STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ASHA J. LOGAN,

Petitioner,

vs. Case No. 17-5005

BROW ART 23 CORDOVA MALL,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, on January 16, 2018, and February 2, 2018, Administrative Law Judge Yolonda Y. Green, of the Division of Administrative Hearings ("Division"), conducted a final hearing by video teleconference in Pensacola and Tallahassee, Florida, pursuant to section 120.57(1), Florida Statutes (2017).

APPEARANCES

For Petitioner: Tracey D. Robinson-Coffee, Esquire
Law Office of Tracey Robinson-Coffee
Post Office Box 18305
Pensacola, Florida 32523

For Respondent: Jason Curtis Taylor, Esquire
McConnaughhay, Duffy, Coonrod,
Pope, and Weaver, P.A.
1709 Hermitage Boulevard, Suite 200
Tallahassee, Florida 32308

STATEMENT OF THE ISSUE

Whether Respondent subjected Petitioner to an unlawful employment practice on the basis of her race in violation of section 760.10, Florida Statutes (2016).[1/]

PRELIMINARY STATEMENT

On February 15, 2017, Petitioner, Asha J. Logan ("Ms. Logan" or "Petitioner"), filed a Complaint of Employment Discrimination with the Florida Commission on Human Relations (the "Commission"). The complaint alleged that Respondent, Brow Art 23 Cordova Mall ("Brow Art 23" or "Respondent"), violated the Civil Rights Act of 1964 and the Florida Civil Rights Act of 1992 ("FCRA"), as amended, by discriminating against her on the basis of race and creating a hostile work environment. On August 11, 2017, following its investigation of the allegations in the complaint, the Commission issued a determination of "No Reasonable Cause" to support Petitioner's complaint.

On September 13, 2017, Petitioner filed a Petition for Relief requesting an administrative hearing regarding the Commission's "No Reasonable Cause" determination pursuant to section 760.11(7).

The Commission referred the matter to the Division on September 13, 2017; and on September 14, 2017, this matter was assigned to the undersigned. The undersigned issued a Notice of Hearing, scheduling the final hearing for November 15, 2017.

The parties filed a Joint Motion for Continuance of Hearing on November 13, 2017. The undersigned granted the motion and rescheduled the hearing for January 16, 2018.

On January 16, 2018, the hearing commenced as scheduled. During the hearing, it was determined that a witness would be unavailable to appear by phone as anticipated. When it was determined that the parties could not complete the hearing during the scheduled time period, the hearing was recessed until a date that the parties were available. The parties were instructed to provide dates of availability within seven days. This matter was rescheduled for February 2, 2018, and it reconvened as scheduled until completion.

The parties filed a prehearing stipulation wherein they stipulated to certain facts, which, to the extent relevant, have been incorporated in the Findings of Fact below.

Both parties offered the testimony of the following three witnesses: Rusbina Malak, store manager of Brow Art 23[2/]; Krishnara Marcano, regional manager of Brow Art 23; and Vyoulit Sadek, human resources staff member of Brow Art 23. The parties offered Joint Exhibit 1, which was admitted.

In addition to the witnesses offered by both parties, Petitioner testified on her own behalf and offered the testimony of the following witnesses: Mariella Ablaza and Dominique Welch, former employees of Brow Art 23. Petitioner offered

Exhibits 1, 2, 3, 7, 11, and 19, which were admitted without objection. Petitioner offered Exhibit 20, which was admitted over objection. Respondent did not offer any witnesses other than those offered jointly. Respondent offered Exhibits 3 through 10 and 13, which were admitted.

The proceeding was recorded by a court reporter and the parties ordered a transcript of the final hearing. The two-volume Transcript was filed on March 5, 2018. Respondent timely filed its Proposed Recommended Order (PRO). Petitioner did not timely file her PRO. However, there were no objections to the Petitioner's late-filed PRO and; thus, it has been accepted. The PROs have both been carefully considered in preparation of this Recommended Order.

FINDINGS OF FACT

The following Findings of Fact are based on exhibits admitted into evidence, testimony offered by witnesses, and admitted facts set forth in the Prehearing Stipulation.

Background

1. Ms. Logan is an African-American female and a member of a protected class. At all times material to this matter, she was employed as an esthetician at Brow Art 23. Ms. Logan was an employee of Brow Art 23 as that term is defined by the FCRA.

