STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JAMES E. GONZALES,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 06-0677
	)	
PEPSI BOTTLING GROUP,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

This cause came on for final hearing, as noticed, before P. Michael Ruff, duly-designated Administrative Law Judge of the Division of Administrative Hearings. The hearing was conducted in Orlando, Florida, on May 2, 2006. The appearances were as follows:

APPEARANCES

For Petitioner: James E. Gonzales, pro se
26437 Troon Avenue
Sorrento, Florida 32757

For Respondent: Nicole Alexandra Sbert, Esquire
Jackson Lewis LLP
390 North Orange Avenue
Orlando, Florida 32802

STATEMENT OF THE ISSUE

The issues to be resolved in this proceeding concern whether the Petitioner was subjected to sexual harassment in the form of a sexually hostile work environment and was retaliated

against for complaining about the alleged harassment in violation of Chapter 760, Florida Statutes.

PRELIMINARY STATEMENT

This cause was initiated upon the Petitioner's termination from his employment with the Respondent, the Pepsi Bottling Group of Central Florida, and his resultant filing of a charge of discrimination. He alleges in the charge of discrimination that he was subjected to sexual harassment amounting to a hostile working environment and that he was retaliated against for complaining of that circumstance and condition. The Florida Commission on Human Relations investigated the matter and ultimately determined that there was no reasonable cause to believe a discriminatory employment practice had occurred. After the entry of that determination by the Commission, the Petitioner filed a Petition for Relief essentially charging the same discriminatory acts or circumstances. The cause was transmitted to the Division of Administrative Hearings and ultimately to the undersigned Administrative Law Judge for a formal proceeding and adjudication.

The cause came on for hearing as noticed. At the hearing the Petitioner presented one witness and Exhibits A through H which were admitted into evidence. The Respondent presented eight witnesses and Exhibits 1 through 26, and 29 through 34, which were admitted into evidence.

Thereafter the parties, or at least the Respondent, ordered a transcript of the proceedings and requested the opportunity to file proposed recommended orders. After stipulating to an extension of time for submission of the proposed recommended orders, a Proposed Recommended Order was submitted by the Respondent on July 17, 2006. The Proposed Recommended Order has been considered in the rendition of this Recommended Order.

FINDINGS OF FACT

1. The Petitioner, James E. Gonzales, is a male person who was hired by the Respondent, Pepsi Bottling Group, on March 13, 1995. He was hired as a route sales trainee in the Central Florida marketing unit of that employer. The Pepsi Bottling Group (Pepsi) is responsible for the manufacture sale and delivery of Pepsi products to its vendors. Over the last three years the Central Florida unit has been the foremost marketing unit in the United States. The management of the Central Florida Marketing Unit has been rated by its employees as being the top management team in the country for Pepsi.

2. The Petitioner applied for a Pre-sale Customer Representative (CR) position on March 27, 2003. On April 21, 2003, the Petitioner was assigned to a Pre-Sell (CR) position. As a Pre-Sell CR, the Petitioner was responsible for serving his own accounts; creating and maintaining good will with all customers; ordering customer's products in advance; and

developing all assigned accounts relative to sales volume, market share, product distribution, space allocation and customer service. He was responsible for solicitation of new business; selling and executing promotions; soliciting placement of equipment; selling sufficient inventory; and utilizing point of purchase materials to stimulate sales. He was also charged with maintaining "shelf facings" cleaning and shelving and rotating product and merchandising product sections and building displays to stimulate sales. Additionally, he was required to complete and submit all related paperwork regarding sales and promotional operations in an accurate and timely manner.

3. The Petitioner's direct supervisor initially was David Lopez. He was replaced by Wanzell Underwood in approximately August 2003.

