STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

METI J. FERGUSON,

Petitioner,

vs. Case No. 16-6631

CTI RESOURCE MANAGEMENT SERVICES,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held on January 24, 2017, by video teleconference with locations in Jacksonville and Tallahassee, before W. David Watkins, the duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Meti J. Ferguson, pro se
200 Crete Court
St. Augustine, Florida 32084

For Respondent: Peter R. Corbin, Esquire
FordHarrison LLP
225 Water Street, Suite 710
Jacksonville, Florida 32202

STATEMENT OF THE ISSUE

Did Respondent, CTI Resource Management Services, discriminate against Petitioner on account of her race, in violation of chapter 760, Florida Statutes?

PRELIMINARY STATEMENT

Petitioner, Meti J. Ferguson (Petitioner or Ms. Ferguson), filed a Complaint of Discrimination with the Florida Commission on Human Relations (FCHR) on December 1, 2015. In her Complaint, Petitioner alleged that Respondent, CTI Resource Management Services, Inc. (Respondent or CTI), discriminated against her on the basis of her race (African-American) when it terminated her employment on September 16, 2015. The allegations were investigated, and on October 4, 2016, FCHR issued its Determination: No Cause.

On November 4, 2016, Petitioner filed a Petition for Relief requesting an administrative hearing regarding the FCHR's "No Cause" determination pursuant to section 760.11(7).

The matter was referred to the Division of Administrative Hearings on November 14, 2016, and on November 23, 2016, the undersigned issued a Notice of Hearing, setting the final hearing for January 24, 2017.

The final hearing was convened as noticed on January 24, 2017. At hearing, Petitioner testified on her own behalf and did not offer any exhibits in evidence.[1/]

Respondent presented the testimony of Robin Norton, director of Human Resources, and Chris Getz, executive vice president and chief operating officer. CTI offered Exhibits 1 through 11 in evidence, all of which were received.

A one-volume Transcript of the final hearing was filed on February 8, 2017. At the conclusion of the hearing, the parties agreed to file proposed orders within 10 days of the transcript filing. Respondent timely filed its Proposed Recommended Order on February 17, 2017. On February 22, 2017, Petitioner filed a document entitled, "Motion for Continuance" which was in reality a request for extension of time for her to file her proposed recommended order. On February 27, 2017, Petitioner filed a Revised Motion for Continuance which, again, was actually a request for extension of time regarding her proposed recommended order. On March 1, 2017, Respondent filed a response to the motion stating that Respondent did not object to the requested extension, and on March 3, 2017, the undersigned entered an Order granting the requested extension. Thereafter, Petitioner filed her Proposed Recommended Order on March 15, 2017. Both parties' Proposed Recommended Orders have been carefully considered in the preparation of this Recommended Order.

All statutory citations are to Florida Statutes (2016), unless otherwise indicated.

FINDINGS OF FACT

Based upon the demeanor and credibility of the witnesses and other evidence presented at the final hearing, and on the entire record of this proceeding, the following Findings of Fact are made:

1. Ms. Ferguson worked for CTI as an enterprise application support (EAS) customer service representative (CSR) at the company's corporate headquarters in Jacksonville, Florida. She was hired on June 18, 2012.

2. CTI is a Service-Disabled Veteran-Owned Small Business. The company operates as a government contractor and provides support for information technology, logistics, staff augmentation, and administrative support primarily for government customers. CTI has been in business since March 2003.

3. At all times relevant to this case, CTI has maintained a Discrimination, Harassment, and Retaliation Policy, prohibiting all forms of unlawful discrimination, harassment, and retaliation. The policy states in part as follows:

> Conduct that interferes with CTI, or an individual's work performance, or creates an intimidating, hostile or offensive working environment is prohibited. CTI will not tolerate any attempts of retaliation against an employee who raises a sincere and valid concern that this policy has been violated. CTI takes all allegations of discrimination, harassment and retaliation very seriously and is firmly committed to ensuring a workplace free of discriminatory activities. Anyone engaging in discrimination, harassment, or retaliation is subject to disciplinary action up to and including termination.

