STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SHERRY VERES,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 04-3004
	)	
ENERGY ERECTORS, INC.,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Upon due notice, a disputed-fact hearing was held in this case on October 19, 2005, in Leesburg, Florida, before Ella Jane P. Davis, a duly-assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: John Vernon Head, Esquire
John Vernon Head, P.A.
138 East Central Avenue
Howey-in-the-Hills, Florida 34737

For Respondent: Stephen W. Johnson, Esquire
Stephanie G. McCullough, Esquire
1000 W. Main Street
Leesburg, Florida 34748

STATEMENT OF THE ISSUE

Whether Respondent Employer is guilty of an unlawful employment practice pursuant to Section 760.10, Florida Statutes, by discriminating against Petitioner based upon her sex (gender). Specifically, whether Petitioner was sexually

harassed in the work place and/or unlawfully terminated for refusing sexual favors.

PRELIMINARY STATEMENT

On May 17, 2002, Petitioner filed a Charge of Discrimination with the Florida Commission on Human Relations (FCHR). The charge alleged that Respondent Employer discriminated against her based upon sex and that she was laid off on June 1, 2001, because she refused to give sexual favors to the company president. The case was assigned FCHR No. 2202063.

FCHR performed an investigation and issued a Determination: No Cause on June 3, 2004. On July 15, 2004, FCHR entered an Amended Determination: No Cause. On August 19, 2004, Petitioner filed a Petition for Relief with FCHR. The case was referred to the Division of Administrative Hearings on or about August 24, 2004.

On September 9, 2004, Respondent filed its Motion to Dismiss and Supplemental Motion to Dismiss the Petition for Relief on the basis that the Petition for Relief had been untimely filed. A Recommended Order of Dismissal was entered by a predecessor Administrative Law Judge on October 1, 2004, but apparently was not docketed or mailed to the parties until April 11, 2005.

On June 15, 2005, FCHR entered an Order remanding the case to the Division of Administrative Hearings, because FCHR had concluded that the Petition for Relief had been filed timely, based upon the issuance of the Amended Determination: No Cause.

When the case was returned to the Division of Administrative Hearings, it was assigned to the undersigned Administrative Law Judge.

A Notice of Hearing dated July 28, 2005, scheduled the disputed-fact hearing for October 19, 2005.

At the disputed-fact hearing, the parties' Joint Pre-hearing Stipulation was admitted as Joint Exhibit "A".

Petitioner testified on her own behalf and presented the oral testimony of Kathy Tonnetti and William (Bill) Beers.

Respondent cross-examined those witnesses called by Petitioner, and presented the oral testimony of Bill Beers, Jerry Schinderle, Deborah Goodnight, William (Bill) Padgett, Glen Busby, Karen Palmer, Bill Beers, and Petitioner. Respondent's Exhibits 1A-1D, 2, 4-9, and "Part one" of R-10, were admitted in evidence. Exhibit R-3 was withdrawn and not offered.

A Transcript was filed on November 7, 2005.

Upon an oral stipulation recorded in the Transcript, Petitioner was permitted/required to after-file a two-part exhibit with regard to her earnings since she was laid off by

Respondent. After receipt, these items have been designated "Parts 2-3 of R-10." Petitioner's delay in filing same until December 20, 2005, resulted in the record remaining open for an extended period of time.

Pursuant to stipulations and Orders, the parties timely filed their respective Proposed Recommended Orders, both of which have been considered in preparation of this Recommended Order.

FINDINGS OF FACT

1. Respondent is a corporation engaged in the utility construction business. Respondent employs approximately 150 people for a variety of tasks. At all times material, Respondent's president, Bill Beers (male), had at least a partial ownership interest in the company. He currently "owns" the company.

2. Petitioner is female.

3. Petitioner was initially employed with Respondent as an accounting assistant on July 22, 1998. Petitioner had earned a high school diploma and an accounting certificate from Lake Technical Center. She has completed approximately one year of junior college.

4. Jerry Schinderle (male), Respondent's Vice-President of Finance and its Comptroller, made the decision to hire Petitioner. He was in charge of Respondent's accounting

department in which Petitioner was employed. Bill Beers did not participate in, or have input for, the decision to hire Petitioner.

