STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ALLISON M. HUTH,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 00-4633
	)	
NATIONAL ADMARK CORPORATION,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on January 30, 2001, at Fort Lauderdale, Florida, before Administrative Law Judge Michael M. Parrish of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Lee Friedland, Esquire
Downs & Associates
101 Madeira Avenue
Coral Gables, Florida 33134

For Respondent: No Appearance

STATEMENT OF THE ISSUE

The issue in this case is whether the Respondent committed an unlawful employment practice and, if so, determination of the relief to which the Petitioner is entitled.

PRELIMINARY STATEMENT

On December 8, 2000, counsel for the Respondent served a Notice of Withdrawal, by means of which it withdrew from further representation of the Respondent. No successor counsel has filed an appearance on behalf of the Respondent. At the final hearing on January 30, 2001, there was no appearance by anyone on behalf of the Respondent.

The Petitioner appeared at the final hearing and testified on her own behalf. The Petitioner did not present the testimony of any other witnesses. The Petitioner offered nine exhibits that were received in evidence. The Petitioner had a tenth exhibit marked for identification. The Petitioner's counsel requested leave to late-file the tenth exhibit. The request was granted, but, as of the date of this Recommended Order, Petitioner's Exhibit 10 has not been filed with the Division of Administrative Hearings.

At the conclusion of the hearing on January 30, 2001, the Petitioner's counsel stated that a transcript of the hearing would not be prepared, and he requested ten days from the date of the hearing within which to file the Petitioner's proposed recommended order. The request was granted.

The deadline for filing the Petitioner's Exhibit 10 and the Petitioner's proposed recommended order expired without either document being filed. The subsequent history of the case is

described in part in an Order Establishing Deadline issued on March 23, 2001:

> On February 20, 2001, at the request of the undersigned, a telephone call was placed to the office of Petitioner's counsel to inquire if Petitioner still intended to file Petitioner's Exhibit 10 and still intended to file a proposed recommended order. On that same day, someone from the office of Petitioner's counsel left a voice-mail message to the effect that Petitioner's counsel had recently had some unidentified "emergencies," but that he intended to file the exhibit and the proposed recommended order by the following Friday. As of the date of this order, no post-hearing documents have been filed by or on behalf of the Petitioner.

The remainder of the Order Establishing Deadline provided as follows:

> In view of all of the foregoing, and in what is perhaps an overabundance of due process, it is ORDERED:
>
> 1. That the Petitioner is hereby allowed until Monday, April 2, 2001, within which to file Petitioner's Exhibit 10 and within which to file a proposed recommended order.
>
> 2. That the deadline established in this order will not be extended, and the Recommended Order in this case will be issued without benefit of the documents mentioned above if they are not filed by April 2, 2001.

As of the date of this Recommended Order, the Petitioner has not filed Petitioner's Exhibit 10 and has not filed a proposed recommended order. There has been nothing filed on

behalf of the Respondent since the Notice of Withdrawal filed by the Respondent's counsel.

FINDINGS OF FACT

1. The Petitioner, Allison M. Huth, is an adult female person. At all times material to this proceeding the Petitioner has been a resident of the State of Florida.

2. The Respondent, National Admark Corporation, is an advertising agency and publishing company. At all times material to this proceeding, the Respondent was doing business from offices located in Fort Lauderdale, Florida.

3. On the morning of June 12, 1998, a Mr. William Rufrano, who was at that time a boyfriend of the Petitioner, took the Petitioner with him to the Fort Lauderdale offices of the Respondent. At that time, Mr. Rufrano had some type of arrangement with the Respondent pursuant to which he worked in the field making sales calls in an effort to sell the Respondent's products.[1] The Petitioner's reason for going with her boyfriend to the Respondent's offices on June 12, 1998, was to find out more about the company in order to decide whether she wanted to work for the company.

4. Upon arriving at the Respondent's offices on June 12, 1998, Mr. Rufrano introduced the Petitioner to his "boss" and to several of the other people who worked in the Respondent's offices. Shortly thereafter, Mr. Rufrano left the Respondent's

offices and spent most of the rest of the day meeting prospective customers and making sales presentations outside of the Respondent's offices. The Petitioner remained at the Respondent's offices for most of the day. The Petitioner spent the day making calls to prospective customers. She attempted to have each of the prospective customers make an appointment for a salesperson to visit and make a sales presentation for the Respondent's products.[2]

5. The Petitioner never signed any paper work with the Respondent regarding any business relationship between herself and the Respondent. Specifically, she did not sign or submit an application for employment with the Respondent, she did not sign or enter into an employment contract with the Respondent, and she did not sign or enter into an independent contractor agreement with the Respondent. The Petitioner did not have an understanding with the Respondent as to what her hours of work would be or as to how many hours she would work each day, each week, or each month. The Petitioner did not have an understanding with the Respondent as to what her compensation would be for making telephone calls.[3] In sum: The Petitioner and the Respondent never entered into any agreement by means of which the Petitioner became either an employee or an independent contractor of the Respondent.

