STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CRAIG S. SAILOR,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 04-1400
	)	
SANDCO, INC.,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

A formal hearing was conducted in this case on June 21, 2004, in Tallahassee, Florida, before Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Craig J. Brown, Esquire
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STATEMENT OF THE ISSUES

The issues are as follows: (a) whether Respondent committed an unlawful employment practice against Petitioner based on his sex and race in violation of Section 760.10(1), Florida Statutes (2003); and (b) whether Respondent committed an unlawful employment act by retaliating against Petitioner in violation of Section 760.11(7), Florida Statutes (2003).

PRELIMINARY STATEMENT

On October 7, 2003, Petitioner Craig S. Sailor (Petitioner) filed a Charge of Discrimination against Respondent Sandco, Inc. (Respondent) with the Florida Commission on Human Relations (FCHR). The charge alleged that Respondent discriminated against Petitioner based on his race and sex.

On February 18, 2004, Petitioner filed an Amended Charge of Discrimination with FCHR. According to the amended charge, Respondent retaliated against Petitioner for filing the original charge by terminating his employment. The amended charge did not allege discrimination based on sex and race.

On March 12, 2004, FCHR issued a Determination: No Cause. On April 15, 2004, Petitioner filed a Petition for Relief with FCHR. The case was referred to the Division of Administrative Hearings on April 21, 2004.

A Notice of Hearing dated May 3, 2004, scheduled the hearing for June 21, 2004. During the hearing, Petitioner

testified on his own behalf and presented the testimony of two additional witnesses. Petitioner offered one exhibit (P1), which was accepted into the record as evidence. Respondent presented the testimony of three witnesses and offered 11 exhibits (R1-R2, R4-R8, R9A and R9B, and R10-R11), which were accepted as record evidence.

A transcript was filed on July 22, 2004. The parties had the opportunity to file proposed findings of fact and conclusions of law 10 days later.

On July 28, 2004, Respondent filed an Unopposed Motion for Extension of Time to File Proposed Recommended Order. An Order dated July 30, 2004, granted the motion and directed the parties to file their proposed orders on August 10, 2004. Both parties filed Proposed Recommended Orders as directed.

All references hereinafter shall be to Florida Statutes (2003) unless otherwise stated.

FINDINGS OF FACT

1. Petitioner is a black male. He began working as a truck driver for Respondent on May 29, 2002.

2. Mike Helms, Petitioner's supervisor, was responsible for hiring Respondent's truck drivers. During the year and a half that Mr. Helms worked for Respondent, 80 to 90 percent of the truck drivers hired were black.

3. During the hearing, Petitioner testified that he repeatedly requested Respondent's mechanics to repair the leak in his truck cab beginning in August 2002. Petitioner stated that Respondent's mechanics did not repair the truck cab until sometime after August 2003 when he was not working and a white female truck driver was driving his truck. Petitioner's allegations of disparate treatment involving the repair of the truck have not been considered here because the record does not reflect that they were raised in Petitioner's original or amended complaint or during FCHR's subsequent investigation. Because the allegations were not raised in either of Petitioner's complaints, FCHR never considered them, which would have allowed consideration in the contested hearing.

4. Petitioner also testified that Respondent did not enforce the no-smoking policy in the driver's lounge until Mr. Helms became ill with a heart condition. The allegations that Mr. Helms dismissed Petitioner's complaints without explanation prior to that time were not included in Petitioner's original or amended complaint. There is no record evidence that Petitioner ever raised an issue involving the no-smoking policy during FCHR's investigation or that FCHR ever considered Respondent's alleged failure to enforce the no-smoking policy, which would have allowed consideration in the contested hearing.

5. Respondent provided its truck drivers with radio/ telephones so that they could communicate with each other and with the office. Each driver had an assigned radio/telephone that he or she used every day. Each night the drivers would leave their telephones in an unsecured area of the truck office that was accessible to all employees.

6. Typically, each telephone was programmed to identify incoming calls by the number of the unit making the call. In other words, the unit number of the person initiating the call would appear on the recipient's screen. However, the recipient's telephone could be programmed to show the name of the incoming caller instead of his or her unit number.

7. On February 17, 2003, Petitioner was using the telephone usually assigned to him. During the day, he noticed that the word "nigger" was programmed into his internal telephone directory. Petitioner made this discovery when he scrolled through his internal telephone directory to place a call to another unit. Petitioner realized that someone had programmed his telephone to show the racial slur when unit 12 called him.

