STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

KATRINA R. MORGAN,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 04-4025
	)	
COUNTY OF COLUMBIA, FLORIDA SHERIFF'S OFFICE,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case before Diane Cleavinger, Administrative Law Judge, Division of Administrative Hearings, on April 26, 2005, and July 28, 2005, in Lake City, Florida.

APPEARANCES

For Petitioner: T.A. Delegal, III, Esquire
Delegal Law Offices, P.A.
424 East Monroe Street
Jacksonville, Florida 32202

For Respondent: Leonard J. Dietzen, III, Esquire
Allen, Norton and Blue, P.A.
906 North Monroe Street
Tallahassee, Florida 32303

STATEMENT OF THE ISSUE

Whether Petitioner was the subject of an unlawful employment practice in violation of Chapter 760, Florida Statutes.

PRELIMINARY STATEMENT

On December 30, 2003, Petitioner, Katrina Morgan, filed a charge of discrimination with the Florida Commission on Human Relations (FCHR) alleging that on November 19, 2003, she was subjected to sexual harassment by a supervisor and subsequently terminated by Respondent in retaliation for complaining about the incident. On September 24, 2004, FCHR issued a No-Cause finding and advised Petitioner of her right to request an administrative hearing. On October 28, 2004, Petitioner filed a Petition for Relief. The Petition essentially alleged the same facts as the original Charge of Discrimination. The Petition was forwarded to the Division of Administrative Hearings.

At the hearing Petitioner testified in her own behalf and presented the testimony of three witnesses. Additionally, Petitioner offered 42 exhibits into evidence. Respondent presented the testimony of five witnesses and offered 33 exhibits into evidence.

After the hearing, Petitioner filed a Proposed Recommended Order on September 29, 2005. Respondent filed a Proposed Recommended Order on September 28, 2005.

FINDINGS OF FACT

1. Petitioner, Katrina Morgan, is a female who was employed by Respondent as a probationary Correctional Officer at the Columbia County Sheriff’s Office.

2. Petitioner first worked for the Columbia County Sheriff's Office from January 2001, through April 1, 2001, as a Correctional Officer. At the time, Petitioner was aware that the Columbia County Sheriff's Office had a policy that required a Correctional Officer to personally call his or her immediate supervisor at least one hour before the scheduled start of the shift if he or she is unable to report for duty. The policy requires the officer to personally call so that inquiry can be made into how sick he or she is and when the officer might return. The information is necessary so that appropriate numbers of staff can be scheduled and planned for. Unfortunately, Petitioner's son was involved in a serious traffic accident that resulted in serious injuries to him. As a result of her son's injuries, Petitioner had many days of absence from her employment. She frequently failed to notify her supervisor when she was unable to report for duty. Such failure violated the Columbia County Sheriff's Office policy regarding notification in such circumstances.

3. As a result of the policy violations by Petitioner, she received several written warnings from her shift supervisor, then Sergeant Donald Little. In addition to written warnings, Sergeant Little spoke with Petitioner on the telephone about the proper utilization of the Columbia County Sheriff's Office call-in policy. Eventually, after several such absences, Lieutenant

Johnson contacted Petitioner to tell her that he could not permit Petitioner to stay employed with the Columbia County Sheriff's Office and offered her an opportunity to resign. Petitioner verbally resigned her position with the Sheriff's Office on March 21, 2001, and later faxed her written resignation to the Sheriff's Office on March 22, 2001.

4. After she left Columbia County, Petitioner was employed by the Florida Department of Corrections where she had, also, been previously employed. She worked for a period of approximately five to six months with the Department of Corrections and decided to return to the Columbia County Sheriff's Office because it would give her better working hours for her family needs.

5. On April 28, 2003, Petitioner reapplied for employment as a Corrections Officer with the Columbia County Sheriff's Office. Knowing her past performance would be an issue and that attendance was an important issue at the jail, Petitioner stated on her April 28. 2003, application as follows:

> Was forced to give up my position with the Columbia County Jail back in 2001. If given the opportunity I will do whatever it takes to be sure the Columbia County Jail can depend on me. I will make sure I will report to my shift on time, no matter what the circumstances are, I hope you will give me a second chance to prove you can count on me.

