STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEMETRIA SAMPSON,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 05-4361
	)	
DEPARTMENT OF CHILDREN AND FAMILY SERVICES,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

A hearing was held pursuant to notice, on April 10 and 11, and June 15 and 16, 2006, in Gainesville, Florida, before the Division of Administrative Hearings by its designated Administrative Law Judge, Barbara J. Staros.

APPEARANCES

For Petitioner: Demetria Sampson, pro se[1/]
133 South East 38th Street
Gainesville, Florida 32641

For Respondent: Lucy Goddard-Teel, Esquire
Department of Children
and Family Services
Post Office Box 390, Mail Sort 3
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STATEMENT OF THE ISSUE

Whether Respondent violated the Florida Civil Rights Act of 1992, as alleged in the Charge of Discrimination filed by Petitioner on April 22, 2005.

PRELIMINARY STATEMENT

On April 22, 2005, Petitioner, Demetria Sampson, filed a Charge of Discrimination with the Florida Commission on Human Relations (FCHR) which alleged that the Department of Children and Family Services violated Section 760.10, Florida Statutes, by discriminating against her on the basis of race, sex, and retaliation.

The allegations were investigated and on October 19, 2005, FCHR issued its determination of "no cause" and Notice of Determination: No Cause. A Petition for relief was filed by Petitioner on November 21, 2005.

FCHR transmitted the case to the Division of Administrative Hearings (Division) on or about November 30, 2005. A Notice of Hearing was issued setting the case for formal hearing on February 23, 2006. Respondent filed an unopposed Motion to Continue which was granted. The hearing was rescheduled for April 10 and 11, 2006. The hearing proceeded as scheduled, but required additional days. The hearing continued on June 15 and 16, 2006, until its conclusion.

At hearing, Petitioner testified on her own behalf and presented the testimony of Patricia Alvarado, Wilfredo Gonzalez, Donna Jordan, Robin Wing, Amanda Mash, Haydee Shanata, Melissa Delcher, Gerry West, Crystal Long-Lewis, Myrtle Hodges, Torry Kingcade, Mireille Mackey, and Monica Felder. Petitioner

offered into evidence Exhibits numbered 1 through 37 which were admitted into evidence with the exception of Exhibit 13. Respondent presented the testimony of Haydee Shanata, Patricia Alvarado, Wilfredo Gonzalez, Ester Tibbs, Mark Williams, Tom Porter, Elaine Kennan, and Vickie Mixson. Respondent offered Exhibits Numbered 1 through 30 which were admitted into evidence.

Official Recognition was taken of Florida Administrative Code Rule 60L-33.003 and Chapter 60L-36.

A Transcript, consisting of four volumes, was filed on May 23, 2006, and on July 15, 2006. On July 27, 2006, Respondent filed a Proposed Recommended Order. On August 8, 2006, Petitioner filed a request for extension of time in which to file proposed orders. The request was granted. On August 25, 2006, Petitioner filed a Proposed Recommended Order. The parties' proposed orders have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is an African-American female who began her employment with Respondent on May 7, 2004.

2. Respondent, the Department of Children and Family Services (Department), is an employer within the meaning of the Florida Civil Rights Act.

3. At all times while she was employed by Respondent, Petitioner worked as a child protective investigator (CPI) and was on probationary status. That is, she had not yet achieved permanent status in the Career Service System and was an "at will" employee.

4. After being hired as a CPI, Petitioner received classroom pre-service training and computer training which is provided to every new CPI. Following this initial training, new CPI's are assigned a limited case load, as was Petitioner.

Allegations of Race Discrimination

5. Wilfredo Gonzalez is a child protective investigator supervisor (CPIS) and has been a supervisor for approximately 10 years. At all times material to this proceeding he was Petitioner's immediate supervisor. Mr. Gonzalez is an Hispanic male.

6. After Petitioner was assigned cases, she received additional on-the-job training and coaching by Mr. Gonzalez. Other child protective investigator supervisors and experienced CPI staff were also available to the Petitioner to answer questions. The work of new CPIs is carefully scrutinized by supervisors. They are expected to learn from mistakes and become increasingly proficient at the job.

