STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

KENEKA JONES, Petitioner, vs. GENERAL AVIATION TERMINAL, INC., Respondent.	)	Case No. 06-0583

RECOMMENDED ORDER

A formal hearing was conducted in this case on June 15 and 26, 2006, and August 4, 2006, in Tallahassee, Florida, before Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Carolyn D. Cummings, Esquire
Cummings, Hobbs and Wallace, P.A.
462 West Brevard Street
Tallahassee, Florida 32301

For Respondent: Joanne B. Lambert, Esquire
Jackson Lewis, LLP
Post Office Box 3389
Orlando, Florida 32802-3389

STATEMENT OF THE ISSUES

The issues are whether Respondent General Aviation Terminal, Inc. (Respondent) discriminated against Petitioner Keneka Jones (Petitioner) based on her sex, gender, and/or

disability and retaliated against her for complaining about said discrimination in violation of Section 760.10, Florida Statutes (2005).

PRELIMINARY STATEMENT

On July 29, 2005, Petitioner filed an Amended Charge of Discrimination with the Florida Commission on Human Relations (FCHR). Petitioner alleged that Respondent discriminated against her based on her sex, gender, and disability by subjecting her to disparate treatment, harassment, and a hostile work environment and retaliated against her for complaining about the discrimination by terminating her employment.

On January 6, 2006, FCHR issued a Determination: No Cause. On February 10, 2006, Petitioner filed a Petition for Relief, which FCHR referred to the Division of Administrative Hearings on February 14, 2006.

A Notice of Hearing dated February 27, 2006, scheduled the case for hearing for May 4, 2006.

On April 24, 2006, Petitioner filed an Unopposed Motion for Continuance. On April 29, 2006, the undersigned issued an Order Granting Continuance and Rescheduling Hearing for June 15, 2006.

During the three-day hearing, Petitioner testified on her own behalf and presented the testimony of two witnesses. Petitioner offered nine exhibits, which were received into evidence.

Respondent presented the testimony of four witnesses. Respondent offered eight exhibits, which were received into evidence.

At the close of the hearing, the parties requested leave to file post-hearing submissions 30 days after the filing of the hearing transcript. For good cause shown, the undersigned granted the request on the record.

The fifth and final volume of the Transcript was filed on August 23, 2006.

On September 22, Petitioner timely filed her Proposed Recommended Order. On September 27, 2006, Respondent filed an Unopposed Motion for Enlargement of Time, Nunc Pro Tunc, to File Proposed Findings of Fact and Conclusions of Law. An Order Granting Extension of Time gave Petitioner and Respondent an opportunity to file a proposed order or an amended proposed order respectively no later than October 13, 2006.

On October 13, 2006, Petitioner filed an Amended Proposed Recommended Order and Respondent file its Proposed Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Respondent is a foreign corporation that is licensed to do business in Florida. Respondent is an employer under the Florida Civil Rights Act of 1992, Sections 760.01 through 760.11, Florida Statutes (2006).

2. Respondent provides contract services to airports and airlines around the country. The services include aircraft cleaning, baggage handling, and other services.

3. Respondent calculated its bid for the Delta Air Lines, Inc. (Delta) cabin cleaning service at the Tallahassee Regional Airport, Tallahassee, Florida, based on eventual staffing of six full-time dedicated cabin service ramp agents (cabin service agents). The contract required Respondent to service the daily inbound flights with each employee having two days off each week. The contract required Respondent to have the cabin service up and running by the end of January 2006. The contract did not include the additional costs and hiring delays that Respondent would have incurred if it created a part-time for one employee, then looked for a second part-time employee in order to fill one of the six full-time positions. Respondent could not perform its contractual obligation to Delta with a part-time cabin service ramp agent.

4. Petitioner, a black female, is a resident of the State of Florida. She has a learning disability that made her eligible for exceptional student education (ESE) classes in public school. Petitioner was retained in the 1st grade, the 9th grade, and the 12th grade. She received a special high school diploma but was unable to attend college because of her

inability to pass the graduate education diploma (GED) examination.

