STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LATASHA MCCLEARY,

Petitioner,

vs. Case No. 19-3974

COLE, SCOTT & KISSANE, P.A.,

Respondent.
_____/

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing by video teleconference on November 6, 2019, at sites in Tallahassee and Lauderdale Lakes, Florida.

APPEARANCES

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STATEMENT OF THE ISSUES

The issues in this case are whether, in violation of the Florida Civil Rights Act, Respondent terminated Petitioner's employment on the basis of her race, or retaliated against her for engaging in protected activity; and whether Respondent subjected Petitioner to a hostile work environment.

PRELIMINARY STATEMENT

On April 21, 2017, Petitioner Latasha McCleary filed a Complaint with the Equal Employment Opportunity Commission and the Florida Commission on Human Relations ("FCHR"), alleging claims of race discrimination, retaliation, and harassment. The FCHR investigated Ms. McCleary's claims, and, on June 20, 2019, issued a Determination stating that no reasonable cause existed to believe that an unlawful practice had occurred. Thereafter, Ms. McCleary filed a Petition for Relief, which the FCHR transmitted to the Division of Administrative Hearings ("DOAH") on July 25, 2019.

Initially, this case was set for final hearing on October 1, 2019. On Petitioner's motion, the final hearing was continued to October 14, 2019; it was later rescheduled, on Respondent's unopposed motion, for November 6, 2019. The hearing took place on that day, with both parties present.

Ms. McCleary testified and called no other witnesses. Petitioner's Exhibits 1 through 10 were received in evidence.

Respondent's Exhibits 1 through 23 were admitted as well. Respondent elected not to call any witnesses.

Neither party opted to order the final hearing transcript. At hearing, the undersigned set November 25, 2019, as the deadline for filing proposed recommended orders. Each party filed one, and these have been considered.

Unless otherwise indicated, citations to the official statute law of the state of Florida refer to Florida Statutes 2019.

FINDINGS OF FACT

1. Respondent Cole, Scott & Kissane, P.A. ("CSK"), is a law firm having offices throughout the state of Florida. Petitioner Latasha McCleary ("McCleary"), an African-American woman, worked for CSK in its Orlando office as a legal assistant from August 7, 2017, through July 31, 2018. However, because McCleary began taking medical leave on June 6, 2018, and never returned to work, her last day in the office was June 5, 2018. Thus, the period of time in which McCleary actually functioned as a regular CSK employee was ten months.

2. During her tenure with the firm, McCleary provided secretarial and administrative support to several attorneys, including partner Bartley Vickers and associates Jeremy Beasley and Shawn Gibbons. McCleary's direct supervisor was the then office manager, Lilliam Hernandez.

3. CSK regarded McCleary as a valued and high-performing employee. Although, as will be discussed, McCleary complains that she was subjected to unfair criticism during the last weeks of her time in CSK's Orlando office, she was never reprimanded, disciplined, or subjected to an adverse employment action.

4. For the first nine months of her employment, McCleary got along well with the attorneys for whom she worked, including Mr. Vickers, and she has no complaints about their treatment of her during this period. The only noteworthy incident or incidents of relevance to have occurred in this time frame are a secretary's use, on one or perhaps more occasions, of the "n-word" in McCleary's presence.

5. An employee's use of this racial epithet in the workplace is, of course, extremely offensive and inflammatory, to say the least, and, if unchecked, could create a hostile work environment. That did not happen here, however. The legal assistant who made the offensive remark (apparently in the presence of peers only, not supervisors or managers) apologized to McCleary when the latter expressed her discomfort. McCleary never reported the incident(s) in writing to the firm's management, as the Employee Handbook required——a fact from which the undersigned infers that she accepted her co-worker's apology——and the bad behavior stopped. The upshot is that this upsetting incident was resolved informally among the affected

employees without initiating an investigation by the firm, and a nascent problem was nipped in the bud.

6. The watershed moment in this case occurred on May 7, 2018, at the beginning of McCleary's tenth month with CSK. An expert witness retained by CSK was scheduled to conduct an on-site inspection that day but failed to appear, forcing a last-minute cancelation which caused opposing counsel to incur travel expenses that CSK had to reimburse. McCleary mistakenly had failed, on the previous business day, to confirm the expert's availability, as the firm's routine required, and thus, she bore some responsibility for the unwanted results. That said, there is no evidence that this situation was other than a relatively minor inconvenience that could be fixed, learned from, and forgotten.