7. Mr. Gonzalez did not give Petitioner a semi-annual performance evaluation at the mid-point of her probationary

period due to workload issues, although he was supposed to have done so.

8. However, Mr. Gonzalez regularly met with Petitioner, in his office and in hers, to discuss the progress of her cases and to advise her of areas in which she needed improvement. He also provided e-mail comments and other instruction with regard to her performance on specific cases as well as on Department policy. He also provided her with reports from Respondent's computer case system, HomeSafeNet, which showed whether or not she was meeting certain performance standards. During these communications with Petitioner, Mr. Gonzalez informed Petitioner of problems with her performance.

9. In addition to Mr. Gonzalez, there are two other CPISs in the Alachua County office of Respondent: Haydee Shanata and Patricia Alvarado, who are white females. In instances in which a person's immediate supervisor is unavailable, other CPISs review a CPI's work and deal with other office issues.

10. Because of the nature of the work involved, CPIs and CPISs have to work weekends, nights, and holidays. If a CPI works at a time that his or her immediate supervisor is not on duty, the CPI reports to the CPIS on duty at that time.

11. During the fall of 2004, Ms. Shanata prepared a holiday "on-call" schedule for December 2004. This was done with input from the other CPSIs. Leave was approved for certain

employees, including Petitioner, during the holidays. However, due to some CPIs being out due to illness, the holiday on-call schedule had to be revised so that there would be sufficient staff to cover the holidays.

12. The revisions in the holiday on-call schedule placed Petitioner on-call on days that she originally did not have to work. She was upset to see the revised on-call list. Upon learning that she would have to work on days when she originally was not scheduled, she called Ms. Shanata on her cell phone to ask her about these changes. Ms. Shanata explained that the changes were due to not having enough staff scheduled to cover the work.

13. On December 10, 2004, Petitioner complained to Mr. Gonzalez about the revised holiday on-call schedule. During that meeting, Petitioner called CPIS Shanata a liar to Mr. Gonzalez.

14. In addition, Petitioner wrote an e-mail entitled "Poor Holiday Planning." Petitioner sent the e-mail to the three CPISs, Mr. Gonzalez, Ms. Shanata, and Ms. Alvarado. The e-mail also copied their supervisor, Barbara Ross, and the District Administrator, Ester Tibbs. The e-mail reads in pertinent part:

> I am writing to express my total dissatisfaction with the planning for the holidays by the supervisors here at the Alachua County office. It is apparent to myself as a new employee and should have

> been apparent to the experienced supervisors here at the Alachua County office that about half of the current staff here is new. I understand that there are some time difficulties and that in the normal day of conducting business that things can be hectic as you are unaware of what may happen however, there is no excuse for poor planning and then FORCING a new investigator to cover three on call shifts during both Christmas and New Years holiday weekends within a seven day work week when originally being scheduled for only one day. As I know that sometimes duty calls however, no organization should infringe on the personal lives of their employees. From this day on, I will be sure not to make plans with my son, as the supervisors here in Alachua County can easily cover their failure to plan properly by dictating to me what time I can spend with my family and when.
>
> Also, I was told in a conversation with Haydee Shanata when the schedules were originally created that I did not want to work any more back to back on-call days (clarified by two days within a three day period) and Haydee assured me that she would not schedule me any more back to back days and then I was randomly selected for two additional on-call days which included both Christmas and New Year weekends without my agreement.

This e-mail did not complain of race or sex discrimination. The racial composition of those persons whose on-call schedules were changed is not in evidence.

15. Mr. Gonzalez responded the same day with an e-mail that read as follows:

> Demetria at the writing of your email you had 21 open cases. I was actually locking a case. A case in which I was helping you by

going ahead and editing the evidence entries and also entering the findings that you had failed to enter. I was doing this because I know you have been overwhelmed and also to help you get some cases closed that you are soon to roll-over so that you can attend the conference next week. I locked that case and now you have 20 open cases.