6. In the process of reviewing Petitioner's background summary the Columbia County Sheriff's Office became aware of some serious areas of concern in her employment history. Specifically, that she had been terminated from the Department of Corrections (DOC) New River Correctional Institute for attendance problems, and that she had poor work performance and problems with calling in at S&S Food Store. This history caused an initial recommendation against rehiring Petitioner. However, the Columbia County Sheriff's Office was experiencing a severe staff shortage and as a result was desperately in need of new Correctional Officer. Because of the shortage, Petitioner was offered employment with the Sheriff's Office.

7. Petitioner was sworn in by the Sheriff as a Correctional Officer on November 6, 2003, and given a second chance to prove she was dependable. At this ceremony, the Sheriff personally spoke with Petitioner about attendance issues and that she was being given a second chance. In response, Petitioner gave the Sheriff assurances that this time she would comply with policies. The Sheriff told Petitioner that any further attendance problems would be cause for termination.

8. On November 7, 2003, Petitioner began working in the Respondent's field training program under the direction of Field Training Officer Howard. Beginning on November 19, she was

placed on the night shift and assigned Officer Siraq as her field training officer.

9. The field training program uses daily observation reports (DORs) to evaluate new officers through the field training process. The program is a multi-week training program that trains a new officer while on the job. Eventually, the new officer will work all three shifts at the prison.

10. On November 19, 2003, Officer Siraq was not at work due to illness. Therefore, Petitioner was assigned Officer Chad Sessions as her field training officer. Petitioner was working in the control room at the Columbia County Jail with Officer Sessions, who engaged in a series of very explicit phone calls in Petitioner's presence. In his telephone conversations he made a number of sexually explict statements, including stating he was going to fuck the girl he was speaking about; that he was "the candy man" and that he was coming to have sex with the girl and that he would do so from behind. Petitioner told Officer Sessions several times that she did not want to hear the sexual comments, but he nonetheless continued in his conversation. Officer Sessions engaged in three such phone calls lasting about 20 minutes. After repeating that she did not wish to have to deal with these types of comments, Petitioner left the control room approximately four times so that she did not have to listen to Officer Sessions conversations.

11. On the daily observation report completed by Officer Sessions for that date, Officer Sessions wrote that Petitioner had engaged in several phone calls and breaks and that she needed to improve on staying at her assigned post without as many distractions. Petitioner spoke to Officer Sessions about his comments on the Daily Observation Report and told him that she did not agree with his statements and refused to sign the document because of her disagreement with him. Officer Sessions took the DOR to Corporal Barcia and informed Barcia that Petitioner would not sign the agreement. He thereafter came back to Petitioner and told her that Barcia had ordered the Petitioner to sign the DOR. Petitioner signed the DOR, but did not put any comments on the DOR in the "Trainee's Comments" Section regarding her disagreement with Officer Sessions or the reason she left her post in the control room.

12. At the end of the shift on the morning of November 20, 2003, Petitioner drafted a memorandum to now Lieutenant Little requesting time off from work. Petitioner did not mention the incidents with Officer Sessions that had occurred on her shift. In the memorandum, Petitioner stated that she had spoken with Beverly Jackson during her swearing-in ceremony regarding specific days off, and that Ms. Jackson had approved the time off.

13. Also, Petitioner spoke to Officer Howard about the incident on the morning after her shift that ended on November 20, 2003. Petitioner told Officer Howard about Officer Sessions' remarks and the fact that she initially refused to sign the DOR and Corporal Barcia's orders to sign the DOR. Officer Howard was concerned when Petitioner gave him this information and told her that he would speak with Lieutenant Little.

14. Officer Howard contacted Lieutenant Little to report the information given to him by Petitioner. Lieutenant Little was on vacation and received the call at home. Officer Howard stated that he needed to report this complaint because Petitioner stated she was uncomfortable with the language used by Officer Sessions in the control room. Lieutenant Little advised Officer Howard that the issue would be addressed upon his return from vacation.