2. Brow Art 23 is a skin care salon that specializes in eyebrow threading. The Brow Art 23 corporate offices are

located in Highland Park, Illinois. However, it has multiple locations throughout the United States, including Florida. Ms. Logan worked at Brow Art 23 in the Cordova Mall located in Pensacola, Florida. At all times material to this matter, Brow Art 23 employed more than 15 full-time employees.

3. Ms. Logan filed a complaint with the Commission alleging Brow Art 23, through Sara Mark, created a hostile work environment and had racial bias against African-Americans.

4. The Commission issued a "No Cause" determination and Ms. Logan filed a Petition for Relief, which is the matter before the undersigned.

5. Ms. Logan is a licensed esthetician in the State of Florida. Her license allows her to perform hair removal techniques, such as threading, waxing, and sugaring. Ms. Logan's license also permits her to perform eyelash extensions.

6. Ms. Logan sought employment with Brow Art 23. She was interviewed and began work the next day. Other than in the instant matter, Ms. Logan had not been disciplined during her employment with Brow Art 23.

Ms. Mark's Actions/Hostile Work Environment

7. Between December 2015 and January 2016, Sara Mark was hired to work in the Cordova Mall store. Ms. Mark is believed to be of Egyptian descent.[3/] Asha Logan and Sara Mark initially

were friendly and worked well together. However, at some point in 2016 their relationship changed.

8. Ms. Logan testified that Ms. Mark engaged in hostile behavior toward her in various ways. Ms. Logan testified that Ms. Mark would remove her tips from the cash register without permission.

9. Ms. Mark told customers not to patronize other threaders but, when confronted, Ms. Mark would deny making the statements. However, Ms. Mark did not single out Ms. Logan.

10. Ms. Logan testified that Ms. Mark would follow her while she was working inside the store and stand close to her when she was servicing customers. Ms. Mark would also follow Ms. Logan outside the store in the mall corridor while Ms. Logan was attempting to solicit customers. Brow Art 23 employees, Dominique Welch and Mariella Ablaza, witnessed the behavior. They testified that Ms. Mark appeared to be attempting to intimidate Ms. Logan when she followed her.

11. Ms. Mark also read Ms. Logan's private emails. All employees had access to a single company computer at Brow Art 23. While emails were sent from the company to communicate with employees as a group, Ms. Mark would repeatedly read Ms. Logan's private emails that were addressed only to her.

12. Ms. Mark's actions went beyond non-physical intimidation. It also involved physical aggression. In an

incident, which is a primary issue here, Ms. Mark walked past Ms. Logan and kicked her foot.

13. Both Ms. Logan and Ms. Welch testified that it was an intentional act because Ms. Mark had enough room within the designated area to avoid contact when she kicked Ms. Logan. Moreover, she did not apologize to Ms. Logan for kicking her foot.

14. Ms. Logan testified that she believed Ms. Mark's behavior was motivated by racial bias against African-Americans because Ms. Mark made comments about African-American customers being dirty, smelling badly, and not tipping.

15. In addition to the comments about African-American customers, Ms. Mark used offensive language which demonstrated her racial animus. While working with Ms. Logan and Ms. Welch, Ms. Mark used the racial epithet "nigger." Ms. Logan and Ms. Welch asked Ms. Mark not to use the word because they found it offensive. Despite the requests, Ms. Mark continued to repeat it and said, "I don't understand why I can't call you a 'nigger.'"

16. In a separate incident, Ms. Logan, Ms. Welch, Ms. Ablaza, and Ms. Mark were working together. The group began discussing where Ms. Mark was originally from and someone referenced Ms. Mark as being from Africa. Ms. Mark replied, "No, I'm not. I'm not a 'nigger.'"

17. Ms. Logan informed her assistant manager, Rusbina Malak, of the incidents and concerns she had with Ms. Mark. After receiving no response, Ms. Logan then reported her concerns to Ms. Marcano. Up to this point, Ms. Logan had not communicated her concerns regarding discrimination.

18. Ms. Marcano testified that she had no independent recollection of Ms. Logan contacting her about complaints of harassment, assault, or discrimination and had discarded any notes that she had in a notebook of conversations with employees during that time.

