STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LINDA SCHWARTZ, Petitioner, vs. GUY M. TUNNELL, BAY COUNTY SHERIFF'S OFFICE, Respondent.	)	Case No. 99-4043

RECOMMENDED ORDER

Upon due notice, this cause came on for a disputed-fact hearing on April 17-18, 2001, in Panama City, Florida, before Ella Jane P. Davis, a duly-assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Linda G. Miklowitz, Esquire
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Post Office Box 14922
Tallahassee, Florida 32317-4922

For Respondent: R. W. Evans, Esquire
Powers, Quaschnick, Tischler & Evans
1669 Mahan Center Boulevard
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STATEMENT OF THE ISSUE

Whether Respondent employer is guilty of an unlawful employment practice against Petitioner employee on the basis of age (over 50), gender (female), retaliation, and/or hostile work environment, as more fully discussed in the Conclusions of Law.

PRELIMINARY STATEMENT

Petitioner filed a Charge of Discrimination with the Florida Commission on Human Relations on May 30, 1996. On July 28, 1999, the Commission entered its Determination: No Cause.

On September 24, 1999, a Petition for Relief was forwarded to the Division of Administrative Hearings.

On January 27, 2000, a Recommended Order of Dismissal upon jurisdictional and constitutional issues was entered.[1]

Upon consideration of the Recommended Order of Dismissal by a three-member panel of the Commission, the Panel Chairperson, on September 28, 2000, signed an Order of Remand, requiring that the case be tried on its merits, but the Order was not filed by the Commission Clerk until February 1, 2001.[2]

The Remand Order arrived at the Division on or about February 13, 2001. On February 14, 2001, a Notice and Order of Pre-hearing Instructions for a disputed-fact hearing, pursuant to Section 120.57 (1), Florida Statutes, was issued. Final hearing on the merits was scheduled for April 17-18, 2001.

The required Pre-hearing Stipulation was filed late, signed only by Respondent's counsel. Thereafter, an Amended Pre-hearing Stipulation was filed by Petitioner which showed signatures of both counsel, but which was both inter-lineated and added-to by Petitioner's counsel. Petitioner also filed an Addendum to the Amended Pre-hearing Stipulation which added or altered the statement of the issues. Respondent's counsel denied agreeing to

admission of Petitioner's additionally-listed exhibits and issues. At the commencement of final hearing, the undersigned determined that there had been no "meeting of the minds," and thus, no binding stipulations as to the admission of exhibits or limitation of witnesses.

Also at the commencement of final hearing, Respondent argued its recently-filed Motion in Limine or in the Alternative Motion to Amend Witness List. The Motion in Limine was denied. Respondent was permitted to enlarge its witness list. However, provision was made for Petitioner's counsel to interview any newly-disclosed witnesses prior to cross-examination of those witnesses.

By agreement, the Charge of Discrimination was admitted in evidence as Joint Exhibit A, and the Petition for Relief was admitted as Joint Exhibit B.

At the end of the first day of trial and before Petitioner rested her case, Petitioner's counsel served a hand-written "Request [sic] to Produce at Hearing" upon Respondent. The undersigned ordered Respondent to honor this notice to produce. The requested items were produced the following day and ultimately admitted as Petitioner's Exhibit P-19.

Petitioner presented the oral testimony of Linda Dauphin, Linda Suggs, Lemar Sauls, Paula Agosta, Leroy French, and Jerry Girven, and testified in her own behalf. Petitioner's Exhibits P-1, P-2, P-3, P-4, P-5, P-6, P-7, P-8, P-9, P-10, P-11, P-12,

P-18, and P-19, were admitted in evidence. Petitioner's Exhibit P-20 was offered but was not admitted over objection. These exhibits will be returned to the Commission with this Recommended Order.

Petitioner's Exhibit 13, which was a duplicate of Joint Exhibit A, was not admitted because it was cumulative, and will be returned to the Commission with this Recommended Order.

Petitioner's other exhibits, pre-marked by Petitioner with the numbers 14, 15, 16, and 17, were not offered and have not been considered by the undersigned. They will be returned to the Petitioner in a separate envelope and will not be forwarded to the Commission with this Recommended Order.

At hearing, Respondent presented the oral testimony of W. E. Miller, William L. Leonard, Richard Beach, Billy Miller, N. D. Williams, Joe Walker, Clarence Youngberg, Ron Gilligan, Glenda Purvis, Guy Tunnell, Sheila Sharp, and Petitioner. Respondent offered and had admitted in evidence Exhibits R-1, R-2, R-4, R-5, R-6, R-7, R-8, R-9, R-10, R-11, R-12, R-13, R-14, R-15, R-16, R-18, R-19, R-21, R-22, R-23, R-24, R-25, and R-26. These exhibits will be forwarded to the Commission with this Recommended Order. Pre-marked Exhibits R-3, R-17, and R-20, were never offered nor admitted. They also were never tendered to the undersigned. Therefore, they were not considered and will not be forwarded to the Commission with this Recommended Order.

A Transcript of the proceedings was filed on May 9, 2001. A ten-day period for filing proposed recommended orders was agreed-upon. Neither party moved to vary this date. Respondent's Proposed Recommended Order was timely-filed on May 21, 2001. Petitioner's Proposed Recommended Order was filed late, on May 22, 2001. However, in the absence of any motion to strike, both proposals have been considered.[3]

FINDINGS OF FACT

1. The facts herein are largely undisputed. What seems to be in dispute is the witnesses' perceptions about what events may signify. Therefore, in making the following findings of fact, it has not been assumed that every denial by one witness of another witness's account constitutes an equipoise of testimony unless that is clearly the case. However, unsupported opinions have been eliminated and only facts proven are related.

2. The undersigned has relied on time-honored methods of fact-finding. First, every effort has been made to reconcile the several witnesses' respective testimony so that all witnesses may be found to speak the truth. If witnesses did not perceive an event in a similar manner, their respective versions have been considered as to credibility, including weighing each witness's ability to observe and hear, to know, and to understand all elements of single events and the chronology of all events; the respective witnesses' motivations, if any, to prevaricate or to distort their testimony; and each witness's consistency, or lack

thereof, in the internal parts of that witness's own testimony, and the consistency, or lack thereof, of each witness's testimony with the external and internal elements of every other witness's testimony and the exhibits. Prior inconsistent statements have been reflected-upon where applicable.[4] Finally, each witness's candor and demeanor while testifying and the persuasiveness of his or her testimony in light of real-world significance and applicable law have been observed and assessed.[5]

3. Petitioner Linda Schwartz is a female Deputy Sheriff with the Bay County Sheriff's Office. Her date of birth is December 15, 1944. She was hired and assigned as a bailiff on August 22, 1987. She was transferred to road patrol, effective April 12, 1996. At all times material, Petitioner knew she was "a sworn law enforcement officer," subject to a para-military command module and promotions based on rank. The ranks were: unranked Deputy, Corporal, Sergeant, Lieutenant, Captain, and Major/Chief Deputy. The elected Sheriff is superior over all ranks.

4. Respondent Guy Tunnell was elected Sheriff of Bay County in November 1988. As such, he is a constitutional officer of the State of Florida. Mr. Tunnell has served in that capacity since his election. As Sheriff, he is responsible for providing law enforcement and corrections services in Bay County.

5. As the head of the Bay County Sheriff's Office, Sheriff Tunnell has final authority for certain personnel actions,

including promotions and transfers. He also approves internal investigations.

6. The Bay County Sheriff's Office is administratively divided into divisions. The Court Services Division includes a bailiffs section, civil section, and warrants section. Bailiffs are assigned to the courthouse and jail. The road patrol section is part of the Field Services Division.

7. Petitioner served honorably and well in the bailiffs section from 1987 until 1996. As a bailiff, she received several commendations and better-than-average employment evaluations, although there was a timeliness problem with some evaluations as discussed below. During this period of time, she served under both the predecessor sheriff and Respondent, who initially became Sheriff when Petitioner had been on the job for approximately 15 months.

8. Respondent Tunnell's predecessor sheriff suffered several public scandals involving "sexual harassment" issues within his office and workforce. Defense against such charges resulted in lost time and money to the Sheriff's Office.

9. One of Respondent's goals upon becoming Sheriff of Bay County was to establish a workable and effective internal grievance procedure to handle sexual harassment complaints, other discrimination complaints, and all employee grievances in an efficient and effective manner, with the goal of correcting problems and warding-off lawsuits. Respondent initiated

discrimination and anti-harassment training for new employees and required in-service training on these issues every two years. Furthermore, Respondent adopted policies and procedures to facilitate employee complaints, including complaints for discrimination or harassment.