4. On December 5, 2002, the Petitioner received the Respondent's employee handbook. The handbook contains the Respondent's Equal Employment Opportunity Policy and Sexual Harassment Policy. The Equal Employment Opportunity Policy prohibits discrimination on the basis of race, color, religion, gender, age, disability, etc. including sexual orientation. It encourages employees to immediately report any complaint, without fear of retaliation, to the Human Resources Manager or Human Resources Director. The Respondent's policy has a zero tolerance for retaliation and forbids any retaliatory action to

be taken against an individual who in good faith reports a perceived violation of that policy. Employees who feel they have been retaliated against are required to report such retaliation to the Human Resources Manager or Director.

5. The sexual harassment policy of the Respondent prohibits all forms of harassment and clearly sets out complaint procedures for employees to follow in the event they have experienced harassment. They are directed to report any complaint immediately to the Human Resources Manager or Director.

6. Throughout his employment the Respondent received numerous customer complaints regarding the Petitioner's poor performance. The Petitioner received five disciplinary actions against him from the period 2003 through 2005. These "write-ups" were for failing to service customers according to the Respondent's standards and were dated August 2003, April 2004, September 2004, October 2004, and May 2005.

7. On August 1, 2003, the Petitioner received a documented verbal warning after the Respondent received a complaint from a customer regarding the amount of out-of-date product in his store and the poor level of service he was receiving from the Petitioner.

8. On April 9, 2004, the Petitioner received a documented verbal warning for his failure to prepare his three Circle K

stores for a "customer tour," although he had assured his direct supervisor, Mr. Underwood, and the Key Account Manager, Eric Matson, that the store would be ready. The Petitioner's failure to prepare his Circle K stores for the customer's tour embarrassed both his supervisor and the Key Account Manager.

9. On June 23, 2004, the assistant manager at ABC Liquor, a store Gonzales was responsible for, sent an e-mail to Eric Matson complaining about the lack of service provided by Gonzales and requested a new CR to service his store. The customer stated that Gonzales had given nothing but "crappy" service, bad attitude, and sometimes no service.

10. On September 21, 2004, Eric Matson received an e-mail regarding the Petitioner's failure to order product for the Mt. Dora Sunoco store. The Petitioner's supervisor, Wanzell Underwood, visited the Mt. Dora Sunoco store and confirmed the manager's complaints. The Petitioner received a written warning for not properly servicing the Mt. Dora Sunoco store. In the Petitioner's contemporaneous written comments in opposition to the written warning he failed to note that the manager of the Mt. Dora Sunoco was purportedly sexually harassing him.

11. On October 11, 2004, the Petitioner received a final written warning and one-day suspension after his direct supervisor re-visited the same Mt. Dora Sunoco store that complained previously. The Petitioner was warned that a similar

problem in the future would lead to his termination. Again, in the Petitioner's written comments in opposition to his written warning, he made no mention that the manager of the Mt. Dora Sunoco store was sexually harassing him.

12. On October 11, 2004, after the Petitioner was suspended for one day, he requested that the Human Resources Manager, Christopher Buhl, hold a meeting. During the meeting he complained for the first time to the Unit Sales Manager, Howard Corbett, the Sales Operations Manager, Tom Hopkins, and Mr. Buhl, that three years previously, in 2001, one person had told the Petitioner that everyone thought he was "gay" (meaning co-employees). One person asked him if he was gay, according to the Petitioner's story, and one person said, "We all know you're gay," before he became a Pre-Sell CR. The Petitioner, however, refused to cooperate with Mr. Buhl in obtaining information regarding his complaints. At no time during the meeting did the Petitioner complain about being sexually harassed by the manager of the Mt. Dora Sunoco store.

13. During the October 11, 2004, meeting the Petitioner claimed his supervisor, Wanzell Underwood, threatened him. However, the Petitioner conceded during the meeting that the alleged statement made by Mr. Underwood was made to a group of Customer Representatives, to the effect that he would "kill you guys if you do not make the sales numbers." Mr. Underwood

denied ever threatening to kill the Petitioner. During the meeting the Petitioner also complained that his route was too large and he requested that it be reduced.