8. Unit 12 was an extra phone, used by the drivers when their phones were not working properly. Therefore, the person who programmed the racial slur into Petitioner's assigned telephone did not know necessarily which driver would be using

unit 12 on February 17, 2003. It follows that the driver who used unit 12 on February 17, 2003, might not have known that the derogatory name would appear on Petitioner's screen when unit 12 contacted Petitioner.

9. Petitioner first checked with a couple of drivers who verified that their internal telephone directories were not programmed to identify unit 12 as "nigger." Petitioner concluded that he was the only target of the epithet. Petitioner then called unit 12/"nigger" and discovered that Ed Wight was using the spare telephone that day.

10. Petitioner believed that only a few drivers knew how to program names into an internal telephone directory. He assumed that Mr. Wight was responsible for tampering with his telephone.

11. Petitioner waited to confront Mr. Wight at Respondent's pit. Petitioner put the radio in Mr. Wight's face and asked him if he had programmed the name in the telephone. Petitioner told Mr. Wight that he did not "play that way" and did not appreciate it.[1/]

12. Next, Petitioner drove his truck into Respondent's parking lot at a high rate of speed. Mr. Helms, who was standing outside, feared the truck would not stop before it struck him. After Petitioner's truck slid to a stop, he emerged

yelling and screaming. Petitioner then threw his telephone at Mr. Helms.

13. Mr. Helms did not understand why Petitioner was so upset until Petitioner showed Mr. Helms the racial slur in Petitioner's internal telephone directory. Petitioner then got into his truck and sped away.

14. Mr. Helms later learned that Petitioner had confronted Mr. Wight at the pit, accusing him of programming the racial slur into Petitioner's telephone. In the meantime, Mr. Helms instructed Petitioner to go home and not to return to work until Mr. Helms called him.

15. When Petitioner returned to work, he met with Mr. Helms and Mr. Wight. During the meeting, Petitioner apologized to Mr. Wight for confronting him. Mr. Helms advised Petitioner that he was suspended for two days for his conduct toward Mr. Wight and for driving into the parking lot in an unsafe manner.

16. There was no evidence that Mr. Wight was responsible for the racial slur. Therefore, Mr. Wight was not disciplined.

17. During the hearing, Petitioner admitted that he does not know who programmed the racial slur into his telephone. He acknowledged that no one at work ever called him by that name again. Petitioner testified that he has never heard Mr. Helms or anyone else in a position of authority at Respondent's place of business make a racially derogatory comment in his presence.

18. Respondent took appropriate steps to ensure that future racial slurs could not be programmed anonymously into the telephones. Specifically, Mr. Helms padlocked the doors that led to the room where the telephones were stored when they were not in use. This was inconvenient for Mr. Helms because he had to be at the office every time a driver picked up or returned a telephone. Nevertheless, Mr. Helms knew it was important to secure the telephones to prevent any recurrence of the problem experienced by Petitioner.

19. Mr. Helms did not believe that a driver would admit to being responsible for the racial slur. Therefore, he did not interview all of the drivers. Instead, Mr. Helms spoke to a couple of drivers, asking them to come forward with any information that might reveal the identity of the guilty person. Mr. Helms hoped the drivers he talked to would cooperate by sharing information circulating among the employees. For these reasons, Mr. Helms considered his investigation to be ongoing. However, neither Mr. Helms nor any other member of Respondent's management team ever found out who was responsible for the racial slur.

20. Respondent did not conduct any special meeting to educate the drivers about Respondent's intolerance of racial discrimination. Respondent's employee handbook clearly prohibits any type of racial discrimination, including but not

limited to, "racial and ethnic slurs, jokes or other derogatory remarks about or directed toward minority groups."

21. Respondent required all employees to acknowledge that they have received and read the employee handbook. Petitioner signed the employee acknowledgement on January 10, 2003. The handbook states that failure to comply with safety rules is an offense that may subject an employee to discipline. The handbook also states that an employee may be discharged for threatening another employee or showing disrespect for a supervisor.

22. On May 1, 2003, approximately two and a half months after the telephone incident, Respondent promoted Petitioner to the position of crew chief. Mr. Helms made the decision to promote Petitioner. As crew chief, Petitioner was responsible for leading a group of drivers and was eligible for a monthly bonus in the amount of $250.00 if no accidents or traffic violations occurred during the month.