10. The anti-sexual harassment policy was enacted and disseminated January 3, 1989. The employee complaint procedure was revamped and disseminated October 1, 1991.

11. Another one of Sheriff Tunnell's goals was to establish a more polished employment system with greater emphasis on deputies' ranks and advancement through the ranks by passing competitive examinations.

12. Time in grade, time in rank, and competitive examinations are not elements in the decision to grant a meritorious promotion.

13. On May 1, 1991, Respondent Tunnell exercised his discretion and awarded Petitioner a meritorious promotion to the rank of corporal. Although meritorious promotions are not Sheriff Tunnell's preference, he was persuaded that Petitioner's past performance in the bailiffs section, which is a specialized type of service, should be recognized at that time.

14. Petitioner was the only person in the bailiffs section (made up of male and female deputies) who received a meritorious promotion, but hers was not the only such promotion. For instance, other male and female deputies who had completed the new

State-sponsored school resource officer (SRO) training program also received meritorious promotions to the rank of corporal, provided they did not already hold that rank or a higher rank.

15. As of her May 1, 1991, promotion, Petitioner knew her corporal rank was unique to the bailiffs section and non-transferable to another division or to specialty positions within the Sheriff's Office.

16. Until August 24, 1992, Petitioner's immediate supervisor in the bailiffs section was Lt. Davis (male). Lt. Davis did not share supervisory authority with Petitioner. Under Lt. Davis, Petitioner's supervisory authority over other deputies/bailiffs was limited to periods when Lt. Davis was absent or not available. In Lt. Davis' absence, Petitioner acted as relief bailiff, moving around the courthouse as needed; she instructed other bailiffs what to do; and she prepared "the jail list," ordering transport of prisoners from the jail to the courthouse for the next day.

17. Under Lt. Davis, the bailiffs also worked independently to a large degree, and bailiffs who were both full-time employees and who also were fully-trained, often were assigned to specific circuit and county judges, who gave those bailiffs orders on their day-to-day activities. All bailiffs regularly brought their own inmates over from the jail to their assigned courtrooms each day.

18. When Lt. Davis retired, Sheriff Tunnell wanted to replace him with another employee in the rank of lieutenant, but no one with the rank of lieutenant applied. The Sheriff's Office

then advertised the position, seeking a sergeant. Finally, Petitioner submitted a letter of interest in the position, but she was not a sergeant.

19. If Petitioner had taken a competitive examination and qualified, she conceivably could have been promoted to the rank of sergeant and been eligible for the supervisor slot in the bailiffs section vacated by Lt. Davis. However, Petitioner did not take the competitive examination for sergeant, and her possible promotion became moot when Deputy Johnson, who already held the rank of lieutenant, laterally transferred into the supervisor slot in the bailiffs section.

20. Petitioner testified that she got along well with Lt. Davis, and that "hostile work environment" problems only developed when Lt. Johnson (male) replaced Lt. Davis as her immediate supervisor on that date. In point of fact, Petitioner had utilized Sheriff Tunnell's new procedures by filing two previous "sexual harassment" grievances against Lt. Davis.

21. After Lt. Johnson's transfer to the bailiffs section in late 1992, Petitioner reported to him, and Lt. Johnson reported to Captain Billy Miller, who reported to Major W. E. Miller, Chief Deputy, who reported to Respondent Sheriff Tunnell. The Millers are not related.

22. Lt. Johnson moonlighted for the federal court system as a United States Marshall, so he often was away from the Bay County Courthouse.

23. While unranked bailiff Lemar Sauls was moonlighting with Lt. Johnson as a U. S. Marshall, Lt. Johnson told Sauls privately that he did not believe women "needed to be in law enforcement." No date or context for this statement was given. There is no evidence Lt. Johnson expressed such a sentiment to Petitioner or any female employee. There is no evidence that any higher ranking officer was ever made aware of this statement or attitude, so as to require that Sheriff Tunnell address it.

24. Petitioner complains herein that Lt. Johnson did not allow her to exercise supervisory duties in his absence.

25. Overall, each bailiff and former bailiff testified that he or she had assumed Petitioner was "in charge" during Lt. Johnson's frequent absences from the courthouse. On occasion, Lt. Johnson specifically informed bailiffs that Petitioner was in charge in his absence.

26. In Lt. Johnson's absence, Petitioner assigned routine duties to the bailiffs, such as providing security at the front door of the courthouse and transporting prisoners. At least twice, she sent bailiffs home when they were no longer needed.

27. Sometimes when Lt. Johnson left the courthouse, he personally and directly informed Petitioner that he was leaving. On other occasions, he asked other bailiffs to inform her that he was leaving the building. Petitioner perceived this "relaying" of information to be demeaning to her, but other witnesses did not share her perception.

28. As of August 6, 1990, while Lt. Davis was still in charge, the Chief Circuit Judge had begun to require that a bailiff be present on the third floor at all times of public access there, and that a bailiff be present in each courtroom whenever court was in session. While on the third floor, bailiffs took their orders from the judges. This system continued under Lt. Johnson, and all the bailiffs also continued to work independently to a large degree.

29. However, memoranda in evidence show Lt. Johnson required increased security in the inmate transport system. Almost immediately upon his arrival in late 1992, Lt. Johnson had bailiffs other than the bailiffs assigned to courtrooms transport and deliver all the prisoners to the correct courtroom, rather than having each courtroom bailiff fetch his or her own prisoners. It may be inferred that this procedure ensured that a full complement of regular bailiffs were always present on the third floor. Although this transport function seems to have rotated among other bailiffs, including Sheila Sharp, a female, Lt. Johnson never assigned it to Petitioner. However, no nexus was shown between this decision of Lt. Johnson, which decision would seem to be his prerogative as Petitioner's supervisor, and Petitioner's age or gender.

30. After Lt. Johnson assumed command, because Petitioner had been specifically requested for third-floor circuit courtroom duty by one or more judges, she often was not readily available on

the other floors of the courthouse. If Petitioner were unavailable due to her own duties, unranked bailiffs sometimes took the initiative to perform what Petitioner normally thought of as her supervisory duties. Instead of waiting to be reassigned, male and female bailiffs sometimes relieved each other at their previously assigned posts. Lt. Johnson apparently permitted this informality, but no competent evidence established that Lt. Johnson or any other bailiff intended or perceived it as undermining Petitioner's authority or even being intentionally directed at her.

31. Memoranda provided to all the bailiffs by Lt. Johnson required notifications and reports be made to "the lieutenant" or the "acting supervisor in his absence." They did not mention Petitioner by name or rank. However, Lt. Johnson never told Petitioner that she could not perform the duties of acting supervisor, and Petitioner was aware of only one occasion when Lt. Johnson told another bailiff to perform the duties of acting supervisor. On that single occasion, Petitioner overheard Lt. Johnson tell another female bailiff, Sheila Sharp, to instruct the bailiffs as to their duties.

32. Petitioner complains herein of being excluded from the chain of command and from bailiffs meetings.

33. Lt. Johnson conducted meetings for bailiffs infrequently and rarely scheduled them in advance. No witness was clear on how many meetings actually occurred, but it was probably less than

five. One witness described these events as "meetings, if you could call them that," and seemed to think that the format was looser than a "gathering." Another witness considered at least two meetings to have been formal, mandatory meetings pre-planned by Lt. Johnson, but considered the other meetings to be impromptu, briefer "gatherings." There is no evidence that anything was accomplished in these meetings.

34. Generally, Lt. Johnson would convene a meeting if the bailiffs were already mostly all together. Because Petitioner had been assigned to the third floor at all times court was in session so as to be available for the judges, Lt. Johnson did not always call her to meetings. On one occasion, Lt. Johnson told Lemar Sauls not to fetch Petitioner from the third floor because "she's not a part of us." However, Petitioner was only aware of two meetings which she did not actually attend, and female bailiff Sheila Sharp was present at most meetings.

35. Petitioner chaffed over her feeling that Lt. Johnson had deliberately excluded her from some bailiffs meetings, but she never told him of her chagrin, asked him to notify her of meetings, or asked him when or where the next meeting would be scheduled.

36. It is not clear from the record whether Lt. Johnson advised bailiffs of upcoming changes during meetings, but it is clear that he advised all bailiffs, including Petitioner, of changes in operations and security procedures by memorandum. As

her superior, he was not required to involve Petitioner before making changes in procedures.

