. An Employee Performance Report with the "termination" block checked was prepared on February 11, 2011, documenting these incidents. Petitioner was given an opportunity to make written comments. Petitioner wrote:

2-2-11 New cashier Fern was assisting customers. I helped her get her line down. Also, it was the end of my shift. After this were no more customers. I clock out and went to put vest in locker the usual. Did not do or say anything to offend customers.

2-4-11 Customer got in line said he didn't see item numbers for the bolts. I responded in friendly voice all the bolts and washers have item numbers. I said there is always someone to assist you said nicely before I can get booked to scan he walked away. For nothing, I did nothing, I said nothing wrong to customer.

I do not recall this complaint with this customer 2-2-11. I thought I had already had clocked out. That would be the only way I turned a customer away if I had clocked out. This problem I do not recall. I have been doing more customer focus. I do not understand these ongoing complaints. I'm not stressed or angry or having a bad day. I try to stay customer focused with every customer. Everyone that works around me knows I do customer focus with every customer. I do not put my foot in my mouth at work. I know how these customers are, so I do not try to do anything to set them off. I have to try a good day at work.

All I try my best to do is customer focus. All employees that work around me knows I'm never mean or nasty to a customer. The customers some of them are very edgie people so why would I do or say anything to set them off or make them complain. I'm not perfect but I know I work customer focus ethics when I'm scheduled to work. Every time I got talked to by upper management about a customer complaint I looked at what they said I did wrong and use that as improvement for better customer service and focus and ethics.

27. Petitioner was terminated from employment at Lowe's by Mr. Walker. He advised Petitioner that she was being terminated because of too many customer complaints. Petitioner was polite, shook Mr. Walker's hand, and departed. Petitioner did not say anything about race discrimination, color discrimination, or gender discrimination at the termination meeting.

28. Petitioner later talked with Ms. Jenkins of the NAACP. Petitioner testified that Ms. Jenkins wrote, and Petitioner signed, an undated letter to Lowe's Regional Human Resources office in North Carolina. The letter complained that Petitioner had been discharged unfairly. It did not assert any discrimination on the basis of race, color, or gender. This letter was written sometime in April of 2011.

29. Mr. Sloan Wilson, Lowe's Regional Human Resources Director, wrote a letter to Petitioner on May 26, 2011, offering Petitioner a cashier position in another store. Petitioner declined this offer.

30. Petitioner filed charges of discrimination with the Florida Commission on Human Relations in June, 2011. She testified that she had been talking to an attorney and was given a packet to fill out. Petitioner stated that the charges of discrimination on race, color, and sex came about because Petitioner didn't know which one on the packet to properly fill out.

31. Mr. Walker was "pretty shocked" when he learned that Petitioner had charged Lowe's with discrimination on the grounds of race, color, and sex. He had talked with Petitioner on numerous occasions and there had been no discussion or complaints to him about any discrimination. He was unaware that Petitioner had had such discussions with anyone in the store. He testified that he would have confronted any customer who used a racial epithet and walked them out of the store.

32. On October 12, 2011, Petitioner filed a Petition for Relief against Respondent for an unlawful employment practice, which was referred to the Division of Administrative Hearings the same day.

CONCLUSIONS OF LAW

33. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties in this case under sections 120.569 and 120.57(1), Florida Statutes.

34. The Florida Civil Rights Act, sections 760.01-760.11 and 509.092, Florida Statutes (2010), is patterned after federal law contained in Title VII of the Civil Rights Acts of 1964, and Florida courts have determined that federal discrimination law should be used as guidance when construing its provisions. See Fla. State Univ. v. Sondel, 685 So. 2d 923 (Fla. 1st DCA 1996); Fla. Dep't of Cmty. Aff. v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991).

35. Section 760.11(1) provides that an aggrieved person may file a complaint with the Commission within 365 days of the alleged violation. Petitioner timely filed her complaint, and following the Commission's initial determination, timely filed her Petition for Relief requesting this hearing.

36. Respondent is an employer as that term is defined in section 760.02(7).

37. Petitioner has the burden of proving by a preponderance of the evidence that the Respondent committed an unlawful employment practice. Fla. Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

Race, Color, and Gender Discrimination Claims

38. Section 760.10(1)(a) provides that it is an unlawful employment practice for an employer 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."

39. Discrimination can be established through direct, circumstantial, or statistical evidence. U. S. Postal Serv. Bd. of Gov'nrs v. Aikens, 460 U.S. 711, 714 (1983); Schoenfeld v. Babbitt, 168 F.3d 1257, 1266 (11th Cir. 1999). Direct evidence of discrimination is evidence that, if believed, establishes the existence of discriminatory intent behind an employment decision

without inference or presumption. Wilson v. B/E Aero., Inc., 376 F.3d 1079, 1086 (11th Cir. 2004); Maynard v. Bd. of Regents, 342 F.3d 1281, 1289 (11th Cir. 2003).