23. Petitioner resigned his position as crew chief in August 2003. He made the decision to step down as crew chief because he did not believe the compensation was sufficient.

24. During the hearing, Petitioner testified that he believed Mr. Helms treated four specifically-named male drivers more favorably than Petitioner. Petitioner testified that three of these drivers were black males and one was a white male.

Petitioner did not include allegations of Mr. Helm's alleged favorable treatment of the four male drivers in his original or amended complaint. There is no record evidence that FCHR investigated or considered these allegations, which would have allowed consideration in the contested hearing.

25. On October 1, 2003, Petitioner hauled a load of dirt to Respondent's dump. The person responsible for telling drivers where to dump and for pulling them out when they got stuck in the mud was David Cochran, a white male. On this occasion, Petitioner followed Mr. Cochran's instructions and got stuck.

26. Because Mr. Cochran ignored Petitioner's request for assistance in getting his truck out of the mud, Petitioner called Mr. Helms to report that Mr. Cochran was not providing assistance.

27. After waiting for 40 to 45 minutes, Petitioner's crew chief, Tommy Bennett (a black male), and another driver, Leonard Glover (a white male) came by to speak to Petitioner. Petitioner explained that he was waiting for Mr. Cochran to pull his truck out of the mud. Mr. Glover then hooked his truck to Petitioner's truck and freed Petitioner's truck from the mud.

28. Approximately one half hour later, Petitioner returned to the dump. He saw a white female truck driver stuck in the

same location. Mr. Cochran immediately pulled her truck from the mud.

29. At this point, Petitioner decided that Respondent was discriminating against him. First, he called a television station. Next, he called FCHR regarding the process of filing a complaint. He then called Vicki Goodman, Respondent's director of human resources, requesting documentation regarding the February 17, 2003, telephone incident.

30. Petitioner did not tell Ms. Goodman about the incident with Mr. Cochran. When Ms. Goodman inquired why Petitioner wanted the documents, he responded that he was dissatisfied with Ms. Goodman's and Mr. Helms' response to the telephone incident.

31. Ms. Goodman advised Respondent that there was no information about the telephone incident other than as discussed with Petitioner eight months before. She also told him he was not entitled to a copy of the report of that incident. Ms. Goodman then inquired whether Petitioner was concerned about something else that was occurring in the workplace. Petitioner responded by saying, "I really don't want to talk about it right now. You'll find out soon enough."

32. During the hearing, Petitioner testified that he told Ms. Goodman, "[s]omeone from FCHR would be contacting her soon." In papers submitted to FCHR, Petitioner claimed he responded to Ms. Goodman's inquiry by stating that "[s]omeone would be

contacting her in the near future in reference to the information that [he] was requesting." Petitioner's testimony that he informed Respondent on October 1, 2003, that he was filing a complaint with FCHR is not persuasive.

33. On October 5, 2003, Petitioner signed a written Charge of Discrimination. He filed the charge with FCHR on October 7, 2003.

34. In the meantime, Mr. Helms received a complaint from a female truck driver, Tina Pincumbe, on October 6, 2003. The complaint involved allegations of sexual harassment by Petitioner toward Ms. Pincumbe and other female truck drivers.[2/]

35. Upon hearing Ms. Pincumbe's complaint, Mr. Helms referred her to Ms. Goodman. He made the referral because he felt Ms. Pincumbe would be more comfortable talking with another female.

36. Ms. Pincumbe went to Ms. Goodman's office and made a statement that was reduced to writing. During the interview, Ms. Goodman told Ms. Pincumbe that it was important for other women who were uncomfortable with the way Petitioner was treating them to come forward.

37. Later on October 6, 2003, Janice Simpson voluntarily visited Ms. Goodman's office. Ms. Simpson also signed a written statement, accusing Petitioner of sexual harassment.

38. On October 7, 2003, Sheila Nichols, a female truck driver, was working light duty in the office. Ms. Goodman approached Ms. Nichols as part of her investigation. Ms. Nichols subsequently signed a written statement containing allegations of unwanted advances by Petitioner.

