STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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| ROSE YOUNGS, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| vs. | ) | Case No. 03-2457 |
| | ) | |
| TOUCAN'S RESTAURANT,[1/] | ) | |
| | ) | |
| Respondent. | ) | |
| | ) | |

RECOMMENDED ORDER

A hearing was held pursuant to notice by video teleconference, on September 25, 2003, in Tallahassee and Daytona Beach, Florida, before the Division of Administrative Hearings by its designated Administrative Law Judge, Barbara J. Staros.

APPEARANCES

For Petitioner: Matthew E. Romanik, Esquire
Johnson, Gilbert & Romanik
444 Seabreeze Boulevard, Suite 430
Daytona Beach, Florida 32118

For Respondent: Mary Ann Pistilli, pro se
2526 Glenhaven Street
New Smyrna Beach, Florida 32168

STATEMENT OF THE ISSUE

Whether Respondent violated the Florida Civil Rights Act of 1992, as alleged in the Charge of Discrimination filed by Petitioner on January 16, 2001.

## PRELIMINARY STATEMENT

On January 16, 2001, Petitioner, Rose Youngs, filed a Charge of Discrimination with the Florida Commission on Human Relations (FCHR) which alleged that Respondent, Toucan's Restaurant, n/k/a Skylark's Sports Shack, violated Section 760.10, Florida Statutes, by discriminating against her on the basis of sex. The Charge of Discrimination alleged that Petitioner was sexually harassed by the restaurant manager's husband.

The allegations were investigated and on May 23, 2003, FCHR issued its Determination: Cause. On June 6, 2003, FCHR issued its Notice of Determination: Cause.

A Petition for Relief was timely filed by Petitioner on June 19, 2003. FCHR transmitted the case to the Division of Administrative Hearings (Division) on or about July 3, 2003.

On July 18, 2003, Petitioner filed a Motion for Joinder seeking the joinder as Respondents, Craig and Mary Ann Pistilli. The motion alleged that the Pistillis were the former owners of Toucan's Restaurant and that Joseph Della Valla, owner of the building which was formerly Toucan's Restaurant, now known as Skylark's Sports Shack, was not in possession of the building at the time of the alleged incident giving rise to this case.

On August 5, 2003, an Order was issued pursuant to Rule 28-106.109, Florida Administrative Code, notifying Craig Pistilli and Mary Ann Pistilli of this proceeding and that their substantial interests may be affected. The Order gave the Pistillis an opportunity to be joined as parties of record with a deadline of August 19, 2001. No response was filed to the Order. Despite not having filed a response to the August 5, 2003, Order, Mary Ann Pistilli appeared at the final hearing on behalf of Respondent, Toucan's Restaurant.

On August 5, 2003, a Notice of Hearing was issued setting the case for formal hearing on September 25, 2003, by video teleconference.

At hearing, Petitioner presented the testimony of Rene Brewer and testified on her own behalf. Petitioner offered Exhibit No. 1, which was admitted into evidence without objection. Respondent presented the testimony of Teresa Woods and Mary Ann Pistilli. Respondent did not offer any exhibit into evidence.

On October 10, 2003, I.J. Wesley Ogburia, Esquire, filed a Notice of Appearance on behalf of Respondent. A Transcript, consisting of one volume, was filed on November 10, 2003. Petitioner timely filed a Proposed Recommended Order which has been considered in the preparation of this Recommended Order. Respondent did not file any post-hearing submission.

## FINDINGS OF FACT

1. Petitioner was employed by Respondent, Toucan's Restaurant, as a cocktail waitress. The record is unclear as to when she began her employment there. Her last day on the job was March 18, 2000.

2. The record is not entirely clear as to the exact legal entity that owned Toucan's Restaurant (the restaurant). However, Mary Ann Pistilli was an apparent officer of the corporation which owned the restaurant and acted in the capacity of manager.

3. There is no evidence in the record showing that Mary Ann Pistilli's husband, Craig Pistilli, was an owner or manager of the restaurant. However, he was sometimes at the restaurant. The extent or frequency of his presence at the restaurant is also unclear. According to Rene Brewer, a bartender at the restaurant, Mr. Pistilli "wasn't there a lot."

