STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BETH MULLIGAN McKNIGHT,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 00-3845
	)	
SEARS TERMITE & PEST CONTROL,	)	
	)	
Respondent.	)	
	)	
_____	)	

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly-appointed Administrative Law Judge, Fred L. Buckine, held a formal hearing in this case on March 28, 2001, in Orlando, Florida.

APPEARANCES

For Petitioner: Beth Mulligan McKnight, pro se
3083 Erskine Drive
Oviedo, Florida 32765

For Respondent: Donald C. Works, III, Esquire
Anthony J. Hall, Esquire
Jackson Lewis Schnitzler & Krupman
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STATEMENT OF THE ISSUE

Whether Petitioner, Beth Mulligan McKnight, was terminated from her position with Respondent as a Call Center telephone operator on or about August 28, 1997, based on her sex,

(pregnancy), in violation of Section 760.10(1)(a), Florida Statutes (1997).

PRELIMINARY STATEMENT

On December 12, 1997, Petitioner (Mrs. McKnight) filed a Charge of Discrimination with the Florida Commission on Human Relations (FCHR) charging Respondent, Sears Termite & Pest Control (Sears), with employment discrimination based on sex. FCHR, by letter dated May 22, 2000, advised it had not completed its investigation of Petitioner's complaint and listed several options for Petitioner's consideration. Petitioner elected to withdraw her discrimination charge and file a Petition for Relief to proceed with an administrative hearing as provided under Section 760.11(4)(b) and (8), Florida Statutes. On September 15, 2000, FCHR referred this matter to the Division of Administrative Hearings for formal hearing de novo.

On December 4, 2000, a Notice of Hearing was issued setting the final hearing for January 30, 2001. On January 12, 2001, Respondent filed a Motion for Continuance, and on January 19, 2001, an Amended Notice of Hearing was issued with the final hearing rescheduled for February 27, 2001. On February 12, 2001, Petitioner filed a Motion for Continuance, and on February 19, 2001, a second Amended Notice of Hearing was issued with the final hearing rescheduled for March 28, 2001.

At the final hearing, Petitioner, Beth McKnight, appeared pro se. Mrs. McKnight testified in her own behalf and offered 12 exhibits, 11 (P1-11) of which were received in evidence. Respondent presented the testimony of two witnesses and one exhibit that was received in evidence. The parties were given ten days after the filing of the transcript of these proceedings to file their Proposed Findings of Fact and Conclusions of Law.

On April 5, 2001, Respondent filed the deposition transcript of Beth McKnight taken March 13, 2001. On April 9, 2001, Respondent filed the Employee Separation Statement for Erskin Nunn, who was Assistant Manager of the Sears Call Center during the period of Petitioner's employment and termination. On April 24, 2001, Respondent filed a Motion for Extension of Time to file Proposed Findings of Fact and Conclusions of Law, and the Order granting the motion was issued April 30, 2001. A Transcript was filed on May 3, 2001. Respondent's Proposed Findings of Fact and Conclusions of Law was filed on May 15, 2001, as was Petitioner's Motion For Extension of Time to file Proposed Findings of Fact and Conclusions of Law. The Order granting Petitioner's Request for an Extension of Time to file Proposed Findings of Fact and Conclusions of Law was issued on May, 16, 2001. Based upon all of the evidence, the following findings of fact are determined:

FINDINGS OF FACT

1. The Respondent, Sears Termite & Pest Control, is an employer as that term is defined under the Florida Civil Rights Act of 1992.

2. Petitioner was employed by Respondent as a Termite Technician. Her duties included servicing existing customers, solicitation of contract renewals, and the sale of contracts to new customers during the relevant period April 1, 1997 through termination on August 28, 1997.

3. Petitioner was earning between $800.00 to $1,300.00 per month, a combination of hourly wages from servicing existing customers and from commissions from her sale of renewals and of new contracts. Each week Respondent paid Petitioner an advance draw of $225.00 and at the end of the month, previously paid draws were deducted from Petitioner's commissions earned during the preceding month. Commissions paid Petitioner were eleven percent on contract renewals and twelve percent on new contract sales. Petitioner worked an average of 30 to 60 hours each week during her employment with Respondent.

