STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF THE REQUEST	)	
FOR REVIEW BY:	)	CHARGE NO.: 2008SF2865
	)	EEOC NO.: 21BA81709
BRANDY BUSH,	)	ALS NO.: 09-0199
	)	
Complainant.	)	

ORDER

This matter coming before the Commission by a panel of two, Commissioners Greg Simoncini and Diane Viverito, presiding, upon the Complainant's Request for Review ("Request") of the Notice of Dismissal issued by the Department of Human Rights ("Department") of Charge No. 2008SF2865, Brandy Bush, Complainant, and OSF Saint Francis, Inc., Respondent; and the Commission having reviewed *de novo* the Department's investigation file, including the Investigation Report and the Complainant's Request and supporting materials, and the Department's response to the Complainant's Request; and the Commission being fully advised upon the premises;

NOW, THEREFORE, it is hereby **ORDERED** that the Department's dismissal of the Complainant's charge is **SUSTAINED** on the following ground:

LACK OF SUBSTANTIAL EVIDENCE

In support of which determination the Commission states the following findings of fact and reasons:

1. The Complainant filed a two-count charge of discrimination with the Department on February 28, 2008, in which she alleged that the Respondent terminated her employment because of her race (Black), in violation of Section 2-102(A) of the Illinois Human Rights Act (the "Act") (Count A), and also as retaliation for opposing unlawful discrimination, in violation of Section 6-101(A) of the Act (Count B). The Department dismissed the Complainant's charge on March 18, 2009 based on finding a lack of substantial evidence of a violation of the Act. The Complainant thereafter filed a timely Request on April 20, 2009.

2. The Respondent hired the Complainant on December 10, 2007 as a Practice Assistant II ("PA").

3. At all times relevant to the allegations of the Complainant's charge, Sue Borman (race, white) worked for the Respondent as a Human Resources Generalist, and Julie Wickersham (race, white) was a Practice Manager for the Respondent.

4. Also at all times relevant to the allegations, the Respondent had in place a Positive Discipline Policy (PDP). The PDP provided three components for dealing with employee disciplinary and performance issues: **(i)** Positive Recognition, **(ii)** Coaching, and **(iii)** Formal Discipline.

5. According to the PDP, Formal Discipline could be utilized either when the employee did not respond to coaching, or when the employee's performance or disciplinary issue was serious enough to warrant Formal Discipline. Further, there were four (4) levels of Formal Discipline: **(i)** Level I Reminder, **(ii)** Level II Reminder, **(iii)** Decision-Making Leave, and **(iv)** Termination. If a single incident were serious enough or if an employee displayed a pattern of performance or disciplinary issues, any of the four levels of Formal Discipline could be utilized without following a particular sequence of disciplinary steps.

6. Finally, the PDP provided that an employee could be asked to write an "action plan." The Respondent's PDP Policy Number 61 required action plans to be in writing, well thought out and actionable. An employee could be given a Decision Making Leave, which is a day off with pay, specifically to allow the employee the opportunity to write an acceptable action plan. Should an employee not turn in an action plan or submit an unsatisfactory action plan after a Decision Making Leave, this action could be deemed insubordination and provide grounds for termination.

7. On February 22, 2008, some of the Respondent's staff members called Wickersham to complain of disruptive behavior by the Complainant and certain other PAs. As a result of the complaints, Wickersham and Borman met with the Complainant and the other PAs to discuss conduct and performance issues.

8. During the February 22, 2008 meeting, the Complainant told Wickersham and Borman that one of her white co-workers had made a racially offensive comment in her presence earlier in February of 2008.

9. Wickersham and Borman met with the co-worker accused of making the racially offensive comment. The results of the meeting with the co-worker were memorialized in Memoranda of March 3, 2008, one of which was addressed to the Complainant, and the other to the co-worker. The Memorandum addressed to the co-worker informed her that any future conduct of the type of which the Complainant complained, or other misconduct, would result in further disciplinary action, up to and including termination. The Memorandum addressed to the Complainant informed her that the Respondent had addressed the incident, that the co-worker had been advised that such conduct would not be tolerated, and that the Complainant should immediately advise the Respondent if there were any additional incidents of this nature.

10. Regarding the February 22, 2008 incident, the Complainant and the other PAs received a Memoranda, also dated March 3, 2008, which advised them to treat other employees with respect, not to engage in any retaliation against the staff members who had reported their conduct, and that if there were future violations, the Respondent would take additional disciplinary action, up to and including termination.

11. On March 24, 2008, pursuant to its PDP, the Respondent issued the Complainant a Level II Positive Discipline form (the "Level II Form") for various acts of misconduct. The Level II Form referenced the February 22, 2008 meeting as a date of previous coaching. The Level II Form also advised the Complainant that if she failed to improve her conduct, she would be subject to further disciplinary action, including termination.

