

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BASHAWN BROOKS,

Petitioner,

vs.

Case No. 13-2711

SUNTRUST BANK,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice, this case was heard on September 27, 2013, and November 7, 2013, in Ocala, Florida, before Suzanne Van Wyk, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Bashawn Brooks, pro se
87 Pine Course
Ocala, Florida 34472

For Respondent: David A. Young, Esquire
Fisher and Phillips, LLP
200 South Orange Avenue
Orlando, Florida 32801

STATEMENT OF THE ISSUE

Whether Petitioner was subject to an unlawful employment practice by Respondent, SunTrust Bank, on account of her race, in violation of section 760.10, Florida Statutes.

PRELIMINARY STATEMENT

On April 26, 2012, Petitioner, Bashawn Brooks, filed a complaint of discrimination with the Florida Commission on Human Relations (FCHR) which alleged that Respondent, SunTrust Bank (Respondent), violated section 760.10, Florida Statutes, by discriminating against her on the basis of her race. The complaint of discrimination alleges that Petitioner was denied promotion on two separate occasions on the basis of her race.

On July 1, 2013, the FCHR issued a Determination: No Cause and a Notice of Determination: No Cause, by which the FCHR determined that reasonable cause did not exist to believe that an unlawful employment practice had occurred. On July 17, 2013, Petitioner filed a Petition for Relief with the FCHR. The Petition alleges that Petitioner was denied promotion on three separate occasions on the basis of her race. The Petition was transmitted to the Division of Administrative Hearings to conduct a final hearing.

The final hearing was set for September 27, 2013, and commenced as scheduled. The hearing was not concluded on September 27, 2013, but was recommenced and concluded on November 7, 2013.

At the final hearing, Petitioner testified on her own behalf, and presented the testimony of Brandie Stalnaker,

Petitioner's former coworker; Staff Sergeant Sheadrick Brooks, Petitioner's husband; and Patricia Nix, BB&T Branch Manager. Petitioner's Exhibits 1A through 1I, 2 through 5, and 7 through 10, were received into evidence. Respondent presented the testimony of Debra Evans and Brooks Hoffman. Respondent's Exhibits 1 through 18, 24 through 34, 36 through 41, 43, and 44 were received into evidence. Respondent's Exhibit 45 was received for demonstrative purposes only.

Volume I of the Transcript was filed on October 30, 2013, and Volume II was filed on December 16, 2013. The parties jointly requested an extension of time to file their post-hearing submissions, which was granted, and which likewise extended the 20-day deadline for the undersigned to issue the recommendation after post-hearing submissions. The parties timely filed their Proposed Recommended Orders on January 10, 2014, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner, who was at all times relevant to this matter an employee of SunTrust Bank, is African-American.

2. SunTrust Bank is an "employer" within the meaning of chapter 760.02, Florida Statutes (2011).^{1/}

3. Petitioner began working for SunTrust Bank at the Lady Lake Branch in Lake County in July 2010 as a Teller 2. Petitioner reported to Branch Manager, Evelyn Williams.

4. On March 31, 2011, Ms. Williams completed Petitioner's yearly evaluation and gave Petitioner an overall "fully successful" rating of 3.

5. On her 2010-2011 evaluation, Ms. Williams raised a concern under "Relationships and Teamwork," one of the SunTrust "Core Behaviors" on which all employees are evaluated.

6. Ms. Williams noted, "Bashawn is a team player. Sometimes personal issues get brought into the workplace between teammates. Need to work on keeping business and personal issues separate."

7. On June 16, 2011, Petitioner transferred to the Golden Hills branch in Ocala as a Teller 2. At that time, the Golden Hills branch manager was Roberta Haluska.

8. Roughly two months later, in August 2011, Petitioner was promoted to the position of Teller 3.

9. In October 2011, roughly two months after Petitioner was promoted to Teller 3, Ms. Haluska was terminated by SunTrust, along with the assistant branch manager and a personal banker.

10. In November 2011, Debra Evans became the Golden Hills branch manager.

11. Petitioner alleges that she was denied three promotions during her tenure at the Golden Hills branch due to discrimination against her on the basis of her race by Ms. Evans and the Area Manager, Michelle Stone.

Golden Hills Client Service Specialist

12. On March 16, 2012, Petitioner applied for the position of Client Service Specialist (CSS) at Golden Hills.

13. The CSS was a new position approved by SunTrust in February 2012. The position was designed to be cross-trained on both the teller side and the platform side of the bank. The platform side includes opening new accounts and providing financial services and products.