19. Ms. Marcano received information from Ms. Malak that she characterized as two employees "not getting along." Ms. Marcano then instructed Ms. Logan to text her complaint to the group and scheduled a conference call on Whatsapp. Whatsapp is an instant messaging application that Ms. Marcano and Ms. Malak used to communicate with the employees at the Cordova Mall store. Whatsapp is an open forum where each user can view the messages and comments of the other users in the group text. The use of Whatsapp was not authorized by Brow Art 23's corporate office.

20. Ms. Logan followed the instructions of her managers and posted her complaint on Whatsapp. During the conference call, there was a group discussion between all the employees at

the Cordova Mall location, Ms. Marcano, and an unnamed individual from human resources.

21. According to Ms. Marcano, all the issues were resolved during the conference call. To the contrary, Ms. Logan and Ms. Welch disagreed and testified that management essentially disregarded their complaints.

22. The Eye Brow Art 23 employees, including the store manager and the regional manager, testified that a manager had never been to the Cordova Mall location once during the period that Ms. Mark was hired and the incident of August 17, 2016.[4/]

Policy and Procedure

23. Brow Art 23 provided employees with an employee handbook, which directs employees to make complaints directly to their team leader and manager. Brow Art 23 also has an equal employment section of their employee handbook that specifically directs employees to address violations of the equal employment policy with the team leader. The team leader would then forward the complaint to the manager or corporate office. Under the policy, complaints are to be promptly investigated with due regard for the privacy and respect of all.

24. In addition to the equal employment policy, Brow Art 23 has a policy prohibiting harassment, including creating a hostile work environment. The circumstances, which may

constitute harassment, include language, epithets, and unwelcome touching.

25. Ms. Malak testified that she received several complaints from Ms. Logan and that she "saw that [Ms. Logan] had a lot of problems [with Ms. Mark]." Ms. Malak advised Ms. Logan to contact her supervisor, Ms. Marcano, because she had no authority to handle those types of complaints.

26. Ms. Logan attempted to send an email to Ms. Sadek on May 19, 2016, regarding her complaints of discrimination and harassment. The email was addressed to "Vyolit@browart23.com." Ms. Sadek denied that she received the email and credibly testified that her email is vyolit.sadek@browart23.com. The undersigned finds that there was insufficient evidence offered to demonstrate that Ms. Sadek received Ms. Logan's email.

27. Ms. Logan also sent electronic messages to management with complaints regarding her problems with Ms. Mark. On June 2, 2016, Ms. Logan sent a text message to Ms. Malak and complained that "I have reported to you several weeks ago via phone that I'm having serious issue with worker Sara. I have told you that she has kick [sic] me in the back store out of dislike and you said you'd get with Krishnara and nothing has been done about being kicked yet." On June 27, 2016, Ms. Logan sent a text message to Ms. Malak and complained that "I have sent you information one [sic] how nasty the store is left

everyday and how I an [sic] harassed everyday. Can you give me an idea of how long before this issue will be resolved." There is a date stamp below the June 27, 2016, text message indicating that it was read on the same date. Ms. Malak confirmed that she received the message. Instead of resolving the issue, Ms. Malak directed Ms. Logan to "put the message on the group message so everybody can read and everybody can see and they can reply." Ms. Logan received no resolution to her complaints.

28. On July 26, 2016, Petitioner sent another email, which was addressed to Mary Fernandez, a human resources staff member of Brow Art 23, and copied Ms. Malak and Ms. Marcano. The email subject line included "discriminative treatment by Worker Sarah Marks." This was the first time that Ms. Logan expressed her concerns about Ms. Mark's behavior being racially motivated.

29. There was insufficient evidence offered to demonstrate that the email address for Ms. Fernandez was correct or that Ms. Fernandez received the email. However, the email address for Ms. Malak and Ms. Marcano were correct and both members of management affirmed that they received the email.

30. Ms. Logan properly followed the written policy contained in the employee manual. She reported her complaints of harassment to her store manager, Ms. Malak, and to the regional manager, Ms. Marcano. She reported her complaints that

she believed the harassment was racially motivated. There was no corrective action taken to address Ms. Mark's behavior.

31. Although there was testimony that Ms. Mark engaged in similar acts with other employees, she consistently engaged in harassing behavior with Ms. Logan. Moreover, although there were other employees of different racial backgrounds (i.e., Hispanic, Asian, etc.), Ms. Logan is the only employee to whom Ms. Mark directed a racial epithet.