5. At some point in time, the Federal Social Security Administration determined that Petitioner suffered from mental retardation. Based on that determination, Petitioner became eligible for a monthly Social Security Disability (SSD) check. No health care provider has diagnosed Petitioner as having a disability that prevents her from working a full-time position.

6. At times Petitioner suffers what she describes as anxiety or panic. However, there is no competent evidence that Petitioner suffers from panic attacks as a disability, which prevents her from working on a full-time basis. According to Petitioner, she takes medication and splashes water on her face when she begins to feel anxious. The only time Petitioner referred to her anxiety at work was when she came out of the restroom on one occasion and told a co-worker that she had just had a panic attack.

7. To the extent that Petitioner suffers from anxiety attacks, her medication appears to quickly correct any impairment she may suffer. There is no competent evidence that the alleged anxiety substantially limits Petitioner’s major life activities.

8. Petitioner has a noticeable speech impediment. The speech impairment is not so severe as to interfere with Petitioner's ability to work.

9. Respondent employed Petitioner in Tallahassee, Florida, as a full-time cabin service agent from January 7, 2005, until February 28, 2005. Petitioner's primary job duty was to clean and service the interior cabins of airplanes, owned and operated by Delta at the Tallahassee Regional Airport. Petitioner was also expected to perform general maintenance of the restrooms inside Respondent's break room and other airline offices, including emptying garbage cans and dusting between arrivals of the various flights at least two times a day.

10. Petitioner's job required her to clean and service four to six daily inbound flights. As a general rule, the flights were spaced out by one or more hours, depending on the schedule.

11. Petitioner worked with two other full-time cabin service agents: (a) Stacy Bennett, lead agent and Petitioner's direct supervisor; and (b) co-worker, Hillary Bennett.

12. Respondent's contract with Delta required each aircraft cabin to be serviced in approximately seven minutes. Over the course of an eight-hour shift, Petitioner and the two other employees in her position worked a total of only two to three hours. During the five to six hours of each shift that

Petitioner was not required to perform any work duties, she was free to watch television, talk with co-workers, eat, or engage in other activities of her choosing, as long as she remained on the airport premises. Petitioner was qualified to perform her job duties without the need for any accommodation.

13. The station manager, Cory Howell, interviewed and hired Petitioner. During the interview, Petitioner told Mr. Howell that she wanted to work part-time because she received SSD benefits and full-time work would cause her to make too much money, subjecting her SSD benefits to reduction or termination. Petitioner did not tell Mr. Howell that she needed part-time work as an accommodation for a disability such as panic attacks, mental retardation, or speech impairment.

14. Petitioner's request for part-time work is consistent with her application in November 2004. However, the most persuasive evidence indicates that Petitioner accepted a full-time position with the understanding that Respondent did not have any positions for part-time ramp agents at that time. Mr. Howell did not promise Petitioner part-time work in the future but said he would see what he could do to honor her request.

15. Due to a clerical error that affected the records of several full-time employees, Petitioner's personnel records erroneously indicate that Respondent hired her on a part-time

basis. Despite the clerical error, Petitioner began working a full-time schedule on or about January 12, 2005.

16. On her first day at work, Petitioner worked until 6:00 p.m. On her first or second day at work, Mr. Beitzel told Petitioner which two days a week would be her regular days off, and which five days a week she would be scheduled to work. Petitioner told Mr. Beitzel that she did not want to work full-time. Mr. Beitzel told Petitioner to speak with Mr. Howell.

17. Later in January, Petitioner spoke to Mr. Howell on several occasions about her desire to work part-time. She told him she did not want to make too much money because she would lose her SSD benefits. She did not tell him that working full-time was causing her to have anxiety attacks or that she needed to work part-time as an accommodation for any disability, other than to preserve her SSD benefits. Mr. Howell consistently told Petitioner there were no part-time ramp agent positions.