14. According to the CSS Job Summary, the "[p]rimary focus is assisting with client transaction and service needs with additional activities related to sales opportunities, based on the needs of the branch." An employee in this position was expected to "[c]ommit to advancing knowledge of sales techniques and product knowledge to better serve personal and business clients."

15. Petitioner met the eligibility requirements to post for another position within SunTrust: (1) employment with SunTrust for at least one year; (2) employment in current position for at least one year; and (3) a "meets minimal standards" rating of 2 or better on the employee's most recent evaluation.

16. Petitioner met the basic qualifications for the position of CSS: (1) high school diploma or equivalent; (2) minimum six months' experience as a SunTrust teller; (3) basic level of knowledge and/or skills related to the financial

services industry; (4) basic math and numeric sequencing aptitude; and (5) willing and able to follow instructions and work under established guidelines.

17. Petitioner was not interviewed for the CSS position.

18. Ms. Evans hired Sarojini Runsewa, an Asian female, as Client Service Specialist with a start date of April 23, 2012.

19. Petitioner testified that she was more qualified than the new CSS because Petitioner was asked to and did train Ms. Runsewa. Petitioner offered the testimony of Ms. Stalnaker that Petitioner trained both the new CSS and the new Teller Coordinator.

20. Petitioner's position is not supported by competent, substantial evidence. The CSS was expected to know both sides of the banking business - the teller side and the platform side. Petitioner admitted that she would have had to be trained on the platform side in order to perform the CSS duties. Clearly, Petitioner could not have trained Ms. Runsewa to perform duties of which Petitioner had no knowledge.

21. The record supports a finding that Petitioner helped familiarize Ms. Runsewa with some of the procedures of the teller line.

Golden Hills Teller Coordinator

22. On March 27, 2012, the Golden Hills Teller Coordinator, Shireen Rahman, resigned without notice.

23. The position of Teller Coordinator performs both operational and management functions. According to the SunTrust job summary, the Teller Coordinator spends "[a]pproximately 50-75% of time [] on client transactional activities and remaining time [] on operations as well as coaching and development."

24. For approximately one month, between the date Ms. Rahman left and a new Teller Coordinator was hired, Petitioner performed the operational functions of the Teller Coordinator. For example, Petitioner had control of the cash vault and helped reconcile teller boards. Petitioner did not handle management issues, such as "coaching" other tellers on SunTrust core behaviors or resolving disputes between tellers.

25. SunTrust advertised the Teller Coordinator position for the Golden Hills branch, but Petitioner did not apply.

26. Petitioner had access to the SunTrust Internet site on which job openings are advertised internally.

27. On or about April 10, 2012, Petitioner observed applicants in the bank lobby and discovered Ms. Evans was interviewing candidates for the Teller Coordinator position. Petitioner asked Ms. Evans why she was not chosen for the position. Petitioner testified that Ms. Evans called her "a bad apple." Ms. Evans denies having made that statement.

28. Petitioner argues that, although she did not apply for the position, Ms. Evans could have, and should have, promoted Petitioner to the Teller Coordinator position, especially since Petitioner was performing the Teller Coordinator duties.

29. Petitioner clearly resents the fact that Ms. Evans did not ask Petitioner to apply for the Teller Coordinator position.

30. Ms. Evans hired Sandra Cunha, a white female, as the Teller Coordinator, with a start date of May 1, 2012.

Executive Park Teller Lead

31. On or about March 29, 2012, Petitioner applied for a Teller Lead position at the Executive Park branch in Ocala. Kendra Scottie was the manager of the Executive Park branch.

32. Ms. Scottie interviewed Petitioner for the Teller Lead position on April 9, 2012, during Petitioner's lunch hour.

33. Petitioner met the minimum requirements for the Teller Lead position.

34. Petitioner received no word about the Teller lead position for at least a month.

35. Petitioner filed her Complaint of Discrimination with FCHR on April 26, 2012.

36. The Executive Park Teller Lead position was cancelled on May 3, 2012.

37. SunTrust cancelled the Teller Lead position due to an internal reorganization known as "Role Clarity." No one was hired as Teller Lead at Executive Park.

38. As a result of "Role Clarity," the Golden Hills branch Teller Coordinator position was eliminated, and the Executive Park branch was assigned a Teller Coordinator 1 position. Ms. Cunha, Teller Coordinator 1 at Golden Hills, was notified by letter dated June 5, 2012, that the position she currently held no longer existed and that her "new comparable job" at SunTrust was as Teller Coordinator 1 at the Executive Park branch. The letter gave Ms. Cunha until June 8, 2012, to "acknowledge" her new role. Ms. Cunha accepted her new role and transferred to Executive Park.