15. Upon returning to work on November 24, 2003, Lieutenant Little called a meeting to discuss Petitioner's complaints about Officer Sessions' DOR and phone calls. Petitioner attended the meeting, along with Officer Howard and Corporal Barcia. At this meeting, Petitioner stated that she disagreed with the DOR that Officer Sessions had issued her for November 19, 2003. Specifically, she disagreed with the ratings she received on the DOR. Petitioner was asked why she had not

included her disagreements in the “Trainee’s Comments” Section of the DOR. After receiving no reply, Lieutenant Little instructed her that she could make those comments on the DOR, but that they would need to be initialed and dated accordingly. In the comments Section, Petitioner wrote:

> I had three phone calls, each one was no longer than three-four minutes. The phone calls were in regards to my children. (Staying in assigned post) Ofc[.] Sessions had me escorting I/M’s back and forth and taking paperwork to Ms. Morgan and other sections. When Ofc[.] Sessions was on the phone I would exit the main control room because I didn’t want to hear about his personal business. [Initialed: KM and dated 11-24-03]

16. With regard to her complaints regarding Officer Sessions’ personal phone conversations, Petitioner was very vague in her recount at the meeting. Lieutenant Little asked Petitioner to state with particularity her complaint. She was asked to reduce her complaints to writing and to be as factual and detailed as she could so that Lieutenat Little could properly investigate the matter. Petitioner claims that Lieutenant Little instructed her not to be detailed about the incident. However, Petitioner’s recollection is not given any weight. He instructed her to write the incident report at a sergeant’s desk that was available to write her report. Corporal Barcia sat in the room with Petitioner while she wrote the report since the office was also used by him. Petitioner

claimed she felt intimidated by the presence of Corporal Barcia. However, Corporal Barcia did nothing to intimidate her. He did not ask questions about her report or read her report. Petitioner's testimony regarding her feelings of intimidation is not credible. Lieutenant Little forwarded the report up the chain of command to Captain Smithey.

17. Officer Sessions was disciplined for his conduct and reprimanded in writing regarding his unprofessional phone conversations of November 19, 2003. Officer Sessions was also required to write a letter of apology to Petitioner. The letter of apology was also placed in Officer Sessions' personnel file. Petitioner testified she never received Officer Sessions' letter of apology.

18. At some point after his return from vacation, Lieutenant Little received Petitioner's memo requesting leave from work. After he reviewed the memo and noted Petitioner's statements regarding Ms. Jackson's approval, Lieutenant Little contacted Ms. Jackson regarding Petitioner's claim. Ms. Jackson told Lieutenant Little that she had not given any such approval and would not have done so since she did not have the authority to grant leave. Based on the information from Ms. Jackson and the fact that Ms. Jackson has no authority to approve leave requests for any Columbia County Sheriff's Office employees, Lieutenant Little concluded that Petitioner was untruthful in

her statements in the memorandum about time off. Such untruthfulness was a serious matter regarding Petitioner's appropriateness to remain employed with the Sheriff's Office. Lieutenant Little was also very concerned with the fact that Petitioner was already requesting time off since her attendance had been an issue in the past and she was being given a second chance for employment.

19. In the meantime, as part of the field training program, Petitioner was assigned Officer Harris as her field training officer for a different shift.

20. On November 28, 2003, only eight working days after being sworn in by the Sheriff, Petitioner became ill with a flu-type illness. There was no credible evidence that she was incapacitated by this illness to the point that she could not personally call her supervisor as the policy required. As in the past, Petitioner failed to report for duty and failed to properly call-in to her supervisor. This failure violated the Columbia County Sheriff's Office policy for such absences.

21. On November 29, 2003, Officer Harris, noted on Petitioner's DOR that she exhibited unacceptable performance with regard to Columbia County Sheriff's Office policies and procedures; namely, Petitioner needed to utilize the proper chain of command when calling-in. Petitioner wished to explain why she did not follow the call-in policy. Below Officer

Howard's comments, Petitioner inserted comments in a section of the DOR designated for field training officers' use. Because her comments were in the inappropriate Section Petitioner was instructed to white-out the comments and to place them in the proper section titled, "Trainee's Comments." The original, whited-out statement read:

> The morning I called in Officer Howard was contacted first when I called main control. Mrs. Harris wasn't in yet and didn't have her number. When I called back at the main control, I was directed to speak with Corporal Green.

The comments that Petitioner rewrote in the "Trainee's Comments" Section on the same date were significantly changed by Petitioner to read as follows:

> The morning I was unable to come to work my husband contacted Ofc[.] Howard [and] was instructed to call Mrs. Harris[.] [W}hen he called Mrs. Harris wasn't in yet so he was instructed to call back in 20 min[utes]. He was told to relay the message to me, for me to call Cpl. Green. I did so at 1:30 p.m.

According to this account by Petitioner, she only made one phone call at 1:30 p.m. to her supervisor well-after the start of her shift and in violation of the Sheriff's Office policy.