18. Respondent has employment practices prohibiting discrimination based on sex, gender, handicap, or retaliation for complaining about any type of discrimination. When Respondent hired Petitioner, she received copies of these policies as well as Respondent's policies regarding reasonable accommodation of disabilities.

19. Petitioner read these policies and solicited help from other people on parts she did not understand. The policies

state that employees should report any concerns regarding perceived harassment/discrimination or failure to provide a disability accommodation to their immediate supervisor or Respondent's human resources director. At all times material here, Dawn Middleton served as Respondent's Director of Human Resources.

20. Petitioner had an opportunity to meet Ms. Middleton during the first few weeks of Petitioner's employment. During a lengthy conversation, Ms. Middleton explained her job responsibilities in detail. Petitioner did not tell Ms. Middleton that Petitioner was unhappy with her job in any respect.

21. Respondent posted the daily flight schedule of aircraft that Petitioner and the other cabin service agents would need to service in the break room on a daily basis. Ms. Bennett also informed Petitioner about the daily schedule. On several occasions, Petitioner was not immediately available when an aircraft arrived for service.

22. Because her mother was dead, Petitioner had custody of her younger sister, who was pregnant when Petitioner went to work for Respondent. Mr. Howell told Petitioner in advance that she would not be able to miss any work due to the baby's impending birth.

23. Early one morning about two weeks after beginning her employment, Petitioner took her sister to the emergency room with symptoms that turned out to be false labor. Petitioner followed correct procedure by calling Mr. Beitzel, Respondent's training supervisor and second-in-command at the Tallahassee office, as soon as possible, to let Respondent know about the emergency and that she would be late to work.

24. That same morning, Ms. Bennett complained to Mr. Howell that Petitioner had missed or been late to service a scheduled aircraft and that Petitioner was not assisting with cleaning the restrooms. When Petitioner arrived at work, Ms. Bennett and Mr. Howell, in the presence of Mr. Beitzel, verbally counseled Petitioner, informing Petitioner that her performance needed to improve. During this counseling, Petitioner was loud, argumentative, and refused to accept responsibility for her poor performance.

25. After the counseling session, Petitioner's performance improved for a short time. However, Petitioner began having problems with her co-workers. At times, Petitioner and other employees would yell at each other. On one occasion, Mr. Howell was aware of verbal conflict between Petitioner and other employees sufficient to make him leave his office and enter the break room to inquire whether anything was wrong. Petitioner,

in the presence of her co-workers, denied that there were any problems.

26. It is clear that Mr. Howell was aware that Petitioner was having problems with some of the male employees because she complained on several occasions that the male employees were “messing” with her. However, other than the one inquiry reference above, Mr. Howell took no steps to verify or disprove Petitioner's complaints.

27. The male employees routinely joked about Petitioner amongst themselves. They said she must have taken ESE classes, that she was special, and that she was a slow learner. The men told each other that Petitioner was a “pretty-ass girl,” until she opens her mouth. They joked about having sex with Petitioner if she were not "a little bit off." These types of comments were made when Petitioner was in the same room. The greater weight of the evidence is that Petitioner heard at least some, if not all, of the inappropriate comments about her mental disability. Petitioner was embarrassed and humiliated by the comments she heard and the knowledge that the men were making fun of her mental disability even when she could not hear precisely what they were saying.

28. The men asked Petitioner whether she had ever taken English classes, sarcastically referring to her inability to

speak properly. They told Petitioner someone needed to teach her how to speak correctly.

29. Some of the male employees had crushes on Petitioner but did not want the other men to know their feelings for fear of being teased. Sometimes a man would tell Petitioner that she looked good. Occasionally, Petitioner would smile at and flirt with the men.

30. One day Petitioner arrived at work with her hair in disarray. The men laughed among themselves, when one of them stated that Petitioner must have been out F------ all night. The greater weight of the evidence indicates that Petitioner did not hear this inappropriate comment.

