STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DENISE JAMES,

Petitioner,

vs. Case No. 18-4090

MILOS,

Respondent.
_____/

RECOMMENDED ORDER

This case was heard before Administrative Law Judge Robert L. Kilbride of the Division of Administrative Hearings on August 29, 2018, by video teleconference with sites in Tallahassee and Miami, Florida.

APPEARANCES

For Petitioner: Denise James, pro se
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For Respondent: Jennifer A. Schwartz, Esquire
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STATEMENT OF THE ISSUE

Whether Respondent, Milos, illegally terminated Petitioner based on her race (Black), in violation of the Florida Civil Rights Act ("FCRA"), section 760.10, Florida Statutes (2018).

PRELIMINARY STATEMENT

On December 8, 2017, Denise James ("Petitioner") filed a Charge of Discrimination ("Charge") against Milos ("Respondent" or "Milos") with the Florida Commission on Human Relations ("FCHR"). In her Charge, Petitioner alleged that she was terminated from employment because of her race.[1/]

On January 29, 2018, Respondent submitted its Position Statement, which explained that Petitioner was terminated from employment on September 21, 2017, after she failed to call in or report for work, without explanation, for seven consecutive days following Hurricane Irma's landfall in South Florida.

The FCHR investigated the Charge, and on June 28, 2018, "determined that no reasonable cause exists to believe that an unlawful practice occurred."

Taking exception to this determination, Petitioner filed a Petition for Relief on August 1, 2018, to request an administrative hearing concerning FCHR's determination.

FCHR referred the matter to the Division of Administrative Hearings to conduct a hearing and the case was assigned to the undersigned, Robert L. Kilbride.

On August 29, 2018, a final hearing was held before the undersigned.

At the hearing, sworn testimony was offered by the parties. Petitioner testified on her own behalf. Milos called as witnesses

Arman Arsan ("Arsan"), head chef at Milos, and Karla Faundez ("Faundez").

At the hearing both parties admitted exhibits into evidence. Petitioner admitted Exhibits 1 and 3 through 5. Respondent admitted Exhibits 1 through 23.

The undersigned directed the parties to submit proposed recommended orders within ten days of receipt of the Transcript of the final hearing.

Petitioner submitted a short handwritten letter. Respondent filed a proposed recommended order. Both were given due consideration by the undersigned in the preparation of this Recommended Order.

All references herein to the Florida Statutes refer to the 2017 version, unless otherwise noted.

FINDINGS OF FACT

The undersigned makes the following findings of material and relevant fact:

1. Petitioner is a Black female who worked for Milos as a line cook.

2. Respondent is a Greek restaurant located in Miami, Florida.

3. On January 12, 2016, Respondent hired Petitioner for a line cook position. Petitioner was interviewed and hired by Arsan.

4. Arsan supervises all back-of-the-house staff and was Petitioner's supervisor throughout her entire 20-month period of employment.

5. On May 30, 2016, approximately four and a half months after Petitioner's hire at Milos, Arsan gave Petitioner a raise in pay because he felt that she was performing well.

6. Many of the employees Arsan supervises at Milos are Black.

I. PETITIONER'S PERFORMANCE ISSUES AT MILOS

7. On September 23, 2016, Petitioner was suspended for insubordination and violating company policies and procedures. Resp. Ex. 7 and 8.

8. More specifically, Arsan was notified by the sous chef that there had been an argument between Petitioner and a coworker. Arsan attempted to investigate the dispute and found Petitioner to be very emotional and aggressive during the investigation. She was asked to leave but refused. Eventually, she left the premises.

9. This incident came on the heels of another similar incident involving a verbal argument with a coworker, which occurred on September 17, 2016.

10. Subsequently, on April 28, 2017, Petitioner was involved in another workplace argument with an employee named Rosa Salazar

("Salazar"). Resp. Ex. 10. The manager on duty intervened and attempted to resolve the dispute and calm the parties down. After he did so, Petitioner left work without permission and left early the following day as well.

11. On June 27, 2017, a third employee named Ishay (a.k.a., Ayse Akbulut) complained that she could not work with Petitioner at their assigned station because Petitioner was "being rude and territorial." Resp. Ex. 11.