Incident Leading to Ms. Logan's Suspension on August 17, 2016

32. On August 17, 2016, Ms. Logan, Ms. Ablaza,[5/] and Ms. Mark were together at the store. There were three chairs in the sitting area, including two store-owned chairs and a chair owned by Ms. Mark. The chair Ms. Logan used was owned by the store for employee use. It was well-known that Ms. Mark did not permit other employees to use her chair.

33. The three employees were sitting in the employee break room area waiting for customers. The employees would sit in a particular position based on rotation to provide services to customers. Ms. Logan was sitting in the first chair as she would service the next customer. Ms. Logan was sitting in a store-owned chair and Ms. Mark was sitting in her personal chair. Ms. Logan then left her chair to service a client. However, she discovered that she did not have a customer. When Ms. Logan returned, Ms. Mark was sitting in the first chair

(previously occupied by Ms. Logan). What happens next is in dispute.

34. The evidence demonstrates that Ms. Logan placed her hand on the back of the chair, Ms. Mark began to stand up from the chair, and Ms. Logan moved the chair so she could sit in it. Ms. Mark did not testify at the hearing. However, her description of the incident in a text message to Ms. Malak was that Ms. Logan pushed her from the chair.

35. Ms. Ablaza, the only neutral witness to the incident, testified about what she observed. Ms. Ablaza recalled that Ms. Logan asked Ms. Mark for her chair but Ms. Mark ignored her. Ms. Logan asked Ms. Mark for the chair a second time and explained that she needed to sit due to back pain. Again, Ms. Mark did not respond to Ms. Logan's request. Ms. Logan was holding the chair when Ms. Mark began to stand. Ms. Ablaza saw Ms. Mark on the floor using her hands to support herself. Ms. Ablaza had a clear, unobstructed view of the incident. Ms. Ablaza did not see Ms. Logan pull the chair from underneath Ms. Mark, and she did not see Ms. Logan push Ms. Mark. Ms. Ablaza shared her description of the incident with Ms. Malak before Ms. Mark was instructed to call the police. Ms. Ablaza also sent a description of the incident to Ms. Marcano by text message within the two days following the incident. Ms. Ablaza is found to be credible and corroborates

Ms. Logan's description that she did not push Ms. Mark, she did not pull the chair from underneath Ms. Mark, or otherwise cause Ms. Mark to fall from the chair.

36. Ms. Malak directed Ms. Mark to call the police and Ms. Mark followed Ms. Malak's instruction. The police arrived and spoke to Ms. Ablaza and Ms. Mark. Ms. Logan was asked to leave the store on that day, but she was not arrested. Ms. Malak notified Ms. Logan that she was suspended for an indefinite period of time because Ms. Mark reported that Ms. Logan hurt her. The action taken by Ms. Malak was communicated to human resources and Ms. Marcano and affirmed by corporate management and human resources.

37. Brow Art 23 corporate representatives attempted to schedule a conference call with Ms. Logan to discuss her employment status. However, Brow Art 23 made no further contact after Ms. Logan requested that her counsel be present during any discussions. Ms. Logan did not return to work at Brow Art 23 and, thus, was effectively terminated on August 17, 2016.

Retaliation

38. Petitioner alleged in her complaint of discrimination that Respondent retaliated against her after she complained about Ms. Mark.

Disability Discrimination

39. Petitioner did not present any evidence to demonstrate she had any condition that proves she suffers from a disability or that an adverse action was taken due to her alleged disability.

Age Discrimination

40. Petitioner did not present any evidence to demonstrate she was discriminated against on the basis of age. Ms. Logan did not present any evidence to demonstrate the age of any alleged comparator.

Past Wages

41. As a condition of employment, Ms. Logan signed a non-compete agreement, which required that she not disclose any information or techniques learned while employed with Brow Art 23. The non-compete agreement also barred Ms. Logan from working with another competitive business within a 25-mile radius for up to 18 months (until after February 17, 2018). Brow Art 23 also had stores in neighboring cities to Pensacola, which in effect extended the 25-mile radius.

42. The parties stipulated that while employed at Brow Art 23, Ms. Logan's pay rate was $20.00 per hour.

43. She worked 40 hours per week and made approximately $150.00 per week in tips. Thus, Petitioner earned $950 per week ($20.00 x 40 hours = $800 + $150 (tips) = $950 per week).