31. The most persuasive evidence indicates that Mr. Howell was aware that Petitioner was mentally retarded/learning disabled. In view of the close proximity of the break room to Mr. Howell's office, his ability to overhear discord among the employees, and Petitioner's complaints that the men were picking on her, Mr. Howell knew or should have known that the male employees were routinely harassing Petitioner, joking about her mental disability, and thereby creating a hostile work environment for Petitioner.

32. On February 28, 2006, Petitioner and her supervisor, Ms. Bennett ate breakfast in the break room. They quietly began watching television after finishing their meal. After 30 or 40

minutes, Carlos Byrd, a male employee, entered the break room and began playing cards with another male employee. Next, Terryl Crenshaw (nicknamed Bama) entered the break room and asked Mr. Byrd what game they were playing. After Mr. Byrd responded, Mr. Crenshaw told Petitioner to move over. Petitioner knew Mr. Crenshaw wanted her to move so that he could play cards with Mr. Byrd and the other male employee.

33. When Petitioner did not move, Mr. Byrd ordered Petitioner to "move your ass over." Petitioner continued to ignore the men. Mr. Crenshaw then abruptly shoved Petitioner's chair from behind, causing her to fall out of her chair. Petitioner got up yelling profanities at Mr. Crenshaw, telling him that he had no right to touch her chair.

34. Mr. Howell, who was in his office, heard the men order Petitioner to move over. Mr. Howell did not hear Petitioner respond until he heard the chair being shoved.

35. Mr. Howell entered the break room as Petitioner and Mr. Crenshaw exchanged hostile words. Because Petitioner was crying and obviously emotionally upset, Mr. Howell told Petitioner to calm down and to go into his office.

36. Petitioner was very agitated and continued to express her feelings in a loud voice. Petitioner told Mr. Howell that he favored the male employees over her and that he always took

their side rather than hers. Petitioner continued to shout at Mr. Howell when Mr. Beitzel entered the office.

37. Mr. Howell could not get Petitioner to calm down. Instead she called Mr. Howell an "asshole" and a "mother-f_____," daring him to fire her. All of the employees in the break room could hear Petitioner's tirade.

38. Mr. Howell finally told Petitioner to hand over her security badge and leave the premises because she was terminated. Petitioner refused to surrender her badge or leave until a security officer arrived to escort her out of the building.

39. Mr. Howell verbally counseled Mr. Crenshaw for his part in the disturbance. He took no other disciplinary action against Mr. Crenshaw.

40. If Petitioner had calmed down as requested, Mr. Howell would have verbally counseled her without terminating her employment. Competent evidence indicates that use of profanity was common in the workplace. The male employees and the management joked with each other, had dinner together on out-of-town trips, and routinely used rough language amongst themselves, but never in an angry, hostile, or insubordinate manner like Petitioner's extended outburst. The only time a similar incident occurred in the past, Mr. Howell fired a male employee.

41. Petitioner's personnel records erroneously indicate that she was discharged for unsatisfactory work performance. Petitioner's continued disruptive behavior and her profane and abusive language was insubordinate, leaving Mr. Howell with no choice but to terminate her employment.

42. After her termination, Petitioner worked for a single day at a nursing home. Petitioner resigned that job, at least in part, because she did not want to lose her SSD benefits. There is no evidence that Petitioner has ever maintained a full-time or part-time job for a significant period of time. She certainly did not make a good-faith effort to mitigate her damages in this case.

CONCLUSIONS OF LAW

43. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to Sections 120.569, 120.57(1), and 760.11, Florida Statutes (2006).

44. Petitioner alleges that Respondent discriminated against her based on her sex/gender and disability by subjecting her to disparate treatment, harassment, and a hostile work environment. Petitioner also alleges that Respondent retaliated against her when it unlawfully terminated her employment.