37. Petitioner testified that Lt. Johnson did not advise her that a security alarm had been installed on a courtroom door. This information also was not included in any memorandum to all bailiffs.

38. Petitioner complains herein that Lt. Johnson undermined her authority as a corporal by intentionally failing to provide her with corporal's stripes. On two occasions when uniforms were ordered, Petitioner's corporal's stripes were not received. Each time, Petitioner complained to Lt. Johnson, who said he would get them for her. It took several reminders by Petitioner for Lt. Johnson to obtain the stripes. Apparently, the longer delay was from early 1995 to January 22, 1996, after her grievance procedure against him was initiated. (See Finding of Fact No. 52).

39. Inmates were transported from the jail to the courthouse and detained in a holding cell in the courthouse, pending court appearances. A key to the holding cell hung just inside the door of the bailiffs office for any bailiff to use. Lt. Johnson gave an extra key to the holding cell to Lamar Sauls, who was then working criminal court. Lt. Johnson did not give a key to Petitioner. Petitioner considered this to be a slight and that it undermined her authority as corporal/assistant supervisor. In

fact, Petitioner already had possession of an extra key to the holding cell. She testified that she believed Lt. Johnson did not know she had it, until she told him in 1993.

40. Under Lt. Davis's command, in his absence, Petitioner had made out the daily jail list indicating which prisoners would have to be transported from the jail to court the next day. Lt. Johnson never asked Petitioner to make out the list, even during his frequent absences. Under Lt. Johnson, Petitioner did not know who made out the daily jail list and admitted it was possible Lt. Johnson did it himself.

41. Lt. Johnson maintained two desks in the bailiffs office. One of the desks was for his personal use. He kept this desk locked, but gave Bailiff N. D. Williams (male) a key to it. He permitted N. D. Williams to store his weapon in it and permitted Bailiff Sheila Sharp to store her personal effects in it. Sharp had to ask to use Lt. Johnson's or N. D. Williams's key to the desk. Apparently, Petitioner had the use of another desk, but resented her subordinates having a key or access to Lt. Johnson's desk when she did not.[6] Nevertheless, Petitioner never requested that Lt. Johnson give her a key to his desk.

42. Sharp gave her reason for using Lt. Johnson's desk as a need to store feminine things held over from a time when she had no locker. N. D. Williams kept his gun in Lt. Johnson's locked

desk because his locker was on the other side of the holding cell, and he preferred not to carry a weapon past inmates lined-up to be admitted to the holding cell.

43. Petitioner's problems with direct insubordination were confined to her orders to, and the behavior of, another female bailiff, Sheila Sharp, who was an unranked deputy.

44. On one occasion, Petitioner directed Sharp to work the front door of the courthouse. Because Lt. Johnson had given Sharp permission to leave early, Sharp left prior to the end of her shift and asked another bailiff to cover the front door for her. Not knowing Sharp had received the lieutenant's permission, Petitioner considered Sharp's actions to be insubordinate, but Petitioner never confronted Sharp or questioned her. Petitioner urges the inference that Lt. Johnson's giving permission to Sharp deliberately undermined Petitioner's supervisory authority and rank. The conjecture is not supported by the facts. Even if proven, it would not create a hostile workplace since Petitioner and Sharp are of the same gender, and age seems to have played no part in the incident.

45. On a separate occasion, an altercation between Petitioner and Sharp arose when an inmate, whom Sharp was transporting at the request of Judge Hess, followed Sharp into the bailiffs' office. Because of the presence of weapons, the inmate was not supposed to be in the office. When Petitioner corrected Sharp in front of the inmate and the bailiffs present, Sharp

reacted angrily and harsh words were exchanged between the two women. Petitioner felt this incident demonstrated a hostile workplace for her because Lt. Johnson shouted at both women to "shut up." Petitioner considered Sharp to be insubordinate, but she never specifically asked Lt. Johnson to discipline Sharp.

46. Petitioner felt the foregoing incident or another similar incident (it is not clear from the record whether there were one or two incidents) demonstrated how all her male superiors failed to "back her up" or "take her seriously" and how the entire workplace was "hostile," because Captain Miller also told Petitioner to "stop bickering and come across the street."

47. While neither male superior's response to the women's verbal altercation(s) showed tact or good managerial skills, the phrase "shut up" and the word "bickering" are not confined in their use to females or aged persons, and they have no clear nexus to Petitioner's age or gender when used to tell her to stop publicly arguing with a female subordinate.

48. On November 7, 1995, Petitioner's attorney wrote as follows to Sheriff Tunnell, complaining that Petitioner was subject to a hostile work environment created by Lt. Johnson.

> **Specifically, Lt. Johnson has:
>
> * Left other deputies in charge rather than his only corporal in his absence.
>
> * Given an extra key to the holding cell to another deputy rather than the corporal.
>
> * Excluded Cpl. Schwartz from bailiffs' meetings.

* Avoided giving administrative duties to the corporal, choosing to give them to other deputies instead.

* Omitted advising the corporal of changes in logistics such as changing security procedures in the courtrooms and bailiffs' [sic] taking the duty of preparing the daily jail lists from the court administrator's office, among other examples.

* Ordered twice new uniforms for the corporal without stripes and taken his time to supply the missing stripes.

* Given keys to the locked desk in the bailiff's (sic) office to another deputy.

* Allowed insubordination to the corporal from one deputy to continue without sanctions. (Capt. Miller has not been helpful in this regard either and minimized the problem as "bickering"). [sic]

* Neglected in three years to prepare annual evaluations for Cpl. Schwartz, leaving her to get "average" by default, thereby impairing her promotional opportunities.

49. Petitioner's attorney's letter closed with this sentence, "At this rate, she is in a dead-end position with an unsympathetic lieutenant and captain in her chain of command."

50. Petitioner testified that at the time the foregoing letter was written, her position as a corporal in the bailiffs section was a job with no opportunity for her to advance due to the section's absence of a sergeant's rank.

51. Sheriff Tunnell wrote in reply to Petitioner's lawyer, expressing his disappointment that Petitioner had not used the

established grievance procedure, so Petitioner filed a formal grievance.

52. On December 8, 1995, Petitioner complained to Lt. Johnson, by memorandum, about a "hostile environment" due to his failure to notify her when he would be absent, leaving a male, unranked deputy in charge, allowing unranked Sheila Sharp to handle supervisory duties and allowing her to not take her instructions from Petitioner, giving the desk key to N.D. Williams, not getting Petitioner's corporal stripes, and not allowing Petitioner to do any paperwork, i.e. schedules or the jail list, and instructing Petitioner to leave the information for the paperwork for him. The thrust of this memorandum is not an accusation of Lt. Johnson's hostility toward women or aged persons but an accusation that he failed to "back up" a subordinate officer's decisions and to enforce the chain of command.

53. Lt. Johnson did not respond, so a month later, in accordance with the grievance procedure for discrimination matters, Petitioner forwarded a copy of her complaint/memorandum to Captain Miller.

54. Captain Miller and Major Miller subsequently met with Petitioner regarding her complaint. This was the next step of the anti-discrimination procedure established by Sheriff Tunnell.

55. Following this meeting, Major Miller recommended that Petitioner's complaint be investigated.

56. Sheriff Tunnell approved an internal investigation of Petitioner's complaint.

57. On January 17, 1996, the investigation was assigned to Allen D. Phillips. His investigation also addressed Petitioner's charge that Lt. Johnson had allowed Sheila Sharp to take excessive leave.

58. Following extensive interviews of court personnel and outside witnesses, Mr. Phillips concluded that Petitioner had not been subjected to a sexually hostile work environment, and that poor record-keeping precluded any determination as to whether Sharp had abused her leave. Phillips also confirmed Petitioner's allegation that Sharp had exercised supervisory duties in Lt. Johnson's absence, but concluded that a personality conflict existed between Petitioner and Sharp.

59. Relying on the investigative report, Sheriff Tunnell concluded that Petitioner was generally exercising her supervisory duties in Lt. Johnson's absence; that inadequate record-keeping, particularly with regard to compensatory leave, was a problem within the bailiffs section; and that improvements needed to be made. Furthermore, he noted that Lt. Johnson had not provided evaluations for Petitioner and other personnel for several years and promised that, as a result of a new evaluation process, employees would henceforth receive annual evaluations.

