STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JENNIFER PEAVY, Petitioner, vs. B LAY ENTERPRISES, LLC, d/b/a BARGAIN BARRY'S, Respondent.	)	Case No. 05-1920

RECOMMENDED ORDER

Administrative Law Judge Don W. Davis of the Division of Administrative Hearings (DOAH) held a formal hearing in this cause in Ocala, Florida, on August 2, 2005. The following appearances were entered:

APPEARANCES

For Petitioner: Kenneth M. Hesser, Esquire
Seven East Silver Springs Boulevard
Suite 300
Ocala, Florida 34470

For Respondent: Gary R. Wheeler, Esquire
McConnaughhay, Duffy, Coonrod
Pope and Weaver, P.A.
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STATEMENT OF THE ISSUE

The issue for determination is whether Petitioner was subjected to an unlawful employment practice by Respondent, specifically sex discrimination in the form of sexual harassment due to Petitioner's gender in violation of Section 760.10, Florida Statutes.

PRELIMINARY STATEMENT

Petitioner filed a Charge of Discrimination against Respondent with the Florida Commission on Human Relations (FCHR) on December 27, 2004, alleging discrimination through sexual harassment on the basis of her gender.

On or about April 18, 2005, the FCHR issued its determination: No Cause.

On or about May 20, 2005, Petitioner filed a Petition for Relief with the FCHR. Subsequently, on or about May 24, 2005, the case was forwarded to DOAH for formal proceedings.

During the final hearing, Petitioner testified in her own behalf. Respondent presented testimony of seven witnesses and one exhibit, which was admitted into evidence.

A transcript of the final hearing was filed on August 19, 2005. At hearing, the parties requested and were granted leave to file proposed recommended orders 20 days after the filing of the transcript with DOAH. By order dated August 30, 2005, the parties

were granted further leave to file proposed recommended orders no later than September 16, 2005. Both parties timely filed Proposed Recommended Orders, which have been reviewed and considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Respondent employed Petitioner, a Caucasian female, from sometime in December of 2003 until termination of her employment on June 21, 2004. Petitioner worked in Respondent's warehouse facility from December, 2003 until sometime in February, 2004, when she was transferred to one of Respondent's retail stores, the Ocala store, where she worked until she was transferred back to the warehouse at the end of May or beginning of June, 2004.

2. Petitioner conceded at hearing that she was terminated after she argued with her supervisor and called her a bitch. Petitioner does not believe that she was terminated on the basis of her sex.

3. During the course of her employment, Petitioner alleges that Respondent's president, Barry Lay, made inappropriate comments to her of a sexual nature and touched her in an inappropriate way twice. All alleged sexually inappropriate conduct occurred from December of 2003 through February of 2004, during the period of time Petitioner worked in Respondent's warehouse facility.

4. Petitioner testified that Barry Lay engaged in the following inappropriate conduct:

(a) At the end of her initial employment interview when she was hired, and out of the presence of other witnesses, Barry Lay allegedly said to her, “If we were to fuck that’s nobody’s business but ours.” In her charge of discrimination, Petitioner alleged that this statement was “said in front of witnesses.” Due to Petitioner's inconsistencies in testifying, her demeanor while testifying and Barry Lay's candid testimony of denial with regard to making such statements to Petitioner at any time, Petitioner's allegation is not credited.

(b) Petitioner testified that, right before Christmas of 2003, Barry Lay told her, "if I would let him eat me out just one time I wouldn't think about any other man." (T. 23). Petitioner testified that other witnesses, including her mother, were sitting nearby at a processing table when this comment was made. No witnesses corroborated Petitioner's testimony on this allegation and, coupled with Barry Lay's denial testimony, Petitioner's allegation is not credited.

(c) Petitioner testified that Barry Lay grabbed her face and tried to kiss her about the same time as he allegedly made the comment discussed above. Again, Petitioner alleges that witnesses were present, but all witnesses testifying in the

matter, including Barry Lay, denied that such an incident occurred. Petitioner's testimony on this point is not credited.

(d) Petitioner also testified that Barry Lay grabbed her hips and tried to pull her from behind when she was bent over at a refrigerator. The allegation was denied by Lay and no corroborating testimony was presented. Petitioner's allegation is not credited.

5. On one occasion, Barry Lay overheard conversation between Petitioner and her mother regarding their breast size and that they could form the “little titty committee.” Lay commented to the duo that both of them could be president of the committee.

6. Barry Lay never attempted to initiate a romantic relationship with Petitioner and never threatened her with job transfer or termination if she failed to provide sexual favors.

7. On one occasion during the course of Petitioner's employment, when employees were discussing a rumor that Barry Lay was having an affair with several people at one time, he overheard the discussion, became irritated, and addressed the employees as a group saying, “It doesn’t matter if I’m fucking you, you, you, or you, it’s none of your business.”

8. Petitioner was transferred to the Ocala Store during the course of her employment to assist her in getting her

children to day care on time. Additionally, the store hours were more suitable to her schedule at the time.