45. FCHR and the Florida courts have determined that federal discrimination law should be used for guidance when

construing the Florida Civil Rights Act of 1992, Sections 760.01 through 760.11, Florida Statutes (2005). See Brand v. Florida Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1991).

46. Section 706.10(1)(a), Florida Statutes (2005), provides that it is an unlawful employment practice for an employer "to discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual because of such individual's race, color, religion, sex, national origin, age, handicap or marital status."

47. Florida law also prohibits retaliation against any person who opposes an unlawful employment practice or because a person complains about such a practice. See § 760.10(7), Fla. Stat. (2005).

Handicap Discrimination

48. Petitioner's claim that Respondent committed an unlawful employment practice based on her disability involves two theories of discriminatory conduct. First, Petitioner alleges that Respondent failed to accommodate her alleged anxiety/panic attacks by not providing her with part-time work. Second, Petitioner alleges that Respondent is responsible for harassment and a hostile work environment that she experienced due to her mental retardation and/or speech impediment.

49. In regards to Petitioner's claim of failure to accommodate, she has the burden of proving the following prima

facie case by a preponderance of the evidence: (a) she suffers from a disability of anxiety or panic attacks; (b) she was qualified for her position and able to satisfactorily perform her work with or without an accommodation; (c) Respondent knew or had reason to know about her disability and refused a requested reasonable accommodation. See Hilburn v. Murata Electronics North America, Inc., 181 F.3d 1220 (11th Cir. 1999).

50. If Petitioner meets this initial burden, Respondent must show that absence of the handicap is a bona fide occupational qualification (BFOQ). See § 760.10(8), Fla. Stat. (2005); Andrews v. Albertson's Inc., 11 FALR 4874 (FCHR 1989). In the alternative, Respondent must demonstrate that it made a good-faith attempt to accommodate the handicap or that the business would experience an undue hardship in providing the requested accommodation. See Id. Respondent is not required to make fundamental alterations to its program to accommodate Petitioner's disability. See Brand at 633 So. 2d 511-512.

51. A disability is a "physical or mental impairment that substantially limits one or more of the major life activities of [an] individual." See 42 U.S.C. § 12102(2)(A). Major life activities include "functions, such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." See 29 C.F.R. § 1630.2(i). Moreover, to be substantially limited, a person must be either

unable to perform a major life function or be "significantly restricted as to the condition, manner or duration" under which the individual can perform a particular function, as compared to the average person in the general population. See 29 C.F.R. § 1630.2(j). Any determination of a disability must take into account any remedial measures, such as medication, that correct the impairment. See Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999).

52. Petitioner has not met her burden of proving that Respondent "failed to accommodate" her alleged anxiety/panic attacks. Indeed, she did not present competent evidence that she suffers from such a disability as defined by the FCRA and federal law. It follows that she did not present competent evidence that any anxiety she experiences substantially limits her major life activities, including the ability to work full-time. To the extent that Petitioner receives medical treatment for anxiety, her medication easily corrects any impairment she suffers.

53. Petitioner never reported any anxiety disability to Mr. Howell, Mr. Beitzel, or Ms. Middleton and never requested part-time work as an accommodation. As far as management knew, Petitioner wanted part-time work so she would not lose SSD benefits.

54. On the other hand, Respondent demonstrated that Petitioner was able to perform her job responsibilities without any accommodation for anxiety or mental retardation. Thus a part-time schedule was unnecessary to allow Petitioner to perform the essential functions of her job. Moreover, the job was essentially part-time by its very nature.

55. Respondent has never hired part-time workers to be cabin service ramp agents. Filling one full-time position with two part-time positions was unreasonable and would have caused an undue hardship on Respondent. Some of Respondent's labor costs would have doubled with two part-time employees, including unemployment taxes, workers' compensation premiums, uniform costs, badge and access fees, and other miscellaneous items.