39. On May 16, 2012, Petitioner transferred to the Fruitland Park branch as a Client Service Specialist.

Golden Hills Branch Staffing

40. When Ms. Evans came to the Golden Hills location, she stepped into management of a SunTrust branch in trouble. The branch was understaffed, having just lost its manager, assistant manager, and a financial services representative. Two branch employees were out on Family Medical Leave, and Ms. Rahman, the Teller Coordinator, left abruptly in March.

41. Brandie Stalnaker worked as a Teller 2 at the branch from January 2012, through March 2013. She testified, credibly, that the work environment was stressful due to short-staffing and customer satisfaction issues.

42. Petitioner sent an email to the SunTrust Area Manager, Michelle Stone, to "inform" Ms. Stone the branch was short-staffed and needed additional employees. Although the exact date of the email was not identified, Petitioner testified that she sent the email prior to applying for either the CSS or Teller Coordinator position at Golden Hills.

43. Ms. Stone is Ms. Evans' superior, and had oversight of all branches in her service area.

44. On April 20, 2012, Ms. Evans sent an email to her team announcing that the branch was finally fully staffed.

Golden Hills Service Excellence

45. Ms. Evans was also faced with low service excellence scores for the Golden Hills branch.

46. SunTrust contracts with a third-party polling organization to conduct random telephone surveys of clients and solicit feedback on the service provided by its employees.

47. Clients who recently interacted with a branch teller are asked to rate, on a scale of one to ten, certain teller attributes (e.g., was knowledgeable, made you feel they

appreciate your business), as well as teller-targeted behaviors (i.e., provided you with all the information you needed). Clients are also asked to rate the branch's overall operations (e.g., satisfaction with wait time, convenient hours of operation, appearance neat and clean).

48. SunTrust monitors the polling results and maintains a "Teammate Feedback Report" on each teller. The Feedback Report shows the teller's Year-to-Date, Quarter-to-Date, and Month-to-Date ratings on teller attributes and targeted behaviors.

49. Tellers are expected to maintain a "rolling ten" service excellence score of no less than 80. The "rolling ten" is the average of the teller's most recent 12 service excellence scores discounting both the highest and lowest score. A score of less than 80 may subject the teller to discipline.

50. On March 26, 2012, Ms. Evans sent the following email to her employees:

Subject: Humble yourself to every client / CLIENT FIRST / OUR SCORES STINK & are unacceptable!! I expect this [sic] to see a change in this right away!!!!!!!

We are one team. I don't care who gets a bad shop. It's your peer accountability to fix it!!! GREAT ACTIVITIES YIELD GREAT RESULTS.

We are not even halfway there))))))

Petitioner's Service Excellence Scores

51. Petitioner's February 2012 Feedback Report shows the following teller attribute scores: YTD - 75, QTD - 75, MTD - 66.7.

52. Petitioner's March 2012 Feedback Report shows the following teller attribute scores: YTD - 66.7, QTD - 66.7, MTD - 50.

SunTrust Attendance Policy

53. SunTrust maintains a strict attendance policy. Absences, late arrivals, and early departures are considered "occurrences" which may result in disciplinary action.

54. Employees may receive approval from their supervisor for absences, late arrivals, or early departures at least 24 hours in advance. Failure to obtain supervisory approval will result in the absence, late arrival, or early departure being counted as an occurrence. However, even if the supervisor pre-approves an absence, late arrival, or early departure, the supervisor retains the discretion to count it as an occurrence.

55. An employee with four occurrences within a three-month period, or seven occurrences within a 12-month period, is subject to a verbal warning. An employee with five occurrences within a three-month period, or eight occurrences within a 12-month period, is subject to a written warning.

Petitioner's Attendance

56. Petitioner had five occurrences in the three-month period between February and April 2012. Petitioner had 11 occurrences during the 12-month period between May 2011 and April 2012.

57. Petitioner argues that some of the absences, late arrivals, or early departures on those dates do not constitute occurrences because she has doctors' notes.

58. The SunTrust Attendance and Punctuality Policy does not provide an exception for doctor appointments or sick leave. The policy clearly states as follows:

Each time an employee takes off work, even for a legitimate illness, the employee's manager will record an occurrence for the absence (unless 'protected leave'). Except for extreme extenuating circumstances, unexpected absences, late arrivals, or early departures will count as occurrences under this policy, regardless of whether employees contacted their supervisor or whether they receive pay for the time away from work.