(Respondent's Ex. 2)

4. Ms. Ferguson was familiar with this policy and received annual training on it. In fact, in 2015, she made a perfect score of 100 on her discrimination policy training.

5. Ms. Ferguson reported to her team leader, Sarah McKibben. Ms. McKibben, in turn, reported to the administrative director and program manager, Wendy Marsh. Ms. Marsh reported to CTI's executive vice president and chief operating officer, Chris Getz. Mr. Getz reported directly to CTI's chief executive officer, Chris Imbach. CTI also employed a director of Human Resources, Robin Norton. Ms. Norton has been employed in this position for approximately six years and has over 20 years of experience in the field of human resources.

6. Iris Maldonado Borges was employed as a coworker on Ms. Ferguson's Team, and, in fact, occupied the cubicle immediately adjacent to Ms. Ferguson. Ms. Borges is Hispanic.

7. On Thursday, September 9, 2015, Ms. Marsh advised Ms. Norton that Ms. Borges was resigning from her employment. This surprised Ms. Norton, since Ms. Borges recently had sought a promotion within the company, and, in the process, had advised Ms. Norton how much she loved working for CTI. Accordingly, Ms. Norton asked Ms. Borges to come to her office to talk about her resignation.

8. When Ms. Borges reported to Ms. Norton's office, Ms. Borges initially did not want to talk about the reasons for

her resignation, simply saying that she was resigning "for personal reasons." When pressed further, Ms. Borges said that she did not want to "get anyone in trouble" and started crying. She also stated that she was afraid of retaliation. When she was assured that CTI had a policy against retaliation, she finally talked about four separate incidents that she had experienced in the workplace.

9. The first incident related by Ms. Borges involved mean and hurtful comments and gossip about Team Leader McKibben and another employee, Veronica Smoot, allegedly being in a lesbian relationship. According to Ms. Borges, Ms. Ferguson and another coworker, Phylisia Knowles, were the ones making the "loudest comments." This was upsetting to Ms. Borges since both Ms. McKibben and Ms. Smoot were friends.

10. The second incident also involved Ms. Knowles. Ms. Borges said that Ms. Knowles was "very mean" to her, would not speak to her, and during a team meeting, she had "shot her a bird."

11. The third incident occurred during the employee "crazy hat day." According to Ms. Borges, she, Ms. Knowles (African-American), and Ms. Ferguson were posing for a picture, when another employee, who was Caucasian, attempted to join the picture. Ms. Ferguson then allegedly told the employee, "no,

this is a minority picture," and the employee was not included in the picture.

12. The fourth incident involved alleged gossiping by Ms. Ferguson with another coworker about Ms. Borges allegedly being in a relationship with a male coworker. Ms. Borges overheard the conversation, which upset her because she was married, and she felt like the conversation was very disrespectful to her marriage.

13. After relating the above incidents, Ms. Borges stated that "these things had been building up and that she couldn't take it anymore" and she wanted to resign. Ms. Norton then asked Ms. Borges to take some time off with pay until the matter could be investigated, which she agreed to do.

14. Ms. Norton conferred with Ms. Marsh and Mr. Getz, and it was determined that Ms. Ferguson and Ms. Knowles would both be interviewed the following Monday, September 14, 2015 (the first day that both were scheduled to be at work). It was also determined that Ms. Borges' workstation would be moved to a new location that was not immediately adjacent to that of Ms. Ferguson.

15. Both Ms. Ferguson and Ms. Knowles were interviewed the following Monday, September 14, 2015, by Ms. Norton, Mr. Getz, and Ms. Marsh. Ms. Norton initially conducted both interviews, asking a sequence of questions concerning the incidents raised by

Ms. Borges. With respect to Ms. Ferguson, she recalled rumors circulating about Ms. McKibben and Ms. Smoot being in a lesbian relationship, but denied participating in them. She could not recall the "this is a minority picture" comment during "crazy hat day," but stated that it sounded like something she could have said in a joking manner. She denied participating in a conversation about Ms. Borges allegedly being in a relationship with a coworker.