56. As to Petitioner's claim that she was harassed and experienced a hostile work environment due to her mental retardation and/or speech impediment, Petitioner's prima facie case involves proving the following: (a) she was disabled; (b) she was subjected to unwelcome harassment or a hostile work environment; (c) the harassment or hostile work environment was based on her disability; (d) the harassment or hostile work environment was sufficiently severe or pervasive to alter her working conditions and create an abusive environment; and (e) Respondent knew or should have known of the harassment or hostile work environment, failed to correct the harassment, and

therefore is liable under a theory of direct or vicarious liability. See Razner v. Wellington Regional Medical Center, Inc., 837 So. 2d 437 (Fla. 4th DCA 2002); Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1275 (11th Cir. 2002).

57. The evidence here demonstrates that Petitioner suffers from a noticeable speech impediment. However, there is no competent evidence that Petitioner's speech impairment substantially limits her ability to speak. To the contrary, Petitioner is able to express herself more than adequately when she understands the subject matter of a conversation. Therefore, the following analysis will focus on Petitioner's mental retardation.

58. To prove a harassment claim, Petitioner must show that she subjectively perceived the harassment to be severe or pervasive, and that objectively, a reasonable person in her position would consider the harassment likewise. See Johnson v. Booker T. Washington Broadcasting Service, Inc., 234 F.3d 501, 509 (11th Cir. 2000). The objective prong of the test requires consideration of the following four factors: (a) the frequency of the conduct; (b) the severity of the conduct; (c) whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and (d) whether the conduct unreasonably interferes with the employees job performance. Mendoza v. Borden, Inc., 195 F.3d 1238 (11th Cir. 1999).

59. The conduct at issue must be so extreme as to "amount to a change in terms and conditions of employment." See Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998).

60. Petitioner did not present competent evidence that her mental retardation substantially limited one of her major life functions, such as her ability to work on a full-time basis. However, Petitioner proved that she is mentally retarded based on her history as an ESE student and a recipient of SSD benefits. Additionally, it is clear that Petitioner's co-workers regarded her as having such impairment and that her supervisors were aware of that perception. By proving two out of three of these factors, Petitioner met her burden of proving that she was mentally disabled as defined under state and federal law. See Gordon v. E.L. Hamm and Associates, 100 F.3d 907, 911 (11th Cir. 1996).

61. Petitioner presented persuasive evidence that she was subjected to unwelcome harassment based on her mental retardation and that the harassment altered her working conditions and created an abusive environment. Petitioner knew or should have known that the male employees routinely made fun of her because she was slow. As a result of their constant jokes, Petitioner was subjectively embarrassed, humiliated, distracted, and unable to get along with her co-workers. The harassment was sufficiently frequent, severe, and humiliating to

qualify as creating a hostile work environment under any objective standard.

62. Mr. Howell knew or should have known that the men were picking on Petitioner because she was mentally disabled. Mr. Howell and Ms. Bennett were aware of Petitioner's on-going problems with the male employees and that the problems were interfering with Petitioner's ability to focus on her work. Despite Petitioner's complaints, Mr. Howell took no action other than to enter the break room on one occasion to ask Petitioner if anything was wrong. Confronted in the presence of her co-workers, Petitioner understandably denied that she was having a problem.

63. Because the evidence supports Petitioner's allegations relative to harassment and a hostile work environment, Respondent can only avoid liability by satisfying the Faragher-Ellerth affirmative defense, which states as follows:

> According to the Supreme Court, if a plaintiff shows that the supervisor effected a tangible employment action against plaintiff, the corporate defendant is liable for the harassment. Faragher, 524 U.S. at 807-08, 118 S. Ct. 2275; Burlington Indus. Inc. v. Ellerth, 524 U.S. 742, 765, 118 S. Ct. 2257, 141 L.Ed. 2d 633 (1998); Miller, 277 F. 3d at 1278. Where, however, the plaintiff does not show that the supervisor took a tangible employment action, the employer may raise an affirmative defense that it: 1) exercised reasonable care to prevent and promptly correct the harassing behavior, and 2) that the plaintiff

> unreasonably failed to take advantage of any preventative or corrective opportunities the employer provided or to avoid harm otherwise. Miller v. Kenworth of Dothan, Inc., 277 F.3d at 1278 (citing Faragher, 524 U.S. at 807, 118 S. Ct. 2275; Ellerth, 524 U.S. at 765, 118 S. Ct. 2257).