6. During the course of her day at the Respondent's offices, the Petitioner had occasion to seek assistance from Mr. Anthony Tundo, who was the Respondent's Sales Manager, and was the person the Petitioner had been told to contact if she had any questions. Following the Petitioner's request for assistance, Mr. Tundo engaged in a number of inappropriate, unwanted, and ungentlemanly acts that caused the Petitioner to become very upset and uncomfortable. The worst of Mr. Tundo's acts that day are described as follows in the Petitioner's Exhibit 8, a letter signed by the Petitioner and her boyfriend a few days after the events on June 12, 1998:

> Mr. Tundo began stroking Allison's [Petitioner's] head very softly and used the excuse that he was trying to pick something out of her hair.
>
> Mr. Tundo trapped Allison against the coffee counter in the hallway. He then pressed himself, including his erection [,] against her body which was against the counter. He then proceeded to kiss her on her forehead and cheeks.
>
> When Allison was in Mr. Tundo's office, he told her to take a look at something he was doing. Not wanting to go behind the desk, Allison leaned over the front of the desk to look. As she did so, Mr. Tundo stared directly down Allison's blouse and commented[,] "what a nice pair of tits you have." Allison quickly stood up, and proceeded to walk around behind Mr. Tundo's desk figuring he couldn't look down her blouse. As she was leaning on his desk watching what he was doing, he began to stroke her fingers and hands. He then told

> her to turn around. Allison did so thinking there was a flaw or something wrong with her outfit. He then grabbed her firmly by the backs of her arms and positioned her[,] which made her feel extremely uncomfortable. After doing so, he uttered the word[,] "there." He then told Allison[,] "You have very, very nice legs," and "You have a very beautiful ass[,]" and proceeded to pat Allison on her rear end.
>
> When Allison was sitting on the couch in Mr. Tundo's office, she got up to go to the ladies' room. Mr. Tundo told her to sit back down. Presuming Mr. Tundo wanted to tell her some more things related to business, she sat back down. Mr. Tundo told her to "do that again." When Allison questioned what he meant, Mr. Tundo told her that he wanted her to uncross her legs (like she would have to do in order to stand up) again so he could see what it looks like inside her legs and up her skirt. Mr. Tundo was also moving his hands in an outward motion as he was telling her these things.
>
> After Allison left Mr. Tundo's office, he continued to follow her around the office building. As he was following her, he continually told her that she has "such a sexy walk," and "such a nice ass." He followed her into the conference room next to the coffee maker. He then proceeded to rub her shoulders, moaning softly and breathing heavy as he did so. He then told her that she seemed "tense."

7. There is no competent substantial evidence that Mr. Tundo had ever previously engaged in conduct such as that to which he subjected the Petitioner. There is no competent substantial evidence that Mr. Tundo had ever previously engaged in any type of conduct that would create a sexually hostile or

abusive work environment. There is no competent substantial evidence that the Respondent's management had ever been advised that Mr. Tundo had previously engaged in any conduct that would create a sexually hostile or abusive work environment. There is no competent substantial evidence that the Respondent's management had ever received any prior complaints that Mr. Tundo had engaged in conduct such as that to which he subjected the Petitioner, or that he had engaged in any other type of conduct that would create a sexually hostile or abusive work environment.

CONCLUSIONS OF LAW

8. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. Section 120.57, Florida Statutes.

9. The statutory basis for the Petitioner's claim for relief is found at Section 760.10, Florida Statutes, which provides as follows, in pertinent part:

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

> deprive any individual of employment opportunities, or adversely affect any individual's status as an employee, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.

10. The basic legal principles applicable to a proceeding of this nature are discussed at length in Elisa L. Scott v. Michael W. Titze Company, Inc., d/b/a Village Inn, DOAH Case No. 94-5635 (Recommended Order issued May 24, 1995), where the Administrative Law Judge included the following in the conclusions of law:

> 156. In resolving this dispute, reference may be made to the precedents set forth in Title VII of the Civil Rights Act of 1964, 42 U.S.C. s.2000e et seq., through court cases interpreting that law. This opportunity exists because Chapter 760, Florida Statutes, "Florida Civil Rights Act of 1992", is patterned after federal legislation. See Florida Dept. of Com. Affairs v. Bryant, 580 So. 2d 1205 (Fla. 1st DCA 1991).
>
> 157. In the Bryant case the court indicated that to resolve the issue of discrimination one must question the facts presented and that includes dealing with issues of weight and credibility of the evidence.
>
> 158. Having alleged that the Respondent maintained a hostile work environment, Petitioner must offer objective proof about the environment, together with Petitioner's subjective perceptions that the environment was hostile. Moreover, Petitioner must show that the Respondent or its agents, . . . knew or should have known of the conduct constituting the hostile environment and

with that knowledge failed to take appropriate corrective action. See Meritor Savings Bank v. Vinson, 106 S.Ct. 2399 (1986).