40. Petitioner presented testimony attempting to show unlawful discrimination in two contexts: first that customers used racial epithets toward Petitioner and Respondent permitted this conduct, and second that she was treated differently by Respondent because she was not promoted or transferred to a home décor sales position.

41. Petitioner's testimony that customers called her "nigger" and that Respondent did nothing about it alleges a racially hostile work environment. A prima facie case of racial discrimination due to a hostile work environment requires proof of the following elements: (1) the employee belonged to a protected group; (2) the employee was subject to unwelcome harassment; (3) the harassment was based on a protected characteristic, such as race; (4) that the harassment was sufficiently severe or pervasive to alter the terms or conditions of employment and create a discriminatorily abusive working environment; and (5) the employer was responsible for such environment under either a theory of vicarious or direct liability. See Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1275 (11th Cir. 2002).

42. The evidence demonstrated that Petitioner is an African American woman who was subjected to unwelcome racial epithets based upon her race and color. These epithets were derogatory and abusive and were intended to be demeaning to Petitioner. At issue is whether or not the harassment was sufficiently severe or pervasive so as to alter the terms or conditions of employment and create a discriminatorily abusive working environment, and if so, whether Respondent was responsible for that environment.

43. In order to establish that harassment affected a condition of employment the Petitioner must show that the harassment was so severe or pervasive that it altered the interpersonal climate of the workplace, creating an objectively abusive and hostile atmosphere. Gupta v. Fla. Bd. of Regents, 212 F.3d 571, 582 (11th Cir. 2000).

44. While it is clear that racial epithets at an "excessive and opprobrious level" may constitute an unlawful employment practice, a few isolated and unconnected incidents involving racial epithets such as those endured by Petitioner, do not. See Cariddi v. Kansas City Chiefs Football Club, Inc., 568 F.2d 87, 88 (8th Cir. 1977), Johnson v. Richmond Co., 507 F. Supp. 993, 996 (S.D. Ga. 1981). As the United States Supreme Court has noted, the "[m]ere utterance of a racial epithet that engenders offensive feelings in an employee" but does not alter

the conditions of employment, does not present an actionable situation. Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986) (quoting Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. Tex. 1971)).

45. Moreover, the evidence did not demonstrate that Respondent was responsible for perpetuating a discriminatory environment. Petitioner stated that no store employee had ever used racial epithets toward her. Petitioner acknowledged familiarity with Respondent's policies against discrimination and various avenues to report it, yet the evidence shows that Petitioner made little effort to utilize them. The evidence shows that she made a report of the customers' racial remarks to her immediate supervisor. Both the Human Relations Manager and the Store Manager credibly testified that they were never informed. Petitioner never escalated her complaints or used the toll free number or website to report these incidents. While Petitioner's immediate supervisor might be faulted for not reporting the incidents, there was no testimony that the racial epithets came from a single identifiable customer or that Respondent failed to take reasonable action available to it to address the issue. Petitioner has not proven that Respondent was responsible for a discriminatory environment under either a theory of vicarious or direct liability. Cf. Walton v. Johnson and Johnson, 347 F.3d 1272, 1288 (11th Cir. 2003) (prompt and

reasonable action to address issues taken after situation was brought to respondent's attention absolved respondent of liability).

46. Petitioner also sought to prove discrimination through circumstantial evidence of disparate treatment. In McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973), the Supreme Court established the analysis to be used in cases alleging claims under Title VII that rely on circumstantial evidence to establish discrimination. This analysis was later refined in St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

47. Under McDonnell-Douglas, Petitioner has the burden of establishing by a preponderance of the evidence a prima facie case of unlawful discrimination. If a prima facie case is established, Respondent has the burden of articulating some legitimate, non-discriminatory reason for the action taken against Petitioner. It is a burden of production, not persuasion. If a non-discriminatory reason is offered by Respondent, the burden shifts back to Petitioner to demonstrate that the offered reason is merely a pretext for discrimination. As the Supreme Court stated, before finding discrimination "[t]he factfinder must believe the plaintiff's explanation of intentional discrimination." Hicks, 509 U.S. at 519.

48. In order to establish a prima facie case, Petitioner must prove: (1) she is a member of a protected class; (2) she

was subject to an adverse employment action; (3) her employer treated similarly situated employees who were not members of the protected class more favorably; and (4) she was qualified for the job or job benefit at issue. Gillis v. Ga. Dep't of Corr., 400 F.3d 883, 887 (11th Cir. 2005).

49. Petitioner is an African-American woman and is a member of a protected class. She suffered an adverse employment action, in that she was not permitted to advance to a position other than cashier. Assuming that her two-year work history as a cashier for Respondent successfully demonstrated her qualification, despite the decline in her performance in the third year, the critical third element was not met.

50. Petitioner must show that the employees who were not members of her protected class were otherwise "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).