5. Mr. Schinderle promoted Petitioner to an accounts payable position on or about August 21, 1998, when another female employee was either terminated or quit. With her promotion, Petitioner received a raise in pay. In her new position, Petitioner's duties were to handle accounts payable, job costing reports, and job tracking.

6. From Petitioner's date of hire until approximately October 1999, Mr. Schinderle was Petitioner's sole immediate supervisor. At all times during this period there were a total of four employees in the accounting department, including Petitioner, Mr. Schinderle, and two female employees.

7. From approximately October 1998 to October-November 1999, Petitioner and Bill Beers engaged in a consensual and intimately sexual romantic relationship.

8. While they were dating in 1998 and 1999, Petitioner gave Mr. Beers a kiss in the morning in his office on the ground floor of the employer's building, before she reported to work in her second floor office. However, it is undisputed that Petitioner and Mr. Beers never had sexual relations at the office. During the period from October 1998 to October-November 1999, their sexual activities occurred only after the work day

was over or during their mutual lunch hours in Petitioner's home, in Mr. Beers' home, or in a car.

9. In 1999, Deborah Goodnight (female) was hired from outside the company as Mr. Schinderle's Assistant Comptroller. As such, Ms. Goodnight became Petitioner's immediate superior, and Mr. Schinderle remained in a supervisory capacity over the entire accounting department, which continued to be made up of four employees, counting himself, Ms. Goodnight, Petitioner, and one other female employee. Petitioner complained herein that Mr. Beers promised her the promotion and that she should have been promoted instead of Respondent's hiring Ms. Goodnight from outside the company. Mr. Beers testified that he had refused Petitioner's request to intervene on her behalf with Mr. Schinderle about the promotion. Mr. Schinderle confirmed that Ms. Goodnight was hired solely by himself. Ms. Goodnight had a four-year bachelor's degree in accounting and had been comptroller of another company previously. Ms. Goodnight's qualifications for the position for which she was hired clearly exceeded those of Petitioner.

10. Thereafter, until Petitioner was laid off by Respondent on June 1, 2001, there continued to never be more than a total of four employees in the accounting department: Mr. Schinderle, Deborah Goodnight, Petitioner, and one other female employee.

11. Most of Respondent's employees became aware that Petitioner and Mr. Beers were dating when Mr. Beers escorted Petitioner to a company Christmas party (year unspecified). Petitioner personally told Ms. Goodnight that they were dating. However, no employee who testified was aware of any unprofessional or inappropriate conduct by Mr. Beers with Petitioner in the office at any time while she was employed by Respondent.

12. Sadly, Petitioner's and Mr. Beers' relationship was rocky, and in October or November 1999, Mr. Beers initiated a break-up of their consensual sexual relationship. Petitioner initially claimed that she initiated the break-up but ultimately admitted that she and Mr. Beers mutually agreed to terminate their consensual sexual relationship at that time.

13. Petitioner and Mr. Beers have different views of who pursued whom between November 1999 and February 2000, but both agree that in February 2000, they resumed a sexual relationship outside the office.

14. By each protagonist's account, during a large part of the period from February 2000 to late summer or the autumn of 2000 (see Findings of Fact 16-17), there were periods of good relations and periods of bad relations between the two of them. There were break-ups, one-night stands, and reconciliations at various times. It was, at best or worst, an "on-again-off-

again" romance, but there still was no unprofessional or improper conduct observed by anyone at the office. Any sexual liaisons occurred outside the office as previously described.

15. It is undisputed that in July 2000, Mr. Beers left a note on Petitioner's vehicle in which he expressed his desire to terminate their relationship once and for all.

16. Mr. Beers and Petitioner disagree as to whether or not they had sexual relations after July 2000. Petitioner claimed that Mr. Beers importuned her at every possible opportunity, in or out of the office, to have sex with him and had sex with her as late as January 2001. Mr. Beers denied any pursuit of Petitioner and denied any sexual contact with Petitioner after July 2000. Both Petitioner and Mr. Beers have some confusion of dates between what happened at their November 1999 break-up versus their July 2000 breakup, and it is possible to interpret part of Mr. Beers' testimony to the effect that there was a sexual encounter between them as late as November 2000, but upon the greater weight of the credible evidence as a whole, it is found that their sexual relationship ended once and for all in July 2000.