14. At no time during that October 11, 2004, meeting did the Petitioner complain that he was sexually harassed by Alice Marsh, the Mt. Dora Sunoco manager. His extensive notes and comments on his Disciplinary Action Reports did not document any such complaint.

15. In November 2004, the Petitioner was asked to go to K-Mart and place an order, but the Petitioner failed to follow instructions and visit the store. Instead, the Petitioner placed the order over the phone. The manager of the store called the Respondent three times to complain about the poor service provided by Mr. Gonzales.

16. Each year the Respondent changes its delivery routes. During the end of 2004 or the beginning of 2005, the Respondent re-routed all of its Pre-sell CR routes. The Respondent reduced the Petitioner's route as he had requested and in conformity with its route standards. Despite the Petitioner's allegation to the contrary, in fact the Petitioner's route was not reduced by as much as 50 percent.

17. In May 2005, Key Account Manager, Mike Lewis, visited the Petitioner's K-Mart store to conduct a "Look at the Leader" audit. The Petitioner had been trained and was responsible for

preparing the K-Mart for the audit. When Mr. Lewis arrived at the store, the store did not meet the Respondent's standards. Additionally, required product was missing from the displays. Mr. Lewis called Howard Corbett to inform him of the problems. Mr. Corbett called the Petitioner to ask about the missing product. The Petitioner assured him that the product was in the store and on display. The missing product was not displayed, however, and was later found in the back room of the K-Mart store.

18. On May 18, 2005, the Respondent received another e-mail from Charles Pippen, District Manager for Sunoco, complaining of the Petitioner's poor service at the Mt. Dora Sunoco store. He claimed that the Petitioner did not reply to phone calls and rarely ordered enough product.

19. On May 19, 2005, the Territory Sales Manager, John York, followed up on that complaint by visiting the Mt. Dora Sunoco store and meeting with the Manager, Alice Marsh. Mr. York was substituting for Mr. Underwood who was out on medical leave. During the meeting, Ms. Marsh complained that the Petitioner did not order the quantity of product she requested, failed to provide adequate signage, and refused to place product where she requested. While at the Mt. Dora Sunoco store, Mr. York observed the problems about which Ms. Marsh had complained.

20. After meeting Ms. Marsh, Mr. York spoke with the Petitioner to inform him of Ms. Marsh's complaints. During his conversation with Mr. York, the Petitioner admitted to failing to service the account by not placing the product by the gas pumps as requested, not ordering the amount of product requested, and not hanging certain signs. Later in this conversation with Mr. York, the Petitioner informed Mr. York that he believed that the Sunoco Manager's reason for complaining about his service was that he had refused her sexual advances. The Petitioner did not tell Mr. York what the alleged advances consisted of or when they might have occurred. Mr. York, however, in fact was never the Petitioner's supervisor.

21. The Petitioner was responsible for two CVS stores in Mt. Dora. On Friday, May 20, 2005, the Petitioner made an unusual request of his temporary Manager, Dan Manor, for a Saturday delivery to his CVS stores. The Respondent does not normally schedule Saturday deliveries for such "small format" stores like CVS.

22. When Mr. Manor approved the Saturday delivery, he specifically instructed the Petitioner that must meet the bulk delivery driver at the stores to "merchandise" the product, because bulk delivery drivers do not merchandise the product delivered and Mr. Manor did not have a merchandiser assigned to

the Mt. Dora stores. The Petitioner agreed to meet the bulk delivery driver at the CVS stores on Saturday.

23. The Petitioner did not advise his supervisor that he had made arrangements with the CVS store manager or a merchandiser regarding alternate arrangements for the Saturday delivery. The supervisor would have expected the Petitioner to do so.

24. On Saturday, May 21, 2005, the Petitioner failed to meet the bulk driver to assist in merchandising the orders at the two CVS stores as instructed. The customer refused to take delivery of the product until a merchandiser was present to merchandise the product.

25. Mr. Manor was unable to reach the Petitioner by telephone because the Petitioner was at Sea World with his family. Mr. Manor had to send a merchandiser from Longwood in order to merchandise the product that the Petitioner had ordered for the CVS stores.