39. On October 7, 2003, Cathie Corrie, a female truck driver, approached Mr. Helms with allegations about Petitioner's unwanted advances. Mr. Helms referred Ms. Corrie to Ms. Goodman. On October 8, 2003, Ms. Corrie signed a statement alleging sexual harassment by Petitioner.

40. On October 8, 2003, Ms. Goodman interviewed Mr. Helms and several male truck drivers. On October 9, 2003, Ms. Goodman interviewed Petitioner, who denied all allegations of sexual harassment in a written statement. Respondent placed Petitioner on administrative leave pending completion of the sexual harassment investigation.

41. Based on her investigation, Ms. Goodman concluded that the allegations of sexual harassment by the four females had merit. She completed a written report and recommended that Behzad (Steve) Ghazvini, Respondent's owner, discipline Petitioner.

42. Mr. Ghazvini and Mr. Helms met with Petitioner either October 10, 2003, or October 13, 2003.[3/] During the meeting, Mr. Ghazvini informed Petitioner that he was discharged from

employment for violating Respondent's policy prohibiting sexual harassment. Mr. Ghazvini terminated Petitioner's employment based on the similarity of the sexual harassment complaints by the female truck drivers, Ms. Goodman's judgment that the women were telling the truth, and out of concern that Respondent would be morally and legally responsible if Petitioner harmed the female employees.

43. When Mr. Ghazvini made the decision to fire Petitioner, neither he nor anyone on Respondent's management team were aware that Petitioner had contacted FCHR to file a discrimination complaint. Respondent received notice about the discrimination complaint for the first time on October 15, 2003.

44. The next two truck drivers that Respondent hired after terminating Petitioner were Troy Rowells, who was hired on October 21, 2003, and Darrell Butler, who was hired on October 22, 2003. Both men are black.

CONCLUSIONS OF LAW

45. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to Sections 120.569, 120.57(1), and 760.11, Florida Statutes.

46. It is unlawful for an employer to discriminate against an employee based on race and gender or to retaliate against an employee who opposes an unlawful employment practice or files a

charge of discrimination. See §§ 760.10(1) and 760.10(7), Fla. Stat.

47. As a general rule, an amended complaint supersedes and replaces the original complaint unless the amendment specifically refers to or adopts the earlier pleading. See Varnes v. Local 91, Glass Bottle Blowers Association, 674 F.2d 1365 (11th Cir. 1982). In this case, Petitioner's amended charge alleged only retaliation as grounds for relief. It did not adopt or refer to the original charge based on race and gender/sex discrimination.

48. At the inception of the hearing, the parties agreed that retaliation was the only issue and that the race and gender/sex discrimination claims were only probative as to providing background information regarding the retaliation claim. However, the parties were given the opportunity to argue in their proposed conclusions of law whether racial and gender discrimination are at issue here. Respondent took advantage of that opportunity; Petitioner did not.

49. After reviewing the entire record, it is apparent that FCHR considered Petitioner's original and amended charge in making its Determination: No Cause. Therefore, all of Petitioner's claims are analyzed here using theories of disparate treatment, hostile work environment, and retaliation.

50. Decisions construing Title VII, United States Civil Rights Act of 1964, as amended, 42 U.S.C.A. Section 2000E, et seq., are applicable in evaluating a claim brought under the Florida Civil Rights Act of 1992, as amended, Sections 760.01 through 760.11, Florida Statutes. See Harper v. Blockbuster Entertainment Corporation, 130 F.3d 1385, 1387 (11th Cir. 1998); Ranger Insurance Company v. Bal Harbour Club, Inc., 549 So. 2d 1005, 1009 (Fla. 1989).

DISPARATE TREATMENT

51. Petitioner has the ultimate burden to prove discrimination based on disparate treatment in one of three ways: (a) by showing direct evidence of discriminatory intent; (b) by meeting the test for circumstantial evidence set out in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973); or (c) by statistical evidence. See Carter v. City of Miami, 870 F.2d 578, 581-582 (11th Cir. 1989). Petitioner did not present any statistical evidence of discrimination. Therefore, only the first two methods of proving discrimination will be addressed.

Direct Evidence

52. "Direct evidence of discrimination would be evidence which, if believed, would prove the existence of a fact without inference or presumption." See Castle v. Sangamo Weston, Inc., 837 F.2d 1550, 1558 n. 13 (11th Cir. 1988). Confronted with

such evidence, the employer has to prove that the same employment decision would have been made absent any discriminatory intent. See id. at 1558 n. 13.