4. Ed Blumenthal was Petitioner's immediate supervisor and zone manager. Petitioner was assigned to the Ovedia/Geneva/ Chuluota route for the service of existing customers and for the solicitation of new customers. Though he could assign Petitioner routes within his zone, Blumenthal had no authority

to transfer Petitioner from his technician service center to another service center.

5. Ed Blumenthal assigned Petitioner a company vehicle and permitted her to take the vehicle home overnight to provide technicians more route time to service customers and additional time for sales of contracts to new customers.

6. On August 4, 1997, at about 7:30 a.m., Petitioner arrived at the Sears Longwood district office for her daily assignments. Petitioner informed Ed Blumenthal of her recently confirmed pregnancy (about three and one-half months at that time). Petitioner initiated a discussion with Ed Blumenthal regarding her desire to continue working as a technician until the end of August, thereby enabling her to earn additional commissions. Petitioner specifically requested that, if possible, her requested transfer to the call center become effective the first Monday of the following month, September 1, 1997.

7. Ed Blumenthal, without promising specific results, assured Petitioner that he would make some calls and see what he could do with her transfer request. Within the next few hours, Ed Blumenthal called Petitioner into his office and informed her he had a telephone conversation with his manager, Kemp Anderson, regarding her request for transfer to the call center. Ed Blumenthal instructed Petitioner to contact Robert Gleeson, call

center director, for further details regarding the requested transfer. Ed Blumenthal, at that time, reassigned Petitioner to a new service-solicitation route.

8. Petitioner worked as a service technician on her newly assigned route until August 19, 1997. On that date, Robert Gleeson, instructed Petitioner to report to the Edgewater Drive corporate office and contact Erskin Nunn, call center manager, for an interview and discussion of her technical and secretarial skills background.

9. During the course of her interview with Erskin Nunn, Petitioner alleged Mr. Nunn said, "A woman in your condition should not be doing that kind of work . . . crawling around attics with guys." Petitioner understood Nunn's comment to have been made in reference to her recently announced pregnancy.

10. Petitioner did not report Erskin Nunn's comment about her pregnancy to Ed Blumenthal, Robert Gleeson, Kemp Anderson or the Human Resource Director at or near the time the statement was made. Though upsetting to her, Petitioner did not consider Nunn's comment to have an impact on her continued employment with Respondent.

11. Erskin Nunn hired Petitioner and informed her that August 20, 1997, training class would be her first work day. Robert Gleeson testified that training class was mandatory for every call center worker.

12. The actual transfer of Petitioner from the service center to the call center was accomplished by verbal communications from Ed Blumenthal to Kempt Anderson to Robert Gleeson to Erskin Nunn.

13. Petitioner made repeated requests to Ed Blumenthal, Erskin Nunn, Robert Gleeson, and Kempt Anderson to start her new assignment on September 1st. The requests were denied.

14. Petitioner's request for a September 1, 1997, starting day for her transfer to the call center was made to Kempt Anderson. During the meeting with Petitioner, Anderson said, "A women in your condition should not be doing this."

15. From August 20 through August 24, there were daily telephone calls between Petitioner and Robert Gleeson. Gleeson inquired if Petitioner was coming to work and Petitioner responded that due to her lack of personal transportation and her requested starting day of September 1st she would not be in to work. By September 24th, Petitioner had not appeared for training as requested, and Robert Gleeson fired Petitioner on September 25, 1997.

16. On November 26, 1997, three months after Petitioner's termination on August 28, 1997, Robert Glesson fired Erskin Nunn. Nunn's termination letter listed the reason for his dismissal as "inappropriate behavior in the workplace." The

"inappropriate behavior" was two or more sexual harassment offenses made toward female employees by Erskin Nunn.

17. Petitioner first raised Nunn's sexual harassment conduct during her cross-examination of Robert Gleeson at the final hearing.

18. Robert Gleeson acknowledged that his firing of Nunn was, in fact, because of Nunn's repeated sexual harassment conduct toward female employees at Sears.

19. Respondent's handbook, "Employee Personnel Policies Manual," February 1997, was given to Petitioner at the time of her initial employment. The manual contains the company's blanket reservation of the "right to transfer employees to whatever job or location may be necessary to accomplish the objectives of the company."