22. Petitioner's phone records reveal that five telephone calls were made on November 28, 2003, with four of them to the Columbia County Sheriff's Office Jail. Petitioner testified that her husband, Ralph Morgan, made the first three telephone

calls, between the times of 5:39 a.m. and 6:02 p.m. Contray to her comments written on her November 29, 2003, DOR, the Petitioner testified that she telephoned the Jail two times that day, once at 6:24 a.m. and again at 1:20 p.m. However, Petitioner's memory of the calls she made is not credible, given the more credible written statement she made on the DOR shortly after her absence occurred.

23. Petitioner admits that none of the phone calls, either from Petitioner's husband or herself complied with the Columbia County Sheriff's Office policy regarding sick leave.

24. On December 2, 2003, Lieutenant Little sent a memorandum to Captain Smithey recommending that the Petitioner be considered for termination. Lieutenant Little formulated his opinion based upon: Petitioner's past attendance problems with the Columbia County Sheriff's Office; her most recent failure to follow Columbia County Sheriff's Office policy with regard to calling-in and attendance; and her untruthfulness with regard to her request for days off. As a result, and based upon the Sheriff's recent imposition of strict probationary guidelines on Petitioner's recent hiring Captain Smithey concurred in the recommendation. There was no evidence that either Little's or Smithey's actions were related to any complaint Petitioner had made regarding Officer Sessions. Captain Smithey forwarded the recommendation to the Sheriff.

25. The Sheriff consulted with members of his command staff and reviewed Petitioner's performance during her probationary period. The Sheriff determined that Petitioner had not satisfied the agency's standards for the probationary period and had failed in the second chance he had given her. On December 3, 2003, the Sheriff withdrew the Petitioner's appointment as a probationary Corrections Officer. At hearing, Petitioner admitted that the Sheriff's decision to terminate her had nothing to do with her complaints to Lieutenant Little about Officer Sessions, but was rather based upon Petitioner's failure to follow Columbia County Sheriff's Office call-in procedure. She felt that it was Lieutenant Little and other Officers who had conspired against her to get her terminated. However, there was no credible evidence to demonstrate that such a conspiracy existed.

26. After Petitioner's termination she contacted the Sheriff to schedule a meeting to discuss her termination. At that meeting, Petitioner spoke with the Sheriff about her complaints regarding Officer Sessions and the issues she had with her DORs. The Sheriff was unaware of the issues she had with Sessions. Specifically, Petitioner claimed that her DOR had been altered or whited-out because she had made complaints to her supervisor in it.

27. Petitioner brought with her to the meeting correct DORs from Officer Sirak as well as the November 29, 2003, DORs. Petitioner told the Sheriff that she believed her DORs were altered in retaliation for a complaint she had made to one of her supervisors. The Sheriff testified that Petitioner did not talk to him about anything with regard to Officer Sessions or sexual harassment during the post-termination meeting. The Sheriff explained to Petitioner that his decision to terminate her was based upon her failure to follow Columbia County Sheriff's Office procedures. With regard to Petitioner's DORs, the Sheriff made copies and told her that he would look into her concerns. The Sheriff investigated Petitioner's concerns, but discovered that all of the DORs that had been changed were changed in order to correct errors made on them. There was no credible evidence to the contrary regarding these DORs. The Sheriff did not discover any reason to change his decision regarding Petitioner's termination.

28. During discovery, Petitioner originally claimed that it was her November 19, 2003, DOR that had been whited-out, and that she had physically witnessed Officer Howard white it out in his office. Petitioner later recanted her testimony and stated that it was in fact her November 29, 2003, DOR which had been whited-out. With regard to her November 29, 2003, DOR being whited-out, Petitioner changed her testimony to reflect that she

witnessed Officer Howard white-out the DOR on November 29, 2003. Despite Petitioner's numerous attempts to explain her version of the facts with regard to who did what and when to her DORs, even her modified testimony is inconsistent with the facts on record. The record reflects that Officer Howard was not on duty on November 29, 2003. He was off for the holiday beginning on November 27, 2003. His time card reflects that he was on annual leave for the Thanksgiving holiday starting on November 27, 2003, and that he did not return to work until the following, Monday, December 1, 2003. The 29th was a Saturday and Officer Howard worked weekdays and did not go to the jail on the 29th.

