STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MICHAEL J. WELCH, Petitioner, vs. RURAL METRO OF NORTH FLORIDA, INC., Respondent.	)	Case No. 04-3184

RECOMMENDED ORDER

This cause came on for formal hearing before Robert S. Cohen, Administrative Law Judge with the Division of Administrative Hearings, on December 13, 2004, in Pensacola, Florida.

APPEARANCES

For Petitioner: Michael J. Welch, pro se
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For Respondent: John B. Trawick, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Respondent, Rural Metro of North Florida, Inc., violated the Florida Civil Rights Act of 1992, as amended, Section 760.10, Florida Statutes.

PRELIMINARY STATEMENT

On July 14, 2003, Petitioner filed a Charge of Discrimination with the Florida Commission on Human Relations ("FCHR"), alleging that he was discriminated against because of his gender, in contravention of the Americans With Disabilities Act, ADA, Section 760.10, Florida Statutes, and Title VII of the Federal Civil Rights Act of 1992. Petitioner alleged that he had suffered sexual harassment by Respondent by being placed with a female co-worker, and was subject to retaliatory conduct by his supervisor, ultimately leading to his dismissal from his employment as a paramedic.

On July 28, 2004, Petitioner received a Notice of Determination: No Cause from the FCHR which provided him with a 35-day window in which to challenge the FCHR's determination. Petitioner filed a petition for Relief with the FCHR on September 1, 2004, which was transmitted to the Division of Administrative Hearings on September 3, 2004. The case was assigned to the undersigned Administrative Law Judge, and proceeded to hearing on December 13, 2004, in Pensacola, Florida.

At the hearing, Petitioner presented the testimony of Lori Bovee-Welch, testified himself, and offered Exhibit Nos. 1 through 6, and 8 through 12 into evidence. Respondent presented the testimony of Kristy Lloyd Bradberry (via deposition), James

Chalmers, Tina Richardson Dunsford, Natashia Duke, Chris Rucker, and Marlene Sanders Tompkins, and offered Exhibit Nos. 1 through 7 into evidence.

A Transcript was filed on January 20, 2005. After the hearing, Petitioner filed a Proposed Recommended Order on January 3, 2005, then filed a second Proposed Recommended Order on January 28, 2005. Respondent filed Proposed Findings of Fact and Legal Conclusions on February 3, 2005.

References to statutes are to Florida Statutes (2004), unless otherwise noted.

FINDINGS OF FACT

1. Petitioner was hired by Respondent on October 11, 1999, as an Emergency Medical Technician Basic, until July 2001 when he was reclassified with Respondent as an Emergency Medical Technician Paramedic, until his termination from employment with Respondent on April 16, 2003.

2. In July 2001, Petitioner told his then manager, Dominic Persichini, that he no longer wanted to work with his partner, Marlene Sanders, and he requested a transfer.

3. Petitioner gave as his reason for the transfer that Ms. Sanders was interested in him in an inappropriate way which disrupted his family life. He never actually heard Ms. Sanders make any inappropriate sexual remarks directed at him.

4. Ms. Sanders accused Petitioner of allowing his wife to interfere with their working relationship and to involving herself in Ms. Sanders' personal life, which made her uncomfortable working with Petitioner.

5. On March 27, 2002, Stephen Glatstein, Respondent's new General Manager, wrote a letter to Petitioner in which he acknowledged that problems had occurred between Petitioner and Ms. Sanders, that the two of them would be separated and reassigned to new shifts, and that Petitioner was being reassigned to the B-shift rotation (1800-0600 hours), which conflicted with his family duties.

6. Petitioner received a good evaluation and a pay raise dated February 15, 2003, in which his supervisor, Ryan Jenkins, stated that "Michael's abilities meet or exceed industry standards. Michael keeps current by completing CEU's and taking refresher classes. There is one new Corrective Action Notice in his file since last year involving a post move. The incident was on 08-07-02 and to my knowledge there have not been any further problems since." Further, the evaluation reads that "Michael shows a great attitude and appears to really enjoy his job. This makes him very easy to work with. Michael's good personality and working knowledge of E.M.S. is a benefit to the customers that he serves. It is clear that we should be proud to have Michael as part of our team."

7. Petitioner received letters of commendation from his supervisors and letters of thanks from patients and their families he had served.

8. In April 2003, Natashia Duke, a new employee with Respondent, went to the General Manager, Mr. Chalmers, and accused Petitioner of having made statements of a sexual nature to her and of touching her inappropriately. Ms. Duke provided a written statement to Mr. Chalmers who forwarded the information to the Division General Manager, Chris Rucker.