17. In August 2000, Mr. Beers began dating another woman. In February 2001, he became engaged to her, and she moved into his home. They were married in July 2001.

18. Petitioner claimed to have been harassed by co-workers at Mr. Beers' instigation from the beginning of her employment in 1998 to its end on June 1, 2001. She further alleged that from February 2000 until her termination on June 1, 2001, she strongly felt that she had to comply with Mr. Beers' requests for sexual favors or she would receive some "punishment" in the workplace or lose her job. Likewise, she believed that any advantage she gained in the employment field also was a "gift" from Mr. Beers either to woo her for future sexual favors or to reward her for immediately past sexual favors. Some of Petitioner's allegations in this regard are less than credible simply because she claimed that she was "punished" even while she was engaging in admittedly consensual sex with Mr. Beers from October 1998 to November 1999. Other of her specific allegations of receiving quid pro quo advantages and punishments from Mr. Beers after February 2000, were either not credible on their face or were affirmatively refuted as set out infra.

19. Testimony from other employees and record evidence indicated that Respondent's employment practices were uniform towards all employees, including Petitioner.

20. Petitioner testified that so long as she was engaging in sexual activities with Mr. Beers, she received the benefit of being assigned a company cell phone, but that when she refused to perform sexual favors for Mr. Beers that benefit was taken

away. The better evidence shows that soon after they started dating in 1998, Mr. Beers loaned Petitioner a company cell phone, assigned to himself, which he let her use for approximately one week, because she had confided to him that the man that she was living with was abusive and she was afraid of him. Also, when Petitioner or anyone else handled the payroll, that person had the use of a company cell phone. Petitioner was unable to show that at any time during her employment from 1998 to 2001, there was any permanent, or even lengthy, assignment of a company cell phone to her, or that such an assignment was taken away from her.

21. Petitioner testified that so long as she was engaging in sexual activities with Mr. Beers she received the benefit of being assigned a company car for personal use. Petitioner was able to establish only that, occasionally, during their first consensual relationship in 1998-1999, Mr. Beers loaned her the use of his company-issued car and also provided her with his company-issued credit card with which to pay for gassing-up that car for both of them to use. While this may constitute a misuse of the employer's car and card by Mr. Beers, the greater weight of the credible evidence is still contrary to Petitioner's unsupported testimony that a company vehicle was assigned to her and then removed from her custody due to her refusal of sexual favors to Mr. Beers. The testimony of several witnesses on this

point was corroborated by a list of vehicles and the names of employees to whom those vehicles had been assigned. Petitioner's name does not appear on this list. The list further supports a finding that the majority of vehicles owned by Respondent employer were trucks and other types of heavy equipment which were assigned to male employees working in the field, as opposed to ordinary vehicles assigned to any office staff, either male or female.

22. Like all Respondent's other employees, Petitioner had access to a company pool vehicle which any employee was allowed to use for company business or for personal use when his or her own vehicle was being repaired or was otherwise out of commission. This vehicle was never individually assigned to any employee.

23. Petitioner claimed that during and after her sexual relationships with Mr. Beers, and continually until her 2001 termination, he directed other employees to purposefully harass her, withhold information or invoice sheets, or create other road blocks to her successfully performing her job duties or completing her assignments at work. Petitioner's testimony is particularly incredible on this point because she specifically contended that several of the instances when other employees harassed her or made her job more difficult took place during the time she admittedly was engaging in a consensual

relationship with Mr. Beers in 1998-1999. Also, no other evidence or testimony corroborated Petitioner's analysis in this regard for any time period. No employees were affirmatively shown to have intentionally tried to prevent Petitioner from being able to perform her job duties at any time, including 2000-2001. Moreover, at no time did Petitioner report any harassment by co-workers to Ms. Goodnight or Mr. Schinderle. Petitioner was only occasionally reprimanded for not doing her job well, and she continued to be employed and to receive regular raises throughout her 1998-2001 employment