12. Arsan spoke to Petitioner and resolved the matter between the two employees. However, he documented the incident as other employees had previously complained about Petitioner creating a hostile working environment.

13. On June 30, 2017, Petitioner reportedly was involved in yet another workplace incident with Sonya Cabret ("Cabret"). Cabret complained that Petitioner made racially charged and demeaning comments to her based on Cabret's Haitian national origin.

14. More specifically, Cabret complained that Petitioner called her an "ignorant Haitian," a "f___ing Haitian," and stated that Cabret does not know how to speak English and that Cabret could not find a job anywhere else.

15. Two months prior, Salazar had also complained that Petitioner made derogatory remarks to her based on Salazar's Latin ethnicity. Resp. Ex. 12 and 13.

16. Salazar recounted that Petitioner had called her a "f____ing Latino." Arsan disciplined Petitioner by counseling her and sending her home for the day.

17. Each of the above incidents occurred prior to Hurricane Irma in September 2017.

18. The undersigned finds that these incidents, and their related warnings and discipline, are relevant to the ultimate decision to discharge Petitioner and have some bearing on the propriety and necessity for termination.

II. PETITIONER'S FAILURE TO RETURN TO WORK AFTER HURRICANE IRMA

19. At some point in time on Wednesday, September 6, 2017, Arsan informed all employees that Milos would be closed at the end of the work day due to the approaching landfall of Hurricane Irma.

20. Petitioner had been scheduled to report to work on September 6, 2017, at 10:00 a.m., but she did not do so.

21. At 12:40 p.m. on September 6, 2017, Petitioner texted Arsan that she could not report to work because she was evacuating to Georgia due to Hurricane Irma. However, she hoped to return to work the following Tuesday (September 12, 2017). Resp. Ex. 14.

22. After the hurricane had passed, on September 10, 2017, Arsan sent a group text message to all back-of-the-house staff alerting them that the restaurant was "closed for Monday" (September 11, 2017) and "we will be probably open for Tuesday" (September 12, 2017). Resp. Ex. 15.

23. Petitioner received this text message.

24. Petitioner never informed Arsan that she would not be back from Georgia by September 12, 2017, as she mentioned in her text message on September 6, 2017.

25. Believing Petitioner would be back in Miami on September 12, 2017, Arsan scheduled Petitioner to work Wednesday, September 13, 2017. Resp. Ex. 16.

26. On September 13, 2017, Petitioner did not call in or report for work.

27. That same day, Arsan called Petitioner to find out why she did not report to work. Petitioner did not answer or return Arsan's call.

28. On September 14, 2017, Petitioner again failed to call in or report for work.

29. Arsan again attempted to reach Petitioner by telephone, but she did not answer.

30. Arsan then sent Petitioner a text message notifying her that she was scheduled to be at work.

31. Petitioner responded to Arsan's text messages on September 14, 2017, and the following discussion ensued:

> Arsan: "Denise you are scheduled to work today[.]"
>
> Petitioner: "Nobody called me and told me anything I cannot get out until Tuesday or Wednesday I'll [sic] area was hit bad and the

bus is [sic] down here start running Wednesday[.]"

Arsan: "Denise everybody is at work except you. How the bus starting [sic] on wednesday, [sic] half of staff is using the bus and they are here, The buses working [sic] fine."

Petitioner: "When you come to my family I don't care about no job [sic] that's not my life we had an emergency down here we don't have any lights some of the buses is not running my house got water in it I am coming from Georgia so I might not be back until Thursday I have a lot of stuff to take care of in my house[.]"

Arsan: "Please help let [sic] me understand your situation are you in Miami? or Georgia?

Petitioner: I will be in Miami tonight I still have a lot of stuff to do at my. . . .

Resp. Ex. 14.

32. Arsan and Petitioner did not have any further communications after this text message exchange. Further, Petitioner did not initiate or attempt to send any more text messages to Arsan after the September 14, 2017, exchange.

33. Petitioner did not report for work scheduled on September 15, 16, 17, 18, 19, or 20.

34. Petitioner testified that she did not report to work from September 13, 2017, to September 20, 2017, because she was attending to damage to her home caused by the hurricane.

35. Based on Petitioner's text message that she does not "care about no job [sic]," Arsan, after consulting with Milos'

outside contracted human resource company, removed Petitioner from the schedule for the week of Monday, September 18, 2017, to Sunday, September 24, 2017.

