STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FRANCES B. SCHLEIN,

Petitioner,

vs. Case No. 18-6246

WORKING AMERICA,

Respondent.
_____/

RECOMMENDED ORDER

On March 25, 2019, Administrative Law Judge Hetal Desai of the Division of Administrative Hearings (DOAH) conducted the final hearing in this matter by video teleconference with locations in Altamonte Springs and Tallahassee, Florida.

APPEARANCES

For Petitioner: Frances Schlein, pro se
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For Respondent: Kathleen M. Keller, Esquire
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STATEMENT OF THE ISSUE

Whether Respondent, Working America, discriminated against Petitioner, Frances B. Schlein, based on her religion, race, and/or nationality (Jewish/Hebrew) when it did not hire her, in violation of the Florida Civil Rights Act (FCRA).

PRELIMINARY STATEMENT

On October 18, 2018, the Florida Commission on Human Relations (the Commission) rendered a "Determination: No Reasonable Cause" against Ms. Schlein, finding there was no reasonable cause to support her claims that she was not hired by Working America because of her religion.[1/] Ms. Schlein filed a Petition for Relief on November 26, 2018, alleging discrimination by Working America against her based on her "ethnic Jewish Hebrew features," and her surname.

The Commission transmitted the Petition to DOAH, where it was assigned to the undersigned and noticed for a final hearing. After two continuances, the final hearing was held on March 25, 2019.

Petitioner presented her own testimony and one additional witness: Roberto Velazquez. Respondent offered the testimony of Angel Darcourt, who also served as its corporate representative. No exhibits were offered into evidence.

The Transcript was filed with DOAH on January 28, 2019. Ms. Schlein requested and was granted two extensions, making the proposed recommended orders (PROs) due on May 31, 2019. Respondent timely filed its PRO, but Ms. Schlein did not.

Instead she filed her PRO, along with a letter explaining the delay, on June 3, 2019. The undersigned treats the letter as a motion to accept the late-filed PRO. On June 18, 2019,

Respondent filed Exceptions to Petitioner's Proposed Recommended Order, which the undersigned treats as a response to the motion to accept Petitioner's late-filed PRO. Because Respondent's objection was not filed in the time allotted by Florida Administrative Code Rule 28-106.204(1), the undersigned has accepted Petitioner's PRO, and reviewed all post-hearing submittals by the parties.

Unless otherwise indicated, all statutory and administrative rule references are to the 2016 version of the Florida Statutes and Florida Administrative Code.

FINDINGS OF FACT

1. Ms. Schlein applied for the position of canvasser in July 2016 with Working America. Ms. Schlein's religion is Judaism, but she also considers being Jewish a part of her national origin and race.[2/]

2. Working America is a non-profit organization focusing on economic issues such as jobs, education, healthcare, retirement security, and corporate accountability. It is an "employer" as defined by section 760.02(7), Florida Statutes (2016).

3. In July 2016, Angel Darcourt served as a field director for Working America in Orlando, Florida. As a field director, Ms. Darcourt had authority to hire employees for Working

America. Working America originally hired Ms. Darcourt for the canvasser position——the same job Petitioner had applied for.

4. Although not offered as an exhibit, Ms. Darcourt testified Working America has an equal employment opportunity (EEO) policy, which "is against discrimination." Working America's EEO policy encourages people of all backgrounds, including women, "people of color," and people who are LGBTQ (lesbian, gay, bisexual, transgender, or queer) to apply for positions. This EEO policy is included in all advertisements.

Job Duties of a Canvasser

5. Working America is a canvassing organization which conducts community outreach. In July 2016, Working America was hiring employees to canvass on behalf of the 2016 Democratic presidential candidate. This involved going to door-to-door to engage people in conversations about what issues they were concerned about in the presidential election, and then sharing information about the Working America's candidate's views on that issue.

6. In the Orlando area, Working America was seeking to reach out and spread information in neighborhoods on the Democratic candidate's views on immigration policy. As explained by Ms. Darcourt, this was a "hot button" issue in the 2016 presidential campaign given the Republican candidate's

promise to build a wall to prevent illegal immigration across the United States-Mexico border.

7. The job of "canvasser" for Working America was to interact with the public, inform them of a candidate's position, and leave a positive impression of that candidate in hopes to garner support and a vote in the upcoming election. Canvassers work without direct supervision. Therefore, the ability to speak without assistance about political issues in a tactful and non-offensive way is a basic qualification for the position.