59. Further, Petitioner argues that some of the occurrences are necessary to pick up or otherwise care for her child when her military spouse is unable to get away.

60. The Attendance Policy provides no exception for child-care issues.

Disciplinary Policies/Forms

61. SunTrust maintains a progressive disciplinary policy known as the "Corrective Discipline Process." The first step in the process is a verbal counseling, followed by written warning, probation, final warning, and termination.

62. A verbal counseling involves a conversation between the employee and manager in which the performance deficiency is identified and they reach agreement on steps to be taken to correct the deficiency. A verbal counseling is documented by the manager as a reference if further action is needed. A "Corrective Action Plan," or CAP, may be used in conjunction with a verbal counseling to document performance deficiency and steps to correct said deficiency.

63. A written warning is designed to put an employee on official notice that if performance work habits, behavior, or policy/procedural compliance fail to meet standards or expectations, his or her employment is at risk.

64. Managers are also expected to engage in "coaching" of employees throughout the workday, both to encourage behaviors that enhance SunTrust performance and correct behaviors which do not.

65. Managers have a number of tools designed to assist in the coaching process. An "In-the-Action" coaching log is a form

used to track specific actions taken by the supervisor to encourage improvement in employee performance - a place to record the supervisor's notes based on his or her observations. The coaching logs are maintained behind the teller line and are available for review by all employees.

66. A "Monthly Coaching Planner" is used to document a supervisor's coaching session with an employee, agree to goals, and commit to follow-up actions.

67. An "InBalance Development Plan" is designed to help a supervisor create a development plan for an employee. It is to be used not solely to improve weaknesses, but also to provide opportunities to enhance employee's strengths.

Coaching and Disciplinary Action

68. Respondent introduced an "In-the-Action" coaching log maintained by Ms. Evans documenting various issues and behaviors on which she coached Petitioner. The log is three pages long. The first entry is dated January 15, 2012. None of the other entries is dated.

69. The log documents a variety of Petitioner's successes, such as her mastery of referring clients in the teller line to other services offered by the branch. One entry notes "teller line responsible for 5. Bashawn Top Referrer!" Another entry states Petitioner is a role model for other tellers to follow on

referrals. One entry commends Petitioner's "perfect" phone voice as a positive ongoing behavior.

70. The log also notes Petitioner's negative behaviors and attributes. Seven separate entries document Petitioner's need to change her tone with her teammates, refrain from using negative language with teammates, and treat others with respect. Other entries note issues with clients, such as a reminder to call clients by their names, rather than pet names; to watch her tone with clients, show empathy, and change negative language (e.g., "I can't do that") to positive language (e.g., "What I can do for you is . . ."). Two entries note attendance issues.

71. Petitioner maintains that the coaching log is manufactured evidence to support a pretext for Ms. Evans' failure to promote her. Petitioner points to the fact that the log entries are not dated as evidence that they are fabricated.

72. Petitioner's argument is not supported by competent, substantial evidence. Petitioner first testified that she had never been coached on any of the behaviors listed in the log. However, on cross-examination Petitioner admitted that at various times during Ms. Evans' tenure, Ms. Evans had spoken to her about using proper body language with clients, working as a team, and using positive words with her teammates. Petitioner specifically recalled Ms. Evans telling her to use "I can" rather than "I

can't" and stated "I love that note [Ms. Evans] gave to me. Not to say I can't. I actually use that now."^{2/}

73. Petitioner denied that Ms. Evans coached her about using pet names for clients, but admitted that she did use pet names for some clients with whom she had developed a rapport. She further admitted that such behavior was unprofessional.

74. Ms. Evans' testimony corroborated her observations documented in the coaching log and is accepted as credible.

75. The "In-the-Action" coaching log is accepted as credible evidence of the strengths and weakness in Petitioner's job performance observed by her manager.

76. On January 15, 2012, Ms. Evans conducted a "mystery shop" of Petitioner's performance on the teller line. In a mystery shop, a teammate or supervisor listens in on an employee's interaction with a client and completes a checklist on whether the service met the expectations for that position.

77. The checklist indicates, and Ms. Evans testified, that Petitioner used appropriate language to greet the client, acknowledge their presence, and value their time. She smiled, made eye contact, and stood while processing the transaction.

78. The checklist indicates, and Ms. Evans testified, that Petitioner did not use appropriate language to let the client know their business was appreciated and to ask if there was anything else she could do to help the client.

79. On or about January 15, 2012, Ms. Evans completed a monthly coaching planner for Petitioner. The planner is not dated.