9. Mr. Rucker advised Mr. Chalmers to place Petitioner on paid administrative leave pending the outcome of an investigation concerning Ms. Duke's complaint. Mr. Chalmers followed this instruction and placed Petitioner on leave.

10. Mr. Rucker traveled to Pensacola to meet with Mr. Chalmers and Ms. Duke. At this meeting, Ms. Duke reaffirmed what she had written in the complaint against Petitioner and told Mr. Rucker and Mr. Chalmers about another employee she believed had been sexually harassed by Petitioner, Kristy Bradberry.

11. The next day, Mr. Rucker and Mr. Chalmers interviewed Ms. Bradberry who informed them that she had been sexually harassed by Petitioner. She provided a written statement which described the alleged harassment in detail. Ms. Bradberry told the interviewers of another person she believed had suffered

sexual harassment by Petitioner, Tina Dunsford (Tina Richardson at the time of her complaint).

12. Mr. Rucker and Mr. Chalmers next interviewed Ms. Dunsford who confirmed that Petitioner had sexually harassed her as well by making sexual comments and propositions to her, and by touching her inappropriately.

13. After Ms. Dunsford's interview, Ryan Jenkins, another of Respondent's employees, reported that Ms. Dunsford had complained to him of sexual harassment by Petitioner a few months earlier. Mr. Jenkins had failed to take any action on the previous complaint.

14. After interviewing the three complainants, Ms. Duke, Ms. Bradberry, and Ms. Dunsford, Mr. Rucker and Mr. Chalmers met with Petitioner. At that meeting, Petitioner denied all of the allegations made by the three female co-workers and gave no explanation for what they alleged had happened.

15. Mr. Rucker believed the statements given by the three female co-workers who complained of sexual harassment by Petitioner were credible.

16. Mr. Rucker made the decision with Mr. Chalmers to terminate Petitioner's employment.

17. Respondent had no prior history of problems with any of the three female co-workers who complained of sexual harassment by Petitioner.

18. Petitioner believes the sexual harassment charges were trumped up against him so that Respondent could fire him, since he was beyond the company probationary period and therefore could be terminated only for a business purpose pursuant to the company employee handbook. No evidence was produced at hearing to support a violation of company policy by Respondent in Petitioner's termination.

19. At the time of hearing, Petitioner was employed with the Escambia County E.M.S.

CONCLUSIONS OF LAW

20. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. §§ 120.569, 120.57(1), and 760.01 et seq., Fla. Stat.

21. The Florida Civil Rights Act of 1992 (the "Act") is codified in Sections 760.01 through 760.11, Florida Statutes, and Section 509.092, Florida Statutes. "Because th[e] [A]ct is patterned after Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, federal case law dealing with Title VII is applicable." Florida Department of Community Affairs v. Bryant, 586 So. 2d 1205, 1209 (Fla. 1st DCA 1991).

22. Among other things, the Act makes certain acts "unlawful employment practices" and gives the FCHR the authority, if it finds, following an administrative hearing

conducted pursuant to Sections 120.569 and 120.57, Florida Statutes, that such an "unlawful employment practice" has occurred, to issue an order "prohibiting the practice and providing affirmative relief from the effects of the practice, including back pay." §§ 760.10 and 760.11(6), Fla. Stat.

23. The "unlawful employment practices" prohibited by the Act include those described in Section 760.10(1)(a) and (7), Florida Statutes, which provide as follows:

> It is an unlawful employment practice for an employer:
>
> (1)(a) To discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.
>
> * * *
>
> (7) It is an unlawful employment practice for an employer, an employment agency, a joint labor-management committee, or a labor organization to discriminate against any person because that person has opposed any practice which is an unlawful employment practice under this section, or because that person has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section.

24. "Sexual harassment can constitute discrimination based on sex for purposes of [Section 760.10(1)(a), Florida Statutes]. Generally, sexual harassment comes in two forms: harassment

that does not result in a tangible employment action (traditionally referred to as 'hostile work environment' harassment), and harassment that does result in a tangible employment action (traditionally referred to as 'quid pro quo' harassment). All harassment by co-workers necessarily falls into the first . . . class, as co-workers cannot take employment actions against each other. Harassment by supervisors, on the other hand, can fall into either category." Johnson v. Booker T. Washington Broadcasting Service, Inc., 234 F.3d 501, 508 (11th Cir. 2000)(citations omitted).