26. On May 23, 2005, the Petitioner failed to attend a weekly mandatory 5:00 a.m. meeting. He did not call his supervisor advising of his unavailability. The Petitioner did call Mr. Manor at about 6:15 a.m. and told him that he had overslept. When Mr. Manor questioned the Petitioner about why he did not meet the bulk driver on Saturday, he said that "he did not get a chance to make it out on Saturday."

27. On May 23, 2005, Mr. Corbett decided to terminate the Petitioner based on his very poor performance. That decision to terminate him was approved by the Respondent's Human Resources Department.

28. On May 26, 2005, the Respondent terminated the Petitioner for failing to service the CVS stores at a critical time, for the services issues at the Sunoco and the K-Mart, and for failing to attend the Monday morning meeting.

29. At the time of his termination the Petitioner was on a final warning and had been advised that he could be terminated. The Petitioner never alleged during his termination meeting that he was being sexually harassed.

30. Howard Corbett provided the Petitioner with documents to file an internal appeal on the day he was terminated. The Petitioner, however, did not appeal his termination as permitted by the Respondent's policy.

31. The Petitioner claims he was the victim of sexual harassment by being subjected to (1) homosexual related comments made in 2001, and (2) alleged sexual overtures by the Sunoco Manager, Alice Marsh, in 2003.

32. According to Ms. Marsh, she was never interested in the Petitioner sexually. She did not socialize with the Petitioner, and did not want a relationship with him. She did not touch him and did not state that she wanted the Petitioner

fired. She also testified that she never stated that she wanted a sexual relationship with the Petitioner.

33. The Petitioner's allegations regarding sexual harassment by Ms. Marsh related the following behaviors:

a. She touched his back and arm;
b. She was too close to him when he was around;
c. She was nice to him until informed that he was married;
d. She suggested sexual interest by her body language and eyes; and
e. She wore provocative clothing.

34. David Lopez supervised the Petitioner for approximately two years in the 2001 to 2003 time period. During this time period the Petitioner never complained to Mr. Lopez that he had been sexually harassed. Mr. Lopez did not witness the Petitioner being harassed while working with the Respondent either.

35. Wanzell Underwood supervised the Petitioner for approximately two years in the 2003 to 2005 time period. During this time, the Petitioner never complained to Mr. Underwood that he had been sexually harassed. Mr. Underwood did not witness the Petitioner being harassed while he worked for the Respondent.

36. The Petitioner never made a compliant regarding the alleged sexual harassment by the Sunoco Manager, Alice Marsh, to the Human Resources Department, in accordance with the

Respondent's policy. He did not explain the nature of any sexual harassment, even when he finally claimed that he was being harassed.

37. The Respondent would have terminated the Petitioner for his poor performance regardless of whether he engaged in the purported protected activity by complaining of sexual harassment.

38. The Petitioner alleges he was terminated for reasons other than complaining about sexual harassment, including his alleged knowledge of theft in Lake County. In any event, on July 15, 2005, the Petitioner filed the Charge of Discrimination with the Commission and the resulting dispute and formal proceeding ensued.

CONCLUSIONS OF LAW

39. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2005).

40. Section 760.10(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 with respect to compensation, terms, conditions, or privileges of employment, because of such individuals race, color, religion, sex, national origin, age, handicap, or marital

status. Chapter 760, Florida Statutes, known as the Florida Civil Rights Act (FCRA) was patterned after Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000E, et. seq. Florida court's have held that federal cases interpreting Title VII are persuasive and may be applied when analyzing claims under the FCRA. See Harper v. Blockbuster Entertainment Corp., 139 F.3d 1385 (11th Cir. 1998); Florida State University v. Sondel, 685 So. 2d 923, 925 (Fla. 1st DCA 1996).