7. When the problem came to light on May 7, 2018, Ms. Hernandez, the office manager, sent an email to McCleary reminding her that the inspection "should have been confirmed" beforehand to avoid a "waste[] [of] time and money." McCleary apologized for making a "human error" and promised it would not happen again.

8. On May 9, 2018, Mr. Vickers, the partner, sent an email to McCleary and Mr. Gibbons, the associate, telling them that "some form of confirmation is needed" "for confirming inspection dates." He added: "This is a mistake that I imagine will not

happen again, and I am glad we can move past it and look to the future without these types of issues again."

9. The only thing remarkable about these emails is how unremarkable they are. Two points of interest will be mentioned. First, as just suggested, the tone of each message was neither derogatory nor personal, but measured and professional. There was a touch of criticism, to be sure, as would be expected, but the criticism was constructive in nature, not harsh or angry in tone. Second, McCleary was not the only one called to account. Mr. Vickers's email was directed as much to the associate attorney as to McCleary.

10. The next day, Thursday, May 10, 2018, Mr. Vickers conducted a training meeting for the legal assistants in his group, which McCleary attended. There were a number of topics on the agenda, covering a range of administrative tasks that CSK expected its litigation support staff to carry out. Although Mr. Vickers brought up that week's scheduling snafu as an example of miscommunication-driven consequences, no evidence suggests that McCleary's mistake had prompted the meeting. Further, McCleary was not identified in the meeting as having been at fault or involved in the incident. McCleary, however, complains that she was "singled out" during the meeting, "80% [of which, she maintains,] covered what happened with [her] in regards to the May 7th re-inspection." The greater weight of

the evidence does not support her characterization of the training session.

11. According to McCleary, Mr. Vickers, who had been a good boss for the previous nine months, suddenly turned into a tyrant around May 10, 2018. McCleary alleged in an email written a few weeks later, on June 1, 2018, that soon after the canceled inspection, Mr. Vickers had begun asking her "idiotic questions to be sure [she knew] her job," and been constantly micromanaging [her] with multiple emails" accusing her of making numerous mistakes. Yet, although this entire period spans just 18 business days, McCleary produced none of Mr. Vickers's alleged, accusatory emails. The greater weight of the evidence does not support McCleary's allegations concerning Mr. Vickers's treatment of her during the month of May 2018.

12. Sometime near the end of May, McCleary sent out notices of taking deposition duces tecum that did not have the document requests attached. McCleary was not solely to blame for this oversight; the attorney handling the case should have reviewed the papers to make sure that everything was in order before service. Still, as the legal assistant, McCleary should have spotted the omission and brought it to the attorney's attention. On the morning of May 31, 2018, after the problem had been discovered, Mr. Vickers sent an email to McCleary and

Mr. Beasley, the associate, admonishing them to "stay focused" when preparing deposition notices for service.

13. Similar to the canceled inspection earlier in the month, the incomplete deposition notices were a problem that CSK obviously would rather have avoided; inattention to detail, moreover, is something any reasonable employer should want to correct. There is no evidence, however, that CSK generally, or Mr. Vickers in particular, made a big deal about this incident. Mr. Vickers told McCleary and the associate that he hoped "it would not happen again"——and that, it seems, would be that.

14. Except it wasn't. Later that day, May 31, 2018, McCleary spoke to the office administrator, Johnson Thomas. During this conversation, McCleary complained about working for Mr. Vickers and asked to be transferred to a different group of attorneys. On Friday, June 1, 2018, McCleary again contacted Mr. Thomas, sending him the email mentioned above. This email was the first written notice that CSK received from McCleary concerning her complaints about Mr. Vickers. In the email, McCleary did not allege racial discrimination, per se, but she did include some language which clearly indicated that such a charge might be forthcoming: "I refuse to subject myself to further *retaliation*, *oppression* and disrespect from Mr. Vickers. He is *creating a hostile working relationship* between us. I

cannot concentrate on work and am in need of immediate transfer." (emphasis added).

15. The following Tuesday, June 5, 2018, CSK approved McCleary's request to be transferred, assigning her to the work group headed by partner Melissa Crowley. When the announcement was made, Ms. Crowley sent an email to McCleary stating, "Welcome Latasha! I look forward to working with you."