29. Regardless of the fact that Petitioner could not have seen Officer Howard white-out her DOR because he was not at work on the day she specified, Petitioner's testimony with regard to the DORs themselves also proved to be inconsistent with the facts. Petitioner asserted that the reason her DOR was whited-out was that she had included comments regarding sexual language she had overheard Officer Sessions use on the night of November 19th. However, upon examination of the November 29th DOR in question, it was discovered that Petitioner did not mention anything at all with regard to sexual comments or Officer Sessions, but that the comments she had inserted were actually her attempts at justifying why she had failed to properly call-in to her supervisor the day before. As indicated

earlier, the reason the comments were whited-out was that Petitioner had inserted them in a Section designated for field training officer use only. As a result, Petitioner was required to move them to the appropriate Section designated as "Trainee's Comments."

30. At hearing, Petitioner produced, after her deposition had already been taken, a new DOR allegedly drafted on November 28, 2003, by Officer Harris. This DOR was not contained in Petitioner's personnel file and it is not known where the newly discovered DOR came from. There is no record evidence, other than Petitioner's own assertions, that Petitioner's November 28th DOR is authentic. Suspiciously, Petitioner did not produce this document in response to Respondent's Request for Production. Nor did Petitioner mention it in her Answers to Interrogatories. She testified that she did not find it in all her papers until after her deposition. Petitioner's testimony regarding this newly discovered DOR is not credible.

31. Finally, Petitioner offered evidence regarding purportedly similary-situated employees. These employees were Charles Bailey, Thomas Daughtrey and Chad Sessions.

32. Officer Charles Bailey had been employed with Columbia County Sheriff's Office two times in his career. During his first employment, Officer Bailey was terminated for attendance

problems similar to the problems Petitioner experienced in her employment with Columbia County Sheriff's Office. When Officer Bailey was hired back, he was given strict probationary terms to abide by, including that he: be on time for all scheduled tours of duty; follow all Columbia County Sheriff's Office call-in procedures; and to generally abide by all Columbia County Sheriff's Office policies and procedures. During his second-chance employment Officer Bailey abided by all of the conditions set out for him. He did not abuse sick leave and he called-in properly pursuant to Columbia County Sheriff's Office policy when he needed to take leave. Officer Bailey left the Columbia County Sheriff's Office on good terms after his second employment. Officer Bailey is not similarly situated in any relevant aspects to Petitioner. Unlike Petitioner, Officer Bailey abided by all of his conditions upon rehire and properly followed Columbia County Sheriff's Office call-in policy when he missed time.

33. Officer Thomas Daughtry was a new employee and in the field officer training program. He was not a second-chance employee. During his training he missed several days, however, despite the fact that Officer Daughtrey missed some days during his training, Officer Daughtrey followed Columbia County Sheriff's Office call-in policy every time he requested time off. Nevertheless, because he did in fact miss days during his

training, Officer Daughtrey was given unsatisfactory reviews and was required to re-do part of his training. Because he properly called in and he was not a second-chance employee, Officer Daughtrey is not similarly situated to Petitioner in any relevant aspects.

34. Officer Chad Sessions was employed two times with Columbia County Sheriff's Office. Both times Officer Sessions resigned under good terms. Petitioner has attempted to compare his second employment with that of her second, probationary employment, specifically with regard to a written reprimand Officer Sessions received for failure to follow call-in policy on September 10, 2004. When Officer Chad Sessions was given a reprimand for failing to call-in properly on September 10, 2004, he was not a probationary trainee. Rather, Officer Sessions was a Field Training Officer, and the reason he was unable to phone the jail was due to the phone outages caused by Hurricane Frances. Officer Sessions could not phone the jail and he could not be reached because of the high winds and heavy rain produced by Hurricane Frances. Because Officer Sessions was not a probationary employee, and taking into consideration the extenuating circumstances surrounding the incident, Lieutenant Little decided to issue him a written reprimand. Furthermore, there is no record evidence that Officer Sessions came to the Sheriff's Office with a prior termination and a poor employment

history similar to that of Petitioner. As a result, Officer Sessions is not similarly situated to Petitioner in all relevant aspects.

CONCLUSIONS OF LAW

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

36. Under the provisions of Section 760.10, Florida Statutes, it is an unlawful employment practice for an employer:

> (1)(a) To discharge 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.