20. The actual transfer of Petitioner from the service center to the call center was accomplished by verbal communications from Ed Blumenthal to Kempt Anderson to Robert Gleeson and finally to Erskin Nunn.

21. Robert Gleeson, at all times pertinent hereto, as director of the Customer Service Center (call center) was responsible for the overall operational functions of the call center. Gleeson gave Esrkin Nunn, call center manager, sole authority to hire and to train personnel to work in the call center.

22. Erskin Nunn, at all times pertinent hereto, was Robert Gleeson's assistant. Mr. Nunn reported directly to Robert Gleeson who reported directly to Kemp Anderson.

23. At all times pertinent hereto, Kemp Anderson was District Manager, with duties and responsibilities for an area just north of Vero Beach to Gainesville, consisting of seven or eight zones offices, several hundred trucks and employees and administrative staff. He was responsible for sales and renewals on a monthly basis, employee retention, customer services, and basic operational functions. Mr. Anderson was Ed Bulmenthal and Robert Gleeson's immediate supervisor.

24. As district manager, Kemp Anderson was the first person called by Ed Bulmenthal to convey Petitioner's pregnancy condition and her transfer request. Robert Gleeson, call center manager, reported directly to Kempt Anderson. Accordingly, Kemp Anderson's testimony, that he did not have authority to grant Petitioner's request for transfer, nor could he alter her starting date for training in the call center, nor was he involved in her termination, is suspect.

CONCLUSIONS OF LAW

25. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with Section 120.57(1), Florida Statutes. The parties were duly noticed for the administrative hearing.

26. Petitioner, Beth Mulligan McKnight, is a "person" within the meaning of Section 760.02(6), Florida Statutes. Petitioner is an "Aggrieved person" within the meaning of Section 760.02(10), Florida Statutes.

27. Respondent, Sears, is an "employer" within the meaning of Section 760.02(7), Florida Statutes.

28. Petitioner claims that Respondent has unlawfully discriminated against her based upon her sex.

29. The statutory basis for Petitioner's claim is set forth in Section 760.10(1)(a), Florida Statutes, which states:

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

30. The Florida Civil Rights Act of 1992 is patterned after Title VII of the Civil Rights Acts of 1964 and 1991, 42 U.S.C. Section 2000, et seq., as well as the Age Discrimination in Employment Act (ADEA), 29 U.S.C. Section 621, et seq. Federal case law interpreting Title VII and the ADEA is applicable to cases arising under the Florida Act. See Florida Department of Community Affairs v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991).

31. It is unlawful to discriminate against an employee due to pregnancy. See Francis M. O'Loughlin v. Evelyn Pinchback, Sheriff of Saint Johns County, 579 So. 2d 788, 791 (1st DCA 1991) and cases cited therein. The Pinchback Court, addressing pre-emption, held that:

> In Florida there is a long-standing rule of statutory construction which recognizes that if a state law is patterned after a federal law on the same subject, the Florida law will be accorded the same construction as in the federal courts to the extent the construction is harmonious with the spirit of the Florida legislation. Kidd v. City of Jacksonville, 97 Fla. 297, 120 So. 556 (1929); Massie v. University of Florida, 570 So. 2d 963 (Fla. 1st DCA 1990); Holland v. Courtsey Corporation, 563 So. 2d 787 (Fla. 1st DCA 1990). Continuing, the Pinchback Court, held that "It is undisputed that Florida's Human Rights Act is patterned after Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e-2. School Board of Leon County v. Weaver, 556 So. 2d 443 (Fla. 1st DCA 1990).

32. In General Electric Company v. Gilbert, 429 U.S. 125, 97 S. Ct. 401, 50 L.Ed 343 (1976), the Supreme Court held that:

> discrimination on the basis of pregnancy was not sex discrimination under Title VII. However, in 1978, in response to the Gilbert decision, Congress amended Title VII by enacting the Pregnancy Discrimination Act of 1978 (PDA). 42 U.S.C. Section 200-e (k). The PDA specifies that discrimination on the basis of pregnancy is sex discrimination, and therefore violative of Title VII. [FN1] Florida has not similarly amended its Human Rights Act to include a prohibition against pregnancy-based discrimination.