8. In 2016, Working America was also trying to "spread the message" regarding the Democratic presidential candidate, so it was imperative Working America canvassers use the right talking points and terminology when discussing the candidate's position on various issues.

The Hiring Process

9. Applicants for the canvasser position could indicate interest in working for Working America by clicking on an electronic link via on-line advertisements. An interested candidate could enter his or her information, and then would be contacted by phone by a Working America employee. Alternatively, an applicant could call or apply to Working America directly.

10. Once Working America made telephone contact with the applicant, it would screen the applicant to ensure he or she was

comfortable going door-to-door, could work the necessary hours, and was in support of the Democratic presidential candidate.

11. If the applicant was approved after an initial phone screening, Working America would bring the applicant in for a face-to-face interview with a field director.

12. The field director then interviewed the candidate to determine if he or she would be good for the canvassing position. If he or she thought the candidate was acceptable, the applicant would be offered a background check form, before a second interview.

13. The second interview consisted of shadowing a field manager, and ultimately participating in door-to-door canvassing. The field manager would then make a recommendation regarding the candidate to a field director.

14. The field director would make the ultimate decision to hire.

The Interview

15. Ms. Schlein visited the Orlando office of Working America with two other applicants: Robert Velazquez and Robert Diaz. It is unclear if any of these three individuals had gone through the initial phone screening before coming to Working America's office.

16. Regardless, upon arrival to the office, the three were greeted by Ms. Darcourt and a conversation ensued in both

Spanish and English. Ms. Darcourt asked the trio where they were from. Mr. Velazquez indicated he was from Puerto Rico; Mr. Diaz said he was from Cuba; and Ms. Schlein said she was from Bronx, New York. Ms. Darcourt then gave all three an application to fill out, and proceeded to interview them separately.

17. Ms. Darcourt's interview with Ms. Schlein did not go well. At some point the discussion turned to immigration policy. Ms. Darcourt indicated she was half-Cuban and half-Mexican. Ms. Schlein responded that her family were also immigrants, but emphasized the fact that her family immigrated to the United States legally.

18. Ms. Schlein went on to use the word "illegals" to describe Mexican immigrants. Specifically, Ms. Schlein stated she did not like the Republican presidential candidate, but that she "agreed with him on the illegals." She also indicated she understood Cubans needed asylum, but did not understand why Mexicans could not come here legally.

19. Ms. Darcourt immediately informed Ms. Schlein that using the word "illegals" to describe humans was inappropriate. Either Ms. Darcourt suggested Ms. Schlein do some research on Mexican immigration, or Ms. Schlein indicated she would do some research on the issue.

20. Regardless, both parties had negative reactions to the conversation. Ms. Darcourt found Ms. Schlein's use of the word "illegals" personally offensive. In turn, Ms. Schlein felt anger from Ms. Darcourt during the interview.

21. Ms. Schlein's conduct at the interview raised concerns with Ms. Darcourt of how she might act if hired and was working unsupervised. Ms. Darcourt believed this kind of language, or agreeing with the Republican candidate's views on immigration during canvassing, would be counterproductive to garnering support for the Democratic candidate promoted by Working America.

22. Ms. Darcourt was also concerned that Ms. Schlein's language and position on immigration policy would offend some of the other Working America employees, who were immigrants or whose families had recently immigrated to the United States.

23. Ms. Darcourt's concerns are validated by Ms. Schlein's demeanor and testimony at the hearing. Although Ms. Schlein may not have intended to be offensive, Ms. Schlein's statements regarding Mexicans, "gay," "black," and other minorities lead to the conclusion, at the very least, that she is unaware these statements may be perceived as insulting.

24. Ms. Darcourt made the decision not to give Ms. Schlein a second interview. At the end of the interview, she informed Ms. Schlein she would call her if she thought she would be a

good fit. Ms. Darcourt never called Ms. Schlein, even though, according to Mr. Velazquez, who was hired and began working for Working America, it was still looking for canvassers.

25. A few weeks later, Ms. Schlein contacted Ms. Darcourt to let her know she had researched the immigration issue. Although there is a dispute about the language used by Ms. Schlein, there is no dispute Ms. Schlein conveyed that she believed Ms. Darcourt was unqualified to be in a management position, and questioned whether Working America employees who were from other countries or ethnicities had been properly vetted.

26. Ms. Schlein admits Ms. Darcourt never asked about her religion, nor was there any discussion at any time about the fact she was Jewish.

27. As evidence of discrimination, Ms. Schlein claims Ms. Darcourt gave her "dirty looks" and "the silent treatment," while she was friendly to other employees. Even if true, there is no evidence Ms. Darcourt's conduct was based on the fact Ms. Schlein is Jewish.