53. Petitioner presented no direct evidence of sex/gender discrimination. He did show uncontested evidence that someone, on one occasion, programmed a racial slur into his telephone.

54. "[O]nly the most blatant remarks, whose intent could be nothing other than to discriminate . . . constitute direct evidence of discrimination." See Carter, 870 F.2d at 581-582. Stray comments by non-decision makers are not direct evidence of discriminatory motive. See Wilde v. Florida Pneumatic Mfg. Corp., 941 F. Supp. 1203, 1206-1207 (S.D. Fla. 1996). "If an alleged statement at best merely suggests a discriminatory motive, then it is by definition only circumstantial evidence." See Schoenfeld v. Babbitt, 168 F.3d 1257, 1266 (11th Cir. 1999).

55. The racial epithet in Petitioner's phone clearly was offensive. However, there is no evidence that his supervisor or anyone in a position of authority was responsible for tampering with the telephone. Without more, the isolated incident, over a period in excess of two years of employment, is insufficient to show direct evidence of a discriminatory intent on the part of Respondent.

Circumstantial Evidence

56. Absent any direct evidence, an employee has the initial burden of proving a prima facie case of discrimination based on disparate treatment. See McDonnell Douglas Corp. v. Green, 411 U.S. at 802. If the employee proves a prima facie case, the burden shifts to the employer to proffer a legitimate non-discriminatory reason for the actions it took. See Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089 (1981). The employer's burden is one of production, not persuasion, as it is always the employee's burden to persuade the fact finder that the proffered reason is a pretext and that the employer intentionally discriminated against the employee. See Burdine, 450 U.S. at 252-256.

57. In order to prove racial or gender/sex discrimination based on disparate treatment, Petitioner must show the following: (a) he is a member of a protected group; (b) he was qualified for the job; (c) he suffered an adverse employment action; and (d) he was treated less favorably than similarly situated employees who were not members of his protected group. Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997).

58. Regarding the sex/gender discrimination claim, Petitioner has not proved that he suffered an adverse employment action when Mr. Cochran ignored Petitioner's request for assistance in pulling the truck out of the mud but immediately

provided assistance to the female driver. An "adverse action" does not include every aspect of an employee's employment, but rather is limited to an "ultimate" employment decision, such as hiring, firing, granting leave, promoting, and compensating employees. See Mattern v. Eastman Kodak Co., 104 F.3d 702 (5th Cir. 1997); Landgraf v. USI Film Products, 968 F. 2d 427 (5th Cir. 1992).

59. Petitioner's suspension and termination were adverse employment actions. However, as to the fourth prong of the McDonnell Douglas test, Petitioner has not proved that he was treated less favorably than similarly situated employees, regardless of their race or gender. There is no evidence that Respondent allowed any other employee to break safety rules by driving a truck in a reckless manner or to remain employed after being accused of sexual harassment by multiple members of the opposite sex.

60. Assuming that Petitioner proved a prima facie case of disparate treatment based on race or gender discrimination, Respondent presented persuasive evidence of a legitimate non-discriminatory reason for every disciplinary action it took. First, Petitioner was suspended after the telephone incident because he broke Respondent's safety rules against reckless driving. Second, Respondent terminated Petitioner because

Respondent believed that Petitioner was guilty of sexually harassing four female drivers.

61. Petitioner has not proved that Respondent's reasons for suspending him and terminating his employment were a pretext for discrimination. Under the facts of this case, Petitioner cannot deny that he acted irresponsibly on February 17, 2003, after the telephone incident. Respondent would have been justified in firing Petitioner at that time.

62. Petitioner does deny that he sexually harassed the female drivers, but there is no evidence that Respondent solicited their statements or conspired with them to provide false statements. To the contrary, the greater weight of the evidence indicates that Respondent conducted a thorough investigation and reached a reasonable conclusion based on voluntary statements by the women. Even the timing of the sexual harassment complaints in relation to Petitioner's filing of his discrimination charge does not overcome the weight of the evidence, showing Respondent's good faith belief that Petitioner was guilty of making unwanted advances to the females.

63. In the absence of an intent to discriminate based on Petitioner's race or gender, courts are "not in the business of adjudging whether employment decisions are prudent or fair," but rather "whether unlawful discriminatory animus motivates a challenged employment decision." Pashoian v. GTE Directories,

208 F. Supp. 2d 1293 (M.D. Fla. 2002). In this case, there is no persuasive evidence that Respondent intentionally discriminated against Petitioner based on his race and/or gender.