16. McCleary never reported for duty under Ms. Crowley. Instead, she took a sick day on June 6, 2018, and applied for unpaid medical leave. Despite McCleary's having presented somewhat nonspecific reasons, such as heart palpitations and anxiety, the firm granted McCleary's application and placed her on medical leave through July 11, 2018. In mid-July, McCleary provided CSK with a note from her mental health counselor in support of a request to extend the unpaid medical leave until September 5, 2018. On July 12, 2018, the firm informed McCleary that it would not be able to keep her position open that long without hiring a replacement, but agreed to let her remain on leave until July 31, 2018. CSK made it clear to McCleary that she needed to return to work on August 1, 2018, or face dismissal on grounds of abandonment.

17. McCleary did not return to work on August 1, 2018, and the firm terminated her employment.

Ultimate Factual Determinations

18. There is no persuasive evidence that CSK took any actions against McCleary motivated by discriminatory animus, or created (or acquiesced to the creation of) a hostile work environment. Indeed, there is no competent, persuasive evidence in the record, direct or circumstantial, upon which a finding of unlawful racial discrimination could be made.

19. There is no persuasive evidence that CSK took any retaliatory action against McCleary for having opposed or sought redress for an unlawful employment practice.

20. Ultimately, therefore, it is determined that CSK did not discriminate unlawfully against McCleary on any basis.

CONCLUSIONS OF LAW

21. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes.

22. As stated in City of Hollywood v. Hogan, 986 So. 2d 634, 641 (Fla. 4th DCA 2008):

> The Florida Civil Rights Act of 1992 (FCRA) prohibits age discrimination in the workplace. See § 760.10(1)(a), Fla. Stat. (2007). It follows federal law, which prohibits age discrimination through the Age Discrimination in Employment Act (ADEA). 29 U.S.C. § 623. Federal case law interpreting Title VII and the ADEA applies to cases arising under the FCRA. Brown Distrib. Co. of W. Palm Beach v.

Marcell, 890 So. 2d 1227, 1230 n.1 (Fla. 4th DCA 2005).

23. Section 760.10(1)(a), Florida Statutes, provides that it is an unlawful employment practice for an employer:

> 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.

24. In McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-803 (1973), the U.S. Supreme Court articulated a scheme for analyzing employment discrimination claims where, as here, the complainant relies upon circumstantial evidence of discriminatory intent. Pursuant to this analysis, the complainant has the initial burden of establishing by a preponderance of the evidence a prima facie case of unlawful discrimination. Failure to establish a prima facie case of discrimination ends the inquiry. If, however, the complainant succeeds in making a prima facie case, then the burden shifts to the accused employer to articulate a legitimate, nondiscriminatory reason for its complained-of conduct. If the employer carries this burden, then the complainant must establish that the proffered reason was not the true reason but merely a pretext for discrimination. Id.; St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506-07 (1993).

25. Under the foregoing framework, McCleary bears the burden of establishing her prima facie case by a preponderance of the evidence and must show, among other elements, that: (i) she was subjected to an adverse employment action; and (ii) similarly-situated employees outside of her protected class were treated differently. Schrock v. Publix Super Mkts., Inc., 653 F. App'x 662, 663 (11th Cir. 2016); see, e.g., Holland v. Gee, 677 F.3d 1047, 1055 (11th Cir. 2012)(Title VII); Chapman v. AI Transp., 229 F.3d 1012, 1024 (11th Cir. 2000)(ADEA).

26. In this matter, the evidence does not establish a prima facie case of discrimination based on race because McCleary failed to prove that she was subjected to an adverse employment action. All that happened to McCleary was that, in May 2018, she received some negative feedback from her boss, Mr. Vickers, following a couple of relatively minor mistakes, which, although unrelated, reflected some inattention to detail on her part. McCleary was not disciplined, berated, harshly criticized, or reprimanded for these errors. Nor was she made the scapegoat, as, in both instances, associate attorneys were also taken to task for dropping the ball. These were commonplace employment interactions, not adverse employment actions.

27. McCleary likewise failed to identify any other similarly-situated employees outside of her protected class who

were treated more favorably. She has argued that Mr. Vickers subjected her to heightened levels of scrutiny as compared to other legal assistants, but this is too general a charge to be probative and, in any event, was not proved.