I try to provide as much support as possible. Earlier this afternoon I pointed out that Myrtle Hodges will be assisting you with your cases so you can get over that hump created by the number of cases you received in Oct. In addition to that--while on-call supervisor for the month of November I specifically limited the number of cases the trainees would receive. In November you were one of the CPI's with the fewest cases at 9 total. This month CPIS Shanata worked hard to try and prevent those staff who will be here at the end of the month from receiving a lot of cases. You are one of those again who benefited. You have been off rotation since Wednesday and as of today you have received only one case for the month of December. On-call is a function of the CPI and CPIS position. This months on-call was an experience unlike any I've experienced since being a supervisor. I have been a supervisor for quite some time. We limited the leave requests we approved. In addition we tried to help persons plan by preparing and presenting the schedules in advance. Since then we've had a CPI out on extended leave as well as other action that limited the number of staff available to accept reports. Because of this we have had to revise the schedule. No doubt that in the work we do, someone has to work holidays and around the holidays. This IS a job that in a sense infringes on our personal lives. Every time I get a call in the middle of the night to assist a CPI investigating a case can be perceived that way but it is not. It's my job. As supervisors we do the best we can and hopefully in the process we learn

> along the way. Barbara has come to morning meetings and indicated that when there are concerns you should follow the chain of command. Though you addressed the email to me and the other supervisors you copied Barbara as well as Ester Tibbs. Give us the chance to resolve the issues before you send it up the chain of command. (emphasis in original)

16. Incredibly, Petitioner responded with another e-mail to Mr. Gonzales with copies to Ms. Shanata, Ms. Alvarado, and Ms. Ross, accusing the supervisors of being inconsiderate, not courteous or professional, and that the supervisors "shoved it" in her face.

17. On December 15, 2004, Petitioner wrote an apology for the choice of words she used in the series of e-mails regarding the holiday on-call schedule and for violating the chain-of command.

18. Mr. Gonzalez wrote a letter of counseling dated December 27, 2004, to Petitioner regarding her unprofessional behavior toward Ms. Shanata and the insubordinate and disrespectful nature of her e-mails. Mr. Gonzalez admonished her for not following the chain of command and reminded her that she must treat her supervisors and co-workers with respect and courtesy. He also reminded her that she was not a permanent employee and that failure of her to use appropriate behavior would result in her immediate dismissal.

19. The December 27, 2004, memo was the first time that Mr. Gonzalez had issued a counseling memo to Petitioner. Petitioner believes that her e-mail complaining about the holiday on-call schedule was the trigger for what she inaccurately believes was retaliation.

20. Petitioner was scheduled to attend a conference in January 2005. The conference, referred to as the Dependency Summit, involved participants from throughout Florida and involved discussions and training that was separate from the general training given to CPIs when they begin employment with the Department. At some point, Petitioner's name was removed from the list of persons approved to attend the conference. Of the seven CPIs approved to attend the conference, four were African-American.

21. During the early months of 2005, both Mr. Gonzalez and Ms. Shanata expressed concerns over Petitioner's work performance. Ms. Shanata sent several e-mails to Mr. Gonzalez documenting incidents in which Petitioner failed to respond to her e-mails requesting information or directing action on a case. Of particular concern was Petitioner's failure to contact law enforcement on cases in which law enforcement should have been called, such as cases involving sex abuse allegations. According to Ms. Shanata, if a criminal act has occurred, law enforcement must be notified immediately and they then take the

lead in the case investigation. Mr. Gonzalez had instructed Petitioner on several occasions to involve law enforcement immediately in certain types of investigations.

22. On March 7, 2005, Ms. Shanata received a telephone call from Detective Sherry French of the Alachua County Sheriff's Office regarding cases assigned to Petitioner that should have been referred to law enforcement, but had not. Ms. Shanata's supervisor, Ms. Ross, instructed Ms. Shanata to review Petitioner's cases which Detective French called her about.

23. During her review, Ms. Shanata became concerned about Petitioner's handling of a case that involved a child who had been taken to the hospital on December 31, 2004. In that case, the child had tears to her vaginal area, which is an indication of possible sexual abuse. Ms. Shanata noted that Ms. Alvarado had "backed down" the case from being classified as an immediate case to a 24-hour case. In this type of case, it is important that the Child Protection Team become involved immediately to conduct their examination of the child, as vaginal tears heal quickly.