HOSTILE WORKING ENVIRONMENT

64. Petitioner failed to present a prima facie case of racial or gender discrimination due to a hostile work environment, which requires proof of the following elements: (a) the employee belongs to a protected group; (b) the employee has been subject to unwelcome harassment; (c) the harassment was based on a protected characteristic; (d) the workplace is permeated with discriminatory intimidation, ridicule, and insult sufficiently severe or pervasive to alter the terms or conditions of employment and to create an abusive working environment; and (e) the employer is responsible for such environment under either a theory of vicarious or direct liability. See Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1275 (11th Cir. 2002); Lawrence v. Wal-Mart Stores, Inc., 236 F. Supp. 2d 1314 (M.D. Fla. 2002).

65. Regarding the first element, Petitioner has shown unwelcome harassment due to the racial slur in his telephone, which he immediately reported to Mr. Helms. Petitioner did not show unwelcome harassment based on his gender because he did not

complain to Ms. Goodman or Mr. Helms after returning to the dumpsite and seeing Mr. Cochran assisting the female driver.

66. As to the fourth element, Petitioner was required to prove that (a) he subjectively perceived the conduct to be abusive; and (b) a reasonable person objectively would find the conduct at issue hostile or abusive. See Lawrence, 236 F. Supp. at 1323. Without a doubt, Petitioner subjectively perceived the racial slur as abusive. The record is not so clear regarding Petitioner's subjective perception regarding the incident at the dumpsite. He complained to Mr. Helms about being delayed before but not after he saw Mr. Cochran assisting the female driver.

67. In determining whether conduct is objectively hostile, one must examine the totality of the circumstances, including the following factors: (a) the frequency of the conduct; (b) its severity; (c) whether it was physically threatening or humiliating or merely offensive; and (d) whether it unreasonably interfered with the employee's job performance. See id. at 1324. The conduct at issue must be so extreme as to "amount to a change in terms and conditions of employment." See Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998).

68. The racial slur may be considered humiliating because it was directed specifically toward Petitioner. The same cannot be said about Petitioner's delay at the dumpsite.

69. Additionally, Petitioner has not shown that he was the subject of racial or gender discrimination with sufficient frequency to constitute harassment. The incidents involving the telephone and the dumpsite were isolated occurrences in over two years of employment.

70. Finally, Petitioner has not shown that the racial slur or the incident at the dumpsite altered his working conditions. It is understandable that the racial slur and Mr. Cochran's alleged preference for the female driver offended Petitioner. However, there was no tangible effect or material alteration of Petitioner's job performance resulting from either incident.

71. The suspension in February 2003 was due to Petitioner's reckless driving, which was unreasonable and unjustified under any circumstances. Petitioner apologized for his behavior and was promoted to crew chief a few months later. The incident at the dumpsite on October 1, 2003, lasted less than an hour and was never repeated. The termination of Petitioner's employment a few days later was based on Respondent's good faith belief that Petitioner was guilty of sexual harassment and unrelated to Petitioner's allegations of racial and gender discrimination.

72. Assuming arguendo that the evidence supports Petitioner's allegations relative to a hostile work environment,

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, 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 v. Kenworth of Dothan, Inc., 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. at 1327.

73. Here, Respondent had a policy prohibiting discrimination of any kind in the workplace. When confronted with the racial slur in Petitioner's telephone, Respondent conducted an appropriate ongoing investigation and successfully took corrective action to ensure that there would be no further tampering with the driver's telephones.

74. As to the alleged gender discrimination at the dumpsite, Petitioner did not give Respondent an opportunity to correct Mr. Cochran's behavior because he did not complain in a

timely manner to Mr. Helms and/or Ms. Goodman as required by Respondent's employee handbook. To the extent that Respondent was aware of the dumpsite incident, whatever steps Respondent may have taken or not taken to prevent recurrence, the incident was never repeated.