80. There are three entries on the planner. The first is with regard to the January 15 mystery shop. Ms. Evans noted that the interaction with the client was good, but that Petitioner needed to do more. The goal is for the client to say "No you've done enough."

81. The second entry is with regard to Petitioner's referrals. Ms. Evans notes Petitioner is the branch referral leader.

82. The last entry is with regard to service excellence and notes that Petitioner's service excellence scores are inconsistent.

83. Overall, Ms. Evans noted on the form Petitioner's success is in referrals, while her obstacle is the need to go above good client service and "wow the client every time."

84. Petitioner objected to introduction of the monthly coaching planner and insisted it was fabricated. Petitioner highlighted the fact that the planner was neither dated nor signed as evidence of its lack of authenticity. Petitioner presented the testimony of Ms. Nix, her branch manager at Fruitland Park, who stated that the standard SunTrust practice is

for both the employee and the manager to sign the form, give a copy to the employee, and put a copy in the employee's file.

85. The form itself has no signature lines or any marking indicating where the manager or employee would sign the form.

86. Ms. Nix has no personal knowledge of how this particular form was completed by Ms. Evans or how Ms. Evans manages this particular branch.

87. The three entries on the form are consistent with Ms. Evans' observations of Petitioner during the mystery shop and as recorded on the coaching log. Ms. Evans' testimony at the final hearing corroborated her notes on the coaching log. The monthly coaching log is accepted as credible evidence of Petitioner's strengths and weaknesses on the teller line observed by her manager.

88. Ms. Evans completed an "InBalance Development Plan" for Petitioner sometime in mid-February 2012. Ms. Evans rated Petitioner a two out of five on the SunTrust competency "Personal Leadership" and selected this as the competency on which Petitioner should focus.

89. Among the behaviors which define "Personal Leadership" are the following:

- Says what needs to be said in a tactful manner, engages in straight talk.

- Provides direct, complete and actionable positive and corrective feedback to others.

90. Ms. Evans listed as development steps for Petitioner to "think before speaking," "accept and respond to authority figures," and "say what needs to be said in a tactful manner." She further directed Petitioner to work on adaptability, which includes "looking at the positive side." The development plan requires Petitioner to take specific training courses and "share takeaways by 02/20/12."

91. Petitioner objected to the introduction of the "InBalance Development Plan" and claimed that she had not previously received the document or signed for it. However, Ms. Evans testified, credibly, that "InBalance Development Plans" do not have to be signed by the employee.

92. On March 15, 2012, Ms. Evans conducted Petitioner's 2011-2012 evaluation. Ms. Evans rated Petitioner four out of five in the category of "Drive for Results." Ms. Evans rated Petitioner two out of five in the category of "Adaptability."

93. The behaviors listed within the competency of "Adaptability" are the following:

- Resilient under pressure.
- Responds evenly to difficult people and situations.
- Maintains composure and professionalism.
- Bounces back from difficulties quickly.

- Displays appropriate level of patience, rarely shows frustration, temper.
- Works well in ambiguous situations.

94. In her written evaluation, Ms. Evans raised concerns with Petitioner's relationships and teamwork. Ms. Evans testified that her concerns were with Petitioner's tone with other teammates, and explained that Petitioner needed to "think before [she] speak[s]."

95. On the sections of the evaluation which were completed by Petitioner, she described herself as "very competitive" and having "a need to win" and "be number 1." With respect to teamwork, Petitioner wrote:

Team work is very important to me. Without my team there is no me. I'm always as a team player helping educate other team members; so they can clearly understand what is need [sic] and wanted of them to help reach there [sic] goals.

96. Petitioner received an overall "fully successful" rating of three on her 2011-2012 evaluation. Petitioner signed her evaluation on March 15, 2012, and did not object to its authenticity or introduction.

97. On May 1, 2012, Ms. Evans approached Petitioner to inform her that Ms. Evans needed some time with her the following day to present two Corrective Action Plans (CAPs) - one for attendance and one for her service excellence scores.

98. Petitioner argued with Ms. Evans that her absences did not constitute occurrences. Ms. Evans printed out a copy of the SunTrust attendance policy and gave it to Petitioner on the spot.

99. With regard to her service excellence score, Petitioner retorted that her score was only two points away from the minimum of 80.

100. Petitioner also made more than a passing reference to the likelihood of her receiving the CSS position at the Fruitland Park branch where she had interviewed earlier that day.

101. Ms. Evans characterized Petitioner's responses as hostile and somewhat insubordinate. Despite Petitioner's testimony to the contrary, Ms. Evans' testimony regarding Petitioner's tone and demeanor at this meeting is accepted as credible.