24. Petitioner contended that Mr. Beers described in lurid detail their sexual activities to other male employees, who then accosted her with suggestive comments. There was no corroboration for this allegation. Although it is probable that rough-and-tumble male employees speculated about the relationship between their boss and Petitioner and it is further probable that they occasionally goaded Petitioner with their speculations, there is no corroboration, whatsoever, that Mr. Beers discussed Petitioner with co-workers or encouraged any bad behavior toward Petitioner by them. The comments, if they occurred, certainly were not shown to be pervasive behavior in the workplace.

25. Petitioner also incredibly claimed that, in general, other employees were instructed not to talk to her both during

and after the end of her sexual relationship with Mr. Beers. Other employees testified that they were not aware of any instructions at any time by Mr. Beers or anyone else that they should refuse to speak with Petitioner. Even Petitioner conceded that Ms. Goodnight was reasonably cordial to her at all times.

26. Petitioner specifically claimed that one particular employee, Glen Busby, was instructed by Mr. Beers not to speak to her and was "punished" for speaking with her by having a company vehicle taken away entirely or replaced with an older, poorer quality car. She conjectured that Mr. Busby was also terminated by Respondent as a result of befriending her. Contrariwise, Mr. Busby testified credibly that he was never instructed by Mr. Beers or his supervisors not to speak to Petitioner. Mr. Busby stated that he had left Respondent's employment for approximately a year in order to care for his mother, who was dying. He also related that when he returned to work for Respondent, he was not assigned a vehicle such as he had previously been assigned, because he came back as a project manager, working primarily in the office, as opposed to returning as a construction site employee who needed a heavy duty vehicle on a jobsite. He acknowledged that while he had been in the field, several company vehicles had been assigned to

him and that these were frequently replaced with newer, better-conditioned vehicles.

27. Petitioner was unable to show that any professional training element of her employment was dependent on whether she did, or did not, provide sexual favors. The greater weight of the credible testimony, plus records and calendars, demonstrated that Petitioner received the same internal accounting training as other accounting department employees, mostly from Mr. Schinderle on a rotating basis. Mr. Schinderle testified, and Petitioner acknowledged, that she also was provided with specialized accounting programming training by an outside computer company representative.

28. Petitioner described one instance, apparently in late 1998, possibly while the consensual relationship with Mr. Beers was still "on," when she took off from work for approximately two weeks. She passed the first week as a Mayo Clinic outpatient for kidney problems and passed the second week in her home or in hospital emergency rooms, due to postoperative problems. She claimed that during these two weeks, she was unable to have sexual relations with Mr. Beers and refused to have sex with him when he personally delivered her paycheck to her home after the first week. She claimed that he had promised her that she would get her check for the second week, too, but when she refused him, he refused to pay her for the second week

that she was unable to work. Actually, Respondent's records show that Respondent had paid Petitioner regular wages for ten days, but she was required to reimburse the employer for the tenth day she was off work that was not covered by saved sick leave or another leave policy.

29. Although Petitioner showed some abuses of company policy regarding breaks and smoking committed by individual employees, the greater weight of the credible evidence is that such company policies were equally applied and enforced among all employees, including Petitioner.

30. Petitioner characterized a bonus she got in February 2000, the first month of the February 2000-July 2000 reconciliation, as a quid-pro-quo reward from Mr. Beers because she had agreed to resume her relationship with him. However, in fact, it was company policy to distribute annual bonuses to everyone in the company in February of each year. The amount paid out by the company depended on the amount authorized by auditors based on the prior year's business profit. Petitioner received an annual bonus each February she worked for Respondent, but the amount varied, according to the company's profit, for Petitioner and for all other employees. In February 2000, all employees received their annual bonuses. Petitioner and two other members of Respondent's office staff, who were not having an affair with the company president, received identical

amounts of $2,500.00 annual bonus based on their function within the company.