9. Petitioner made sexual remarks, participated in discussions of a sexual nature, or participated in sexual horseplay in the workplace during the course of her employment with Respondent. Petitioner was heard and observed to smack or slap Barry Lay's bottom and say, "I want a piece of that." Barry Lay did not do anything to provoke Petitioner's conduct, but responded by saying, "if you did, you'd never go back to your boyfriend."

10. While at work Petitioner discussed having oral sex with her boyfriend and the length and frequency of those encounters.

11. During Petitioner's assignment to the Ocala store, she developed problems with absenteeism from the job. She quit calling in when she unable to work and demonstrated a poor attitude when she was at work. As a consequence, Petitioner was transferred back to Respondent's warehouse, where any absenteeism by the Petitioner would result in less of a hardship to operations. The transfer occurred at the end of May or beginning of June, 2004.

12. After Petitioner was transferred back to the warehouse, she continued to exhibit a poor attitude and unacceptable conduct while at work. In June of 2004, just

before she was terminated, Petitioner screamed at her supervisor that she was not going to perform a requested task due to medical restrictions. The supervisor informed Petitioner that she was not being asked to perform the task by herself, but simply to assist. Petitioner began using abusive language to the supervisor, calling her a “bitch.” Petitioner was asked to leave, but replied that she would not unless and until the supervisor “fucking” fired her. Petitioner pushed the supervisor and call her a “fucking whore” and “bitch.” Eventually, after using further epithets, Petitioner left the premises.

13. Barry Lay did not witness the argument between Petitioner and the supervisor, but when he was later informed he instructed the supervisor to tell Petitioner that her employment was being terminated.

14. The decision to terminate Petitioner’s employment was communicated to her the next day. Petitioner's stated response to the supervisor, before walking away, was “get fucked.”

CONCLUSIONS OF LAW

15. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings. §§ 120.56(9) and 120.57(1), Fla. Stat.

16. Chapter 760, Florida Statutes, the "Florida Civil Rights Act of 1992," provides security from discrimination based

upon race, color, religion, sex, national origin, age, handicap, or marital status.

17. The burden of proof rests with Petitioner to show a prima facie case of employment discrimination. After such a showing by Petitioner, the burden shifts to Respondent to articulate a nondiscriminatory reason for the adverse action. If Respondent is successful and provides such a reason, the burden shifts again to Petitioner to show that the proffered reason for adverse action is pre-textual. School Board of Leon County v. Hargis, 400 So. 2d 103 (Fla. 1st DCA 1981).

18. Provisions of Chapter 760, Florida Statutes, are analogous to those of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sections 2000e, et seq. See Department of Corrections v. Chandler, 582 So. 2d 1183 (Fla. 1st DCA 1991). Further, decisions construing Title VII are applicable in evaluating a claim brought under the Florida Civil Rights Act of 1992, as amended, Sections 760.01 through 760.11, Florida Statutes. Harper v. Blockbuster Entertainment Corporation, 130 F.3d 1385, 1387 (11th Cir. 1998) (citing Ranger Insurance Company v. Bal Harbour Club, Inc. 549 So. 2d 1005, 1009 (Fla. 1989)).

19. Title VII states that it is an unlawful employment practice for an employer "to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions,

or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a). Sexual harassment is a form of sex discrimination prohibited by Title VII. See Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 64, 106 S. Ct. 2399, 2404, 91 L. Ed. 2d 49 (1986) (stating that "the phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women'").

20. There are two types of sexual harassment cases: (1) quid pro quo, which are "based on threats which are carried out" or fulfilled, and (2) hostile environment, which are based on "bothersome attentions or sexual remarks that are sufficiently severe or pervasive to create a hostile work environment." Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 751, 118 S. Ct. 2257, 2264, 141 L. Ed. 2d 633 (1998). There is no credible evidence in the record of the instant case to support a claim of quid pro quo sexual harassment. Barry Lay never tried to initiate a romantic relationship with Petitioner, nor did he proposition her. He never threatened to transfer Petitioner if she failed to do something in particular for him. Therefore, any discussion of Petitioner’s sexual harassment claim focuses on her theory of hostile environment sexual harassment.

21. The Eleventh Circuit Court set forth in Mendoza v. Borden, Inc., 195 F.3d 1238 (11th Cir.1999)(en banc), the elements that an employee must establish to support a hostile environment claim under Title VII based on harassment by a supervisor. An employee must establish: (1) that he or she belongs to a protected group; (2) that the employee 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 must have been based on the sex of the employee; (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. Id. at 1245. Requiring proof that the conduct complained of was "sufficiently severe or pervasive to alter the conditions of employment and create an abusive work environment," is the element that tests the mettle of most sexual harassment claims. The necessity for a complainant to prove that the harassment is severe or pervasive ensures that Title VII does not become a mere "general civility code." Faragher v. City of Boca Raton, 524 U.S. 775, 788, 118 S. Ct. 2275, 2283-84, 141 L. Ed. 2d 662 (1998). This requirement is regarded "as crucial, and as sufficient to ensure that courts and juries do not mistake ordinary socializing in the workplace--such as male-on-male horseplay or intersexual flirtation--for

discriminatory 'conditions of employment.' " Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 81, 118 S. Ct. 998, 1003, 140 L. Ed. 2d 201 (1998).