102. Following her conversation with Petitioner, Ms. Evans prepared an email to the area manager, Michelle Stone, relating some details of her conversation with Petitioner and requesting Ms. Stone's presence the following day to present the two CAPs to Petitioner.

103. On May 2, 2013, Ms. Evans and Ms. Stone met with Petitioner and delivered both CAPs. The CAP for violations of the Attendance policy documents five occurrences during the most recent rolling three months and 12 occurrences during the most

recent rolling 12 months. Altogether, the CAP documents seven absences, two tardies, and five early departures in the last 12 months. The CAP for service excellence scores documents Petitioner's failure to maintain an average score of 80 or better on the most recent rolling 10 surveys.

104. Ms. Evans, Ms. Stone, and Petitioner all three signed and dated the CAPs on May 2, 2012. Petitioner wrote in parenthesis after her signature on both CAPs "Not in agreement."

105. In keeping with the SunTrust Disciplinary Policy, Petitioner was given until May 11, 2012, to create an Action Plan to identify steps to correct the behaviors documented by her supervisor.

106. Petitioner prepared and submitted to Ms. Evans her Action Plan on May 2, 2012, the same day as the meeting.

Petitioner's Action Plan begins as follows:

My action plan for this occurrence's [sic] is to continue to keep my teammates in mind according to any preventable occurrence that I have not had.

107. The first sentence is flippant, at best.

108. The "Action Plan" contains no actions, just a series of excuses for her attendance issues, including the necessity to pick up her child when her military husband is unable to, how much she has paid in late pickup fees, that she has no family in

town to help, and her ignorance that excused absences are occurrences.

109. Both Ms. Evans and Petitioner testified that they got along well when Ms. Evans first became Golden Hills manager. It is not clear whether a particular incident changed the relationship, such as Petitioner's email to Ms. Evan's area manager to complain that the branch was understaffed. What is clear is that the workplace was highly stressful, Ms. Evans could not rely upon Petitioner's regular attendance, which was critical in a short-staff situation; Petitioner resented that Ms. Evans did not promote her to Teller Lead when Ms. Rahman abruptly left; and Petitioner was not tactful in dealing with her teammates she viewed as being less-qualified.^{3/} Even Ms. Stalnaker, who testified on Petitioner's behalf, commented that "Bashawn was opinionated, but I mean, you just had to know how to take her" ^{4/}

CONCLUSIONS OF LAW

110. Sections 120.569 and 120.57(1), Florida Statutes (2013), grant the Division of Administrative Hearings jurisdiction over the subject matter of this proceeding and of the parties.

Discrimination

111. Section 760.10 provides, in pertinent part:

(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.

112. Petitioner maintains that SunTrust, particularly Ms. Evans and Ms. Stone, discriminated against her on account of her race.

113. Chapter 760, Part I, is patterned after Title VII of the Civil Rights Act of 1964, as amended. When "a Florida statute is modeled after a federal law on the same subject, the Florida statute will take on the same constructions as placed on its federal prototype." Brand v. Florida Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994); see also Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17 (Fla. 3d DCA 2009); 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).

114. Petitioner has the burden of proving by a preponderance of the evidence that SunTrust committed an unlawful employment practice. See St. Louis v. Fla. Int'l Univ., 60

So. 3d 455 (Fla. 3rd DCA 2011); Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981).

115. Employees may prove discrimination by direct, statistical, or circumstantial evidence. Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d at 22.

116. Direct evidence is evidence that, if believed, would prove the existence of discriminatory intent without resort to inference or presumption. Denney v. City of Albany, 247 F.3d 1172, 1182 (11th Cir. 2001); Holifield v. Reno, 115 F.3d 1555, 1561 (11th Cir. 1997). Courts have held that "'only the most blatant remarks, whose intent could be nothing other than to discriminate . . .'" will constitute direct evidence of discrimination." Damon v. Fleming Supermarkets of Fla., 196 F.3d 1354, 1358-59 (11th Cir. 1999) (citations omitted).

117. The record of this proceeding contains no direct evidence of any racial bias on the part of SunTrust at any level.

118. In the absence of any direct or statistical evidence of discriminatory intent, Petitioner must rely on circumstantial evidence of such intent. In McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and as refined in Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) and St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993), the United States Supreme Court established the procedure for determining whether

employment discrimination has occurred when employees rely upon circumstantial evidence of discriminatory intent.