37. FCHR and the Florida courts have determined that federal discrimination law should be used as guidance when construing provisions of Section 760.10, Florida Statutes. See Brand v. Florida Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994); Florida Department of Community Affairs v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991); Cooper v. Lakeland Regional Medical Center, 16 FALR 567 (FCHR 1993).

38. The Supreme Court of the United States 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 such as the one at bar. This analysis was reiterated and refined in St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

39. Pursuant to this analysis, Petitioner has the burden of establishing by a preponderance of the evidence a prima facie case of unlawful discrimination. If a prima facie case is established, Respondent must articulate some legitimate, non-discriminatory reason for its employment action. If the employer articulates such a reason, the burden of proof then shifts back to Petitioner to demonstrate that the offered reason is merely a pretext for discrimination. As the Supreme Court stated in Hicks, before finding discrimination, "[t]he fact finder must believe the Plaintiff's explanation of intentional discrimination." 509 U.S. at 519.

40. In Hicks, the Court stressed that even if the fact finder does not believe the proffered reason given by the employer, the burden at all times remains with Petitioner to demonstrate intentional discrimination. Id.

41. To establish a prima facie claim of a sexually harassing hostile work environment, petitioner must prove:

> (1) that the employee belongs to a protected group; (2) that the employee was subjected to unwelcome harassment; (3) that the harassment was based on the employee's gender; (4) that the harassment was severe

> enough to affect a term, condition, or privilege of employment and to create a discriminatorily abusive working environment; and (5) that the employer knew or should have known of the harassment and failed to intervene.

See Walton v. Johnson & Johnson Servs., Inc., 347 F.3d 1272, 1279-80 (11th Cir. 2003) (quoting Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1275 (11th Cir. 2002)); Russell v. KSL Hotel Corp., 887 So .2d 372, 377-78 (Fla. 3d DCA 2004). Here, Petitioner only established the first prong: that she belongs to a protected group.

42. Petitioner cannot establish a prima facie case because she has failed to demonstrate that she was subjected to unwelcome harassment, that the harassment altered the terms and conditions of her employment, and that the Respondent failed to intervene once her concerns were made known. Petitioner overheard nothing more than offensive utterances made by Officer Sessions to a friend during personal telephone calls. The utterances were neither about Petitioner nor directed at Petitioner. Furthermore, Petitioner left the control room while Officer Sessions was on the phone because she "didn't want to hear about his personal business."

43. The question of whether that harassment was sufficiently severe or pervasive so as to alter Petitioner's terms and conditions of employment requires both a subjective

and objective analysis. Mendoza v. Borden, Inc., 195 F.3d 1238, 1246 (11th Cir. 1999) (en banc); cert. denied, 529 U.S. 1068 (2000). As the United States Supreme Court has stated, "sexual harassment is actionable . . . only if it is 'so severe or pervasive as to alter the conditions of the victim's employment and create an abusive working environment.'" Clark Co. Sch. Dist. v. Breeden, 532 U.S. 268, 270 (2001); (quoting Faragher v. Boca Raton, 524 U.S. 775, 786 (1998)). The totality of the circumstances must be considered, including the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Faragher, supra, at 787-88. "Simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'" Id. at 788; see also Oncale v. Sundowner Offshore Services, Inc. 523 U.S. 75, 81 (1998) (Title VII "forbids only behavior so objectively offensive as to alter the 'conditions' of the victim's employment").

44. An incident in which Petitioner overheard an offensive utterance in telephone calls made by Officer Sessions is insufficient to establish a claim for a hostile work environment under Chapter 760, Florida Statutes, or Title VII. In Clark Co.

Sch. Dist. v. Breeden, an incident, in which two male co-workers chuckled after one co-worker asked what "I hear making love to you is like making love to the Grand Canyon" meant, and another employee then said, "Well, I'll tell you later," could not reasonably be believed to have violated Title VII). As stated by Petitioner, Officer Sessions' comments to his friend over the phone were his personal business and Petitioner left the control room to avoid having to listen to them. This was "at worst an 'isolated incident' that cannot remotely be considered 'extremely serious,' as [Title VII sexual harassment] cases require." Faragher v. Boca Raton, supra, at 788.

