STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

EVELYN E. FERRANTI,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 04-1051
	)	
UNITED DOMINION REALTY TRUST, INC.,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly-designated Administrative Law Judge, Jeff B. Clark, held a final administrative hearing in this case on June 4, 2004, in Viera, Florida.

APPEARANCES

For Petitioner: Evelyn E. Ferranti, pro se
2370 Oak Creek Circle
Melbourne, Florida 32935

For Respondent: Juan C. Lopez-Campillo, Esquire
Fisher & Phillips, LLP
1250 Lincoln Plaza
300 South Orange Avenue
Orlando, Florida 32801

STATEMENT OF THE ISSUE

Whether Respondent, United Dominion Realty Trust, Inc., violated the Florida Civil Rights Act of 1992, as amended, as alleged in Petitioner's Petition for Relief.

PRELIMINARY STATEMENT

On March 22, 2004, Petitioner, Evelyn E. Ferranti, filed her Petition for Relief with the Florida Commission on Human Relations alleging that her employer, Respondent, United Dominion Realty Trust, Inc., had discriminated against her in violation of the Florida Civil Rights Act of 1992, as amended, through acts of its employee(s) which essentially constituted sexual, religious, and ethnic harassment.

On March 25, 2004, the Florida Commission on Human Relations transmitted the Petition for Relief to the Division of Administrative Hearings. On the same day, an Initial Order was sent to both parties. On April 2, 2004, the case was scheduled for final hearing in Viera, Florida, on June 4, 2004. The case was presented as scheduled on June 4, 2004; however, the case began at 2:00 p.m. to accommodate Petitioner, who was not available until that time.

Petitioner testified on her own behalf. She did not present any documentary evidence. At the close of Petitioner's case, Respondent moved to dismiss the Petition for Relief, which was accepted as a Motion for a Recommended Order of Dismissal. The undersigned reserved ruling on Respondent's motion. Respondent presented three witnesses: David Morenti, Kathy Ratchford, and Kelli Brain. Respondent offered 11 exhibits which were received in evidence without objection and marked

Respondent's Exhibits 1, 2, and 4 through 12. The Transcript of Proceedings was filed on June 17, 2004. Respondent filed a Proposed Recommended Order on June 18, 2004.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing, the following findings of facts are made:

1. Petitioner became an employee of Respondent on September 25, 2000, as a marketing associate at Respondent's LakePointe Apartment Homes.

2. On September 25, 2000, as a part of employee orientation, Petitioner received a copy of Respondent's Associate Manual, which contains Respondent's non-discrimination and anti-harassment policies. On June 1, 2001, Petitioner received a revised copy of Respondent's Associate Manual, which also contains Respondent's non-discrimination and anti-harassment policies. In addition to the foregoing written documents, Petitioner indicated that she was aware that she had 24-hour access to Respondent's internal website wherein Respondent maintains online copies of its Associate Manual.

3. The foregoing manuals and website outlined a "chain of command" of management employees who were available for reporting incidents of sexual, religious, and ethnic harassment and obligated employees to report perceived incidents of unlawful workplace harassment.

4. The referenced manuals assert Respondent's stated policy that it will not tolerate any harassment in the workplace. No evidence was presented that suggests that Respondent did not actively pursue the stated anti-harassment policy.

5. Petitioner voluntarily resigned her employment with Respondent on June 9, 2003. No evidence was presented that indicated that any of Respondent's employees coerced or in any way pressured Petitioner into resigning her employment with Respondent.

6. Petitioner did not report any acts of discrimination or harassment during the time she was employed by Respondent. After her resignation, she complained that she had observed what she considered to be inappropriate sexual contact between two employees and that a co-employee had made inappropriate comments about whether or not she was wearing undergarments and had commented on her "wearing her rosary." Nothing in Petitioner's testimony indicates that the purportedly offensive conduct was pervasive or that it created a "hostile workplace."

7. Petitioner reports that these perceived incidents of harassment occurred prior to the replacement of Mary Snyder by Kelli Brain as Community Director in March of 2002. It is, therefore, Petitioner's testimony that she continued to work in a non-hostile environment for 14 months until she felt compelled

to resign in June 2003. Petitioner's Charge of Discrimination was filed with the Florida Commission on Human Relations on October 12, 2003, more than 18 months after the alleged harassment had last occurred according to Petitioner's testimony.

CONCLUSIONS OF LAW

8. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. § 120.57(1), Fla. Stat. (2003).

9. Subsection 760.10(1)(a), Florida Statutes (2003), provides that it is an unlawful employment practice for an employer:

> 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.

10. Florida courts have determined that federal discrimination law should be used as a guidance when construing provisions of Section 760.10, Florida Statutes (2003). Harper v. Blockbuster Entertainment Corp., 139 F.3d 1385 (11th Cir. 1998); Florida Department of Community Affairs v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991).