31. It is undisputed that on January 19, 2001, after their final break-up, Petitioner approached Mr. Beers in his office and indicated that she was having difficulty accepting the end of their relationship. She had apparently anticipated that they would eventually marry, and was struggling with the fact that Mr. Beers was romantically involved with the woman he had begun dating in August 2000. Petitioner asked Mr. Beers to pay her money so that she could go away and find other employment. Petitioner contends that this was a request for Mr. Beers to pay her the bonus that Respondent annually paid its employees each February.

32. Mr. Beers interpreted Petitioner's January 19, 2001, request for money as a demand that he pay her to quit her job and get out of his life. He refused to accept her offered letter of resignation.

33. Petitioner claims that on January 26, 2001, Respondent advertised as vacant her position as "account payable specialist" in the newspaper, but no date appears on the supporting exhibit; Petitioner was not terminated; and no replacement for Petitioner was hired.

34. At all times material, Respondent had a sexual harassment policy in place which required a victim of sexual

harassment to report such harassment to his/her supervisor or the company president. Petitioner received a copy of the policy when she was hired in 1998.

35. Petitioner admittedly did not complain to her immediate superior, Ms. Goodnight, at any time.

36. Although Petitioner claimed she reported harassment by Mr. Beers, the company president, to Mr. Schinderle in late 1998, just prior to her first break-up with Mr. Beers, Mr. Schinderle recalls no such report.

37. Although Mr. Schinderle testified that if Petitioner had reported any alleged sexual harassment by the company president he would have brought the complaint to the attention of the company's then-majority stock-holder, Mr. Schinderle is less than credible on that single point.

38. However, Petitioner's "resignation letter" of January 19, 2001, may be considered notification to Mr. Beers and Respondent employer of most of the allegations raised in this case.

39. Sometime in February of 2001, Petitioner received her annual bonus, like any other employee. It was based on the earnings of the company in the year 2000. Every employee on the second floor of Respondent's office got the same amount.

40. On February 23, 2001, Petitioner received a raise from $13.00 to $13.50 per hour for taking on the additional

responsibility of adding a new phone system. The appropriate paperwork was filled out for this raise, and witnessed by Mr. Schinderle and Mr. Beers. Given the foregoing, plus Petitioner's admission that she voluntarily took on the additional phone duties in order to get the raise, Petitioner's characterization of the raise as her reward for giving Mr. Beers sexual favors is not credible.

41. Sometime in March 2001, Petitioner showed up at Mr. Beers' home intoxicated. Mr. Beers' fiancée and his son were residing in the home. Petitioner asked to come in, and Mr. Beers asked her to go away and not make a scene because he did not want to have to call the police.

42. One Sunday a few weeks later, Petitioner approached Mr. Beers' fiancée and his mother in WalMart. Petitioner's characterization of this conversation varies, but it is clear that what she said was intended to shock the fiancée and damage Mr. Beers' relationship with fiancée.

43. Petitioner left a message on Mr. Beers' telephone before his mother and fiancée could return home from WalMart. Her message was to the effect, "I just caused you a bunch of problems." Petitioner came to Mr. Beers' office at Respondent's place of business on the following Monday morning and gloated. Mr. Beers angrily ordered her out of his office, but he did not terminate her.

44. Petitioner testified that she believed that Mr. Beers ordered all of Respondent's employees to be tested for drugs on March 19, 2001, in an effort to "catch" her because she had confided to him back on November 25, 2000, that she had smoked "pot" (marijuana) in order to relieve her distress over their deteriorating relationship. At first, Petitioner claimed that she was too frightened to show up for the test. Later, she claimed to have been "escorted" to the drug testing center by two other employees. The greater weight of the credible evidence is that company policy was to do drug testing of every employee when that employee was hired and then drug test selected employees at random intervals, but that the policy had been only loosely followed. Of the employees who testified on the subject, only Mr. Schinderle recalled being drug-tested upon his date of hire in 1993. Ms. Goodnight and others had never been tested. It appears that Bill Padgett, Respondent's head of security, had previously done random drug testing in a very random manner, so all employees who had not previously been tested for drugs, including Ms. Goodnight, Petitioner, and the other female employee in the accounting department, were tested on March 19, 2001. Petitioner rode, as a matter of convenience, in the same car to the drug-testing site with the other two females employed in the accounting department. Petitioner was not singled out at that time. In fact, all employees, even Mr.