24. Ms. Shanata discussed this case with Ms. Alvarado who recalled the circumstances of the case. According to Ms. Alvarado, Petitioner informed Ms. Alvarado that the Child Protection Team had seen the child, which led Ms. Alvarado to

authorize that the case be "backed down." Ms. Alvarado considered receiving inaccurate information regarding a case of this nature to be an extremely serious problem.

25. During her review, Ms. Shanata found other cases in which Petitioner had not followed Department policy and operating procedures. Ms. Shanata reported her findings to her supervisor, Ms. Ross, and to Mr. Gonzalez in an e-mail dated March 10, 2005.

26. On March 24, 2005, Petitioner was directed to take a child to the Child Advocacy Center for a forensic interview. However, she failed to do so.

27. In addition to these job performance issues, Mr. Gonzalez and Ms. Shanata expressed concern that Petitioner was habitually late to morning meetings at which cases are presented and discussed.

28. On March 24, 2005, Mr. Gonzalez completed a Performance Evaluation of Petitioner. Performance ratings range from one to five points, with "5" being the highest rating in any category. A rating of "2" means that the employee's performance sometimes meets expectations and needs improvement. Petitioner received a "2" rating in three performance expectations. Her overall rating was a 2.70. A rating of "3" means that an employee's performance consistently achieves expectations.

29. On March 29, 2006, Mr. Gonzalez wrote a memorandum to Marc Williams, District Operations Manager, detailing concerns about Petitioner's work and recommending that Petitioner be removed from her position. Mr. Williams is a white male.

30. Petitioner was reassigned to a non-CPI position on March 26, 2005. She received the same pay and benefits during her period of reassignment.

31. Consistent with Department policy, the reassignment was done abruptly and Petitioner was no longer allowed access to the Department's case management system.

32. Petitioner requested a meeting with Mr. Gonzalez and Mr. Williams. Petitioner met with Mr. Gonzalez, Mr. Williams and Bonnie Robison on March 29, 2005, to discuss the Department's concerns and to give her a chance to present her side of the story. Petitioner was presented with a copy of her performance appraisal at this meeting. At the meeting, Petitioner requested a list of the issues regarding her job performance and an opportunity to respond to their concerns. The meeting lasted two to three hours.

33. Petitioner was provided a bulleted list of concerns on April 1, 2005, which contained issues of concern that Mr. Williams felt she had not adequately refuted at the March 29, 2005, meeting. Petitioner provided a response on April 6, 2005.

34. Probationary employees may be fired at will. The employing agency only needs to notify the employee that he or she has failed to complete the probationary period.

35. Although probationary employees may be fired at will, Mr. Williams does not lightly recommend dismissal of a CPI investigator. However, Mr. Williams expects mistakes to diminish over time and, in Petitioner's case, the mistakes had not diminished and supervisors found that she was not receptive to coaching. Further, Mr. Williams felt that they had reason to doubt Petitioner's word. He recommended Petitioner's dismissal to Ester Tibbs.

36. Ester Tibbs is the District 3 Administrator of the Department. She has the final authority in making the decision with regard to whether or not to terminate an employee. Ms. Tibbs is an African-American woman.

37. According to Ms. Tibbs, she expects supervisors and managers to present compelling reasons as to why a probationary CPI should not be retained in a permanent status. This is because recruitment and training of CPIs are costly and terminating a probationary CPI interrupts investigations and adds to the workloads of other CPIs. In order to make the decision to terminate the employee, she must be convinced that the Department has provided appropriate training, necessary coaching, and support and that, despite their best efforts, she

is convinced that the employee cannot carry out the demands of the job. Ms. Tibbs approved Petitioner's termination.

38. On March 31, 2005, Petitioner filed a Career Service Employee Grievance seeking reinstatement of employment, and modification of her performance appraisal. The grievance alleges that she had been harassed by Mr. Gonzalez, Ms. Shanata, and Ms. Alvarado; that she disagreed with her performance appraisal; and that she was discriminated against based on sexual orientation on July 1, 2005. The grievance does not allege race discrimination.