51. Petitioner failed to show that Respondent treated similarly situated employees who were not members of her protected class more favorably. Petitioner offered no testimony or other evidence that any person placed in a sales position was a man. She offered no testimony or other evidence that Respondent otherwise treated men more favorably. While Petitioner did testify that she observed some white employees "hired off the street" into sales positions, there was no evidence as to the identity of these individuals, or any evidence that these persons were in any way similarly situated to Petitioner. Petitioner had put in a written request for transfer before the procedures changed and later never applied for a new position using the new online system. Petitioner admitted that she was not aware if anyone else had applied under either the old or new procedures. Petitioner failed to identify any cashier, of any race, color, or gender, who had been moved to a sales position though Petitioner was not. Mere conclusory allegations and assertions are not sufficient to meet Petitioner's burden. See Earley v. Champion Int. Corp., 907 F.2d 1077, 1081 (11th Cir. 1990).

52. Petitioner failed to demonstrate a prima facie case of discrimination on the basis of race, color or gender.

53. Even assuming that Petitioner had established a prima facie case of discrimination, Respondent articulated a

legitimate non-discriminatory reason for not moving Petitioner into a sales position. Respondent met that burden of production with the testimony of Mr. Walker and Ms. Benjamin that Lowe's needed cashiers and that Petitioner would not be moved until that shortage was addressed.

54. Petitioner offered no evidence to suggest that Respondent's reason for not moving Petitioner was simply a pretext for unlawful discrimination. See Young v. Gen. Food Corp., 840 F.2d 825, 830 (11th Cir. 1988) ("Once a legitimate, nondiscriminatory reason for dismissal is put forth by the employer, the burden returns to the plaintiff to prove by significant probative evidence that the proffered reason is a pretext for discrimination.").

55. The evidence showed that Petitioner had been told that Respondent planned on moving her out of the cashier position to the home décor department, a "promise" that was never fulfilled. Under these circumstances, it might be anticipated that the dashed expectations of Petitioner might result in a discontented employee. However, Respondent presented a plausible business reason for the decision not to move Petitioner, and there was no evidence that the true motive was actually discrimination. The decision to leave Petitioner in the cashier position may have been wrong, or even unfair, but there was no evidence that Respondent's decision had anything to do with Petitioner's race,

color, or gender. Similarly, Respondent's technique of correcting Petitioner not by discussing violations with her first, at the time they occurred, but rather advising her of them only at the time she was being "written-up" might not be the management approach most likely to inspire improved employee behaviors. There was no evidence, however, that this technique was used only with Petitioner, or that this approach had anything to do with Petitioner's race, color, or gender.

56. The law is not concerned with whether an employment decision is fair or reasonable, but only with whether it was motivated by unlawful animus. See Nix v. WLCY Radio/Rahall Commc'ns, 738 F.2d 1181, 1187 (11th Cir. 1984).

57. Petitioner offered the Decision of Appeals Referee as proof that she did not engage in misconduct. However, the conclusion of the Appeals Referee that Lowe's failed to prove misconduct in that proceeding is not binding or relevant to this hearing. The standard for proving "misconduct" under the Unemployment Compensation law is different and more stringent than the standard for proving misconduct as a "nondiscriminatory reason" for Petitioner's dismissal that is applicable here.

Retaliation Claim

58. While the checkbox for alleging a claim of retaliation in Petitioner's original filing with the Florida Commission on Human Relations was not checked, her Petition for Relief alleged

a retaliatory discharge. The Florida Commission on Human Relations has stated that only those claims fairly encompassed within the complaint filed with the Commission can be the subject of an administrative hearing or subsequent award of relief to a complainant by the Commission. Pamphile v. Fedex, Case No. 2010-1893 (FCHR Nov. 3, 2011).

59. The evidence did not show retaliation. The court in Blizzard v. Appliance Direct, Inc., 16 So. 3d 922, (Fla. 5th DCA 2009), described the elements necessary to establish a prima facie case of retaliation under section 760.10(7). The Petitioner must demonstrate that: (1) she engaged in a statutorily protected activity; (2) she suffered an adverse employment action; and (3) that the adverse employment action was causally related to the protected activity.

60. Section 760.10(7), provides in relevant part, "It is an unlawful employment practice for an employer . . . to discriminate against any person because that person has opposed any practice which is an unlawful employment practice under this section, or because that person has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section."

61. There is no evidence of retaliatory discharge. The evidence showed a few isolated complaints related to customer's making racial slurs, and no evidence that the persons making the

decision to terminate Petitioner's employment were even aware of these complaints. The evidence showed, to the contrary, a history of customer complaints and other policy violations that were the basis for Respondent's action.

RECOMMENDATION

Upon consideration of the above findings of fact and conclusions of law, it is

RECOMMENDED:

That the Florida Commission on Human Relations enter a final order dismissing Petitioner's complaint.

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



F. SCOTT BOYD
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of January, 2012.

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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.