4. While present at the restaurant, Mr. Pistilli would sometimes give direction to employees on certain issues. For example, he directed Ms. Brewer as to the amount of liquor she put in a customer's drink. It was Ms. Brewer's understanding that Mrs. Pistilli knew that Mr. Pistilli would sometimes direct employees regarding such employment tasks. However, Mrs. Pistilli did not testify as to her knowledge of Mr. Pistilli's actions of giving any direction to employees,

and, therefore, the extent of her actual knowledge of Mr. Pistilli's actions regarding directing employees on employment matters was not established.

5. On Friday nights, Karaoke entertainment was offered at the restaurant. During a certain song, Petitioner would perform a dance. Petitioner was not asked to perform this dance by her employer and did so voluntarily. Mrs. Pistilli was opposed to Petitioner dancing in this manner. Petitioner would stand on a chair near the Karaoke machine with her back to the patrons, let down her hair, and unbutton her shirt giving the appearance she was undressing. However, she wore a t-shirt under the shirt she unbuttoned. When she turned to face the patrons, it became clear that she wore the t-shirt underneath the shirt she unbuttoned. Then she would dance around the restaurant and its bar area and patrons would give her money for dancing. The money was given to her by both male and female patrons in various ways. For example, when a male patron would put money in the side of his mouth, she would take it with her teeth.

6. Petitioner's dancing was not sexual in nature but was more in the nature of a fun part of the Karaoke.

7. On March 18, 2000, Petitioner was in the bar area of the restaurant. Petitioner's description of what happened is as follows:

> I was at work, and Craig had come in with one of his friends. It was his friend's birthday. And the bar wasn't very busy at all. I had two customers that just came in. And he was just being loud, and he came over and asked me if I'd get up on the bar and dance, and I told him no.
>
> He set me up--at the end of the bar is like a long, and then there's a little like an L, and that part lifts up. The lift-up part was down, and he set me up on top of that. And I told him, you know, to leave me alone. And when I got down, he slapped me on the rear. And then he backed up, he unbuttoned his shirt, he unzipped his pants and said I ought to go in the dining room and dance around like this….Craig's friend was sitting at the bar, and Craig came over and said I got twenty dollars in my pocket, I want you to dance, it's Chris' birthday, and I told him no.
>
> And so a few minutes later he came over, he grabbed my arms, he shoved me against-- lifted my arms over my head, shoved me in the corner of the bar. I told him he was hurting me . . . . After the third time of me telling him that he was hurting me, he finally let go and he backed up and he went 00-00-00.
>
> And I was very upset. I went into the kitchen, I was crying very hard . . . .

8. While Petitioner's description of what happened contains hearsay statements purportedly made by Mr. Pistilli, Petitioner's testimony describing Mr. Pistilli's actions and her reaction to the incident is deemed to be credible.

9. Petitioner sustained physical injuries as a result of this incident with Mr. Pistilli.[2/]

10. Ms. Brewer was behind the bar on Petitioner's last day of employment. She saw Mr. Pistilli come into the restaurant with a friend. Mr. Pistilli appeared to her to be intoxicated. She saw Mr. Pistilli hug Petitioner in front of the bar. She did not see any other contact between Mr. Pistilli and Petitioner on that day. However, she had seen Petitioner hug Mr. Pistilli on other occasions. She also saw Petitioner hug restaurant patrons on other occasions.

11. Teresa Woods was another bartender who worked at the restaurant. On Petitioner's last day of employment, Ms. Woods briefly saw and spoke to Petitioner in the kitchen of the restaurant. Petitioner was upset and told Ms. Woods that her neck and back were hurt. Petitioner then left the building and did not say anything further to Ms. Woods. Petitioner did not return to work.

12. Mrs. Pistilli was not at the restaurant on March 18, 2000. She did not see any of the events that occurred between Petitioner and her husband. She had heard about the allegation that her husband hugged Petitioner but was unaware of the other allegations:

> Q: When did you first become aware that Mrs. Youngs had filed a workers' compensation claim?
>
> A: I can't recall exactly when it was. They did call me. I can't tell you exactly how long a period of time--

Q: Can you give us your best approximation of how close it was in time to--if you assume that the date--

A: A month. A month maybe. I don't know. It was well after.

* * *

Q: And did the comp carrier tell you the nature of the injury or how Mrs. Youngs contends that it happened?

A: Yes, And he came in and I spoke with him, and they said that they'd be back in touch, and never heard from them.

Q: And what did they tell you or what was their understanding of what Mrs. Youngs was contending happened after that conversation?

