STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ANNA L. FOSTER,

Petitioner,

vs. Case No. 14-5354

MAX-PAK, LLC, AND STAFF BUILDERS HR, LLC,

Respondents.
_____/

RECOMMENDED ORDER

On February 12, 2015, this case was heard by D.R. Alexander, the assigned Administrative Law Judge of the Division of Administrative Hearings (DOAH), at videoconferencing sites in Lakeland and Tallahassee, Florida.

APPEARANCES

For Petitioner: Richard A. Johnson
Qualified Representative
1412 Connestee Road
Lakeland, Florida 33805-3349

For Respondent: Virgil Tray Batcher, Esquire
(Staff Builders) Trent Cotney, P.A.
407 North Howard Avenue
Suite 100
Tampa, Florida 33606-1575

For Respondent: No appearance
(Max-Pak)

STATEMENT OF THE ISSUE

The issue is whether Respondents violated the Florida Civil Rights Act (the Act), as amended, as alleged in Petitioner's Employment Complaint of Discrimination.

PRELIMINARY STATEMENT

The procedural background of this case is somewhat unusual. On June 30, 2014, Petitioner filed an Employment Complaint of Discrimination with the Florida Commission on Human Relations (FCHR) alleging that she was terminated from employment by her former employer, Max-Pak, [LLC], on account of her sex. On November 14, 2014, the FCHR issued a Notice of Determination: No Cause, in which it identified Max-Pak and "Staff Builders" as co-respondents. Petitioner then filed a Petition for Relief, which identified "Johnnie Ford/Max-Pak" as the Respondent.[1/] The Petition was transmitted by FCHR to DOAH requesting that a hearing be conducted to resolve the complaint. The transmittal letter reflected only Max-Pak as a respondent. On February 6, 2015, an appearance was entered by counsel on behalf of Staff Builders HR, LLC (Staff Builders). At hearing, by agreement of the parties, Staff Builders was added as a co-respondent. On February 9, 2015, the case was transferred from Administrative Law Judge Quattlebaum to the undersigned.

At the final hearing, Richard A. Johnson was authorized to appear as Petitioner's qualified representative. Petitioner testified on her own behalf and presented the testimony of one witness. Staff Builders presented the testimony of two witnesses. Respondent's Exhibits 1-10 were received in evidence. There was no appearance on behalf of Max-Pak.

There is no transcript of the hearing. Staff Builders filed a Proposed Recommended Order, which has been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is an African-American female. She began employment with Staff Builders around October 2012 and continued working with that entity until she voluntarily resigned around May 2014. As the name implies, Staff Builders is a staffing agency in Lakeland, Florida, that provides temporary staffing for various clients in the Lakeland area. One client is Max-Pak, a manufacturing firm also located in Lakeland. A service agreement has been executed by the two companies to formalize this arrangement.

2. Because the evidence shows that Max-Pak was able to exercise control over the manner in which Petitioner and other temporary employees performed their duties, a joint employer relationship is present. See, e.g., Amarnare v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 611 F. Supp. 344, 349 (D.N.Y.

1984); Washington v. Cingular Wireless, LLC, Case No. 05-2988 (Fla. DOAH Oct. 25, 2005; FCHR Jan. 6, 2006).

3. Before an employee is placed with a client, Staff Builders provides in-house training regarding work rules. Each employee is required to sign a training checklist acknowledging that he/she has received this training. Exhibit 8 reflects that Petitioner received this training on October 15, 2012.

4. As a part of her training, before she was assigned to work at Max-Pak, Petitioner was given a copy of Max-Pak's work rules. See Resp. Ex. 7. Among other things, the rules provide that if an employee is "threatening, intimidating, coercing or interfering with fellow employees at any time," it would "usually lead to the immediate dismissal at the first offense." Employees are expected to follow the work rules of both Staff Builders and their temporary employer.

5. When the underlying incident occurred, Petitioner was working as a temporary employee for Max-Pak in the assembly line. On March 24, 2014, the men's restroom was out of service. This required that both male and female workers use the women's restroom until the men's restroom was restored to service.

6. That morning, Petitioner went to the restroom, knocked on the closed door, and a male voice responded "wait a minute." The person using the bathroom was Tommy Engram, an African-

American male who worked as a temporary staffing employee in the shipping and receiving department.

7. Although the testimony describing the incident is quite limited, the more credible evidence shows that when Engram exited the restroom, Petitioner demanded to know why he was using the women's restroom. "Words" between the two ensued, including a comment by Engram that Petitioner should not disrespect him. Petitioner testified that she was insulted by the tone and demeanor of Engram's words, and had she not been a female, he would not have spoken to her in the manner that he did. However, there is no credible evidence that Engram used profanity or words of a sexual nature, or that his remarks were motivated by gender considerations.

8. When Petitioner spotted Engram in her work area a few minutes later, she demanded to know why he was there. The two had further words, and Petitioner told Engram she would have her boyfriend "beat him up." She then telephoned her boyfriend, Kenneth Graham, and told him about the incident. By threatening Engram in this manner, Petitioner violated a Max-Pak work rule that prohibits an employee from threatening or intimidating a fellow employee and was subject to immediate dismissal.