60. On an occasion when Lt. Johnson <u>had</u> rated Petitioner, he rated her as very satisfactory or 3.2, with 4.0 being the highest

possible score, and Captain Miller approved the rating. Petitioner testified that she believed she lost no promotions and did not think she lost any wage increases as a result of Lt. Johnson's failure to evaluate her.

61. On April 4, 1996, following his review of the internal investigation report, Respondent informed Petitioner of his conclusions. By this same letter, Sheriff Tunnell transferred Petitioner to the road patrol section. In pertinent part, his letter read:

> I can genuinely appreciate your interest in furthering your career opportunities and advancing in rank within this organization. However, I find it odd that you apparently did not choose to even participate in the most recent sergeant's promotional process. Further, within the current structure of the Bailiff section there are no provisions for any additional promotional steps, nor do I see any development in such position within the foreseeable future. It would be difficult, therefore, for you to receive any considerations for advancement in that area.
>
> It has often been my experience that law enforcement personnel frequently become somewhat "stale" when assigned to particular duties and perhaps working within the Bailiff Section, given the often stressful nature of the work, can be such an assignment.
>
> Therefore, effective Friday, April 12, 1996, I am assigning you to the Field Services Division under the command of Captain Gene Hendrix. <u>Upon learning the various intricacies of their operations, as a patrol supervisor, you should have the opportunity to perform in a higher profile area and, thusly, will be given more ample chances for promotional benefit to your career.</u> Please report at 0800 hours on Friday to Captain

> Hendrix for further detail with regard to this new assignment.
>
> Should you have any questions or comments regarding the disposition of this matter, as always, I will be more than happy to discuss them with you. (Emphasis added)

62. Sheriff Tunnell did not ask Petitioner to concur in this transfer.

63. During Petitioner's hiring process with the predecessor sheriff in 1987, Petitioner came to believe that she would never have to serve in any section other than the bailiffs section and that she could not be transferred out of the bailiffs section without her consent. Petitioner maintains that Sheriff Tunnell's transfer of her to road patrol was "against her will," in retaliation for filing her grievance. However, Petitioner does not suggest that the predecessor sheriff or Sheriff Tunnell ever promised her she could not be utilized as any other sworn law enforcement officer, according to the para-military command module (see Finding of Fact 3), and she offered nothing of a formal nature which would bind a successor sheriff to insinuations of non-transferability made by his predecessor. Likewise, she presented no statute, rule, or organizational schematic which would preclude the Bay County Sheriff from utilizing any deputy, of any rank, in any unit of the Office, at any time he believed it to be necessary.

64. There was at least one other female deputy on road patrol when Petitioner was transferred there, but there was no female deputy in her platoon.

65. Petitioner was 52 years old when she was transferred. Information presented with regard to the age and gender of those persons who have been transferred into the road patrol section and whether or not they wanted to be transferred into that unit is largely hearsay or speculation. All that is reasonably probable is that up to three male deputies over forty years of age have been transferred to road patrol; all of them may have had previous road patrol experience; and there was no evidence that their transfers were "against their wills." It is by no means clear whether they requested or simply accepted transfer. It is also merely probable that Petitioner is the only deputy over 50 years of age, with no prior road patrol experience, who was transferred to road patrol without requesting the transfer.[7]

66. Sheriff Tunnell testified credibly that he had two motivations in transferring Petitioner to road patrol. First, he felt that after the internal investigation, it would be hard for Petitioner to return to work for Lt. Johnson, since the majority of her allegations had been determined to be unfounded. Second, he concurred with her attorney's assessment (see Finding of Fact 49) that people did not go up in rank or get promotions in the bailiffs section. In his opinion, there were no new career challenges in the bailiffs section at that time, April of 1996, an

opinion apparently shared at that time by Petitioner. See Finding of Fact 50.

67. It may be inferred that Sheriff Tunnell's transfer of Petitioner out of the Court Services Division also removed her from any potential "hostile environment" or retaliation from Lt. Johnson or Captain Miller which could have resulted from her grievance, the grievance procedure, or the internal investigation.

68. Petitioner was replaced in the bailiffs section by a female deputy, Anita Newsome, who already had achieved the rank of sergeant by competitive examination. Sometime later, Sergeant Newsome was promoted to lieutenant and replaced Lt. Johnson as supervisor of the bailiffs section.

69. Sheriff Tunnell did not consider Petitioner's age in her transfer. He was unaware of any physical factors indicating that she could not handle shift work in the road patrol section.

70. Petitioner did not receive the transfer letter until April 9, 1996, so that in effect, she only had three days to make all arrangements to move to the road patrol section. She testified that this abrupt change in circumstances was a "hardship" on her, but she did not explain what the hardship was, except that she felt stress.

71. Petitioner did not assert that the physical requirements for a road patrol deputy were a problem for her at the time of her 1996 transfer. Although she had back surgery in 1999 and 2000, and now also has arthritis, these conditions did not exist at the

time of transfer. Also, prior to her testimony at hearing, she had never informed her superiors that these later infirmities required any accommodation. She has not asked to transfer back to the bailiffs section. Accordingly, her assertion that Sheriff Tunnell's keeping her in the road patrol section is retaliatory or hostile because road patrol shift work is unhealthy for her is unpersuasive.

72. At hearing, Petitioner also complained that the road patrol section is more mentally demanding than the bailiffs section and that she feels isolated on road patrol due to most road patrol deputies being males in their twenties and thirties, but she related no specific incident or pattern of behavior supporting her feeling.

73. Petitioner interpreted the transfer letter (see the emphasized language in Finding of Fact 62) to mean that she would retain her rank of corporal and after re-training for road patrol, she would exercise supervisory authority as a corporal over other members of the road patrol section. She asserted that the failure to assign her such supervisory duties on road patrol subsequent to her initial training and during the intervening five years demonstrates that Sheriff Tunnell transferred her to a position which is inferior to the one she occupied in the bailiffs section in retaliation for her filing a grievance. However, she has not shown that on road patrol, younger and/or male deputies of her rank or of lesser rank have been assigned such supervisory duties.

74. Respondent did not intend for Petitioner to carry any supervisory authority with her upon her transfer to road patrol, because her rank as a corporal was meritorious and she was moving out of her specialty field into a general law enforcement position with arrest authority. (See Finding of Fact 15)

75. Nonetheless, Petitioner was transferred in her rank of corporal and suffered no decrease in pay or other work-related benefits by being assigned to road patrol. She received an increase in pay the following August at her annual evaluation.

76. One male road patrol corporal, Andy Thomas, was, or is, earning more per annum than Petitioner at the same grade, but their respective evaluations, times in grade, times in rank, and times in position were not shown. Therefore, there can be no valid comparison.

77. Following Petitioner's transfer to road patrol, she was provided three months of training by experienced field training officers.

78. Petitioner testified that the training was difficult only because it required study at nights after training all day. There were no physical demands during training that she could not meet. She related no way in which she received any different training than a younger deputy or a male deputy.

79. Upon completion of her training, Petitioner was recommended for assignment as a road patrol deputy based on her proficiency. Despite this, Petitioner felt lacking in training

because she had been trained only during the day shift. She did not tell anyone she did not feel fit to go on active road patrol after her training. She only went on the night shift after a four months' assignment to day patrol, which is the standard rotation period for all road patrol officers, regardless of age or gender. She did not relate that her road patrol assignment was different than that of younger deputies or male deputies or that it was harder on her because she is female.

80. In the intervening five years that Petitioner has been assigned to road patrol, she has again served honorably and well. Her evaluations have been above average. She once received 4.57 out of a possible 5.0 points. She has received compliments from the public and a commendation from Sheriff Tunnell for her work. Accordingly, Petitioner's assertion that road patrol, particularly night duty, is dangerous to herself and the public is unpersuasive, as is her assertion that she was placed in the road patrol position so that she could fail.

81. Subsequent to Petitioner's transfer to road patrol, there have been two or three promotional examinations for which she has been eligible. She has never taken one. Therefore, she has not advanced in rank on road patrol or become eligible for the higher ranks now present in the bailiffs section. Her explanation why she has never taken a competitive examination, even while in the bailiffs section, was that she believed that in order to advance in rank, she both had to pass the sergeant's

examination and serve a period of time on road patrol. However, she admits that she never verified this belief through official channels. Even if her belief is correct, since she is currently in the road patrol section, it would seem that Petitioner's failure to progress to supervisory status on road patrol is not that of the Sheriff's Office, but her own.

82. Petitioner presented no examples of a hostile work environment specific to the road patrol section. (See Findings of Fact 70-81 and the Conclusions of Law).