A: All I know is my husband hugging her. This stuff I heard today is all new stuff about zippering pants. I never heard of any of that. I never heard any of that.

13. While Mrs. Pistilli was generally aware of an ongoing workers' compensation claim by Petitioner against the restaurant, she was unaware of the most egregious allegations made regarding her husband until well after the fact. While she understood that her husband hugged Petitioner on March 18, 2000, her knowledge of that was gained approximately one month after the fact when finding out about a workers' compensation claim. Moreover, she had knowledge that during Petitioner's period of employment at the restaurant, Petitioner occasionally hugged her husband and some restaurant patrons.

14. No competent evidence was presented that Mrs. Pistilli knew or should have known that Mr. Pistilli engaged in the behavior described by Petitioner that took place on March 18, 2000.

15. Petitioner acknowledged that other than the incident on March 18, 2000, Mr. Pistilli did not make any references to Petitioner about her body during her employment at the restaurant.

## CONCLUSIONS OF LAW

16. The Division of Administrative Hearings has jurisdiction over the parties and subject matter in this case. §§ 120.569, 120.57, and 760.11, Fla. Stat. (2000).

17. Section 760.10(1), Florida Statutes, states that it is an unlawful employment practice for an employer to discharge or otherwise discriminate against an individual on the basis of sex.

18. To establish a prima facie case of sexual harassment as a result of a hostile work environment, the employee must prove the following by a preponderance of the evidence: (a) that she is a member of a protected group; (b) that she was subjected to unwelcome harassment; (c) that the harassment complained of was based on sex; (d) that the harassment complained of was sufficiently severe or pervasive to alter a term, condition, or privilege of employment by creating an

abusive working environment; and (e) respondeat superior, that is, that the employer knew or should have known of the harassment in question and failed to take remedial action. Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554 (11th Cir. 1987); Henson v. City of Dundee, 682 F.2d 897, 905 (11th Cir. 1982).[3/]

19. The United States Supreme Court has described the test for measuring the quality of the work environment and whether it constitutes a sexually hostile or abusive environment:

> So, in Harris, we explained that in order to be actionable under the statute, a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so. 510 U.S. at 21-22, 114 S. Ct., at 370-371. We directed courts to determine whether an environment is sufficiently hostile or abusive by 'looking at all the circumstances,' including 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 an employee's work performance.' Id., at 23, 114 S. Ct., at 371.

Faragher v. City of Boca Raton, 524 U.S. 775 at 787, 118 S. Ct. 2275 at 2283(1998), quoting Harris v. Forklift Systems, Inc, Inc., 114 S. Ct. 370 (1993).

20. A hostile work environment claim requires a showing of severe or pervasive conduct. Burlington Industries v. Ellerth,

524 U.S. 742, 743 (1998). Conduct must be so extreme to amount to a change in the terms and conditions of employment. Faragher supra, 118 S. Ct. 2275 at 2284. Isolated incidents, unless extremely serious, do not amount to discriminatory changes in the terms and conditions of employment. Id.

21. The facts in this case support the conclusion that Petitioner met the first four elements necessary to establish a prima facie case: (a) Petitioner belonged to a protected class or group; (b) she was subjected to unwelcome harassment on March 18, 2000; (c) the harassment was based on sex; and (d) while the evidence does not support a conclusion that Mr. Pistilli's actions were pervasive,[4/] his actions on March 18, 2000 were severe enough to meet the definition of hostile work environment set out in Faragher, supra.

22. However, Petitioner has not met the fifth element required to establish a prima facie case of hostile work environment, i.e., respondeat superior. Petitioner has not offered any citation which persuades the undersigned that the case law regarding liability of employees as a result of actions of their supervisors applies under this factual circumstance. That is, Mr. Pistilli was neither a president, owner, partner, corporate officer, or even an employee of Respondent. See generally, Faragher, 118 S. Ct. 2275 at 2284 (Court cited cases

in which employer was held liable for conduct of persons in various capacities).

23. An employer is not automatically liable for harassment by a supervisor who creates the requisite degree of discrimination. Faragher 118 S. Ct. 2275, 2291 relying on Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 106 S. Ct. 2399 at 2286. As a general proposition, only a supervisor, or other person acting with the authority of the employer, can cause an injury that results in an adverse tangible employment action. Ellerth at 762. In the instant case, Mr. Pistilli was not a supervisor or employee of Respondent. Further, he did not take any adverse employment action (i.e., he did not fire Petitioner or take any other action regarding her employment.) Accordingly, there is no automatic liability imputed to Respondent. See Ellerth, 524 U.S. 742 at 763; and Faragher, 524 U.S. 775 at 790.