Padgett and Mr. Beers, were tested. Petitioner passed the drug test and was not laid off in March 2001.

45. Petitioner kept a log of personal notes and summarized them into a diary. This item, which may have been edited and copied over several times, reflects that Petitioner connected every life event, however small, to Mr. Beers. According to Petitioner's notes from March 20, 2001, Petitioner was "an emotional wreck," and she thought that Mr. Beers wanted to "get rid of" her and was "finished with me now." In her accounting post, she had seen a $5,000.00 check Mr. Beers had written on "Monday" and speculated whether or not it was for an engagement ring. Mr. Beers and his fiancée had become formally engaged in February 2001. (See Finding of Fact 17.)

46. Although Petitioner testified that on March 21, 2001, Mr. Beers arranged for her to get additional company medical and/or dental benefits so as to make good a promise to her in return for her sexual favors, several of Respondent's employees testified more credibly that Petitioner was given the same health and other benefits as all other employees in her "Hourly B" class, throughout her employment with Respondent. Moreover, the greater weight of the credible evidence is that all of Respondent's employees were offered an opportunity to sign-up for additional health benefits and that Petitioner had the same opportunity for this benefit as every other employee did, and

that she had, in fact, received the benefits for which she signed-up.

47. At the beginning of the second quarter of the year 2001, in approximately April or May, Respondent made the decision that each department would have to cut staff and overhead expenses due to deteriorating business conditions and the cancellation of a lot of expected work. Mr. Beers gave each department head, including Mr. Schinderle, the sole discretion to make the decision as to who would be laid-off, based upon the position the department head believed would be most easily and efficiently eliminated.

48. Mr. Schinderle was department head for the accounting department. He made the decision to lay-off Petitioner effective 6/1/2001. Mr. Schinderle did not receive any input or guidelines from Mr. Beers except to lay-off the one employee he could best do without. Mr. Beers had no discussions with Mr. Schinderle regarding the decision to lay-off Petitioner. Mr. Schinderle testified that he felt Petitioner's position could be the most easily eliminated because the Assistant Comptroller, Deborah Goodnight, was able to perform the functions of her own position and the functions of Petitioner's position. In fact, Ms. Goodnight was capable of doing the work of either Petitioner or the other female employee, but she was not consulted by Mr. Schinderle.

49. On or about June 1, 2001, Petitioner and three other employees were laid-off from their positions with Respondent. Each of the other employees was from a different department and the decision to lay-off each of them had been made by different department heads than Mr. Schinderle.

50. Mr. Schinderle listed Petitioner as eligible for re-hire. Petitioner never called back to Respondent in any attempt to be re-hired after her lay-off.

51. After Petitioner was laid-off, there remained only three (not four) employees in Respondent's accounting department. The accounting department was able to effectively and efficiently function with the reduced three-person staff and did not acquire additional staff for approximately four years, until May 2005.

CONCLUSIONS OF LAW

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

53. Petitioner has the duty to go forward and the burden of proof by a preponderance of the evidence herein.

54. Florida law prohibits employers from discriminating against employees on the basis of sex. See § 760.10(1)(a), Fla. Stat.

55. The Eleventh Circuit Court of Appeals has noted, and other courts have determined, that a claim of sexual harassment resulting in tangible employment action (quid pro quo sexual harassment) can be premised on an employer's (or an employer's agent's) adverse treatment of an employee due to a past consensual romantic relationship. See Touten v. Autozone, 2003 WL 21660827 (Mich. App.), Pipkins v. City of Temple Terrace, 267 F.3d 1197, 1199 (11th Cir. 2001). To establish a prima facie case of such sexual harassment, Petitioner must prove the following elements: (1) that she is a member of a protected class; (2) that she has been subject to unwelcome sexual harassment; (3) that the harassment was based on her sex; (4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment; and 5) that there is a basis for holding the employer liable. Pipkins v. City of Temple Terrace, Florida, supra.; Johnson v. Booker T. Washington Broadcasting Service, Inc., 234 F.3d 501 (11th Cir. 2000).