83. In February 2001, Sheriff Tunnell decided to discontinue the meritorious rank of corporal and permit the rank to be retained only if an officer were exercising supervisory authority. He drafted a memorandum to that effect, but the memorandum was not disseminated until April 12, 2001.

84. Petitioner contends that the timing of the February 12, 2001, draft of the memorandum and its April 12, 2001, dissemination constitute Respondent's "continuing retaliation" against her for achieving a remand from the Commission on February 1, 2001, and for proceeding with the disputed-fact hearing on April 17-18, 2001. (See Preliminary Statement) This contention is unpersuasive because it was shown that Respondent's decision to eliminate the meritorious rank of corporal affected three corporals without supervisory authority, only one of whom was Petitioner. The other two corporals who lost their meritorious rank were males, John Vaught and Barry Black. Vaught

was a corporal inherited from Sheriff Tunnell's predecessor. Vaught had served on road patrol and then was transferred to the bailiffs section, without supervisory authority.

85. Male meritorious corporals, such as J. R. Nelson, in the warrants section, who supervised other Sheriff's Office personnel for transport, and boot camp supervisors, did not lose the meritorious corporal rank.

86. None of the meritorious corporals who lost rank, including Petitioner, suffered financially by the loss.

87. Petitioner had admitted in evidence some EEO4 forms of Respondent. Without expert interpretation, these forms are not competent evidence of age, gender, retaliation, or hostile workplace discrimination.[8] They do not refute Respondent Sheriff's credible testimony that, despite an active recruitment program, he has had trouble hiring both male and female qualified deputies.

88. Petitioner testified that she did not want to return to the bailiffs section because "it's not the same people" and "it's all changed now."

89. In an effort to establish the existence of a hostile work environment for females, Petitioner presented the testimony of several female deputies. None of the female deputies who testified worked in either the bailiffs section or the road patrol section at any time that Petitioner was in the respective section.[9]

90. Paula Agosta worked a short time on road patrol, a short time in the courthouse as a bailiff, and in the courthouse civil division. She had no knowledge of Petitioner's situation with Lt. Johnson or Captain Miller, and never worked for Lt. Johnson. She offered no complaints about her treatment as a bailiff or on road patrol.

91. Tragically, in June 1993, Ms. Agosta was diagnosed with cancer and underwent a double mastectomy. She returned to work in October 1993. Early in her recovery, she hurt her chest muscles carrying some heavy docket books; she complained to Captain Miller, and he or another male carried them for her from then on.

92. Thereafter, Ms. Agosta underwent a series of reconstructive surgeries which concluded in 1995. During the course of Ms. Agosta's reconstructive surgeries, she was directed by her physician to wear loose-fitting clothing. She also sometimes could not wear a bra or any undergarment covering her breasts. She presented a note to that effect to Captain Miller. Wearing loose-fitting clothing was not a problem for Ms. Agosta for a short period of time while she served civil process in civilian clothes or after she returned to the courthouse full time where most of the civil division personnel also wore civilian clothes. When uniforms were ordered for everyone in 1995, Ms. Agosta was also asked to wear one. Ms. Agosta did not comply, even refusing to order the pants or a skirt. The uniform consisted of a white cotton blouse and green pants or a skirt.

Several times, Captain Miller counseled her to wear a uniform, but she would not. On July 10, 1995, he issued her a memorandum requiring her to wear a properly-fitting uniform within five working days or face disciplinary action.

93. Ms. Agosta was hurt by Captain Miller's handling of the uniform situation because she had requested that she be allowed to wear loose-fitting civilian clothes for five more days due to the last reconstructive surgery and he had yelled at her in the presence of other employees, saying that he would not let her have the five days. She also faults him for publicly yelling at her when they had a dispute about her time sheets and he reprimanded her for not calling in early enough one morning that she had stayed at home on sick leave. Apparently, this last occasion was approximately when he issued the memorandum. She also claims that he only told her out of spite, at that point, that members of the public had complained a month previously that her reconstructed nipples were visible through her civilian clothing. Ms. Agosta's testimony is accepted as credible, over Captain Miller's denial, that he did yell at her under these circumstances, but that makes the public complaints no less valid and does not diminish the need for her to correct the situation, through wearing the uniform or by taking additional sick days until she could wear the uniform. The fact that her superior yelled at Ms. Agosta is egregious under the circumstances, but it does not eliminate her duty to be accurate about her timesheets and punctual about calling-in.

94. Captain Miller's testimony is accepted as credible that he received complaints from the public, that he needed to correct the situation complained-of, that he thought what he saw Ms Agosta wearing most of the time looked like a tight tube top under a loose-fitting, open, shirt and not a bandage, and that he felt that the white cotton uniform shirt could not be tighter than a tube top.

95. Since July 1995, Ms. Agosta has worn the uniform and provided no doctor's notes to the contrary.

96. Linda Dauphin worked from January 1987 to August 1994 in the Civil Division, reporting through Tommy Simmons (rank unspecified) to Captain Miller. Over Captain Miller's denial, it is found that in 1993, Ms. Dauphin and Captain Miller had an argument in his office in which he told her that if it were his choice "there would be no women on the road and that women should be barefoot, pregnant, and behind a desk," and she called him, "a male chauvinist pig." Ms. Dauphin apparently considered this dispute not to be job-related and never filed a grievance or otherwise alerted human resources personnel or Sheriff Tunnell to any discrimination or hostile work environment issues.

97. Despite the animus, if it can be called that, expressed by Captain Miller, this comment had no real-world significance to Ms. Dauphin's perception of the overall work environment or to Petitioner's transfer to road patrol duty.

98. Ms. Dauphin had no knowledge of Petitioner's situation with Lt. Johnson or with Captain Miller. Ms. Dauphin had worked with Lt. Johnson and testified that she "loved working with [him]" and "didn't have any problem . . . ."

99. Linda Suggs has worked in the radio room, criminal warrants, computer room, and records sections. She had no knowledge of Petitioner's situation with Lt. Johnson or Major Miller. Major Miller's situation with regard to Ms. Suggs and Petitioner is that every deputy, male or female, ultimately reports through the chain of command to a Captain, who in turn reports to Major Miller, who is also Chief Deputy.

100. Ms. Suggs had an on-going problem with her immediate superior, Captain Leonard, against whom she orally complained to Major Miller. There is no evidence that Captain Leonard ever supervised Petitioner.

101. On several occasions from 1993 through 1995, Captain Leonard disciplined Ms. Suggs for tardiness and failing to, or failing to timely, notify her immediate supervisors that she would be late or absent from work. Her failure to attend meetings intended to resolve computer problems considerably inconvenienced non-agency personnel who had traveled to meet with Sheriffs Office Staff.

102. Ms. Suggs vehemently denied that Major Miller discriminated against her because she is a woman, but she believed that he allowed Captain Leonard to do so. However, she conceded

that sometimes Major Miller countermanded discipline against her which had been imposed by Captain Leonard, and sometimes he did not, depending on the situation.

103. Ms. Suggs' testimony concerning a specific demeaning remark to her as a woman made by Captain Leonard, his refusal to assign her to a computer task she wanted, his assignment of the task to a male co-worker, and Major Miller's failure to make Captain Leonard apologize when Ms. Suggs orally complained about this incident to him, only creates an equipoise with the equally credible denials of Captain Leonard and Major Miller. However, it is significant for the instant case that Ms. Suggs never filed a formal grievance about this particular incident against Captain Leonard for Major Miller to process, whereas Petitioner filed a formal grievance against Lt. Johnson, which formal grievance Major Miller did process towards a full-scale investigation. Ms. Suggs has filed other grievances which have been processed.

CONCLUSIONS OF LAW

104. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this cause, only pursuant to Section 120.57(1) and Chapter 760, Florida Statutes.

105. A precondition to the jurisdiction of discrimination actions under Chapter 760, Florida Statutes, before the Division is that a charge of discrimination must be filed before the Florida Commission on Human Relations within 365 days of the last

act of alleged discrimination. If a particular type of discrimination is not timely claimed, it cannot be added by the Petition for Relief or other means over objection after the 365 days have passed. Miller v. Levy County, DOAH Case No. 97-3732 (Recommended Order November 26, 1997; Final Order adopting in toto August 4, 1998); Lannom v. Barnett Banks, Inc., DOAH Case No. 93-5465 (Recommended Order February 23, 1995; no Final Order); Luke v. Pic 'N' Save Drug Company, Inc., DOAH Case No. 94-0294 (Recommended Order August 25, 1994; Final Order adopting in toto December 8, 1995); Austin v. Florida Power Corp., DOAH Case No. 90-5137 (Recommended Order June 20, 1991; Final Order adopting in toto October 24, 1991).