11. The United States Supreme Court established, in McDonnell-Douglas Corporation v. Green, 411 U.S. 792 (1973) and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), the analysis to be used in cases alleging discrimination under Title VII, which is persuasive in the instant case, as reiterated and refined in the case of St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

12. This analysis illustrates that a petitioner has the burden of establishing, by a preponderance of evidence, a prima facie case of discrimination. If that prima facie case is established, the respondent must articulate a legitimate, non-discriminatory reason for the action taken. The burden then shifts back to the petitioner to go forward with evidence to demonstrate that the offered reason is merely a pretext for unlawful discrimination. The Supreme Court stated in Hicks, before finding discrimination in that case, that:

> [T]he fact finder must believe the plaintiff's explanation of intentional discrimination.

509 U.S. at 519.

13. In the Hicks case, the Court stressed that even if the fact finder does not believe the proffered reason given by the employer, the burden still remains with the petitioner to demonstrate a discriminatory motive for the adverse employment action taken.

14. To prove a prima facie case of sexual harassment involving a hostile work environment, Petitioner must allege and prove the following: (a) she belongs to a protected class; (b) she experienced unwanted sexual advances; (c) the harassment was based on her sex; (d) the harassment affected a term, condition, or privilege of her employment; and (e) Respondent knew or should have known about the harassment and failed to take prompt remedial action. Henson v. City of Dundee, 682 F.2d 897, 903-905 (11th Cir. 1982).

15. Petitioner has failed to present evidence of harassment or that Respondent knew or should have known of the existence of the harassment. Accordingly, she has failed to present a prima facie case. In addition, she did not pursue appropriate reporting of the alleged improper conduct until she had resigned from employment with Respondent.

16. Section 760.11(1), Florida Statutes (2003), provides as follows, in pertinent part:

> (1) Any person aggrieved by a violation of ss. 760.01-760.10 may file a complaint with the commission within 365 days of the alleged violation . . .

17. Petitioner filed her Charge of Discrimination with the Florida Commission on Human Relations on October 12, 2003. By Petitioner's own testimony, any alleged discriminatory conduct took place before April 2002. Any alleged discriminatory act

that occurred on or before October 12, 2002, is time-barred. Therefore, Petitioner's claim is time-barred. Thompson v. Orange Lake Country Club, Inc., 224 F. Supp. 2d 1368, 1374-75 (M.D. Fla. 2002); Caraballo v. South Stevedoring. Inc., 932 F. Supp. 1462, 1464 (S.D. Fla. 1996).

18. Assuming arguendo that there was evidence that supported Petitioner's allegations that there was work-place discrimination, Respondent has satisfied the Faragher-Ellerth affirmative defense.

> According to the Supreme Court, if a plaintiff shows that the supervisor effected a tangible employment action against plaintiff, then the corporate defendant is liable for the harassment. Faragher, 524 U.S. at 807-08, 118 S. Ct. 2275; Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765, 118 S. Ct. 2257, 141 L.Ed.2d 633 (1998); Miller, 277 F.3d at 1278. Where, however, the plaintiff does not show that the supervisor took a tangible employment action, the employer may raise an affirmative defense that it: 1) exercised reasonable care to prevent and promptly correct the harassing behavior, and 2) that the plaintiff unreasonably failed to take advantage of any preventative or corrective opportunities the employer provided or to avoid harm otherwise. Miller, 277 F.3d at 1278 (citing Faragher, 524 U.S. at 807, 118 S. Ct. 2275; Ellerth, 524 U.S. at 765, 118 S. Ct. 2257.

Lawrence v. Wal-Mart Stores, Inc., 236 F. Supp. 2d 1314, 1326-27 (M.D. Fla. 2002)(citing Faragher v. City of Boca Raton, 524 U.S. 775 (1998) and Burlington Indus., Inc. v. Ellerth, 524 U.S. 742

(1998)); Walton v. Johnson & Johnson Serv., Inc., 203 F. Supp. 2d 1312, 1319-20 (M.D. Fla. 2002), aff'd, 347 F.3d 1272 (11th Cir. 2003), cert. denied, 124 S.Ct. 1714 (2004)(citing same); Carter v. America Online, Inc., 208 F. Supp. 2d 1271, 1277 (M.D. Fla. 2001).

19. In the instant case, Respondent exercised reasonable care to prevent harassment by having in place a meaningful anti-harassment policy. Petitioner failed to avail herself of the established procedures set forth in the anti-harassment policy. It was literally impossible for Respondent to implement corrective action, assuming such action was needed, if Petitioner failed to complain appropriately.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Florida Commission on Human Relations enter a final order dismissing Petitioner's Petition for Relief for failure to present a prima facie case and because it is time-barred.

DONE AND ENTERED this 9th day of July, 2004, in Tallahassee, Leon County, Florida.

JEFF B. CLARK
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of July, 2004.

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.