39. As a probationary employee, Petitioner was not entitled to a grievance process regarding her dismissal. The record is not clear as to whether Petitioner should have been provided an opportunity to grieve the portion of her grievance relating to her performance appraisal, since she had already been informed she was being terminated at the time she filed the grievance. In any event, there is no evidence that not granting her request for a grievance process was based upon race.

Other Employees in the Alachua County Office of Respondent

40. Amanda Mash is a senior CPI with five years experience and permanent career service status. Ms. Mash is a white female. She was frequently late to morning meetings. However, if she was going to be late for a morning meeting, she called to

let her supervisor know that she would be late. She has turned in cases late. She has not received disciplinary action.

41. Ms. Mash never called a supervisor late at night and failed to inform of critical information; never failed to take a child to a child advocacy center appointment when asked to do so; never failed to respond to e-mails from supervisors asking information about cases; never neglected to submit her files to her supervisor when required to do so; and never called her supervisor a liar.

42. Melissa Delcher is a CPI and is a white female. In February 2005, she interviewed a child in a case that was not assigned to her. The case was assigned to Petitioner. The child had disclosed to Ms. Delcher that he had been hit, but she did not see any visible signs of injury. According to Ms. Delcher, she did not contact the child protection team or law enforcement because the case was not assigned to her.

43. Crystal Long-Lewis, an African-American female, was secretary for Mr. Gonzalez from July 2003 through April 2005. She was terminated from her position for conduct unbecoming a state employee and falsifying documents. She was a permanent career service employee at the time of her termination. It is Ms. Long-Lewis's perception that she was not treated fairly because of her race and her young age. She believed that there was favoritism of white CPIs over non-minority CPIs.

44. Myrtle Hodges, an African-American female, became a probationary CPI when her other job with the Department was privatized. She received a below standards evaluation and was encouraged to resign rather than face termination. When asked was it possible that she was terminated based upon her race, she responded, "No, I don't think I was terminated on race."

45. Torrey Kincade, an African-American male, was a CPI in the Alachua County office until he was transferred to another city where he currently works for Respondent. His supervisor while in Alachua County was Ms. Alvarado. He believes that when he worked for Ms. Alvarado, that she targeted him by giving him more tasks and "riding him" harder than a non-minority CPI. He believes he was held to a different standard regarding the dress code. He also believes that he did not receive as high a pay increase as his coworkers, who did not testify. There was no evidence presented as to employees' salaries or amount of pay increases for Mr. Kincade or any of his coworkers.

46. Regarding his perception of the office while he worked under Ms. Alvarado's supervision, he stated, "I definitely--I can't say its discriminatory behavior, but I could say that each minority in the office was at one point targeted."

47. Monica Felder is an African-American female who was employed by the Department for approximately a year and a-half. She was terminated from employment in January 2006 for personal

misuse of the cell phone issued to her by the Department and failure to reimburse the Department for the personal calls. As a permanent career service employee, she appealed her dismissal to the Public Employees Relations Commission which affirmed her dismissal. In March 2005, Ms. Felder had received a satisfactory performance appraisal from Ms. Alvarado. Ms. Alvarado made positive comments on Ms. Felder's March 2005, performance evaluation.

48. In January 2004, an employee of Respondent sent an e-mail to Ms. Tibbs regarding concerns about Ms. Alvarado, including an allegation of racism. Ms. Tibbs determined that an internal investigation was needed, and one was conducted. The investigative report concluded that while certain employees held this perception, there was no evidence that Ms. Alvarado targeted anyone based on race. The remaining allegations concerned Ms. Alvarado's management style.

Allegation of Sex Discrimination

49. In July 2004, Mr. Gonzalez was approached by another CPI in his unit. Mr. Gonzalez was informed by the CPI that Petitioner had been seen hugging another female CPI in her office in a "romantic way." He instructed that person not to repeat that information and then conferred with his supervisor at that time, Lori Walker.

50. As a result of hearing this allegation, Mr. Gonzalez called Petitioner into his office and told her that there was a rumor in the office that she was having a relationship with another female employee, that her conduct needed to be professional, and that she should keep her door open when that CPI was in her office.