106. The instant cause was initiated by Petitioner's Charge of Discrimination, upon which the boxes for "age" (over 50), "sex" (female), and "retaliation" were checked. It was filed with the Florida Commission on Human Relations on or about May 22, 1996.

107. In that Charge of Discrimination, then-Corporal Schwartz complained of a "hostile work environment," as distinguished from "sexual harassment." The Charge of Discrimination involved (1) an allegedly hostile work environment manifested day-by-day through Lt. Johnson (male), who at that time had immediate supervision of the bailiffs, including Petitioner while Petitioner had been assigned to the bailiffs section; and (2) an allegedly discriminatory retaliation by Sheriff Guy Tunnell, who had ultimate supervisory authority over Lt. Johnson

and Petitioner through a chain of command. The nature of the alleged retaliation was described as Sheriff Tunnell's transfer of Petitioner to the road patrol section, effective April 12, 1996, because Petitioner had filed an internal grievance on the basis of the allegedly hostile work environment she had experienced in the bailiffs section. (Joint Exhibit A)

108. The Charge of Discrimination is the initial charging document. It contains nothing about a hostile work environment existing in the road patrol section to which Petitioner was transferred, but it does suggest that Petitioner's transfer to, and service in, the road patrol section created a hardship upon Petitioner due to her age. By its attachments, it alleges that there was a disproportionately high number of males compared to females in the entirety of Respondent's workforce, but this allegation is not tied to any disparate treatment or hostile treatment of Petitioner in either the bailiffs section or road patrol section.

109. On July 28, 1999, more than 365 days after the involuntary transfer incident complained-of, and indeed, more than 365 days after the filing of the Charge of Discrimination, the Commission, by its Executive Director, entered a "Determination: No Cause," finding Respondent to be an "employer" under Chapter 760, Florida Statutes, and finding no reasonable cause to believe that an unlawful employment practice had occurred. This determination constitutes the Commission's "proposed final agency

action" herein, and any allegations of acts of discrimination which were not reviewed by the Commission are not subject to referral to the Division because they would be outside the proposed final agency action, and thus outside the jurisdiction of the Division. However, the Commission's determination of "no cause," as to the issues presented to it, is not binding upon the Division, and those issues properly plead before the Commission are within the jurisdiction of the Division of Administrative Hearings and appear here for a trial de novo.

110. A Petition for Relief (Joint Exhibit B) was filed with the Commission. The Commission's date stamp is not clear, so it is not possible to determine therefrom if the Petition for Relief was timely-filed within 35 days of July 28, 1999, as required by law.[10] However, the Commission did not give notice of the Petition to Respondent, nor transmit the Petition for Relief to the Division, until September 24, 1999, considerably more than 35 days after the Determination: No Cause.

111. The Petition for Relief (Joint Exhibit B) clearly alleges "gender, age, and retaliation" discrimination and further alleges, in Paragraph 1C, "The unlawful treatment of the complainant was part of a pattern and practice of hostile work environment to other members of the department in the same protected classes as the complainant."

112. Accordingly, I have interpreted the Charge of Discrimination and Petition for Relief to complain of all aspects

of Petitioner's transfer situation on the basis of alleged retaliation rather than being merely a complaint about a discrete incident of retaliatory transfer which occurred on the finite date of April 12, 1996. Therefore, evidence Petitioner believed would demonstrate either retaliation or how her new road patrol position is allegedly inferior to, or more onerous than, her prior bailiff position has not been excluded, because such evidence might explain why the transfer constituted retaliation, i.e. an adverse employment action. In an abundance of caution, Petitioner has even been permitted to present evidence that she believed would show a hostile work environment in the hierarchy of the Sheriffs Office.

113. However, the Petition for Relief makes no discrete claim for loss of back-end or front-end pay, for failure to hire, for failure to promote, or for any specific hostile treatment or hostile work environment alleged to have been suffered by Petitioner or by any other aged or female person after the finite date of Petitioner's transfer to road patrol, April 12, 1996, or continuing to the present, so any assertions she makes now in those regards are barred as extra-jurisdictional, under Section 120.57(1) and Chapter 760, Florida Statutes, and pursuant to the cases cited supra.

114. Federal cases under Title VII are in accord, that any new assertions are jurisdictionally barred. See Rush v. McDonald's Corp., 966 F.2d 1104, 1110 (7th Cir. 1992); Lieberman

v. Miami-Dade County, 2000 WL 1717649; 13 Fla. L. Weekly Fed. D.3 (S.D. Fla. Aug. 16, 2000).

115. Decisions construing Title VII are applicable when considering claims under Chapter 760, Florida Statutes. The Florida Civil Rights Act was patterned after Title VII. Harper v. Blockbuster Entertainment Corp., 139 F.3d 1385, 1387 (11th Cir. 1998), cert. denied 119 S.Ct. 509 (1998).

116. Nonetheless, Petitioner's new assertions are peripherally addressed below.

117. Petitioner is a person of the protected classes of female and aged persons, as those terms are defined in Chapter 760, Florida Statutes, The Florida Civil Rights Act, and the case progeny arising thereunder.

118. The Commission has remanded this case for trial on the merits, despite the previous case law holding that elected Sheriffs cannot be employers under Chapter 760, Florida Statutes.

119. Sexual harassment is a form of gender discrimination prohibited by Title VII and the Florida Civil Rights Act. When making a claim of sexual harassment, there are two possible forms that can be alleged: hostile work environment and quid pro quo Scelta v. Delicatessen Support Services, Inc., 57 F.Supp.2d 1327, 1339 (M.D. Fla. 1999). There is no suggestion herein of a quid pro quo situation.

120. To prove a claim of hostile work environment, an employee must allege and prove five elements: (1) that the employee belongs to a protected class; (2) that the employee was subjected to unwelcome harassment; (3) that the harassment was based on the employee's sex; (4) that the harassment effected a "term, condition, or privilege of employment"; and, (5) that the employer knew or should have known of harassment and failed to intervene. Succar v. Dade County School Board, 229 F.3d 1343, 1344-1345 (11th Cir. 2000); Henson v. City of Dundee, 682 F.2d 897, 903-905 (11th Cir. 1982).

121. Four factors are considered in determining whether harassment objectively altered an employee's terms or conditions of employment: (1) the frequency of the conduct; (2) the severity of the conduct; (3) whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and (4) whether the conduct unreasonably interferes with the employee's job performance. Harris v. Forklift Systems, Inc., 510 U.S. 17, 23, 114 S.Ct. 367, 126 L.Ed. 29, (1993); Mendoza v. Borden, Inc., 195 F.3d 1238, 1246 (11th Cir. 1999). The environment must be one that a "reasonable person would find hostile or abusive" and that "the victim . . . subjectively perceive[s] . . . to be abusive." Harris v. Forklift Systems, Inc., supra, at page 21. Furthermore, the objective severity of the harassment should be judged from the perspective of a reasonable person in the Petitioner's position,

considering all the circumstances. Harris v. Forklift Systems, Inc., at page 23.

122. Basically, Petitioner's concern was that she wanted no changes in procedure from the way Lt. Davis had run the bailiffs section, but the real-world significance of a para-military command module is that the superior officer, in this case Lt. Johnson, gets to run the operation the way s/he wants to, so long as s/he does not discriminate. A commanding officer is not always right, but he or she is always the commanding officer.

123. All of the bailiffs section incidents identified by Petitioner involve general work matters which are not actionable as hostile work environment gender discrimination. See Brown v. Brown and Williamson Tobacco Corp., 1996 WL 325890; 70 Fair Empl. Prac. Cas. (BNA) 1211 (N.D. Fla. 1996), citing Bolden v. PRC Inc., 43 F. 3d 545, 551 (10th Cir. 1994), cert. denied, 516 U.S. 826, 116 S. Ct. 92, 133 L.Ed 2d 48 (1995). Petitioner cannot turn a personal dispute into a discrimination claim. See Succar v. Dade County School Board, supra, citing McCollum v. Bolger, 794 F.2d 602, 610 (11th Cir. 1999) and Oncale v. Sundowner Offshore Services, infra.