119. Under McDonnell Douglas, Petitioner has the initial burden of establishing a prima facie case of unlawful discrimination. In the context of a promotional hiring decision, "to establish a prima facie case of discriminatory failure to promote, a plaintiff must prove: (1) that she is a member of a protected class; (2) that she was qualified for and applied for the promotion; (3) that she was rejected; and (4) that other equally or less qualified employees who were not members of the protected class were promoted." Denney v. City of Albany, 247 F.3d 1172, 1183 (11th Cir. 2001) (citing Combs v. Plantation Patterns, 106 F.3d 1519, 1539 n.11 (11th Cir. 1997)).

120. If Petitioner is able to prove her prima facie case by a preponderance of the evidence, the burden shifts to SunTrust to articulate a legitimate, non-discriminatory reason for its employment decision. Texas Dep't of Cmty. Aff. v. Burdine, 450 U.S. at 255; Dep't of Corr. v. Chandler, 582 So. 2d 1183 (Fla. 1st DCA 1991). An employer has the burden of production, not persuasion, to demonstrate to the finder of fact that the decision was non-discriminatory. Dep't of Corr. v. Chandler, supra. This burden of production is "exceedingly light."

Holifield v. Reno, 115 F.3d 1555, 1564 (11th Cir. 1997); Turnes v. Amsouth Bank, N.A., 36 F.3d 1057, 1061 (11th Cir. 1994).

121. If the employer produces evidence that the decision was non-discriminatory, then the complainant must establish that the proffered reason was not the true reason but merely a pretext for discrimination. St. Mary's Honor Center v. Hicks, 509 U.S. at 516-518. In order to satisfy this final step of the process, Petitioner must "show[] directly that a discriminatory reason more likely than not motivated the decision, or indirectly by showing that the proffered reason for the employment decision is not worthy of belief." Dep't of Corr. v. Chandler, 582 So. 2d at 1186 (citing Tex. Dep't of Cmty. Aff. v. Burdine, 450 U.S. at 252-256). The demonstration of pretext "merges with the plaintiff's ultimate burden of showing that the defendant intentionally discriminated against the plaintiff." Holifield v. Reno, 115 F.3d at 1565. (citations omitted).

122. The law is not concerned with whether an employment decision is fair or reasonable, but only with whether it was motivated by unlawful discriminatory intent. In a proceeding under the Civil Rights Act, "[w]e are not in the business of adjudging whether employment decisions are prudent or fair. Instead, our sole concern is whether unlawful discriminatory animus motivates a challenged employment decision." Damon v.

Fleming Supermarkets of Fla., 196 F.3d at 1361. As set forth by the Eleventh Circuit Court of Appeals, "[t]he 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." Nix v. WLCY Radio/Rahall Commc'ns, 738 F.2d 1181, 1187 (11th Cir. 1984). Moreover, "[t]he employer's stated legitimate reason . . . does not have to be a reason that the judge or jurors would act on or approve." Dep't of Corr. v. Chandler, 582 So. 2d at 1187.

Promotion (1)- Golden Hills CSS

Prima Facie Case

123. Petitioner established a prima facie case of discrimination with regard to her application for the CSS position at Golden Hills: (1) Petitioner is African-American, thus a member of a protected class; (2) Petitioner met the minimum requirements and applied for the CSS position; (3) Petitioner was neither interviewed nor selected for the position; and (4) SunTrust hired a person outside of the protected class for the CSS position.

124. Having proven a prima facie case of discrimination, the burden shifted to SunTrust to proffer a legitimate non-discriminatory reason for its action, which at this stage is a

burden of production, not a burden of persuasion. Holland v. Washington Homes, Inc., 487 F.3d 208, 214 (4th Cir. 2007).

125. SunTrust met its burden by producing credible, clear, and convincing testimony and evidence that Petitioner was not selected for the CSS position due to her attitude, tone with her teammates, and service excellence scores. Petitioner applied for the position on March 16, 2012, when the branch was under-staffed and struggling with low service excellence scores. Ms. Evans had been managing the branch roughly four months and was fighting an uphill battle to fully staff the branch with the right employees for each open position, while motivating her stressed team to improve service excellence scores.

126. Ms. Evans completed Petitioner's performance evaluation just prior to Petitioner's application for the CSS position. The evaluation is fair and balanced, noting Petitioner's strength in referrals, as well as her lack of tact and air of superiority with respect to her fellow employees. The record is clear that Petitioner was openly critical of her teammates. It is not a stretch to understand why a manager would not promote an employee whose mantra is "Without my team there is no me." It is also not a stretch to understand why a manager would not promote an employee who had gone over her head and complained to the area manager about the branch staffing.