36. On September 21, 2017, Petitioner showed up at Milos to work.

37. Arsan believed Petitioner had abandoned her job and did not expect her to report to work again.

38. After she arrived, Arsan directed Petitioner to speak to Faundez, Milos' outside human resource representative at Eleva Solutions.

39. Contrary to what Petitioner told Arsan (i.e., that she missed work because she was attending to damage in her home from the hurricane), Petitioner gave Faundez three different reasons for her failure to call in or show up for work the preceding week: (a) she did not know that she was supposed to be at work; (b) there was no bus transportation; and (c) Petitioner had to be evacuated.

40. Faundez concluded that Petitioner's reasons for failing to appear for work were inconsistent and conflicted with each other. She also did not believe that Petitioner had provided a definitive or plausible answer explaining why she had not returned to work.

41. After consultation, Faundez and Arsan decided together to terminate Petitioner's employment.

42. Arsan was not the sole decision-maker with respect to Petitioner's termination.

43. Prior to her termination and despite having received Respondent's antidiscrimination policy and complaint procedures, Petitioner never complained that Arsan was discriminating against her because of her race.

44. During the course of the hearing, Petitioner was unable to identify any employee(s) outside of her protected class who engaged in the same conduct and were not terminated from employment.

45. Specifically, on cross-examination, Petitioner admitted that she was unable to identify a single non-Black employee who failed to show up for work following the hurricane and who was not terminated from employment.

46. The evidence Petitioner offered to support her race discrimination claim was vague, unpersuasive, and included only conclusory and general allegations by her that Arsan "was a racist" and is a "nasty human being."

47. There were no emails, texts, documents, or other direct evidence from Petitioner or Arsan supporting her claim that she was fired by Milos because of her race. Likewise, Petitioner called no witnesses to offer any compelling facts or circumstances to support her claim.

CONCLUSIONS OF LAW

48. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the parties pursuant to sections 120.569, 120.57(1), and 760.11, Florida Statutes (2018).

49. Under Title VII, it is unlawful for an employer "to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race . . . ." 42 U.S.C. § 2000e-2(a)(1).

50. The FCRA likewise prohibits discrimination in the workplace. Among other things, the FCRA makes it unlawful for an employer "[t]o discharge . . . or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race . . . ." § 760.10(1)(a), Fla. Stat.

51. Claims under the FCRA are subject to the same substantive law and legal standards as claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e; Johnson v. Great Express Dental Ctrs. of Fla., P.A., 132 So. 3d 1174, 1176 (Fla. 3d DCA 2014); and Wilbur v. Corr. Servs. Corp., 393 F.3d 1192, 1195 n.1 (11th Cir. 2004). See also Byrd v. BT Foods, Inc., 26 So. 3d 600, 605 (Fla. 4th DCA 2009).

METHODS OF PROOF

52. Racial discrimination prohibited by Title VII and the FCRA can be proven one of two ways: either through (1) direct evidence that an employer intended to discriminate against an individual because of his or her race or (2) through circumstantial evidence. Hill v. Metro. Atlanta Rapid Transit Auth., 841 F.2d 1533, 1539 (11th Cir. 1987), modified by, 848 F.2d 1522 (11th Cir. 1988).

53. "[O]nly the most blatant remarks whose intent could be nothing other than to [discriminate/retaliate]" constitute direct evidence. See Carter v. City of Miami, 870 F.2d 578, 582 (11th Cir. 1989).

54. In this case, Petitioner submitted no persuasive or credible direct evidence of racial discrimination.

55. Petitioner, no doubt, had a strong belief about Arsan's motives, but presented no direct testimonial or documentary evidence to support her claim that Arsan was motivated by racial discrimination. For instance, there were no emails, texts, or credible statements from Arsan or other management level supervisors at Milos that Arsan or Milos intended to discriminate against Petitioner because of her race.

56. As a result, her race discrimination claim must be analyzed under the second method--circumstantial evidence--to determine if she made out a prima facie case. See McDonnell

Douglas Corp. v. Green, 411 U.S. 792, 802-803 (1973); See also Texas Dept. of Cmty. Aff. v. Burdine, 450 U.S. 248 (1981); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993); Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133 (2000).