124. Petitioner did not specifically plead age discrimination with regard to the alleged hostile work environment created by Lt. Johnson, but there simply is no clear nexus between any of Lt. Johnson's acts or omissions and either gender or age discrimination against Petitioner. At the heart of Petitioner's

hostile work environment claim is her contention that another female, Sheila Sharp, was permitted to encroach on Petitioner's supervisory duties, authority, and prerogatives, and that Sheila Sharp was allowed to go to meetings that Petitioner was not allowed. Perhaps Lt. Johnson erred in yelling at both women for quarreling. Perhaps Captain Miller erred in not doing more than he did. However, there is no proof the superior officers would not have reacted the same way to two bickering males. The purpose of Title VII is to strike at the disparate treatment of men and women. There is simply no evidence that Petitioner suffered by being a woman or that Ms. Sharp or anyone else got some advantage over Petitioner based on age.

125. In reaching the foregoing conclusions, the testimony of Lamar Sauls that Lt. Johnson harbored discriminatory animus against all women in law enforcement and stated that Petitioner was "not one of us" has not been overlooked. The latter statement clearly had no discriminatory effect against women because females other than Petitioner, in this case, Ms. Sharp, were present at meetings. Such isolated and ambiguous statements are too abstract to support a finding of discrimination. See Carpenter v. Western Credit Union, 62 F.3d 143, 145 (6th Cir. 1995), citing Gagne v. Northwestern Nat'l Ins. Co., 881 F.2d 309, 314 (6th Cir. 1989). Lt. Johnson's comment that women did not belong in law enforcement could not create a sexually hostile work environment. Mere utterance of a sexual epithet in the workplace is not enough to

alter the terms, conditions, or privileges of employment. Isolated comments without physical force or intimidation are insufficient. Rather, the workplace must be "permeated with discriminatory intimidation, ridicule and insult." Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 118 S.Ct. 998, 1001, 140 L.Ed 201 (1998). Because the comment was made outside the work environment and outside Petitioner's presence, it did not affect the terms and conditions of her employment. See Hanley v. Sports Authority, 2000 WL 33310903, 14 Fla. L. Weekly D97 (S.D. Fla. 2000).

126. However, where animus has been voiced, as in Lt. Johnson's comment about women not needing to be in law enforcement, the employer must offer a non-discriminatory explanation for the acts complained-of that is a more likely reason for those acts than the discriminatory presumption. Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775, 104 L.Ed. 2d 268 (1989); Texas Department of Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L.Ed 2d 207 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed 2d 668 (1973); Chandler v. Florida Department of Corrections, 582 So. 2d 1183 (Fla. 1st DCA 1991); Battles v. Department of Corrections, DOAH Case No. 91-4387 (Recommended Order February 24, 1992; Final Order not provided by FCHR). In this case, Respondent has met the shifting burden of proof by showing that Petitioner suffered no significant change in her employment conditions under Lt. Johnson

and by showing the reasons behind Lt. Johnson's few changes in procedure; greater security for weapons, of the inmates, and for the courtrooms.

127. The comment made by Captain Miller that offended Linda Dauphin regarding his opinion that women should not go on the road is a non-sequitur in the circumstances of this case, since Petitioner is complaining because she was transferred to the road patrol. The remainder of Captain Miller's comment that women should stay barefoot, pregnant, and behind a desk, is clearly offensive, and "fighting words" to most women today. The fact is, however, the comment was said in anger and was not perceived as a serious workplace problem by Ms. Dauphin, to whom it was addressed. It was made outside Petitioner's presence. It was an isolated incident. It is irrelevant to Petitioner's hostile work environment claim based on her bailiffs section experience because she charged Lt. Johnson, rather than Captain Miller, with creating the hostile environment. See Holifield v. Reno, 115 F.3d 1555, 1563-1564 (11th Cir. 1997), the biases of one who neither makes nor influences the challenged personnel decision are not probative.

128. Assuming arguendo, but not ruling, that Petitioner's pleadings had addressed hostile work environment due to Captain Miller, all he did was tell her to stop bickering on one occasion. He approved a good evaluation of her by Lt. Johnson. Suppose, only for argument's sake, Petitioner had claimed that a hostile

work environment existed throughout road patrol or the entire Sheriff's Office, Captain Miller's alleged animus demonstrates nothing about Petitioner's road patrol experience and Sheriff Tunnell's transfer of her to road patrol under another Captain eliminated any nexus of Captain Miller's alleged animus or action to Petitioner.

129. In claims based on a middle supervisor's harassment, the employer, in this case Sheriff Tunnell, may be vicariously liable for actionable hostile work environment discrimination caused by a supervisor, subject to an affirmative defense. Mendoza v. Borden Inc., supra, at page 1245, n.4, citing Faragher v. City of Boca Raton, infra. The affirmative defense available to the employer is two-fold: (a) whether the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (b) whether the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer. Faragher v. City of Boca Raton, 524 U.S. 2275 at 807, 118 S. Ct. 2275, 141 L.Ed. 662 (1998); Madray v. Publix Supermarkets, Inc., 208 F.3d 1290, 1296-1297 (11th Cir. 2000). The Respondent met his burden by exercising reasonable care to prevent and correct promptly any sexually harassing behavior. In-service training is provided every two years to employees regarding sexual harassment. Furthermore, policies and procedures have been implemented to address complaints of sexually harassing behavior. Petitioner was

familiar with the policies and procedures regarding complaints and the prohibition against sexual harassment, as well as the grievance process which she used in filing complaints of gender discrimination against Lt. Davis and Lt. Johnson and not against Captain Miller.

130. Respondent Tunnell also satisfied the second prong of the affirmative defense. Although Petitioner claims that she was subjected to discriminatory conduct by Lt. Johnson from the time he assumed his duties as supervisor in August 1992, until her attorney corresponded with the Sheriff in November 1995, she delayed overlong in lodging her grievance. Once an employer has promulgated an effective anti-harassment policy and disseminated that policy and its associated procedures to employees, then "it is incumbent upon the employees to utilize the procedural mechanisms established by the company specifically to address problems and grievances." Farley v. American Cast Iron Pipe, 115 F.3d 1548, 1554 (11th Cir. 1997); Madray v. Publix Super Markets, supra. at page 1300. Respondent acted on her formal complaint against Lt. Johnson once she filed it.

131. As previously stated, Petitioner did not properly plead animus and hostile environment permeating the entire Sheriff's Office, and therefore, much of the evidence is inappropriate to the only claims legitimately within the jurisdiction of this forum. However, again assuming arguendo, but not ruling, that Petitioner had filed a broader charge of hostile work environment,

Findings of Facts 89-103, clearly show that she did not prove either animus or a hostile environment for females existed throughout the Sheriffs Office.

132. Petitioner was removed by the allegedly retaliatory act of transfer from contact with the two immediate superiors, Lt. Johnson and Captain Miller, who had expressed any animus to females. One of these superiors, Lt. Johnson, created no problem for Ms. Dauphin, who "loved" him. Major Miller, complained-of by Ms. Suggs, processed Petitioner's grievance, once she filed it.

133. Petitioner's "statistical evidence" regarding the number of female employees in the Sheriff's Office is insufficient to establish gender or age discrimination. The statistics lack any meaningful foundation. The general rule as to the choice of a statistical benchmark is that there must be a proper comparison between demographic composition of employees and the composition of the qualified labor market. Forehand v. Florida State Hosp. at Chattahoochee, 89 F.3d 1562 (11th Cir. 1996) at page 1575, citing, and distinguishing Wards Cove Packing Co. Inc. v. Atonio, 490 U.S. 642, 650, 109 S. Ct. 2115, 104 L.Ed. 733, (1989). See also Holified v. Reno, supra, and Brown v. Honda, 939 F.2d 946 (11th Cir. 1991).

134. To state a prima facie case of retaliation under Title VII, the employee must show: (1) that she engaged in protected activity; (2) that her employer was aware of that activity; (3) that she suffered adverse employment action; and (4) that there

was a causal link between her protected activity and the adverse employment action. See Little v. United Technologies Carrier Transicold Div., 103 F.3d 956, 959 (11th Cir. 1997). After an employee establishes a prima facie case of retaliation, the burden shifts to the employer to rebut the presumption of retaliation by articulating a non-retaliatory reason for the actions taken. Raney v. Vinson Guard Service, Inc., 120 F.3d, 1192, 1196 (11th Cir. 1997). If the employer meets its burden, then the employee must present sufficient evidence to conclude that the proffered reason is pretextual. See Raney v. Vinson Guard Services, supra, page 1196.