28. Mr. Velazquez also testified Ms. Darcourt was "not friendly" toward Ms. Schlein, but was "friendly" toward him and Mr. Diaz. His testimony, however, was conclusory and unreliable. He could not provide any details of specific conduct and stated his "memory's not too good." Additionally,

Mr. Velazquez admitted on cross-examination he is in a personal relationship and lives with Ms. Schlein. More importantly, his conclusion about Ms. Darcourt's feelings toward Ms. Schlein was based on a single interaction he witnessed when they initially arrived at the Working America office. He was not present during the interview.

29. There was also testimony about an employee known only as Layla, who was allegedly mistreated by the Working America management. It is unclear when or what position Layla held at Working America, but she was described as being Jewish, from a Muslim country, who spoke Spanish. Ms. Schlein admitted she had never met this employee and had only spoken with her on the phone; Mr. Velazquez's knowledge regarding this employee was entirely secondhand. The undersigned cannot base any finding of fact based on this testimony as it is anecdotal and entirely based on hearsay. See § 120.57(1)(c), Fla. Stat.[3/]

30. The undersigned finds Working America did not hire Ms. Schlein based on her poor interview, and not based on the fact she was Jewish.

CONCLUSIONS OF LAW

31. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this cause pursuant to sections 120.569, 120.57(1), and 760.11(7), Florida Statutes. See Fla. Admin. Code R. 60Y-4.016.

32. The FCRA protects individuals from discrimination in the workplace. See §§ 760.10 and 760.11, Fla. Stat. Section 760.10 states, in pertinent part:

> (1) It is an unlawful employment practice for an employer:
>
> (a) To discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status. (emphasis added).

33. Because the FCRA is patterned after Title VII of the Civil Rights Act of 1964, as amended (Title VII), Florida courts are guided by federal decisions construing Title VII when considering claims under the FCRA. See In re Standard Jury Instructions in Civil Cases—Report No. 16-01, 214 So. 3d 552, 555 (Fla. 2017) ("Florida courts have endorsed the general rule that, because the FCRA was patterned after Title VII, the Florida statute should be given the same construction as the federal courts give the federal act."); Carsillo v. City of Lake Worth, 995 So. 2d 1118, 1119 (Fla. 4th DCA 2008) (finding FCRA should be construed the same as Title VII with regard to pregnancy discrimination protections).

34. The burden of proof in an administrative proceeding is on Ms. Schlein as the complainant. See Dep't of Banking & Fin., Div. of Sec. & Investor Prot. v. Osborne Stern & Co., 670 So. 2d

932, 935 (Fla. 1996) ("The general rule is that a party asserting the affirmative of an issue has the burden of presenting evidence as to that issue."). To show a violation of the FCRA, Ms. Schlein must establish, by a preponderance of the evidence, a prima facie case of discrimination. See St. Louis v. Fla. Int'l Univ., 60 So. 3d 455, 458-59 (Fla. 3d DCA 2011).

35. "Preponderance of the evidence" is the "greater weight" of the evidence, or evidence that "more likely than not" tends to prove the fact at issue. This means that if the undersigned found the parties presented equally competent substantial evidence, Ms. Schlein would not have proved her claims by the "greater weight" of the evidence, and would not prevail. See Gross v. Lyons, 763 So. 2d 276, 289 n.1 (Fla. 2000). In an FCRA case, the petitioner may meet this burden by presenting direct evidence of discrimination, or circumstantial evidence that creates an inference of discrimination. See Tseng v. Fla. A&M Univ., 380 Fed. App'x 908, 909 (11th Cir. 2010).

36. Direct evidence is evidence that, if believed, would prove the existence of discriminatory intent behind an employment decision without any inference or presumption. Denney v. City of Albany, 247 F.3d 1172, 1182 (11th Cir. 2001). Courts have held that "'only the most blatant remarks, whose intent could be nothing other than to discriminate . . .' will constitute direct evidence of discrimination." Damon v. Fleming

Supermarkets of Fla., Inc., 196 F.3d 1354, 1358-59 (11th Cir. 1999) (citations omitted).