57. To prove a discrimination case by circumstantial evidence, Petitioner must first establish a prima facie, or legally sufficient, case of discrimination. Sims v. MVM, Inc., 704 F.3d 1327, 1333 (11th Cir. 2013).

58. If Petitioner establishes a prima facie case, the burden then shifts to Respondent to produce a legitimate nondiscriminatory reason for the adverse employment action or termination. Burdine, 450 U.S. at 248, 254.[2/]

59. If a prima facie case has been established and the employer offers a legitimate nondiscriminatory reason for the termination, the burden then shifts back to Petitioner to show that the nondiscriminatory reason given for her firing is a pretext or just made up. Petitioner may accomplish this "by showing that the employer's explanation is unworthy of credence." Reeves, 530 U.S. at 143 (citing Burdine, 450 U.S. at 256).

THE ELEMENTS OF RACE DISCRIMINATION

60. The elements necessary to prove a case of race discrimination are simple and straightforward. Petitioner has the burden to establish, by a preponderance of the evidence, the following elements: (1) that she is a member of a protected

class; (2) that she was subjected to an adverse employment action; (3) that she was qualified for the job at issue; and (4) that she was treated less favorably than a similarly situated individual outside her protected class. Maynard v. Bd. of Regents, 342 F.3d 1281, 1289 (11th Cir. 2003). See also Coles v. Post Master Gen. U.S. Postal Servs., 711 Fed Appx. 890 (11th Cir. 2017).

61. The undersigned concludes that Petitioner's race discrimination claim fails as a matter of law because she did not establish the fourth element of her prima facie case.

62. The first and second elements of the Maynard test were proven and require no detailed discussion.

63. Contrary to the position taken by Milos, Petitioner satisfied the third element needed to make out a prima facie case of race discrimination.

64. Regarding what evidence is required for a plaintiff to satisfy the third qualification element of the prima facie test, the law is explicit. At the prima facie stage, a court should focus on a plaintiff's objective qualifications to determine whether he or she is qualified for the relevant job. Wexler v. White's Fine Furniture, 317 F.3d 564 (6th C.A. 2003).

65. The prima facie burden of showing that Petitioner was qualified for the job is met by presenting credible evidence that

her qualifications are at least equivalent to the minimum objective criteria required for employment in the relevant field. Id.

66. Petitioner demonstrated that she possessed the required general skills for the job as line cook. Based on the evidence concerning her hiring, tenure, job responsibilities, and the raise she received, the undersigned concludes that she made out a prima facie case that she was qualified for the job, as that phrase is intended by Title VII and the FCRA.

67. As to the fourth element, however, Petitioner fell far short of the proof required. Under the fourth element of Maynard, Petitioner was required to prove that she was treated less favorably than a similarly situated individual outside her protected class.

68. A similarly situated employee or comparator must be similarly situated in all relevant aspects. Trask v. Sec'y, Dep't of Vets' Aff., No. 15-11709, 2016 U.S. App. LEXIS 6168, (11th Cir. 2016). "The comparator must be 'nearly identical' to [Petitioner] to prevent courts from second guessing a reasonable decision by the employer." Id.

69. Petitioner did not identify any non-Black employee comparators (White or Hispanic) who failed to call in or timely return to work following Hurricane Irma, and who were not terminated from employment. Put a different way, there was no

proof that a White or Hispanic failed to return to work after the hurricane like she did, but was not terminated.

70. Petitioner's failure to identify a single comparator who did the same and was treated more favorably is fatal to her claim. See, e.g., Peters v. HealthSouth of Dothan, Inc., 542 Fed. Appx. 782, 785 (11th Cir. 2013) (affirming district court's finding that plaintiff "had not established a prima facie case for disparate treatment based on her termination because she failed to identify a valid comparator outside her race that was treated more favorably").

71. As a result, Petitioner did not establish a prima facie case of race discrimination, and her claim fails as a matter of fact and law.

72. Even if Petitioner had established a prima facie case of discrimination, Respondent convincingly established a legitimate, nondiscriminatory reason for the termination of her employment: Petitioner's failure to return to work for seven consecutive days following Milos' reopening after Hurricane Irma, her conflicting reasons for her failure to return to work, and her text message to Arsan stating "I don't care about no job [sic] that's not my life."