24. An employer can be liable for the sexual harassment of a supervisor if the employer knew or should have known about the conduct and failed to stop. Ellerth, 524 U.S. 775 at 758. The evidence is clear that Mrs. Pistilli did not know about Mr. Pistilli's inappropriate actions on March 18, 2000, until well after the fact and well after Petitioner left the employment of Respondent. Moreover, Petitioner did not report the incident to Mrs. Pistilli.

25. Further, the evidence does not support a conclusion that Mrs. Pistilli should have known about Mr. Pistilli's behavior toward Petitioner on March 18, 2000. The evidence does not establish that his behavior was pervasive enough to establish constructive knowledge on behalf of Mrs. Pistilli. See Farley v. American Cast Iron Pipe Company, 115 F.2d 1548, 1553 (11th Cir. 1997).

26. Accordingly, even if Mr. Pistilli were considered to be a supervisor or someone within the authority of Respondent, Petitioner did not prove that the employer knew or should have known about the complained-of behavior. Mrs. Pistilli did not have any opportunity to take preventative or corrective opportunities of any offensive behavior of her husband. See Faragher, 524 U.S. 775 at 807.

27. In summary, while Mr. Pistilli's conduct toward Petitioner on March 18, 2000, was unwanted and unwelcome harassment based upon her sex, there is no showing that Respondent's management knew or should have known about the behavior. Accordingly, as a matter of law, there is no basis upon which to conclude that Respondent committed an unlawful employment practice.

## RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law set forth herein, it is

RECOMMENDED:

That the Florida Commission on Human Relations enter a final order dismissing the Petition for Relief.

DONE AND ENTERED this 4th day of December, 2003, in Tallahassee, Leon County, Florida.

BARBARA J. STAROS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 4th day of December, 2003.

## ENDNOTES

[1/] On September 23, 2003, correspondence was filed by Neil S. Schecht, Esquire, who appeared specially on behalf of Skylark's Sports Shack and its owner, Joseph Della Valle, seeking to dismiss Skylark's Sports Shack and Mr. Della Valle from the case. Attached to the request for dismissal of Skylark's Sports Shack and Mr. Della Valle was a copy of an Asset Purchase Agreement which was signed on January 4, 2001 by Mary Ann Pistilli individually and as Vice-President of Kara Corporation of Volusia County, Inc., designated as the "Seller" and Joseph Della Valle as Managing Member of Skylark Sports LLC designated as "Buyer." This matter was addressed at the commencement of

the hearing, and upon consideration of the above correspondence and the agreement of the remaining parties, the request seeking to dismiss Skylark's Sports Shack and Mr. Della Valle as its owner was granted.

[2/] Petitioner's Exhibit 1 is a copy of a stipulation for settlement in Petitioner's workers' compensation claim against Respondent. Petitioner asserts that it is a self-authenticating document pursuant to Section 90.092(2), because it had been approved by a workers' compensation judge. However, the judge's order was not offered into evidence. There is no certification from the court of compensation claims on the stipulation showing that it had been filed. Accordingly, it does not fit within the parameters of Section 90.092(2) and Petitioner's argument is rejected. Moreover, Petitioner's argument that Exhibit 1 constitutes an admission against interest pursuant to Section 90.803(18) is also rejected. Accordingly, while Petitioner's Exhibit 1 is admissible pursuant to Section 120.569(1)(g), it does not establish Respondent's admission of Petitioner's allegations and is not sufficient to support such a finding. § 120.57(1)(c), Fla. Stat. (2000).

[3/] FCHR and Florida courts have determined that federal discrimination law should be used as guidance when construing provisions of Section 760.10, Florida Statutes. See Brand v. Florida Power Corporation, 633 So. 2d 504, 509 (Fla. 1st DCA 1994).

[4/] Petitioner presented hearsay testimony regarding isolated instances of comments Mr. Pistilli allegedly made to other female employees. However, those statements attributable to Mr. Pistilli are not sufficient to support a finding, as contemplated by Section 120.57(1)(c), that he made such comments to other employees and certainly are not sufficient to support a finding that his comments were pervasive.

COPIES FURNISHED:

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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.