28. McCleary's failure to make out a prima facie case of discrimination ended the inquiry. Because the burden never shifted to CSK to articulate a legitimate, nondiscriminatory reason for its conduct, it was not necessary to make any findings of fact in this regard.

29. McCleary asserts that CSK refused to extend her unpaid sick leave in retaliation for her complaint about Mr. Vickers's purported harassment. Under the Florida Civil Rights Act's ("FCRA") opposition clause, CSK is prohibited from retaliating against McCleary because she has opposed an unlawful employment practice. § 760.10(7), Fla. Stat. Meanwhile, under the FCRA's participation clause, CSK is prohibited from retaliating against an employee because he or she "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [the FCRA]." Id.

30. To establish a prima facie case of retaliation, McCleary must demonstrate that: (i) she engaged in statutorily protected activity; (ii) she suffered a materially adverse action; and (iii) a causal relationship existed between her protected activity and the adverse action. Goldsmith v. Bagby

Elevator Co., Inc., 513 F.3d 1261, 1277 (11th Cir. 2008). If McCleary establishes a prima facie case, the burden shifts to CSK to rebut the presumption by articulating a legitimate non-retaliatory reason for the materially adverse action. Id. McCleary then must demonstrate that the articulated reason is a pretext to mask an improper motive. Id. In other words, McCleary must show that her alleged protected activity was a "but for" cause of her termination. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338 (2013).

31. Assuming for argument's sake that McCleary engaged in a statutorily protected activity on May 31 and June 1, 2018, by notifying the firm about her issues with Mr. Vickers, what happened next was that CSK *approved* her request for a transfer and then *approved* her request for unpaid medical leave. True, McCleary's later request for additional medical leave was denied in part; but it was also *approved* in part, with result that CSK granted McCleary nearly two months of unpaid medical leave. This strikes the undersigned as actually rather generous under the circumstances, given that McCleary had not provided documentation of a specific chronic illness. Regardless, receiving approximately two-thirds of something one has asked for in a negotiation is generally considered a win; it is certainly not indicative of a materially adverse action. McCleary's failure to prove that she suffered a materially

adverse action is a sufficient reason to conclude that a prima facie case of retaliation was not shown.

32. Finally, McCleary asserts a claim of hostile work environment. To establish such a claim, McCleary must prove that "the workplace is permeated with discriminatory intimidation, ridicule, and insult, [which] is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993).

33. When, as here in part (with respect to a colleague's use of a racial epithet in McCleary's presence), the alleged harassment is committed by coworkers, non-supervisory employees, or third parties, the petitioner must demonstrate that the respondent "knew, or reasonably should have known, of the harassment and failed to take prompt remedial actions." See Allen v. Tyson Foods, Inc., 121 F.3d 642, 647 (11th Cir. 1997)(citing Faragher v. City of Boca Raton, 111 F.3d 1530, 1535, 1538 (11th Cir. 1997)). The remedial action must be reasonably calculated to prevent the misconduct from recurring. Kilgore v. Thompson & Brock Mgmt., Inc., 93 F.3d 752, 753-54 (11th Cir. 1996).

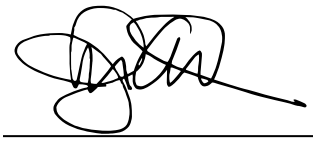
34. McCleary failed to establish a hostile work environment claim because there was no credible evidence of harassment, much less harassment that was sufficiently severe or

pervasive to alter a "term, condition, or privilege" of employment and create an abusive working environment. Overhearing another, non-supervisory employee use the "n-word" understandably upset McCleary, but she failed to prove that CSK knew or should have known about this incident. Plus, it should be added, there was no persuasive evidence that the use of the "n-word" was a pervasive problem at the firm; rather, the employee at fault ceased uttering the term when McCleary voiced her disapproval. A few isolated incidents do not amount to pervasive harassment. See Johnson v. Rice, 237 F. Supp. 2d 1330 (M.D. Fla. 2002)(harasser's conduct held not to be objectively pervasive where he made sexual comments and jokes over a period of six months).

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 finding CSK not liable for race discrimination, retaliation, or creating a hostile work environment.

DONE AND ENTERED this 20th day of December, 2019, in Tallahassee, Leon County, Florida.



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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.