45. Further, even assuming, arguendo, that the Petitioner can state a claim for sexual harassment, Respondent intervened and investigated the incident when the details became known. Lieutenant Little conducted a meeting with Petitioner and Officer Howard in order to ascertain the details necessary to investigate the matter, had Petitioner put her complaint in writing, and allowed Petitioner to amend her November 19, 2003, DOR to reflect her concerns over Officer Sessions' behavior. As a result of this investigation and in light of the circumstances surrounding the incident, Lieutenant Little took remedial action in order to prevent any further unprofessional use of Columbia County Sheriff's Office telephones by issuing Officer Sessions a Letter of Reprimand and requiring a letter of apology to

Petitioner. There was no evidence that there were ongoing sexually oriented comments. As a result, Petitioner cannot prove that Respondent did not intervene and take prompt remedial action when the details of the situation became clear. For the above reasons, Petitioner's claim of sexual harassment should be dismissed.

46. Petitioner also claims that she was retaliated against for her opposition or complaints regarding Officer Sessions. For such complaints to be protected, a Petitioner need not show opposition to or complaint of an employment activity that actually constituted a violation of Title VII. It is sufficient if the employee reasonably believes that the activity opposed or reported would constitute a violation of Title VII. Bigge v. Albertsons, Inc., 894 F. 2d 1497, 1501 (11th Cir. 1990). However, in order to establish a prima facie case of retaliation, Petitioner must prove the following elements:

> (1) she participated in an activity protected by Title VII; (2) she suffered an adverse employment action; and (3) there is a causal connection between the participation in the protected activity and the adverse employment decision.

Gupta v. Florida Bd. of Regents, 212 F.3d 571, 587 (11th Cir. 2000) (emphasis added). "Once Petitioner establishes a prima facie case, the burden shifts to [Respondent] to articulate a legitimate, non-discriminatory reason for the challenged

action." Johnson v. Booker T. Washington Broad. Serv., Inc., 234 F.3d 501, 507 n. 6 (11th Cir. 2000). "The burden then shifts back to the petitioner to prove by a preponderance of the evidence that the legitimate reason was merely a pretext for the prohibited, retaliatory conduct. See Sierminski v. Transouth Financial Corporation, 216 F.3d 945, 950 (11th Cir. 2000).

47. In the instant case, Petitioner cannot establish a causal connection between her complaint and her termination. "To demonstrate a causal connection, petitioner must show that the decision-makers were aware of the protected conduct and that 'there was close temporal proximity between this awareness and the adverse employment action.'" Singh v. Green Thumb Landscaping, Inc., 2005 WL 1027585 (M.D. Fla. 2005) (quoting Farley v. Nationwide Mut. Ins. Co., 197 F.3d 1322, 1337 (11th Cir. 1999). Although there is a close temporal proximity between Petitioner's complaint regarding Officer Sessions' language while on the phone, Petitioner cannot establish that the Sheriff, the ultimate decision-maker, was aware of her complaint when he made the decision to terminate her employment. In fact, Petitioner testified that when she met with the Sheriff after her termination, he was surprised when she informed him of her complaints. The first time the Sheriff learned that the Petitioner had complaints about her DORs and Officer Sessions was at a post-termination meeting. As a result of this lack of

a causal connection, Petitioner cannot meet her burden of demonstrating a prima facie case.

48. Even if Petitioner could establish a prima facie case of retaliation, Respondent has articulated legitimate, non-discriminatory reasons for its actions. See Johnson v. Booker T. Washington Broad. Serv., Inc., 234 F.3d 501, 507 n. 6 (11th Cir. 2000). Petitioner was terminated due to her failure to follow Columbia County Sheriff's Office call-in procedure, despite being given a second chance and having given the Sheriff assurances that she could be depended upon. Taking into account Petitioner's history of poor attendance and improperly calling-in at Columbia County Sheriff's Office, and her prior termination at DOC for similar reasons, the Sheriff had a valid reason to withdraw her probationary appointment.

49. The evidence did not establish that the reasons offered by Respondent were actually a pretext for discrimination. There was no evidence that lower-level employees conspired against her to cause her termination. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973). "The burden of persuasion never shifts but remains with plaintiff at all times." Welch v. Delta Air Lines, Inc., 978 F. Supp. 1133 (N.D. Ga. 1997) citing Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). Despite Petitioner's claims that she was retaliated against when her