56. Although all cases in this category put great weight against a Petitioner who fails to report sexual harassment if she knows of such a policy, that element has not been given any weight here, because here, such a report was hardly feasible.

57. Petitioner satisfies element (1) of the prima facie case because she is female. However, her evidence does not establish pervasive "unwelcome" sexual harassment, or that her

response to Mr. Beers' sexual advances and the alleged adverse employment action are causally linked.

58. Indeed, Petitioner was unable to establish that she suffered any adverse employment action either because she granted sexual favors or because she withheld them. Petitioner was not singled out for any of the alleged rewards or punishments she related. Each of the alleged rewards or punishments (cell phone, car, health benefits, leave, pay raises, promotions, annual bonuses and breaks) which Petitioner received were part of her regular employment benefits, identical to those of all similarly situated employees. With regard to her termination in June 2001, it is true that Mr. Schinderle could just as easily have required Ms. Goodnight to assume the payroll clerk's duties as Petitioner's, but that choice was not shown to be directed toward retaliating against Petitioner instead of being directed toward saving the expense of Petitioner's paycheck, which was higher than that of a payroll clerk. (See Finding of Fact 5.) When Petitioner was laid-off she was not the only employee terminated. Three other employees were terminated from other departments on the same basis. Likewise, her termination cannot be considered pretextual where Respondent struggled along with one less employee in the accounting department for more than three years.

59. Harassment by any co-worker in the performance of Petitioner's job duties was simply not proven. As to lewd comments by some employees, there was neither proof that Mr. Beers instigated it, nor that it was so pervasive as to change the conditions of Petitioner's employment.

60. Petitioner was pursued at different times by Mr. Beers, but by her own admission, it was only during the period after February 2000 that she considered his advances unwelcome. The evidence as a whole is not persuasive that his advances were entirely unwelcome even then. For Petitioner to prevail, the conduct at issue "must be unwelcome in the sense that the employee did not invite it, and in the sense that the employee regarded the conduct as undesirable or offensive." Henson v. City of Dundee, 682 F.2d 897, 903 (11th Cir. 1982). "Therefore, [t]he correct inquiry is whether the [plaintiff] by her conduct indicated that the [complained-of behavior] was unwelcome, not whether her actual participation in sexual intercourse is voluntary." Meritor Savings Bank v. Vinson, 477 U.S. 57, 64, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986). The determination of whether conduct is "unwelcome" must be made in light of the record as a whole, and the "totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred." Meritor Savings, supra.

61. Even if Petitioner is to be believed that the sexual relations with Mr. Beers went on until January 2001, but not finding so, it appears that Petitioner was sexually willing as long as she could emotionally hope, reasonably or unreasonably, for an eventual marriage to Mr. Beers, but that she became disillusioned and a harasser in her own right as his engagement to another woman progressed. Her testimony and notes in evidence detail her perspective of their interactions, her feelings of rejection about these events, and her struggle with the status of their personal/sexual relationship, but they do not spell out that Mr. Beers' advances were "unwelcome."

62. Furthermore, in establishing that the complained-of conduct was unwelcome, Petitioner must also establish a causal link between her response (good or bad) to the unwelcome advances and a subsequent employment decision. Burlington Industries, Inc., v. Ellerth, 524 U.S. 742, 753, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998). No connection between Mr. Beers' sexual advances and Petitioner's termination has been established.

63. Even if Petitioner demonstrates a prima facie case, which she has failed to do here due to the absence of a nexus to any employment decision, Respondent has only the burden of producing a legitimate non-discriminatory reason for its employment decisions. If such a reason is produced, as it was

here, Petitioner has the ultimate burden of proving the reason to be pretextural. See Pipkins, supra. Herein, Petitioner has not borne that shifted burden.

RECOMMENDATION

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

RECOMMENDED that the Florida Commission on Human Relations enter a final order dismissing the Petition for Relief and Charge of Discrimination.

DONE AND ENTERED this 22nd day of March, 2006, in Tallahassee, Leon County, Florida.

ELLA JANE P. DAVIS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of March, 2006.

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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.