127. Although SunTrust's burden to refute Petitioner's prima facie case was light, the evidence showing the reasons for its personnel decision to be legitimate and non-discriminatory was overwhelming.

Pretext

128. SunTrust having produced evidence of a legitimate non-discriminatory reason for not promoting Petitioner to CSS, the burden shifted back to Petitioner to prove by a preponderance of the evidence that SunTrust's stated reasons were a pretext for discrimination. To do this, Petitioner would have to "prove 'both that the reason was false, and that discrimination was the real reason' for the challenged conduct." Jiminez v. Mary Washington Coll., 57 F.3d 369, 378 (4th Cir. 1995) (citing St. Mary's Honor Center v. Hicks, 509 U.S. at 515)).

129. As applied to a hiring decision,

[t]he case law establishes that a plaintiff cannot prove pretext merely by asserting that he was better qualified. Wilson v. B/E Aerospace, Inc., 376 F.3d 1079, 1090 (11th Cir. 2004); Dancy-Pratt v. Sch. Bd. of Miami Dade Cnty., No. 00-1382, 2001 U.S. Dist. LEXIS 24521, 2001 WL 1922063, *7 (S.D. Fla. Dec. 13, 2001); see also Cofield v. Goldkist, Inc., 267 F.3d 1264, 1269 (11th Cir. 2001) (holding that qualifications must be so superior that a reasonable fact-finder would conclude reason given for hiring another was pretextual); Deines v. Texas Dep't of Protective & Regulatory Servs., 164 F.3d 277, 280-81 (5th Cir. 1999) (holding that "disparities in

qualifications must be of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question").

City of Miami v. Hervis, 65 So. 3d 1110, 1120 (Fla. 3d DCA 2011).

130. Petitioner posited that she was more qualified than Ms. Runsewa, the applicant hired for the CSS position. However, Petitioner's position was not supported by competent, substantial evidence. Petitioner helped familiarize Ms. Runsewa with some of the procedures of the teller line. Petitioner may have considered this "training" but management did not. Further, it is insufficient to establish that Petitioner was more qualified for the CSS position than Ms. Runsewa.

131. Petitioner did not meet her burden to prove by a preponderance of the evidence that SunTrust's stated reasons for not promoting Petitioner to CSS were not its true reasons, but were a pretext for discrimination.

Promotion (2) - Golden Hills Teller Coordinator

132. Petitioner did not establish a prima facie case of discrimination for failure to be promoted to the position of Teller Coordinator upon the resignation of Ms. Rahman. One of the basic elements of a prima facie case is that the candidate applied for the position. Petitioner admitted that she never applied for the Golden Hills Teller Coordinator position.

Promotion (3) - Executive Park Teller Lead

133. Petitioner did not establish a prima facie case of discrimination for failure to hire her for the position of Executive Park branch Teller Lead. One of the basic elements to establish a prima facie case is that the employer hired someone outside the protected class. In the case at hand, SunTrust eliminated the position of Teller Lead at Executive Park. No person of any class was hired for the position.

Conclusion

134. SunTrust put forth persuasive evidence that Petitioner was denied promotion to Client Service Specialist based upon her tone and attitude, as well as her service excellence scores, not based on her race.

135. Section 760.10 is designed to eliminate workplace discrimination, but it is "not designed to strip employers of discretion when making legitimate, necessary personnel decisions." See Holland v. Washington Homes, Inc., 487 F.3d at 220. Because Petitioner failed to put forth any credible evidence that SunTrust had some discriminatory reason for its personnel decisions, her petition must be dismissed.

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 that Respondent, SunTrust, did not commit any unlawful employment practice as to Petitioner, Bashawn Brooks, and dismissing the Petition for Relief filed in FCHR No. 2012-01607.

DONE AND ENTERED this 4th day of March, 2014, in Tallahassee, Leon County, Florida.



SUZANNE VAN WYK
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Filed with the Clerk of the
Division of Administrative Hearings
this 4th day of March, 2014.

ENDNOTES

^{1/} Except as otherwise noted herein, reference to the Florida Statutes is to the 2011 version, which was in effect when the alleged acts of discrimination occurred.

^{2/} T.199:3-5

^{3/} T.51:22-23

^{4/} Petitioner's superior attitude pervaded the final hearing. She insisted upon standing to deliver her testimony and cross-examination of witnesses in a small conference room in which all others, including the undersigned, remained seated around the conference table. Petitioner reminded witnesses, on more than one occasion, that they were "under oath" during cross-examination.

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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.