See Lawrence v. Wal-Mart Stores, Inc., 236 F. Supp. 2d 1314, 1327 (M.D. Fla. 2002).

64. Respondent had a policy prohibiting discrimination of any kind in the workplace. However, Mr. Howell never conducted an appropriate investigation to ensure that Petitioner was not being harassed or subjected to a hostile work environment. After her complaints were totally ignored by Mr. Howell, Petitioner cannot be faulted for failing to complain to Ms. Middleton as suggested by Respondent's anti-discrimination policy. Therefore, Respondent is subject to vicarious liability for subjecting Petitioner to harassment and a hostile work environment based on her mental retardation.

Sexual Discrimination

65. As to the alleged sex discrimination, Petitioner has to prove a prima facie case of sexual harassment involving the following elements: (a) she was subject to unwelcome harassment; (b) the harassment was based on her sex as a female; (c) the harassment was sufficiently severe or pervasive to alter her working conditions and create an abusive environment; and (d) Respondent knew or should have known of the harassment and

failed to correct it. See Mendoza v. Borden, Inc., 195 F.3d at 1245.

66. The severity or pervasiveness of the conduct "is the element that tests the mettle of most sexual harassment claims." See Gupta v. Florida Board of Regents, 212 F.3d 571 (11th Cir. 2000). Just as in her claim of disability discrimination, Petitioner must show that she subjectively perceived the harassment to be severe or pervasive, and that objectively, a reasonable person in her position would consider the harassment to be severe or pervasive. See Johnson, 234 F.3d at 509.

67. Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e-2 et seq., is not a "general civility code" for the workplace. See Oncale v. Sundowner Offshore Svcs., 523 U.S. 75, 80 (1998). Offhand comments and isolated incidents, unless extremely serious, will not amount to discriminatory changes in the terms and conditions of employment. See Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993). The "severe or 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 protections. See Faragher, 524 U.S. at 788.

68. The incidents of sexual discrimination that Petitioner described during the hearing are insufficient to support a claim of harassment or hostile work environment for two reasons.

First, persuasive evidence indicates that Petitioner did not hear most of the comments. The male employees made the comments among themselves and not directly to Petitioner. The greater weight of the evidence shows that Petitioner heard the male employees make sporadic sexual comments and/or gender-related jokes that at best constitute "ordinary tribulations of the workplace."

69. Second, there is no persuasive evidence that Mr. Howell or other members of management ever heard the male employees make sexual comments about Petitioner. Petitioner's testimony that she specifically described the derogatory sexual comments to Mr. Howell is not credible. Therefore, Mr. Howell did not know or have reason to know that the male employees were making inappropriate sexual comments about Petitioner. For these reasons, Petitioner has not proved her initial burden involving harassment or a hostile work environment based on sexual discrimination.

Gender Discrimination

70. A complainant alleging discrimination based on disparate treatment bears the burden of proof established in McDonnell Douglas v. Green, 411 U.S. 792 (1973), and in Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). In this case, Petitioner bears the burden of establishing a prima facie case of gender discrimination based on disparate treatment

by demonstrating the following: (a) she is a member of a protected group (female); (b) she was qualified for the position; (c) she was subject to an adverse employment action; and (d) Respondent treated similarly situated male employees more favorably. See Maniccia v. Brown, 171 F.3d 1364, 1368 (11th Cir. 1999); Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997).