44. Ms. Logan applied for and received unemployment in the amount of $2,614.00. Ms. Logan introduced re-employment letters for 11 weeks, but was paid a total of 12 weeks, bringing the total paid out closer to $3,000.00.

45. Ms. Logan worked for two weeks temporarily as a server in March 2017 and earned approximately $200.00. Ms. Logan could not remain employed in the position due to her medical limitations.

46. From October 2017, through November 2017, Ms. Logan also worked at Blink part-time as a full-service technician performing epilation techniques, such a sugaring, waxing, and eyebrow design. She initially earned a wage rate of $15.00 per hour. At some point her hours were decreased, and her pay was ultimately reduced to $10.00 per hour. Ms. Logan was paid a total of $1,350.00 while employed at Blink. Ms. Logan also worked at a hotel for an undetermined time period in November and December 2017, earning approximately $1,800.00.

47. Based on the evidence, Ms. Logan experienced a loss in pay of $34,690.

48. Ms. Logan has incurred costs and attorneys' fees related to this final hearing in amounts that are currently undetermined.

CONCLUSIONS OF LAW

49. Pursuant to sections 120.569 and 120.57(1), Florida Statutes (2016), DOAH has jurisdiction over the subject matter and parties to this proceeding.

50. Section 760.10(1)(a) makes it unlawful for an employer to take adverse action against an individual because of that employee's race.

51. The civil rights act defines "employer" as "any person employing 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person." § 760.02(7), Fla. Stat.

52. The parties have stipulated that Brow Art 23 is an employer as defined by chapter 760.

53. Petitioner filed a complaint alleging Respondent discriminated against her on the basis of her race.

54. Section 760.11(1) provides, in pertinent part, that "[a]ny person aggrieved by a violation of ss. 760.01-760.10 may file a complaint with the [FCHR] within 365 days of the alleged violation." Petitioner timely filed her complaint.

55. Section 760.11(7) provides that upon a determination by the FCHR that there is no reasonable cause to believe that a violation of the FCRA has occurred, "[t]he aggrieved person may request an administrative hearing under ss. 120.569 and 120.57, but any such request must be made within 35 days of the date of

determination of reasonable cause." Following the FCHR determination of no cause, Petitioner timely filed her Petition for Relief from Unlawful Employment Practices and Request for Administrative Hearing requesting this hearing.

56. 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. Fla. 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).

57. Petitioner has the burden of proving by a preponderance of the evidence that Respondent committed an unlawful employment practice. See St. Louis v. Fla. Int'l Univ., 60 So. 3d 455 (Fla. 3d DCA 2011); Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981).

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

59. 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). It is well established that "'only the most blatant remark, whose intent could be nothing other than to discriminate . . .' will constitute direct evidence of discrimination." Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d 1354, 1358-59 (11th Cir. 1999)(citations omitted).

60. In the absence of any direct or statistical evidence of discriminatory intent, Petitioner must rely on circumstantial evidence. In McDonnell Douglas Corporation 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.

61. Under McDonnell Douglas, Petitioner has the initial burden of establishing a prima facie case of unlawful discrimination. "Demonstrating a prima facie case is not onerous; it requires only that the plaintiff establish facts adequate to permit an inference of discrimination." Holifield, 115 F.3d at 1562; cf., Gross v. Lyons, 763 So. 2d 276, 280 n.1 (Fla. 2000)("A preponderance of the evidence is 'the greater weight of the evidence,' [citation omitted] or evidence that 'more likely than not' tends to prove a certain proposition.").

62. Petitioner's Charge of Discrimination against Respondent alleges that Petitioner was subjected to a hostile work environment because of her race, age, disability, and on the basis of retaliation. Petitioner established a prima facie case that she was subjected to a hostile work environment based upon her race. However, Petitioner failed to establish discrimination on the basis of her age, disability, or on the basis of retaliation.

Hostile Work Environment

63. Petitioner asserts that Respondent's discriminatory harassment created a hostile working environment. "A hostile work environment claim is comprised of a series of separate acts that collectively constitute one unlawful employment practice." Amtrak v. Morgan, 536 U.S. 101, 117 (2002).

64. For an employer to be held liable for harassment based on race, it must be established upon proof that "the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1275 (11th Cir. 2002)(quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1998)).