37. Here, none of Ms. Darcourt's behavior described by Ms. Schlein or Mr. Velazquez rises to the level of direct evidence of discrimination. In addition, Ms. Schlein asserts in her PRO that Working America's commitment to diversity in its policies, while failing to specifically mention Jewish people as a protected class, constitutes evidence of discrimination. The existence of an EEO policy, or encouraging diversity in the workplace, cannot be said to be discrimination. See Nagy v. Taylor Cty. Sch. Dist., 2017 U.S. Dist. LEXIS 165154, at *21 (M.D. Ga. Oct. 5, 2017) ("the Court does not find un-constitutional or discriminatory a hiring procedure that requires a committee to 'reflect the community' and be 'composed of differing genders, races, [and] ages,' because this does not one-sidedly benefit a particular group.").

38. Alternatively, Ms. Schlein can establish her case through circumstantial proof following the framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). In this case, the framework involves a three-step process. First, Ms. Schlein must establish a prima facie case of discrimination based on her religion, race, and/or nationality; if Ms. Schlein does so, a presumption of discrimination arises against Respondent. If Ms. Schlein

completes step one, Respondent has the burden to present a legitimate, non-discriminatory reason for its employment actions; if Respondent can put forth such a reason, Ms. Schlein's presumption of discrimination evaporates. Finally, if Respondent can complete the second step, Ms. Schlein has the burden of proving the reason established by Respondent was a pretext for discrimination. McDonnell Douglas Corp., 411 U.S. at 802; Scholz v. RDV Sports, Inc., 710 So. 2d 618, 624 (Fla. 5th DCA 1998) (evaluating race discrimination claim under FCRA).

39. Although these burdens of production shift back and forth, the ultimate burden of persuasion that Working America intentionally discriminated against her remains at all times with Ms. Schlein. See EEOC v. Joe's Stone Crabs, Inc., 296 F.3d 1265, 1273 (11th Cir. 2002); Byrd v. RT Foods, Inc., 948 So. 2d 921, 927 (Fla. 4th DCA 2007) (noting under FCRA the ultimate burden of proving intentional discrimination remains with the plaintiff at all times).

40. Petitioner correctly argues that this is not a religious accommodation case. Rather, based on the assertions in her Petition for Relief and at the hearing, her claim is that Working America failed to hire her because she is Jewish.

41. To demonstrate a prima facie case in the failure-to-hire context, Ms. Schlein must establish: (1) she is a member of a protected class; (2) who applied and was qualified for the

position; (3) despite her qualifications, she was not selected; and (4) either the position was filled by a person outside the protected class, or the position remained open and the employer continued to seek applicants. Shannon v. AMTRAK, 2019 U.S. App. LEXIS 14775, at *22-23 (11th Cir. May 20, 2019).

42. Ms. Schlein established three of the four elements of a prima facie case. Regarding the first prong, Working America admits Petitioner belonged to a protected class based on her Jewish religion. (Resp. PRO, ¶ 34). There also is no dispute that Working America declined to hire Ms. Schlein for the canvasser position, and thus, the third element is satisfied. As to the fourth element, Ms. Schlein established through the testimony of Mr. Velazquez that Working America continued to seek applicants for the canvasser position after she was rejected.

43. Ms. Schlein, however, has not established the second prong——that she was qualified for the position. Based on her interview, Working America had valid reasons to believe Ms. Schlein lacked the tact and self-awareness necessary for speaking to the public about immigration issues. Moreover, it had no confidence she could leave a positive impression of the candidate's views, especially on the subject of immigration. Therefore, she has failed to carry her burden of establishing a prima facie case for a "failure to hire" discrimination claim.

44. Even if she had met her burden of establishing a prima facie case of discrimination under the McDonnell Douglas burden-shifting framework, Working America had a legitimate non-discriminatory reason to not offer her a position of canvasser: a poor interview.

45. Interview performance qualifies as a legally sufficient, legitimate, nondiscriminatory reason not to hire a candidate if the hiring employer articulates a clear and reasonably specific factual basis on which it based its opinion. See Babb v. Sec'y, Dep't of Vets. Aff., 743 F. App'x 280, 290, n.4 (11th Cir. 2018) (finding decision to not promote plaintiff, where she had offered inadequate answers to technical questions and made disparaging remarks about coworkers in her interview, was not motivated by retaliatory animus where decision was based on plaintiff's interview performance).[4/] This is particularly true where, as in this case, the job involves public interaction and the applicant's demeanor and responses at the interview are inappropriate. See Saweress v. Ivey, 354 F. Supp. 3d 1288, 1299 (M.D. Fla. 2019) ("Defendant's proffered reasons for failing to hire Plaintiff——poor communication and interpersonal skills displayed during his [deputy sheriff] interview——satisfy Defendant's burden of articulating a legitimate, nondiscriminatory basis for the decision."); McCoy v. People Care, Inc., 2013 U.S. Dist. LEXIS 134966, at *17-18 (S.D.N.Y.