71. If Petitioner meets her initial burden, then Respondent must articulate a legitimate, non-discriminatory reason for the adverse employment. See Dept. of Corrections v. Chandler, 582 So. 2d 1183 (Fla. 1st DCA 1991). If Respondent meets its burden of production, Petitioner bears the ultimate burden of persuasion, showing that Respondent's proffered reason is a pretext for intentional discrimination. See Id.

72. Petitioner has not met her initial burden of proving that Mr. Howell treated her less favorably than Mr. Crenshaw when it discharged her. Mr. Crenshaw was not similarly situated to Petitioner because there is no evidence that he continued to participate in the disturbance after Mr. Howell entered the break room. Mr. Crenshaw's behavior prior to that time was certainly rude, aggressive, and a serious violation of workplace ethics. However, Mr. Crenshaw did not continue to aggravate the situation once Mr. Howell intervened. Petitioner, on the other

hand, could not control her anger and refused to calm down as requested.

73. Mr. Howell intended to talk to Petitioner in his office after she had a chance to quit crying and calm down in his office. He had no intention of firing Petitioner when he asked Petitioner to talk to him privately. If Petitioner had been able to comply with his request, Mr. Howell would have verbally counseled Petitioner about the disturbance, as he did with Mr. Crenshaw later that day.

74. Mr. Howell presented persuasive testimony that he fired Petitioner, not because of the incident in the break room, but because of Petitioner's angry, profane, and insubordinate behavior in the office. Mr. Beitzel corroborated Mr. Howell's unsuccessful attempt to get Petitioner to discuss the situation in a civil manner.

75. Petitioner failed to identify a single male employee who engaged in the same behavior toward a manager without being terminated. Respondent's reason for firing Petitioner was not a pretext for intentional discrimination based on her gender.

Retaliation

76. Petitioner claims that Respondent unlawfully terminated her employment in retaliation for objecting to the alleged disability and sexual harassment by male employees. This claim follows the sequence regarding burden of proof set

forth in McDonnell Douglass, 411 U.S. at 792, and Texas Dept. of Community Affairs, 450 U.S. at 248.

77. Petitioner first must prove that she engaged in a statutorily protected activity, that she suffered an adverse employment practice, and that a causal link exists between the protected activity and the adverse action. See Bass v. Bd. of County Commissioners, 256 F.3d 1095, 1119 (11th Cir. 2001), citing, Gupta, 212 F.3d at 590; Little v. United Technologies, 103 F.3d 956, 959 (11th Cir. 1997).

78. Petitioner complained to Mr. Howell that the male employees were mistreating her under circumstances that he knew or should have known involved her mental disability. Petitioner suffered an adverse employment action when Mr. Howell fired her. Even so, there is no persuasive evidence of a causal link between Petitioner's complaints and the termination of her employment.

79. To the extent that Petitioner met her prima facie burden, Respondent presented evidence that it fired Petitioner, not because she complained about the male employees, but because she was profane and insubordinate in Mr. Howell's office. The circumstances of this case prove that Respondent's reason for discharging Petitioner were not a pretext for retaliation.

80. Petitioner did not make an effort to mitigate her damages after being discharged. Therefore, jurisdiction is

reserved for the determination of reinstatement, back pay, and appropriate attorney's fees and costs in this proceeding if the parties cannot agree.

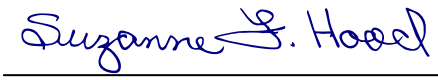
RECOMMENDATION

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

RECOMMENDED that:

The Florida Commission on Human Relations enter a final order finding that Respondent discriminated against Petitioner based only on her mental disability relative to harassment and a hostile work environment.

DONE AND ENTERED this 28th day of November, 2006, in Tallahassee, Leon County, Florida.



SUZANNE F. HOOD
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

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Division of Administrative Hearings
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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

Carolyn D. Cummings, Esquire
Carolyn Davis Cummings, P.A.
462 West Brevard Street
Tallahassee, Florida 32301

Joanne B. Lambert, Esquire
Jackson Lewis LLP
Post Office Box 3389
Orlando, Florida 32802-3389

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.