159. A sexually hostile or abusive environment exists "when the work place is permeated with 'discriminatory intimidation, ridicule, and insult' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment' . . . ", Harris v. Forklift Systems, Inc., 114 S.Ct. 370 (1993). Concerning the alleged victim's subjective perception about the working environment, the Harris court stated, "so long as the environment would reasonably be perceived and is perceived, as hostile or abusive, there is no need for it to also be psychologically injurious". However, the affect of the alleged discrimination on the employee's psychological well-being has relevance in determining whether the employee perceived that the environment was abusive.

160. In the Harris opinion, at 114 S.Ct. at 371, the court described the test for measuring the quality of the environment and whether it constituted a sexually hostile or abusive environment when it stated:

> . . . whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity, whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with the employee's work performance . . . no single factor is required.

161. Again in the Harris case, at 114 S.Ct. 372, Justice Ginsburg in a concurring opinion commented on the test for a sexually hostile or abusive environment in this manner:

> The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed . . . It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the Plaintiff did, that the harassment so altered working conditions as to make it more difficult to do the job.

162. Robinson v. Jacksonville Shipyards, Inc., 760 F.Supp. 1486 (MD Fla. 1991) speaks to the nature of the proof that must be demonstrated by Petitioner to prevail in her claim where it is stated:

> Five elements comprise a claim of sexual discrimination based on the existence of hostile working environment; (1) Plaintiff belongs to a protected category; (2) Plaintiff was subject to unwelcomed sexual harassment; (3) The harassment complained of was based upon sex; (4) The harassment complained of affected a term, condition or privilege of employment; and (5) Respondeat superior, that is Defendants knew or should have known of the harassment and failed to take prompt, effective remedial action.

163. Those elements of proof follow the holding in Jones v. Flagship International, 793 Fed. 2d 714 (5th Cir. 1986).

> 164. Verbal abuse in an environment which allows verbal abuse of a female worker is not condoned even in the instances where the individual committing the harassment and the female worker/claimant do not like each other. See Burns v. McGregory Electronics Industries, Inc., 989 F.2d 959 (8th Cir. 1993) and unwelcomed sexual harassment by a co-worker cannot be justified even in the instances where the Claimant is "unlady like". See Carr v. Allison Gas Turbine Division, General Motors Corp., 32 F.3d 1007 (7th Cir. 1994).
>
> 165. As a female Petitioner belongs to a protected category.

11. The legal principles quoted above are equally applicable to the facts in this proceeding. When so applied, it becomes clear that the relief requested in the petition in this proceeding must be denied because the evidence in this proceeding is insufficient to support a conclusion that the Respondent engaged in an unlawful employment practice. While the conduct of Mr. Tundo was unwanted and unwelcomed sexual harassment, which was based upon sex, there is no showing that the Respondent's management knew or should have known about the harassment. Absent such a showing, there is no basis upon which to conclude that the Respondent committed an unlawful employment practice.

12. The petition in this proceeding must also be dismissed for yet another reason. The evidence in this case is insufficient to show that the Petitioner ever applied to become

an employee of the Respondent or that she ever became an employee or an independent contractor of the Respondent. Absent a showing that she was an applicant for employment or that she became an employee, the Petitioner lacks a statutory basis for seeking relief from an unlawful employment practice. See Faye Musgrove v. Suwannee County and Suwannee County Sheriff's Department, DOAH Case No. 98-0175 (Recommended Order of Dismissal, May 20, 1998).

RECOMMENDATION

On the basis of all of the foregoing, it is RECOMMENDED that the Florida Commission on Human Relations issue a Final Order in this case dismissing the Petition for Relief and denying all relief sought by the Petitioner.

DONE AND ORDERED this 30th day of May, 2001, in Tallahassee, Leon County, Florida.

MICHAEL M. PARRISH
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of May, 2001.

ENDNOTES

1/ The record in this case contains very little information about the nature of Mr. Rufrano's relationship with the Respondent, other than the fact that he worked in the field making sales calls. It is not clear whether Mr. Rufrano was an employee or an independent contractor.

2/ The record in this case contains very little information as to how the Petitioner came to be making these telephone calls or on whose behalf she was making the calls. It is possible that she was making the calls on behalf of the Respondent, and that any appointments arranged by the Petitioner were to be given to any salesperson chosen by the Respondent. It is also possible that the Petitioner was making the telephone calls on behalf of her boyfriend and that any appointments arranged by the Petitioner were to be given to Mr. Rufrano. The record does not contain sufficient information upon which to determine who arranged for the Petitioner to spend the day making telephone calls or to determine on whose behalf the calls were being made.

3/ The only thing the Petitioner recalls being discussed regarding compensation was that if any appointments she scheduled resulted in a sale of the Respondent's products, the Petitioner would be paid a percentage of the proceeds of the sale. The Petitioner does not recall what percentage of the sales proceeds were to be paid to her. It is also unclear whether any such payment was to be made by the Respondent or by the salesperson who made the sale.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 10 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.