65. In order to establish a prima facie case under the hostile work environment theory, Petitioner must show: (1) that

she belongs to a protected group; (2) that she has been subject to unwelcome harassment; (3) that the harassment must have been based on a protected characteristic of the employee, such as race; (4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and (5) that the employer is responsible for such environment under a theory of vicarious or of direct liability. Id.

66. Petitioner established all of the elements required to establish a prima facie case. Petitioner is African-American, and she was subject to unwelcomed intimidation and ridicule based upon her race. The harassment directed toward Petitioner, as described in the Findings of Fact above, was sufficiently severe and pervasive to alter the terms and conditions of her employment and create a hostile work environment.

67. Factors relevant in determining whether conduct is sufficiently severe and pervasive to show a hostile work environment include, among others: (a) the frequency of the conduct, (b) the severity of the conduct, (c) whether the conduct is physically threatening or humiliating, or a mere offensive utterance, and (d) whether the conduct unreasonably interferes with the employee's job performance. Miller, 277 F.3d at 1276.

68. Ms. Mark's disrespect and intimidation, and interference with customers occurred during each shift that Ms. Mark worked with Ms. Logan. The conduct was severe in that it interfered with Petitioner's ability to do her job and provide service to customers. Ms. Mark's conduct was physically threatening in that she kicked Ms. Logan's foot without apology or acknowledgment of the encounter. Despite Petitioner's efforts and complaints to members of management, the offensive and discriminatory conduct continued. The management indicated that they believed the interaction between Ms. Mark and Ms. Logan was simply a case of "not getting along," however, Ms. Mark used racial epithets in reference to Ms. Logan. Such references were not directed to other employees who were of a different race than Ms. Mark.

69. The evidence also demonstrated that Brow Art 23 was responsible for a hostile work environment under the theory of direct and vicarious liability. Ms. Mark, who was responsible for the hostile work environment, was an employee of Brow Art 23. Despite numerous efforts and attempts by Petitioner to request Ms. Mark to stop her behavior, the hostile work environment continued. Petitioner's complaints, both written via email and text, and oral, to Ms. Malak and Ms. Marcano, were not resolved. The evidence demonstrates that Ms. Mark

understood how her use of the racial epithet would impact Ms. Logan.

Legitimate Non-Discriminatory Reason

70. Petitioner alleges that she was suspended from employment with Brow Art 23, which is an adverse employment action.

71. The burden now shifts to Respondent to proffer a legitimate reason for the adverse employment action. Assuming Respondent does proffer a legitimate reason for the adverse employment action, the burden then shifts back to Petitioner to prove by a preponderance of the evidence that the "legitimate reason" is merely a pretext for the prohibited, retaliatory conduct. Russell v. KSL Hotel Corp., 887 So. 2d 372 (Fla. 3d DCA 2004) (citing Sierminski v. Transouth Fin. Corp., 216 F.3d 945, 950 (11th Cir. 2000)).

72. Respondent's proffered legitimate nondiscriminatory reason for suspending Ms. Logan was the incident with Ms. Mark on August 17, 2016, and Ms. Logan's alleged refusal to participate in the investigation of the incident. The bases relied upon by Respondent are not supported by the evidence.

73. Despite receiving discrimination and harrassment complaints about Ms. Mark, Brow Art 23 accepted Ms. Mark's description of the incident over two other employees, one of which was a neutral observer. Furthermore, Ms. Logan was not

arrested even though there was police involvement. Based on the totality of the facts and circumstances, there was insufficient evidence to demonstrate that the suspension for the August 17, 2016, incident was a legitimate non-discriminatory basis for the adverse employment action.

74. Brow Art 23 also asserts that Ms. Logan's inability to return to work was her unwillingness to participate in the August incident investigation. To the contrary, the preponderance of evidence demonstrates that Ms. Malak had suspended Ms. Logan for the incident that occurred on August 17, 2016. Ms. Logan did not refuse to participate in the incident investigation but rather, she requested that her counsel be present during the interview. Petitioner's request was not an unreasonable request given the nature of the allegations and her acrimonious history with Ms. Mark.

75. Moreover, the evidence demonstrates that there were at least two occasions when Ms. Mark allegedly used the term "nigger" when she was aware that use of the racial epithet was offensive to Ms. Logan, an African-American. The other issue specifically related to any form of racial animus consisted of Ms. Mark's use of the phrase "you people." She used the phrase approximately 10 times within a seven-month period.