RETALIATION

75. In order for an employee to prove that his employer retaliated against him for engaging in a statutorily protected expression, the employee must show the following: (a) he engaged in a statutorily protected activity; (b) he suffered an adverse employment action; and (c) the adverse employment action was causally related to the protected activity. See Harper v. Blockbuster Entertainment Corp., 139 F.3d 1385, 1388 (11th Cir. 1998); Stewart v. Happy Herman's Chesire Bridge, Inc., 117 F.3d 1278, 1287 (11th Cir. 1997). Although the employee does not need to prove the underlying claim of discrimination in order to maintain a retaliation action, he does need to show that he suffered an adverse employment action prompted by the statutorily protected expression. See Gupta v. Florida Board of Regents, 212 F.3d 571, 586 (11th Cir. 2000).

76. An employee's initial burden requires him to show that the "decision-maker[s] [were] aware of the protected conduct," and "that the protected activity and the adverse action were not wholly unrelated." See Gupta, 212 F.3d at 578. Close temporal

proximity may be sufficient to show that the protected activity and the adverse action were not wholly unrelated. See id. at 578.

77. In E.E.O.C. v. Total System Services, Inc., 221 F.3d 1171, 1176 (11th Cir. 2000), the court states as follows:

> [W]e cannot agree that an employer must be forced to prove . . . more than its good faith belief that a false statement was knowingly made. In the kind of investigation involved in this case, the employer is not acting pursuant to the statute or under color of law, but is conducting the company's own business.
>
> When an employer is told of improper conduct at its workplace, the employer can lawfully ask: is the accusation true? When the resulting employer's investigation (not tied to the government) produces contradictory accounts of significant historical events, the employer can lawfully make a choice between the conflicting versions--that is, to accept one as true and to reject one as fictitious--at least, as long as the choice is an honest choice. And, at least when the circumstances give the employer good reason to believe that the fictitious version was the result of a knowingly false statement by one of its employees, the law will not protect the employee's job.
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> * * *
>
> . . . Therefore, an employer, in these situations, is entitled to rely on its good faith belief about falsity, concealment, and so forth. Cf. Damon, 196 F.3d at 1363 n.3 ("An employer who fires an employee under the mistaken but honest impression that the employee violated a work rule is not liable for discriminatory conduct."); Sempier v. Johnson Higgins, 45 F.3d 724,731 (3d Cir.

1995)("Pretext is not demonstrated by showing simply that the employer was mistaken.")

78. In this case, Petitioner has proved that he participated in a protected activity by filing a claim with FCHR on October 7, 2003. Likewise, he has shown that he suffered an adverse employment action, i.e., termination on October 10, 2003, or October 13, 2003. However, he failed to present persuasive evidence that Respondent's decision-makers were aware of the pending discrimination charge until Respondent received it in the mail on October 15, 2003. Accordingly, Petitioner has not proved a prima facie case of retaliation.

79. To the extent that Petitioner met his initial burden to establish a claim of retaliation, Respondent has produced persuasive evidence of legitimate reasons for Petitioner's termination, i.e., the sexual harassment complaints. Petitioner did not show that Respondent's reasons were a pretext to mask a retaliatory action.

80. Respondent received voluntary and unsolicited statements accusing Petitioner of unwanted sexual advances. Respondent initiated an investigation, which included taking a statement from Petitioner, denying all charges. Respondent found the four females to be credible and elected to believe their version of events over Petitioner's contradictory statement. Respondent fired Petitioner based on its good faith

belief that Petitioner was guilty of sexual harassment and without knowledge that Petitioner had filed a claim with FCHR. Accordingly, Petitioner has not shown that the reasons for his termination were a pretext for discrimination.

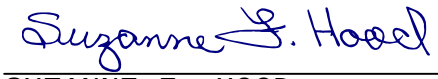
RECOMMENDATION

Based on the forgoing Findings of Facts and Conclusions of law, it is

ORDERED:

That FCHR enter a final order dismissing the Petition for Relief.

DONE AND ENTERED this 25th day of August, 2004, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of August, 2004.

END NOTES

[1/] Mr. Wight did not testify at the hearing. Testimony that Mr. Wight denied programming the racial slur into Petitioner's telephone is inadmissible hearsay.

[2/] Neither Ms. Pincumbe nor any of the other female truck drivers testified at the hearing. Any reference here to their allegations of sexual harassment is inadmissible hearsay except to show Respondent's reaction to the complaints.

[3/] The record is not clear whether Respondent met with Petitioner to terminate his employment on Friday, October 10, 2003, or Monday, October 13, 2003.

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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.