16. Mr. Getz concluded the interviews with both Ms. Ferguson and Ms. Knowles by stating that whether or not they had participated in the incidents and rumors involving coworkers, such conduct did not resonate with CTI's values and was not to be tolerated. He reiterated that if such conduct happened again, the offending employee would be immediately terminated and he would personally escort him or her out the door. At the conclusion of the interviews, Mr. Getz, Ms. Norton, and Ms. Marsh conferred and it was decided that, aside from the stern warning from Mr. Getz, no further action was to be taken against either Ms. Ferguson or Ms. Knowles.

17. Two days later, on Wednesday, September 16, 2015, Ms. Marsh, Ms. McKibben, and Ms. Borges, who was crying, all came into Ms. Norton's office. Ms. Borges described an incident that had occurred that morning in the ladies' room involving Ms. Ferguson. She stated that as she was exiting her stall,

Ms. Ferguson was standing there blocking her exit and "fronting" her. When asked what she meant by "fronting" her, Ms. Borges stated that Ms. Ferguson had her chest bowed out, and had a "very mean and intimidating look on [her] face" like she was "going to fight." While describing the incident, Ms. Borges was very, very upset and crying. She stated that she "had had it . . . that she couldn't take it anymore and she wanted to resign." Ms. Norton again asked her to please go home until they had an opportunity to address the situation.

18. Ms. Norton, Ms. Marsh, and Ms. McKibben then contacted Mr. Getz and related to him what Ms. Borges had reported. In discussing the situation, it was determined that they had no reason not to believe Ms. Borges. She had been an excellent employee and was very non-confrontational in her demeanor. There also were no other witnesses to the incident besides Ms. Borges and Ms. Ferguson. Mr. Getz and Ms. Norton also conferred with CTI's chief executive officer, Chris Imbach. It was decided that the type of intimidating behavior reported by Ms. Borges was not consistent with the company's values, particularly since it had occurred a mere two days after Mr. Getz had made it "crystal clear" that such conduct would not be tolerated. Accordingly, the decision was made to terminate Ms. Ferguson's employment.

19. Mr. Getz, Ms. Norton, Ms. Marsh, and Gary Rogers, director of Security, met with Ms. Ferguson that same afternoon.

Mr. Getz conducted the meeting, which was "relatively short and to the point." He advised Ms. Ferguson that she was being terminated for her intimidating behavior in the women's bathroom, which was found to have created a hostile working environment. Ms. Ferguson was argumentative and tried to interrupt Mr. Getz throughout the meeting. Ms. Ferguson stated that she could not believe that she was being fired for merely "glaring" at a coworker. This statement confirmed to Mr. Getz and Ms. Norton that Ms. Ferguson knew what she had done in the ladies' room, as Mr. Getz had simply told her that she was being terminated for her "intimidating behavior" in the ladies' room--no details of the incident were disclosed to her. Ms. Ferguson was provided a written letter of termination at the meeting, confirming the reason for her termination.

20. Mr. Getz made the final decision on termination. There was no persuasive evidence presented at hearing that race played any part in Mr. Getz's decision. Mr. Getz was a pastor in a local church for 15 years prior to being an executive with CTI. Mr. Getz also has a very racially diverse family. He and his wife adopted four children, one of which is Asian, one is half Caucasian, half Hispanic, and two are African-American.

21. The evidence established that CTI has a racially diverse workforce at its corporate headquarters. In 2015, 21 of its 70 employees, or 30 percent, were African American; five, or

seven percent, were Hispanic; and three, or four percent, were Asian.

22. Petitioner presented evidence that an African-American coworker, Jeff Lazenby, had made a complaint of a hostile work environment against his Caucasian supervisor, Adam Highfill, but that Mr. Highfill was not terminated by CTI. The complaint against Mr. Highfill occurred in June 2011, over four years prior to the incident leading to Ms. Ferguson's termination.

23. Mr. Lazenby's complaint was investigated by Ms. Norton; Mr. Getz; Mike Vonbalson, senior program manager and Mr. Highfill's supervisor; and Bob Bearden, also a program manager. It was determined that Mr. Highfill had not created a hostile working environment; rather the two individuals became engaged in a disagreement on the work floor and both were found to have acted inappropriately. Mr. Lazenby and Mr. Highfill were both counseled for their behavior. Further, Mr. Highfill was found to have engaged in poor management practices. He was placed on a 30-day development plan to attempt to improve his management skills. When his management skills did not improve to an acceptable level, Mr. Highfill was demoted to a nonsupervisory position on August 3, 2011, where he remains employed.