CONCLUSIONS OF LAW

51. The Division of Administrative Hearings has jurisdiction over the parties and subject matter in this case. §§ 120.569 and 120.57, Fla. Stat.

52. Section 760.10(1), Florida Statutes, states that it is an unlawful employment practice for an employer to discharge or otherwise discriminate against an individual on the basis of race or sex.

Race Discrimination

53. In discrimination cases alleging disparate treatment, the Petitioner generally bears the burden of proof established by the United States Supreme Court in McDonnell Douglas v. Green, 411 U.S. 792 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).[2/] Under this well established model of proof, the complainant bears the initial burden of establishing a prima facie case of discrimination. When the charging party, i.e., Petitioner, is able to make out a prima facie case, the burden to go forward shifts to the

employer to articulate a legitimate, non-discriminatory explanation for the employment action. See Department of Corrections v. Chandler, 582 So. 2d 1183 (Fla. 1st DCA 1991) (court discusses shifting burdens of proof in discrimination cases). The employer has the burden of production, not persuasion, and need only persuade the finder of fact that the decision was non-discriminatory. Id. Alexander v. Fulton County, Georgia, 207 F.3d 1303 (11th Cir. 2000). The employee must then come forward with specific evidence demonstrating that the reasons given by the employer are a pretext for discrimination. "The employee must satisfy this burden by showing directly that a discriminatory reason more likely than not motivated the decision, or indirectly by showing that the proffered reason for the employment decision is not worthy of belief." Department of Corrections v. Chandler, supra at 1186; Alexander v. Fulton County, Georgia, supra. Petitioner has not met this burden.

54. Petitioner claims she was terminated and not offered a permanent position because of race discrimination. To establish a prima facie case of race discrimination, she must prove that (1) she is a member of a protected class (e.g., African-American); (2) she was subject to an adverse employment action; (3) her employer treated similarly situated employees, who are not members of the protected class, more favorably; and (4) she

was qualified for the job or benefit at issue. See McDonnell, supra; Gillis v. Georgia Department of Corrections, 400 F.3d 883 (11th Cir. 2005).

55. Petitioner established the first two elements in that she is African-American and that she was subject to adverse employment discrimination in that she was terminated from her job.

56. However, she has not provided sufficient evidence that the non-minority employees with whom she compares her treatment were similarly situated in all aspects or that their conduct was of comparable seriousness. Holifield v. Reno, 115 F.3d 1555, 1563. 115 F.3d 1555 (11th Cir. 1997)

57. Ms. Mash, a white CPI, was a permanent employee who had not been accused of the type of conduct for which Petitioner was terminated. While Ms. Mash was late to morning meetings, she called her supervisor on such occasions. Moreover, the fact that Petitioner was often late to morning meetings was not the primary reason that she was terminated.

58. Ms. Delcher described circumstances of a single case in which she interviewed a child who reported abuse and in which she did not contact law enforcement. However, she was not the assigned investigator. Neither she nor Ms. Mash was accused of conduct of comparable seriousness as Petitioner and are not

similarly situated for purposes of establishing a prima facie case. Id.

59. While there was testimony by Mr. Kincade and Ms. Long-Lewis that they believe racial discrimination exists, generalizations are insufficient to establish a prima facie case with regard to Petitioner. See Holifield at 1563.

60. Moreover, other than her testimony that she disagreed with her performance appraisal, Petitioner did not present competent evidence to prove the fourth component of establishing a prima facie case regarding her being qualified for the job. "When the employer produces performance reviews and other documentary evidence . . . that demonstrate poor performance, an employee's assertions of his own good performance are insufficient in the absence of other evidence." Holifield at 1565.

61. Applying the McDonnell analysis, Petitioner did not meet her burden of establishing a prima facie case of discriminatory discharge. Even assuming that Petitioner had demonstrated a prima facie case of discriminatory discharge, the Department demonstrated a legitimate, non-discriminatory reason for recommending her termination. That is, she was terminated because of problems in her case work, failure to follow directives, misrepresenting facts to a supervisor, and questions about her credibility.