> FN1. Section 701(k), the definitional Section of Title VII, provides, in part: The terms "because of sex" or "on the basis of sex" include, but not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions, and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in Section 703(h) of this title shall be interpreted to permit otherwise.

33. The law affords no protection from discrimination unless the employee engages in an adverse employment action. Bristow v. Daily Press, 770 F.2d 1251 (4th Cir. 1985). Respondent took adverse employment action against Petitioner by terminating Petitioner's employment. The remaining issues are whether the adverse employment action was taken against Petitioner because of her sex or any other prohibited status or if Respondent sexually harassed Petitioner.

34. In a case of alleged discrimination, the employee carries the burden of establishing that an unlawful employment practice has occurred. In this regard the instructive language found in Texas Department of Community Affairs v. Burden, 450 U.S. 248, 101 S. Ct. 1089 (1981) bears repeating. There the Court held that the terminated employee carries the burden of proving by a preponderance of the evidence a prima facie case of discrimination. Demonstrating a prima facie case is not

onerous; it requires only that the plaintiff establish facts adequate to permit an inference of discrimination. Holifield v. Reno, 115 F.3d 1555 (11th Cir. 1997). If the employee succeeds, the burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for the employee's termination. Should the employer meet this burden, the employee must then prove by a preponderance of evidence that the legitimate reasons offered by the employer were not its true reasons, but were instead a pretext for discrimination. Burdine, supra. See also Jones v. Bessemer Carraway Medical Center, 137 F.3d 1306 (11th Cir. 1998).

35. Petitioner has the initial burden of establishing a prima facie case of discrimination. Rosenbaum v. Southern Manatee Fire and Rescue District, 980 F. Supp 1469 (M.D. Fla. 1997); Andrade v. Morse Operations, Inc., 946 F. Supp 979, 984 (M.D. Fla. 1996). Petitioner must show by a preponderance of evidence that: she is member of a protected class; she suffered an adverse employment action; she or others similarly situated non-protected individuals received dissimilar treatment; and sufficient evidence of bias to infer a causal connection between her sex (pregnancy) and the disparate treatment. 980 F. Supp at 1472. Failure to establish the last prong of the foregoing conjunctive test is fatal to a claim of discrimination.

Mayfield v. Peterson Pump Company, 101 F.3d 1371 (11th Cir. 1996).

36. It is clear that Mrs. Beth Mulligan McKnight is a member of a protected class based upon her gender and pregnancy and that she is qualified to accomplish her job as a call center telephone operator. It is equally clear that she has suffered an adverse employment action in that she was terminated. Mrs. McKnight, prompted by her pregnancy, voluntarily made a request to be transferred from one work-center to another work-center. Management, aware of her pregnancy, granted her request and transferred Mrs. McKnight. Management, in keeping with its training policy and as a pre-requisite for all call center employees, scheduled a training class session. Management called and gave Mrs. McKnight several opportunities to report to work and she refused.

37. It has not been proven that the employer intended to discriminate in reaching the decision to terminate McKnight's employment. While there is some evidence that both Erskin Nunn and Kempt Anderson made comments about her pregnancy, there is no evidence of any connection between their comments and Mrs. McKnight's termination. Mrs. McKnight was terminated for her failure to report to work, as instructed by her supervisor, Robert Gleeson, on August 25th, 26th and 27th of 1997, and he terminated her for that reason. Speculation as to another cause

of her termination, such as sexual comments by Erskin Nunn and his subsequent termination for sexual harassment of other female employees is insufficient to make out a prima facie case of sexual discrimination due to her pregnancy with regard to Mrs. McKnight.

38. Because Petitioner failed to overcome her initial burden, the remaining elements of proof need not be addressed. Accordingly, the evidence failed to demonstrate the Respondent engaged in unlawful employment practices directed to Petitioner, as defined in Section 760.10(1), Florida Statutes.

RECOMMENDATION

Based upon the findings of fact and the conclusions of law, it is,

RECOMMENDED:

That a final order be entered which dismisses Petitioner's claim of discrimination based upon her (sex) pregnancy.

DONE AND ENTERED this 6th day of June, 2001, in Tallahassee, Leon County Florida.

FRED L. BUCKINE
Administrative Law Judge
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Filed with the Clerk of the
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this 6th day of June, 2001.

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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.