24. Ms. Knowles, who is African-American, was not terminated by CTI, because there were no further complaints or

incidents involving alleged behavior by her following the company's interview with her on September 14, 2015.

25. The credible evidence of record established that Ms. Ferguson was terminated for creating a hostile work environment after being specifically advised on September 14, 2015, that any such behavior in the future would result in her termination by the company. There is no credible evidence of record that Ms. Ferguson's termination was racially motivated.

CONCLUSIONS OF LAW

26. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this cause pursuant to sections 120.569 and 120.57(1), Florida Statutes.

27. The Florida Civil Rights Act of 1992 ("FCRA") prohibits discrimination in the workplace. Among other things, FCRA makes it unlawful for an employer:

> To limit, segregate, or classify employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities, or adversely affect any individual's status as an employee, because of such individual's race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status.

§ 760.10(1)(b), Fla. Stat.

28. Florida's chapter 760 is patterned after Title VII of the Civil Rights Act of 1964, as amended. Consequently, Florida

courts look to federal case law when interpreting chapter 760. Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17 (Fla. 3rd DCA 2009).

29. Petitioner claims she was discriminated against by CTI because of her race (African American) in violation of FCRA. Specifically, Petitioner alleges that race was a motivating factor in Respondent's decision to terminate her employment.

30. Section 760.11(7) permits a party who receives a no cause determination to request a formal administrative hearing before the Division of Administrative Hearings. "If the administrative law judge finds that a violation of the Florida Civil Rights Act of 1992 has occurred, he or she shall issue an appropriate recommended order to the commission prohibiting the practice and recommending affirmative relief from the effects of the practice, including back pay." Id.

31. Petitioner claims disparate treatment (as opposed to disparate impact) under the FCRA; in other words, she claims she was treated differently because of her race. Petitioner has the burden of proving by a preponderance of the evidence that Respondent discriminated against her. See Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981). A party may prove unlawful race discrimination by direct or circumstantial evidence. Smith v. Fla. Dep't of Corr., Case No. 2:07-cv-631, (M.D. Fla. May 27, 2009); 2009 U.S. Dist. LEXIS 44885 (M.D. Fla.

2009). When a petitioner alleges disparate treatment under chapter 760, or the Civil Rights Act, the petitioner must prove that her race "actually motivated the employer's decision. That is, the [petitioner's race] 'must have actually played a role [in the employer's decision making] process and had a determinative influence on the outcome.'" Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 141 (2000) (alteration in original).

32. Direct evidence is evidence that, "if believed, proves [the] existence of [a] fact in issue without inference or presumption." Burrell v. Bd. of Trs. of Ga. Mil. 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).

33. The record in this case did not establish unlawful race discrimination by direct evidence.

34. 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. GlobeGround N. Am., LLC, supra. Facts that are sufficient to establish a prima facie case must be adequate to permit an inference of discrimination. Id.

35. Accordingly, Petitioner must prove discrimination by indirect or circumstantial evidence under the McDonnell Douglas framework. Petitioner must first establish a prima facie case by showing: (1) she is a member of a protected class; (2) she was qualified for the position held; (3) she was subjected to an adverse employment action; and (4) other similarly-situated employees, who are not members of the protected group, were treated more favorably than Petitioner. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). "When comparing similarly situated individuals to raise an inference of discriminatory motivation, these individuals must be similarly situated in all relevant respects." Jackson v. BellSouth Telecomm., 372 F.3d 1250, 1273 (11th Cir. 2004).

36. Thus, in order to establish a prima facie case of disparate treatment based on race, Petitioner must show that CTI treated similarly situated non-African American employees differently or less severely. Valdes v. Miami-Dade Coll., 463 Fed. Appx. 843, 845 (11th Cir. 2012); Camara v. Brinker Int'l, 161 Fed. Appx. 893 (11th Cir. 2006).