DORs were altered, the record reflects that Petitioner's training was in no way affected when her DORs were corrected and properly filled out. Furthermore, considering the fact that Petitioner was a second-chance, probationary employee, with a history of poor attendance and a poor employment background, and given that the Sheriff had personally warned Petitioner during her swearing-in that any more attendance problems would not be tolerated, when Petitioner failed to follow Columbia County Sheriff's Office call-in procedure on November 28, 2003, the Sheriff had a legitimate, non-discriminatory reason to terminate her employment. See, e.g., St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993); Smith v. Florida Dept. of Transp., 1999 WL 33216741, *4 (M.D. Fla. 1999); cf. Williams v. Vitro Serv. Corp., 144 F.3d 1438, 1442 (11th Cir. 1998). In Bradley v. Harcourt, Brace and Co., 104 F.3d 267, 270-71 (9th Cir. 1996), the court drew a strong inference of non-discrimination when the same actor hired and then fired the plaintiff and both actions occurred in a short period of time. Courts held likewise in Brown v. CSC Logic, Inc., 82 F.3d 651, 658 (5th Cir. 1996) (approving a "same actor" inference after noting that several circuit courts have approved the same); Evans v. Technologies Applications & Service Co., 80 F.3d 954, 959 (4th Cir. 1996) (recognizing a powerful inference that the failure to promote the plaintiff was not motivated by discriminatory animus where

the actor who failed to promote the plaintiff was the same actor that hired the plaintiff); and see E.E.O.C. v. Our Lady of Resurrection Med. Ctr., 77 F.3d 145, 152 (7th Cir. 1996) (finding a strong presumptive value where the same actor hired and then fired the plaintiff). Therefore, Petitioner's claim of retaliation should be dismissed.

50. Finally, when determining whether employees are similarly situated for purposes of establishing a prima facie case, courts should necessarily consider "whether the employees are involved in or accused of the same or similar conduct and are disciplined in different ways." Jones v. Bessemer Carraway Med. Ctr., 137 F.3d 1306, 1311 (11th Cir.1998); opinion modified by 151 F.3d 1321 (11th Cir. 1998). In order to be similarly situated, "the quantity and quality of the comparator's misconduct must be nearly identical to prevent courts from second-guessing employer's reasonable decisions and confusing apples and oranges." Henry v. City of Tallahassee, 216 F. Supp. 2d 1299, 1316 (N.D. Fla. 2002) citing Maniccia v. Brown, 171 F.3d 1364 (11th Cir. 1999). "The most important factors in the disciplinary context are the nature of the offenses committed and the nature of the punishments imposed." Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997) (internal quotations and citations omitted). Further, "Title VII does not take away an employer's right to interpret its rules as it chooses, and to

make determinations as it sees fit under those rules." Maniccia v. Brown, 171 F.3d 1364, 1369 (11th Cir. 1999) (quoting Jones, 137 F.3d at 1311); Nix v. WLCY Radio/Rahall Comms., 738 F.2d 1181, 1187 (11th Cir. 1984); Henry v. City of Tallahassee, 216 F. Supp. 2d 1299, 1315-16 (N.D. Fla. 2002).

51. Petitioner cannot show that a probationary employee outside the protected class engaged in conduct nearly identical to hers and received treatment that is more favorable. Petitioner admits that she has no knowledge of such a comparator. Instead, Petitioner identifies employees that are not similarly situated in any relevant aspects. None of the three employees offered as comparators were similarly situated to Petitioner.

52. In this case, Petitioner failed to establish all the elements of a prima facie case of either sexual harassment or retaliation in that she failed to demonstrate that she was subjected to significant and unwelcome harassment, that the harassment altered the terms and conditions of her employment, and that the Respondent failed to intervene once her concerns were made known. Moreover, even assuming she had established a prima facie case, Respondent articulated a reasonable basis for Petitioner's termination. Respondent's reasons were not a pre-text.

RECOMMENDATION

Based on upon the above findings of fact and conclusions of law, it is

RECOMMENDED that the Petition For Relief should be dismissed.

DONE AND ENTERED this 8th day of November, 2005, in Tallahassee, Leon County, Florida.

DIANE CLEAVINGER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of November, 2005.

COPIES FURNISHED:

Cecil Howard, General Counsel
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

Denise Crawford, Agency Clerk
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

Katrina R. Morgan
4777 Shavesbluff Road
Macclenny, Florida 32063

T.A. Delegal, III, Esquire
Delegal Law Offices, P.A.
424 East Monroe Street
Jacksonville, Florida 32202

Leonard J. Dietzen, III, Esquire
Allen, Norton & Blue, P.A.
906 North Monroe Street
Tallahassee, Florida 32303

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.