25. "Sexual harassment, like any other claim under [Section 760.10(1)(a), Florida Statutes], is a claim based on intentional discrimination." Pospicil v. Buying Office, Inc., 71 F. Supp. 2d 1346,1356 (N.D. Ga. 1999); see also Downing v. Board of Trustees of University of Alabama, 321 F.3d 1017, 1024 (11th Cir. 2003)("Since Cross holds that the elements of a sexual harassment claim under Title VII and the Equal Protection Clause are the same--meaning that the employee must prove that the state actor intended to discriminate because of the employee's sex--we discern no principled basis for holding that the Equal Protection Clause is implicated in a case of opposite-sex discrimination but not in a case of same-sex discrimination.").

26. "To demonstrate sexual harassment, [a complainant] must show: (1) that 'she [or he] belongs to a protected group'; (2) that she [or he] 'has been subject to unwelcome sexual harassment, such as sexual advances, requests for sexual favors, and other conduct of a sexual nature'; (3) that the harassment was 'based on [his] sex . . .'; (4) 'that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment'; and (5) 'a basis for holding the employer liable.'" Johnson v. Booker T. Washington Broadcasting Service, Inc., 234 F.3d at 508, quoting from, Mendoza v. Borden, Inc., 195 F.3d 1238, 1245 (11th Cir. 1999).

27. It has been said that "[t]he fourth element--that the conduct complained of was 'sufficiently severe or pervasive to alter the conditions of employment and create an abusive work[ing] environment"--is the element that tests the mettle of most sexual harassment claims.'" Gupta v. Florida Board of Regents, 212 F.3d 571, 583 (11th Cir. 2000). To establish the existence of this "fourth element" a complainant "must establish not only that she subjectively perceived the environment as hostile and abusive, but also that a reasonable person would perceive the environment to be hostile and abusive." Id. "In evaluating the objective severity of the harassment, [one must] consider, among other factors: (1) the frequency of the

conduct; (2) the severity of the conduct; (3) whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and (4) whether the conduct unreasonably interferes with the employee's job performance." Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1276 (11th Cir. 2002).

28. With respect to the "fifth element" required to make a prima facie case of sexual harassment, employer liability, "[a]n employer 'is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee.' The employer will be strictly liable for the hostile environment if the supervisor takes tangible employment action against the victim. However, when an employee has established a claim for vicarious liability but where no tangible employment action was taken, a defending employer may raise as an affirmative defense to liability or damages: '(a) that the employer exercised reasonable care to prevent and correct promptly any . . . harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.'" Miller v. Kenworth of Dothan, Inc., 277 F.3d at 1278 (citations omitted). "While proof that an employer had promulgated an anti-harassment policy with complaint procedure is not necessary in every instance as a

matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense. No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment." Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2270 (1998); and Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2293 (1998).

29. To prove a prima facie case of retaliation, Petitioner must show the following: (a) he engaged in statutorily protected expression; (b) he suffered an adverse employment action such as demotion and/or assignment to a position with less responsibility; 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).

30. In this case, Petitioner has failed to show that he suffered an adverse employment action for making a complaint

against Ms. Sanders. Although he was reassigned to the B-shift, which he found to be less desirable due to his family obligations, he was neither docked in pay, demoted, nor terminated from his employment. The greater weight of the evidence indicates that Petitioner was fired because his employer accepted the truthfulness of the allegations made by Petitioner's three female co-workers that he had made inappropriate sexual advances toward them. The evidence produced by Petitioner at hearing fails to support his claim of sexual harassment by his co-worker, Ms. Sanders. He "believed" she was harboring inappropriate thoughts toward him, yet he never actually heard her make remarks of a sexual nature directed at him.

31. Other than his own testimony, Petitioner provided no corroborating evidence for any of his allegations of sexual harassment by Ms. Sanders. Further, Petitioner failed to prove that his employment was terminated due to retaliation by Respondent as a result of Petitioner's going over his supervisor's head to complain to the General Manager about the alleged sexual harassment by Ms. Sanders. Respondent articulated the basis for Petitioner's termination, namely, that three female co-workers complained of sexual harassment by Petitioner against them in the workplace. Petitioner's supervisors believed the statements of the three female co-

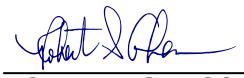
workers to be credible. Petitioner's testimony and the evidence he produced at hearing fail to overcome Respondent's justification for his termination. Further, Petitioner has been able to find employment as a paramedic in his same county, and cannot therefore claim nor did he prove at hearing, that Respondent's actions have caused him financial harm.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law, it is,

RECOMMENDED that the Florida Commission on Human Relations enter a Final Order dismissing Petitioner's claim for relief.

DONE AND ENTERED this 24th day of February, 2005, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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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.