37. The Findings of Fact here are not sufficient to establish a prima facie case of discrimination based on race. The greater weight of the evidence does not establish that Ms. Ferguson was treated less favorably than other employees outside of her protected class. Nor has Petitioner presented "a convincing mosaic of circumstantial evidence" showing that she was the victim of race discrimination. Smith v. Lockheed-Martin Corp., 644 F.3d 1321 (11th Cir. 2011).

38. Petitioner presented evidence attempting to show that CTI treated Caucasian supervisor Adam Highfill more favorably than it did her when one of Mr. Highfill's subordinates, who was African-American, filed a complaint against him that he was creating a hostile work environment. To be a proper comparator, Mr. Highfill's conduct must have been "nearly identical" to Ms. Ferguson's. Vickers v. Hyundai Motor Mfg. Ala., LLC, 648 Fed. Appx. 751 (11th Cir. April 14, 2016); and Stone & Webster Constr., Inc. v. U.S. Dep't of Labor, 684 F.3d 1127, 1134-35 (11th Cir. 2012). This requirement prevents courts from "second-guessing employers' reasonable decisions and confusing apples with oranges." Maniccia v. Brown, 171 F.3d 1364, 1368 (11th Cir. 1999).

39. The evidence shows that Mr. Highfill's conduct was not at all similar to Ms. Ferguson's. CTI's investigation showed that Mr. Highfill and Mr. Lazenby had a disagreement in the

workplace that neither handled appropriately, but that there was no conduct that constituted a hostile work environment. In contrast, Ms. Ferguson was found to have engaged in intimidating and hostile behavior in the ladies' room against a coworker, a mere two days after the company's chief operating officer had told her in "crystal clear" terms that such conduct would not be tolerated and would lead to termination. Moreover, Mr. Highfill did receive appropriate discipline for his actions. He was required to complete a 30-day development course to try to improve his management skills, and when they did not sufficiently improve, he was demoted to a non-supervisory position. In short, Mr. Highfill's case is not a proper comparator, and Petitioner has fallen short of establishing her prima facie case. See Robinson v. Colquitt EMC, 651 Fed. Appx. 891 (11th Cir. June 2, 2016) (summary judgment for the employer affirmed in race discrimination action where the plaintiff failed to present sufficient evidence of a proper comparator).

40. Even assuming, arguendo, that Petitioner established a prima facie case of discrimination, Respondent presented persuasive documentary and testimonial evidence that it terminated Ms. Ferguson because of its reasonable belief she had engaged in intimidating and hostile behavior against a coworker, and not because of her race. As such, CTI has met its burden to

establish legitimate, non-discriminatory business reasons for its decision to terminate Ms. Ferguson's employment.

41. Petitioner did not present any credible evidence that Respondent's reason for terminating her was a pretext for discrimination. Petitioner expressed her belief that her termination was unfair, and that Respondent's investigation leading to her termination was incomplete, but disagreement with the employer's decision falls short of the showing necessary to establish pretext. Chambers v. Walt Disney World Co., 132 F. Supp. 2d 1356, 1366 (M.D. Fla. 2001). Even showing that an employer breached an internal policy does not amount to a showing of pretext. Springer v. Convergys Customer Mgmt. Group, Inc., 509 F.3d 1344, 1350 (11th Cir. 2007). Courts "do not sit as a super-personnel department that examines an entity's business decisions." Chapman v. AI Transport, 229 F.3d 1012, 1033 (11th Cir. 2000) (en banc) (citations omitted).

42. "The ultimate burden of persuading the trier of fact that the [employer] intentionally discriminated against the [employee] remains at all times with the [employee]." Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. at 253. In this case, Petitioner failed to meet her burden.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human

Relations dismiss the Petition for Relief from an Unlawful Employment Practice filed against Respondent.

DONE AND ENTERED this 24th day of March, 2017, in Tallahassee, Leon County, Florida.

W. DAVID WATKINS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of March, 2017.

ENDNOTE

[1/] Three documents were attached to Petitioner's Proposed Recommended Order. Those documents consist of a photograph, and two pages of Facebook postings. None of these documents were offered by Petitioner at the final hearing, nor was leave granted by the undersigned for Petitioner to late-file exhibits. Accordingly, those documents are not received in evidence.

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.