22. As to the fourth element, it is settled that "[e]stablishing that harassing conduct was sufficiently severe or pervasive to alter an employee's terms or conditions of employment includes a subjective and objective component." Mendoza v. Borden, Inc., 195 F.3d 1238, 1245 (11th Cir.1999). If the complainant does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the plaintiff's employment, and there is not Title VII violation. Harris v. Forklift Systems, Inc., 510 U.S. 17, 21-22, 114 S. Ct. 367 (1993). "In looking at the entire context of the alleged harassment, a plaintiff's provocative speech or dress may be relevant." Morgan v. Fellini's Pizza, Inc., 64 F. Supp. 2d 1304, 1309 (N.D. Ga. 1999); Balletti v. Sun-Sentinel Co., 909 F. Supp. 1539, 1547 (S.D. Fla. 1995) ("Where a plaintiff's action in the workplace shows that she was a willing and frequent participant in the conduct at issue, courts are less likely to find that the conduct was 'unwelcome' or 'hostile.'").

23. In Mangrum v. Republic Industries, Inc., et al., 260 F. Supp. 2d 1229, 1237 (N.D. Ga. 2003), the court held that a plaintiff could not succeed on her hostile environment claims

because she participated in and, in some instances, initiated inappropriate language and activity in the workplace. The court held this despite conceding that the alleged harasser engaged in such inappropriate behavior as: on two different occasions, saying to the Plaintiff "stretch out on the desk, lay back on the desk, we'll knock out a little piece right quick"; asking for a “blow job” in exchange for a favor; and exposing his penis to plaintiff. Id. The court indicated that there was significant evidence, including the plaintiff’s own admissions, that the plaintiff had participated in the sexual banter, had used bad language, and “was one of the guys . . . in there with the best of them talking trash” throughout her employment. Id. at 1238. Plaintiff also admitted that she “participated in a lot of the things which were said there[,]” and that she “sat in other employees’ laps and rubbed their shoulders and that she gave scalp, neck, and back massages to various employees and would scratch their backs and ask for the same in return.” Id.

24. 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. See Mendoza, 195 F.3d at 1246; Faragher, 524 U.S. at 788, 118 S. Ct. at 2284 (explaining that the objective component of the "severe and pervasive" element prevents "the ordinary tribulations of the workplace, such as

the sporadic use of abusive language, gender-related jokes, and occasional teasing" from falling under Title VII's broad protections).

25. Although examination must be made of the statements and conduct complained of collectively to determine whether they were sufficiently pervasive or severe to constitute sexual harassment, see Mendoza, 195 F.3d at 1242, the statements and conduct must be of a sexual or gender-related nature--"sexual advances, requests for sexual favors, [or] conduct of a sexual nature," Id. at 1245, before they are considered in determining whether the severe or pervasive requirement is met. Innocuous statements or conduct, or boorish ones that do not relate to the sex of the actor or of the offended party, are not counted. Title VII, as it has been aptly observed, is not a "general civility code." Faragher, 524 U.S. at 788, 118 S. Ct. at 2283-84; Gupta v. Florida Bd. of Regents, 212 F.3d 571, 582-583 (11th Cir. 2000).

26. The Gupta court stated that if complained of conduct is of a gender-related or sexual nature, or arguably so, then four factors are applied to determine if the complained of conduct was objectively severe and pervasive enough to alter an employee's terms and conditions of employment: "(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." Id. (citing Mendoza v. Borden, Inc., 195 F.3d 1238 (11th Cir 1999)).

27. Viewed from either the complainant's subjective perspective or from the objective perspective of a reasonable person, Petitioner has not established that harassing conduct was sufficiently severe or pervasive to alter the terms or conditions of her employment.

28. Here Petitioner participated in sexual banter or horseplay in the workplace. While Petitioner's voluntary participation in such conduct does not preclude her from demonstrating a sexually hostile work environment, it does suggest that when, or if, she was on the receiving end of similar conduct, such conduct was not unwelcome or hostile. Balletti v. Sun-Sentinel Co., 909 F. Supp. 1539, 1547 (S.D. Fla. 1995) ("Where a plaintiff's action in the workplace shows that she was a willing and frequent participant in the conduct at issue, courts are less likely to find that the conduct was 'unwelcome' or 'hostile.'"). Petitioner did not subjectively perceive her work environment as hostile or abusive.

29. Even if Petitioner did subjectively perceive that the work environment was hostile and abusive, Petitioner has not met her burden of establishing that, from an objective perspective,

harassing conduct was sufficiently severe or pervasive to alter the terms or conditions of her employment.

30. Petitioner failed to establish a prima facie case of hostile work environment due to sexual harassment.

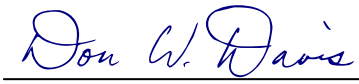
RECOMMENDATION

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

RECOMMENDED:

That a Final Order be entered dismissing the Petition for Relief.

DONE AND ENTERED this 4th day of October 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.