62. Even if it were necessary to go to the next level of the McDonnell analysis, Petitioner did not produce any evidence that the Department's legitimate reasons were pretext for discrimination. Therefore, Petitioner has not met her burden of showing that a discriminatory reason more likely than not motivated the decisions to terminate Petitioner or by showing that the proffered reason for the employment decision is not worthy of belief. Consequently, Petitioner has not met her burden of showing pretext.

63. It is notable that Mr. Williams gave Petitioner an opportunity to discuss in detail during a two-to-three-hour meeting, the reasons for her termination and to allow her an opportunity to rebut those reasons. As a probationary employee, she was not entitled to such a meeting or an opportunity to rebut their concerns, but was given that opportunity anyway.

64. In summary, Petitioner has failed to carry her burden of proof that Respondent engaged in racial discrimination toward Petitioner when it terminated her.

Allegation of Sex Discrimination

65. Petitioner's allegation of sex discrimination was based on an incident which had to do with her alleged sexual orientation. That is, Petitioner asserts that in July 2004, her supervisor, Mr. Gonzalez, called her into his office to advise her that it had been reported that she was seen in her office

hugging a female co-worker in a romantic way. As a result, Mr. Gonzalez instructed Petitioner to keep her door open. The facts of this case are completely different from one in which sexual harassment is alleged when the harasser and the harassed employee are of the same sex. Cf., Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 118 S. Ct. 998 (1998).

66. These allegations do not constitute anything that is actionable under Title VII or Florida's Civil Rights Act. "Clearly, sex and sexual orientation are not the same, the former referring to one's biological makeup as a man or a woman, the latter referring to one's mating preferences." Mowery v. Escambia County Utilities Authority, 2006 U.S. Dist. LEXIS 5304, (D. Fla. 2006). Other courts have consistently ruled that Title VII's proscription on discrimination based on sex does not extend to sexual orientation. See, e.g., Vickers v. Fairfield Medical Center, 453 F.3d 757, 762 (6th Cir. 2006) ("sexual orientation is not a prohibited basis for discriminatory acts under Title VII"); Bibby v. Philadelphia Coca Cola Bottling Co., 260 F.3d 257, 261 (3d Cir. 2001) ("Title VII does not prohibit discrimination based on sexual orientation.") Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir 2000) ("Title VII does not prohibit harassment or discrimination because of sexual orientation.")

67. As noted by the Mowery Court, The Eleventh Circuit has not directly addressed this question, but commented in Fredette v. BVP Management Assocs., 112 F.3d 1503, 1510 (11th Cir. 1997) "We do not hold that discrimination because of sexual orientation is actionable." Moreover, a supervisor telling a subordinate to keep her door open does not constitute harassment or discrimination.

Retaliation

68. Petitioner's charge of retaliation is based upon her complaining about the Holiday work schedule being changed. That is, Petitioner claims that after she wrote the e-mail about the holiday schedule changes, she alleges that she was retaliated against. There is nothing in her e-mail that reflects a complaint about discrimination. There is no evidence that she engaged in protected activity in the e-mail complaining about the holiday on-call schedule to support a charge of retaliation.

69. To make a prima facie case of retaliation, Petitioner must show that she engaged in protected activity, that she suffered adverse employment action, and that there is some causal relation between the protected activity and the adverse employment action. Casiano v. Gonzales, 2006 U.S. Dist. Lexis 3593 (N.D. Fla. 2006); Jeronimus v. Polk County Opportunity Council, Inc., 2005 U.S. App. Lexis 17016 (11th Cir. 2005).

Petitioner has not produced any evidence that she was retaliated against.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law set forth herein, it is

RECOMMENDED:

That the Florida Commission on Human Relations enter a final order dismissing the Petition for Relief.

DONE AND ENTERED this 29th day of September, 2006, in Tallahassee, Leon County, Florida.

BARBARA J. STAROS
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of September, 2006.

ENDNOTES

1/ At hearing, Petitioner was assisted by Kevin Robinson, Esquire, on April 10 and 11, but not on June 15 and 16, 2006.

2/ FCHR and 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 Corporation, 633 So. 2d 504, 509 (Fla. 1st DCA 1994).

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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.