76. Petitioner carried her burden of persuasion necessary to state a prima facie case for her claim of a hostile work

environment based on Petitioner's race and that she was suspended from her position as a threader at Brow Art 23. Brow Art 23 failed to offer or prove a legitimate, nondiscriminatory reason for its actions.

Back Pay

77. As Petitioner brought this action as an administrative proceeding pursuant to section 760.11(7), Florida Statutes, the relief she is entitled is authorized under the same section, which provides in pertinent part: If the administrative law judge finds that a violation of the FCRA 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.

78. In accordance with section 760.11(6) and federal case law, Petitioner is "presumptively entitled to back pay." Weaver v. Casa Gallardo, Inc., 922 F.2d 1515, 1526 (11th Cir. 1991)(superseded by statute on other grounds).

79. As noted in the Findings of Fact above, Petitioner experienced a loss in pay totaling $34,690.[6/]

80. Respondent asserts that Petitioner failed to mitigate her damages. Based on the circumstances, Petitioner appropriately sought suitable employment. Ms. Logan offered evidence of positions she held and the reasonable bases for her separation from those positions. Moreover, the non-compete

agreement hampered her ability to work in the area in which she was licensed without causing undue hardship (i.e., moving out of the area or traveling a long distance). As Respondent asserted in its PRO, Ms. Logan has the freedom to select the desired field in which she works. In this matter, her ability to mitigate damages was limited due to the non-compete agreement.

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:

1. Finding that Respondent constructively discharged Asha J. Logan by suspending her indefinitely and subjecting her to a hostile work environment based on Petitioner's race;

2. Ordering Respondent to pay Petitioner $34,690.00 in back pay through the final date of the hearing, February 2, 2018, with interest accruing on the total amount at the applicable statutory rate from the date of the Commission's final order;

3. Ordering Brow Art 23 to make arrangements to reinstate Petitioner to an equivalent position with Brow Art 23;

4. Prohibiting any future acts of discrimination by Brow Art 23; and

5. Award Petitioner attorneys' fees and costs.

Jurisdiction is reserved for a determination of the specific amount of attorneys' fees and cost to be awarded.

DONE AND ENTERED this 23rd day of May, 2018, in Tallahassee, Leon County, Florida.

YOLONDA Y. GREEN
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 23rd day of May, 2018.

ENDNOTES

[1/] Unless otherwise indicated, all references to the Florida Statutes, Florida Administrative Code, and federal laws are to the 2016 versions, which have not substantively changed since the time of the alleged discrimination.

[2/] During the final hearing, there were several references to Ms. Malak as the assistant store manager. However, based on her job description and responsibilities, she was the store manager.

[3/] Egypt is located in North Africa. Persons having origins in Europe, the Middle East, or North Africa are considered white. See Office of Mgmt. & Budget, Executive Office of the President, Revised Statistical Policy Directive No. 15, 62 Fed. Reg. 58,782, 58,789 (Oct. 30, 1997).

[4/] Despite the title of store manager, Ms. Malak was based in Puerto Rico, with communications with store employees accomplished electronically.

[5/] Ms. Ablaza is Asian.

[6/] Petitioner minimized the amount owed for back pay by securing other employment. Champion Int'l Corp. v. Wideman, 733 So. 2d 559, 562 (Fla. 1st DCA 1999)(plaintiff in employment discrimination suit required to minimize damages by attempting to find suitable employment).

COPIES FURNISHED:

Tammy S. Barton, Agency Clerk
Florida Commission on Human Relations
Room 110
4075 Esplanade Way
Tallahassee, Florida 32399-7020
(eServed)

Anthony Caruso, Esquire
Wessels Sherman
The Dunham Center
2035 Foxfield Road
St. Charles, Illinois 60174

Tracey D. Robinson-Coffee, Esquire
Law Office of Tracey Robinson-Coffee
Post Office Box 18305
Pensacola, Florida 32523
(eServed)

Jason Curtis Taylor, Esquire
McConnaughhay, Duffy, Coonrod,
Pope, and Weaver, P.A.
1709 Hermitage Boulevard, Suite 200
Tallahassee, Florida 32308
(eServed)

Cheyanne Costilla, General Counsel
Florida Commission on Human Relations
4075 Esplanade Way, Room 110
Tallahassee, Florida 32399
(eServed)

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.