135. Disregarding any cases which have held that a claim for retaliation cannot be made except upon the precondition that either a charge of discrimination has been filed with the Commission or with the Federal Equal Employment Opportunity Commission, since that issue has not been raised in this case, Petitioner's charge that her transfer to the road patrol was retaliatory fails first because it was not shown to be an adverse employment action. In determining adverse employment action, the courts employ an objective rather than a subjective standard. See Doe v. Dekalb County School District, 145 F.3d 1441, 1451 (11th Cir. 1998), an Americans With Disabilities Act case brought under Title VII. Transfers have been held to be adverse where the transfers were objectively equivalent to demotions. Doe v. Dekalb County School District, supra. at page 1450. A relevant

consideration is whether the transfer will enhance career opportunities. Doe v. Dekalb County School Dirstrict, supra. at page 1453 n.22. It is unrefuted that Petitioner's transfer from her position as a bailiff, where she had no opportunities for advancement, to the road patrol, enhanced her career opportunities through potential promotion or specialized assignment. Accordingly, a reasonable person cannot consider Petitioner's transfer to be "adverse."

136. Sheriff Tunnell had mixed motives related to Petitioner's transfer to road patrol, one of which peripherally related to her internal grievance procedure, but the fact that he thought she would be better off away from the people she had accused, without more, is not a retaliatory motive. His other motive responded to Petitioner's complaint that she was in a dead-end job. As such, the transfer was unrelated to her internal grievance.

137. Respondent having articulated legitimate, nondiscriminatory reasons for Petitioner's transfer, it was incumbent upon Petitioner to present sufficient evidence to conclude those reasons were pretextual. See Raney v. Vinson Guard Services, Inc., supra. In order to meet this burden, the employee needed to show that the Respondent's reasons are not worthy of belief. See Morgan v. City of Jasper, 959 F.2d 1542, 1548 (11th 1992), Chandler v. Department of Corrections, supra. Petitioner has not met the burden of rebuttal or persuasion.

138. Nor has Petitioner shown that her transfer to road patrol created any particular hardship on her or that it represented a hostile work environment.

139. To prove an age discrimination claim, an employee must prove: (1) that she was a member of the protected group of persons between the ages of 40 and 70; (2) that she was subject to adverse employment action; (3) that a substantially younger person filled the position that she sought or from which she was discharged; and (4) that she was qualified to do the job for which she was rejected. See Damon v. Fleming Supermarkets of Florida, Inc.,196 F.3d 1354, 1359 (11th Cir. 1999) cert. denied Fleming Supermarkets of Florida, Inc. v. Damon, 529 U.S. 1109, 120 S. Ct. 1962, 146 L.Ed 793 (2000). If a prima facie case is established, as in a case of retaliation, an employer must proffer legitimate non-discriminatory reasons for its employment decisions. If the employer's reasons are identified, the employee then bears the ultimate burden of proving them to be a pretext for age discrimination. The sole concern is whether unlawful discriminatory animus motivates a challenged employment decision. Damon v. Fleming Supermarkets, Inc., 196 F.3d at 1391.

140. There is no proof that Petitioner's transfer to road patrol constituted an adverse employment action. Anita Newsome replaced Petitioner in the bailiffs section, but there is no evidence of Anita Newsome's age, so there is no evidence that a

substantially younger person filled the position from which Petitioner was removed.

141. Petitioner contends that she was the subject of discriminatory treatment because she was transferred to road patrol, where she felt isolated because the road patrol deputies were younger and mostly male. Her subjective reactions are not the test. In determining if an adverse employment action has occurred with regard to age, the courts employ an objective test. The societal goal of anti-discrimination legislation is to promote employment of older persons based on their abilities rather than age, and to prohibit arbitrary age discrimination in employment. Petitioner, on the other hand, is complaining that she was treated like every other deputy, not that she was singled out because of her age.

142. The terms and conditions of Petitioner's job were affected by the type of work she was transferred into, but her grade and pay were not affected. Petitioner competently performed the duties of her new position. See Harris v. Forklift Systems Inc., supra. Moreover, a reasonable person would not find her working environment to be hostile or abusive based on her testimony in this case. Harris v. Forklift Systems, Inc., supra., at page 23. See also Burns v. AAF-McQuay, Inc., 166 F.3d 292 (4th Cir. 1999).

143. Petitioner has not plead a loss of pay. Section 760.11(7), Florida Statutes, provides that back pay may be awarded

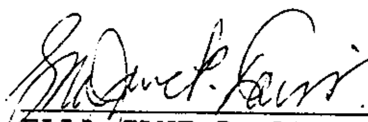
if a discriminatory act is found to have occurred in violation of Section 760.10. Florida Statutes. Petitioner has not suffered any loss of pay as a result of her transfer or loss of rank. Although Petitioner provided evidence that Corporal Andy Thomas's salary exceeded Petitioner's pay, there is no evidence that Thomas was similarly situated to Petitioner. See Brown v. McDonnell Douglas Corp., 113 F.3d 139, 142 (8th Cir. 1997) holding statistical evidence not probative of discriminatory intent because it failed to compare similarly situated employees.

RECOMMENDATION

Upon the foregoing findings of fact and conclusions of law, it is

RECOMMENDED that the Florida Commission on Human Relations enter its Final Order dismissing the Petition for Relief.

DONE AND ENTERED this 29th day of June, 2001, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of June, 2001.

ENDNOTES

1/ In essence, the Recommended Order of Dismissal held upon cited authority that deputies of Florida's elected sheriffs, as constitutional officers, were not "employees" as defined in Chapter 760, Florida Statutes.

2/ Apparently, no interlocutory appeal of the Remand Order was taken.

3/ Respondent's counsel may have been unaware of the late-filing. The certificate of service by mail signed by Petitioner's counsel reflects a May 21, 2001, mailing date for Petitioner's proposed Recommended Order. The FAX transmittal of this document reflects that it was received by the Division at 3:26 a.m. on May 22, 2001; hence, the May 22, 2001, filing date.

4/ However, instances in which counsel asked a witness if a prior statement was made, the witness denied making such a statement, and no record of any kind of the prior statement beyond counsel's oral characterization existed, do not constitute proof of a prior statement, inconsistent or otherwise.

5/ Only the witnesses' sworn testimony (answers to questions) probative exhibits, and clear stipulations agreed-to by both counsel have been assessed. Questions, legal argument, gratuitous comments, and characterizations of testimony by either lawyer during the course of hearing do not constitute sworn testimony upon which findings of fact may legitimately be made.

6/ There was only hearsay and speculation that Lt. Johnson was locking-up items related to his moonlighting as a U.S. Marshall and concerning misuse of leave policies. No nexus to a discriminatory reason was demonstrated.

7/ Exhibit P-20, which supposedly would clarify these issues was excluded for all the reasons evident at TR-458-463. This Finding of Fact is stated in "probabilities" because some of the testimony was speculative, without means to know the truth of the matter asserted, or incompetent.

8/ Exhibit P-18 was admitted in evidence over objection. However, it lacks credibility or weight sufficient to make it of any probative value. It therefore cannot be a determining factor. As the court remarked in Brown v. American Honda Motor Co., Inc., 939 F.2d 946 (11th Cir. 1991), "Statistics such as these . . . without an analytic foundation, are virtually meaningless." See also Holifield v. Reno, 115 F.3d 1555 (11th Cir. 1997).

9/ This testimony (Findings of Facts 89-103) was arguably irrelevant and nonprobative because none of these witnesses served under Lt. Johnson. McWhorter v. City of Birmingham, 906 F.2d 674, 679 (11th Cir. 1990); See Sims v. Mulcahy, 902 F.2d 254, 531 (7th Cir. 1990); Stopka v. Alliance of American Insurers, 141 F.3d 681, 687 (7th Cir. 1998). Petitioner only plead hostile work environment with regard to her situation in the bailiffs section, not the entire sheriff's office. At a stretch, this allegation would only encompass a chain of command stretching from Petitioner as a corporal in the bailiffs section through Lt. Johnson, whom she named as being the cause of her hostile work environment, through Captain Miller, through Major Miller, and ultimately to Sheriff Tunnell. Therefore, these witnesses' testimony have been admitted on that basis. The legal issues raised thereby are discussed in the Conclusion of Law.

10/ See Section 760.11(7), Florida Statutes, and Rules 60Y-4.004, 60Y-4.007, and 60Y-5.004(5), Florida Administrative Code.

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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.