12. On March 28, 2008, the Complainant was issued a Positive Discipline Formal Discipline form (the "PDFD") for alleged misconduct. The PDFD listed February 22, 2008 and March 24, 2008 as dates of previous coaching. The PDFD indicated that the Complainant was placed on Decision Making Leave and that the Complainant was to return to work on March 31, 2008 with an action plan. The PDFD stated that the Complainant would be terminated if the action plan did not indicate that the Complainant would stop using profane and abusive language; would not retaliate, and would conform to the Respondent's policies.

13. On March 31, 2008, the Complainant returned to work without a written action plan. The Respondent terminated her, and the reason given was the Complainant's failure to have a written action plan, pursuant to the Respondent's policy.

14. In her charge, the Complainant alleged that she was terminated because of her race, and in retaliation for her having opposed the use of "racial slang" by white co-workers.

15. Further, in her Request, the Complainant contends that the Department's investigator was curt and rude. The Complainant also contends that she was not permitted to have her witness present at the fact finding conference; that the Respondent was able to consult with its attorney during the fact finding conference, and that the Respondent's representative was allowed to talk without being interrupted.

16. In its Response, the Department argues that there is no substantial evidence of racial discrimination or retaliation. Essentially the Department argues that as to both claims, the Respondent put forth a legitimate business reason for terminating the Complainant—namely that the Complainant failed to return to work with the written action plan—and that there was no evidence of pretext.

17. The Commission's review of the Department's investigation file leads it to conclude that the Department properly dismissed the Complainant's charge of discrimination for lack of substantial evidence. The Commission finds no evidence that the stated reason for having terminated the Complainant on March 31, 2008 was a pretext for either discrimination or retaliation.

18. As to the Complainant's race discrimination claim, the undisputed evidence in the file demonstrates that the Complainant has in the past discharged a white employee for failing to follow its policy regarding written action plans: On May 24, 2007, the Respondent discharged a white PA when she failed to provide a satisfactory action plan upon her return from a Decision Making Leave. The Complainant has not presented any additional evidence with her Request to demonstrate that a similarly situated white employee was not discharged for failing to submit an action plan in accordance with the Respondent's policy.

19. As to the Complainant's retaliation claim, in order to establish a *prima facie* case of retaliation under the Act, the Complainant must present evidence which demonstrates: (1) that she engaged in a protected act; (2) that the Respondent took an adverse action against her, and (3) that there is a causal connection or nexus between the protected activity and the adverse act. *See* Carter Coal Co. v. Human Rights Commission, 261 Ill.App.3d 1, 7, 633 N.E.2d 202 (5th Dist. 1994).

20. Here, assuming *arguendo* that the Complainant has established a *prima facie* case of retaliation, the Respondent provided a legitimate non-discriminatory business reason for terminating the Complainant. Thereafter, the Complainant had the burden to provide some evidence that this reason was a pretext for retaliation, which she failed to do.

21. Finally, as to the Complainant's concerns about the Department's investigator and the fact finding conference, the Complainant has not presented any evidence to show that she was denied due process or a fair opportunity to present her evidence during the investigatory process.

22. First, 56 Ill Admin. Code 2520.440(c) (2009), gives the investigator the authority to exclude witnesses from the fact finding conference. Second, 56 Ill. Admin. Code 2520.440(b) (2009) permits parties to have an attorney present at the fact finding conference. The Commission finds no error in permitting the Respondent to confer with its attorney during the fact finding conference, nor in permitting the Respondent's attorney to address questions about the case. The Code merely requires that the party cannot appear …"exclusively through an attorney"; it does not demand the attorney's silence if one should appear at the fact finding conference with his or her client. *See* 56 Ill. Admin. Code 2520.440(d)(2) (2009). The Complainant does not present any other evidence which demonstrates that she was not able to fully participate in the fact finding conference, or any other aspect of the investigatory process.

23. Clearly, if the Complainant was the recipient of rude or curt treatment by her assigned investigator, this would understandably create in the Complainant a perception of an unfair and biased investigatory process. The Department did not address these allegations in its response. If the Complainant's characterization of the investigator is accurate, any behavior by a Department investigator that creates a perception of bias in the investigatory process is regarded with great disfavor by the Commission.

24. Notwithstanding the investigator's alleged rudeness, the evidence in the file does not demonstrate that the Complainant presented substantial evidence of discrimination or retaliation. Accordingly, it is the Commission's decision that the Complainant has not presented any evidence to show that the Department's dismissal of her charge was not in accordance with the Act. The Complainant's Request is not persuasive.

THEREFORE, IT IS HEREBY ORDERED THAT:

The dismissal of the Complainant's charge is hereby **SUSTAINED.**

This is a final Order. A final Order may be appealed to the Appellate Court by filing a petition for review, naming the Illinois Human Rights Commission, the Illinois Department of Human Rights, and the Respondent OSF Saint Francis, Inc., as appellees, with the Clerk of the Appellate Court within 35 days after the date of service of this order.

STATE OF ILLINOIS)
)
HUMAN RIGHTS COMMISSION)

Entered this 12th day of August 2009.

Commissioner Greg Simoncini

Commissioner Diane Viverito