Sep. 20, 2013) (finding applicant was not suitable for employment as a home health aide after employer observed her disruptive behavior and inability or unwillingness to follow directions in application process). Any reasonable employer would have been justifiably concerned about hiring an employee who behaved as Ms. Schlein did at her interview, or who made statements similar to the type made by Ms. Schlein at the hearing regarding minorities and immigrants.

46. Given that Working America established it had a legitimate, nondiscriminatory reason not to hire Ms. Schlein, the burden shifts back to her to demonstrate by competent evidence Working America's reason not to hire her was "a pretext." McDonnell Douglas, 411 U.S. at 805. A "pretext" is a reason given in justification for conduct that is not the real reason. Id. Ms. Schlein could do this by offering competent evidence that a discriminatory reason more likely motivated Working America, or indirectly by showing that the explanation is "unworthy of credence." Id. at 804-05.

47. Here, Ms. Schlein has not offered sufficient evidence that would cast doubt on Working America's proffered nondiscriminatory reason for not hiring, nor has she shown that this reason was not what actually motivated its conduct. See Taylor v. Roche, 196 Fed. App'x 799, 802 (11th Cir. 2006) (finding Air Force's assertion that plaintiff's poor attitude

during his interview was not a pretext for discrimination); Conner v. LaFarge N. Am., Inc., 343 Fed. Appx. 537 (11th Cir. 2009) (finding decision not to hire was not a pretext for discrimination where during the interview candidate indicated he was not willing to discipline employees, lacked leadership, decision-making skills, and technical aptitude and experience required for the position.).

48. Rather, much of Ms. Schlein's testimony and argument at the hearing was that she was treated unfairly by Ms. Darcourt, and should have been allowed to move ahead in the hiring process after she had educated herself on immigration issues. Even if the undersigned accepted Ms. Schlein's view that Ms. Darcourt overreacted to the use of "illegals" in the interview, there was no evidence the decision not to hire Ms. Schlein was motivated by her religion, race, or nationality. "[T]he wisdom of the decision cannot be second-guessed here. A plaintiff cannot establish pretext merely by showing he or she was better qualified than the hired candidate; the plaintiff must show the hiring decision was made because of an illegal motive." Mells, 2015 U.S. Dist. LEXIS 103891, at *17 (finding plaintiff who arguably had more experience than other candidates, but ranked fourth out of five candidates after interview portion of hiring process, had not shown decision to not hire her was racially motivated).

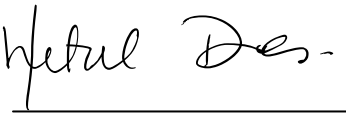
49. Consequently, Ms. Schlein did not meet her ultimate burden of proving by a preponderance of the evidence that Working America's actions were discriminatory based on her religion, race, or ethnicity.

50. The undersigned finds Working America's actions did not violate the FCRA.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations issue a final order dismissing Frances B. Schlein's Petition for Relief.

DONE AND ENTERED this 21st day of June, 2019, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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this 21st day of June, 2019.

ENDNOTES

[1/] Although the transmittal letter from the Commission indicated a Charge of Discrimination was attached, it was not included. A Technical Assistance Questionnaire for Employment Complaints against another entity unrelated to Working America was attached, but not considered.

[2/] Ms. Schlein repeatedly asserted at the hearing that "it is very obvious" that she is "a Jew" because of her features and her name. The undersigned finds Ms. Schlein is Jewish, not because of her appearance or her name, but because her testimony that she is Jewish was undisputed.

[3/] Pursuant to section 120.57(1)(c), hearsay is admissible in administrative proceedings, but it is not sufficient in itself to support a finding of fact. Rather, it can only be used to supplement or explain non-hearsay evidence.

[4/] See also Mells v. Shinseki, 2015 U.S. Dist. LEXIS 103891 (M.D. Fla. 2015) (finding no discrimination where decision to not hire plaintiff was based on her inability to discuss responsibilities for the promotion adequately at the interview); Conner v. Lafarge N. Am. Inc., 343 F. App'x 537, 538 (11th Cir. 2009) (accepting employer's nondiscriminatory reason for not promoting plaintiff; plaintiff performed poorly in interview for management position in areas of leadership, decision-making, and safety); Johnson v. City of Mobile, Ala. 321 Fed. App'x 826, 833, (11th Cir 2009) (finding decision not to hire was not discriminatory where applicant was tentative and lacked self-confidence during the interview).

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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.