73. The undersigned concludes that under the circumstances surrounding her absence--her failure to stay in touch and her failure to report for scheduled work--Arsan and Faundez credibly

concluded that her text message was either (1) a voluntary resignation by her or (2) was sufficient cause to terminate her.

74. To be clear, Petitioner did not present a prima facie case of racial discrimination, and the analysis ended there. Mathew v. Va. Union Univ., 1992 U.S. App. LEXIS 5540 (4th Cir. 1992).

75. However, even if she had presented a prima facie case of race discrimination, Respondent established a legitimate nondiscriminatory reason for Petitioner's termination, and the burden of production would have shifted back to Petitioner to "introduce significantly probative evidence showing that the asserted reason is merely a pretext or made up excuse for discrimination." Zaben v. Air Prods. & Chems., Inc., 129 F.3d 1453, 1457 (11th Cir. 1997). Petitioner failed to do so.

76. In short, Petitioner failed to prove that the reasons asserted by Respondent for terminating her were a pretext or made up. Hicks, 509 U.S. at 502; Conner v. Ft. Gordon Bus. Co., 761 F.2d 1495, 1500 (11th Cir. 1985).

77. In this case the undersigned also considered that there is a permissible inference against finding discrimination since Arsan had been the decision-maker with regard to Petitioner's hire, pay increase, and termination. Williams v. Vitro Servs. Corp., 144 F.3d 1438, 1442 (11th Cir. 1998) (stating the "same actor" factual scenario "may give rise to a permissible inference

that no discriminatory animus motivated" the decision-maker's actions); Robinson v. Alutiiq-Mele, LLC, Case No. 07-20778-CIV-GOLD/McALILEY, 2008 U.S. Dist. LEXIS 33341, (S.D. Fla. 2008) ("Where as here, the same individual who hired or promoted the plaintiff is the one who fires or demotes him, there is an inference that the decision was not motivated by discriminatory animus.").

78. It is important for the parties to understand a simple point about workplace terminations: in evaluating claims of discrimination in the workplace, courts do not sit as a super-personnel department that reexamines a company's business decisions. Davis v. Town of Lake Park, Fla., 245 F.3d 1232, 1244 (11th Cir. 2001). Whether an employment decision was prudent, just, or fair is immaterial, because an 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).

79. Further, an employee may not recast the employer's proffered nondiscriminatory reasons or substitute her business judgment for that of the employer. Chapman v. AI Transport, et al., 229 F.3d 1012, 1030 (11th Cir. 2000). Provided that the reason offered by Milos is one that might motivate a reasonable employer to terminate an employee (failure of Petitioner to report

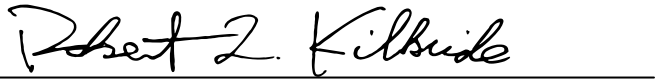
back to work after the hurricane), Petitioner had to meet that reason head on and rebut it. Petitioner failed to do so. The employee cannot succeed by simply quarreling or disagreeing with the wisdom of that decision. Id.

80. Finally, while Arsan's and Faundez's decision to terminate Petitioner may seem unfair, callous, or even unjustified, this does not convert an otherwise permissible termination into an unlawful or illegal termination. Zook v. Benada Aluminum Fla., Inc., Case No. 15-5538, 2016 Fla. Div. Admin. Hear. LEXIS 30, at *19 (Fla. DOAH Jan. 27, 2016)(recommending dismissal of petitioner's claims because while the termination "may seem unfair, abrupt, or even unjustified, this does not convert an otherwise legitimate termination into an unlawful or illegal termination").

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations dismiss Petitioner's Petition for Relief with prejudice and find in Respondent's favor.

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



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

ENDNOTES

[1/] Milos' correct legal name is "Milos by Costas Spiliadis, Inc."

[2/] Significantly, however, if a prima facie case is not established by Petitioner, the inquiry ends and a ruling should be entered for the employer. No further proof is required. Kidd v. Mando Am. Corp., 731 F.3d 1196, 1202 (11th Cir. 2013); and Mathew v. Va. Union Univ., 1992 U.S. App. LEXIS 5540 (4th Cir. 1992).

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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.