9. That same evening, Engram went to "the trees," a local area frequented mainly by African-Americans where they socialize and drink. Graham was also at the trees that evening, and after

he spotted Engram, Graham says they began arguing about the restroom incident and a "fist fight" between the two took place. Engram suggested that the fight was instigated by Graham, and his version of events was corroborated by a witness to the fight, whose statement indicates that Graham initiated the skirmish. See Resp. Ex. 2. Engram's version is accepted as being more credible.

10. The next morning, Engram reported the incident to Ford. After Ford and Max-Pak conferred, Staff Builders advised Petitioner that Max-Pak no longer wanted her as a staffing employee at their plant. This action was taken solely because Petitioner had violated a Max-Pak work rule by threatening Engram with physical harm. There was no evidence that the decision by either Respondent was based on Petitioner's gender.

11. This was not the first time a temporary employee at Max-Pak was asked not to return for violating work rules. Two other Staff Builder workers, both males, were also reassigned to another client after violating the same anti-violence work rules.

12. Petitioner continued working for Staff Builders and was assigned to staff another client in Tampa, where she worked for four or five weeks. After finding a permanent job, Petitioner voluntarily resigned her position with Staff Builders around May 2014.

13. Petitioner's complaint was filed on June 30, 2014. She says it was filed because no one would tell her why she could not return to Max-Pak. However, at no time before the complaint was filed did Petitioner advise either Max-Pak or Staff Builders that she believed her "termination" was because of her sex. In fact, the only person she reported any alleged discrimination to was "Jade," a co-worker whose last name was not given.

CONCLUSIONS OF LAW

14. Petitioner has the burden of proving by a preponderance of the evidence that Respondents committed an unlawful employment practice. See § 120.57(1)(j), Fla. Stat.

15. Section 760.10(1)(a), Florida Statutes (2014), makes it unlawful for an employer to take adverse action against an individual because of the individual's sex.

16. The Act is patterned after Title VII of the Civil Rights Act of 1964, as amended. Thus, case law construing Title VII is persuasive when construing the Act. See, e.g., Fla. State Univ. v. Sondel, 685 So. 2d 923, 925 n.1 (Fla. 1st DCA 1996).

17. Petitioner may establish unlawful discrimination based on gender through the use of direct evidence or circumstantial evidence. Harris v. Shelby Cnty. Bd. of Educ., 99 F.3d 1078, 1083 (11th Cir. 1996). Direct evidence is evidence that, "if

believed, proves [the] existence of [a] fact in issue without inference or presumption." Burrell v. Bd. of Tr. of Ga. Military Coll., 125 F.3d 1390, 1393 (11th Cir. 1997). Direct evidence consists of "only the most blatant remarks, whose intent could be nothing other than to discriminate" on the basis of an impermissible factor. Carter v. City of Miami, 870 F.2d 578, 582 (11th Cir. 1989). There is no direct evidence of gender discrimination in the record.

18. To prove unlawful discrimination by circumstantial evidence, a party must establish a prima facie case of discrimination by a preponderance of the evidence. If successful, this creates a presumption of discrimination. Then the burden shifts to the employer to offer a legitimate, non-discriminatory reason for the adverse employment action. If the employer meets that burden, the presumption disappears and the employee must prove that the legitimate reasons were a pretext. Valenzuela v. Globe Ground N. Am., LLC, 18 So. 3d 17 (Fla. 3d DCA 2009).

19. Petitioner must prove discrimination by indirect or circumstantial evidence by first establishing a prima facie case of gender discrimination showing (a) she is a member of a protected class; ((b) she was qualified for the job; (c) she was subjected to an adverse employment action; and (d) other similarly-situated employees, who are not members of the

protected group, were treated more favorably than Petitioner. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

20. There is insufficient evidence to establish a prima facie case of discrimination based on gender. There is no evidence that Petitioner was subject to an adverse employment action--she was merely reassigned to a different job. Even assuming that reassignment constituted an adverse employment action, Petitioner failed to identify any other similarly-situated males who were treated more favorably than she. Indeed, two males were reassigned to a different client for the same reason as Petitioner.

21. Even if a prima facie case was made, evidence was presented that established Petitioner was reassigned from Max-Pak to another client for legitimate, non-discriminatory reasons. There is ample evidence to show that Petitioner's reassignment was due solely to her violating a Max-Pak work rule.

22. Petitioner has failed to establish a prima facie case of gender discrimination by a preponderance of the evidence. Therefore, her Petition for Relief should be dismissed.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Florida Commission on Human Relations enter a final order dismissing the Petition for Relief filed by Petitioner against both Respondents.

DONE AND ENTERED this 25th day of February, 2015, in Tallahassee, Leon County, Florida.

D. R. ALEXANDER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of February, 2015.

ENDNOTE

[1/] In her Petition for Relief, Petitioner alleged for the first time that she was terminated in retaliation for participation in a protected activity, not otherwise described. The undersigned lacks jurisdiction to consider the new charge. See, e.g., Williams v. Shands at Alachua Gen. Hosp. & Santa Fe Health Care, Case No. 98-2539, 1999 Fla. Div. Adm. Hear. LEXIS 5120 (Fla. DOAH Jan. 8, 1999; FCHR June 16, 1999).

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days of the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will render a final order in this matter.