The Hostile Work Environment-Sexual Harassment Claim

41. In accordance with the procedural requirements of Chapter 760, Florida Statutes, an aggrieved person must file a charge with the Commission within 365 days of the alleged conduct. See § 760.11(1), Fla. Stat. In a hostile work environment claim, the entire period of the hostile environment may be considered by a court for the purposes of determining liability provided that an act contributing to the hostile work environment occurred during the filing period. AMTRAK v. Morgan, 536 U.S. 101 (2002). However, the acts about which an employee complains must be part of the same actionable hostile work environment claim. Id.

42. The Petitioner filed his charge of discrimination with the Commission on July 15, 2005. Accordingly, all incidents alleged prior to July 15, 2004, are time-barred under the FCRA. The Petitioner's hostile work environment claim consists of

homosexual related comments purportedly made in 2001 and sexual overtures allegedly made by the Respondent's customer, Alice Marsh, in 2003. The Petitioner does not allege that any acts contributing to his alleged hostile work environment claim occurred on or after July 15, 2004. Therefore, the Petitioner's entire hostile work environment claim is outside the limitation period for the FCRA and the claim is therefore time-barred.

The Prima Facie Case

43. Even if it were not determined that the allegations were time-barred, the Petitioner did not establish a prima facie case of hostile work environment sexual harassment. To establish such a prima facie case under Title VII or the FCRA, an employee must show the following: (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; (5) a basis for holding the employer liable. Mendoza v. Borden, Inc., 195 F.3d 1238, 1245 (11th Cir. 1999).

44. The severity or pervasiveness of the conduct "is the element that tests the mettle of most sexual harassment claims."

Gupta v. Florida Board of Regents, 212 F.3d 571 (11th Cir. 2000). A party must show that he or she subjectively perceived the harassment to be severe or pervasive, and that, objectively, a reasonable person in the employee's position would consider the harassment to be severe or pervasive. Johnson v. Booker T. Washington Broadcasting Service, Inc., 234 F.3d 501, 509 (11th Cir. 2000). In considering the objective prong of this test, the courts consider four factors: "(1) the frequency of the conduct; (2) the severity of the conduct; (3) whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and (4) whether the conduct unreasonably interferes with the employee's job performance." Mendoza v. Borden, Inc., supra, at page 1246.

45. Title VII is not a "general civility code" for the workplace. Oncale v. Sundowner Offshore Services, 523 U.S. 75, 80, (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 778, (1998). Offhand comments and isolated incidents, unless extremely serious, will not amount to discriminatory changes in the terms and conditions of employment. 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. Faragher v. City of Boca Raton, supra, 775, 788.

The Severe or Pervasive Standard:

46. The incidents described by Petitioner as "harassment" are simply insufficient to support a hostile work environment claim because they are not sufficiently severe or pervasive to alter the terms and conditions of his employment. First, the Petitioner claims that he was sexually harassed because his co-workers allegedly questioned his sexuality in 2001. His entire claim consists of one person telling the Petitioner that "everyone" thought he was gay, one person asking him if he was gay, and one person saying, "we all know your gay." The Petitioner did not complain about these alleged comments until approximately three years later on October 12, 2004, during a post-disciplinary meeting. These alleged comments, even if made, are insufficient to establish a hostile work environment but rather may be considered offensive, but not severe or persuasive. See Baskerville v. Culligan Int'l Co., 50 F.3d 428, 431 (7th Cir. 1995) (holding remarks innocuous or merely mildly offensive when delivered in a public setting as opposed to the suggestive isolation of a hotel room).

47. The Petitioner's hostile work environment claim also consists of alleged harassment by Alice Marsh, the Sunoco manager in 2003. The Petitioner claims Ms. Marsh touched his

back and arm, stood to close to him when he was around, was nice to him until he informed her that he was married, and suggested sexual interest by her body language and eyes and the wearing of provocative clothing. Ms. Marsh and other witnesses adamantly denied those allegations. The Petitioner did not complain about this alleged harassment until May 19, 2005, during another disciplinary interview, approximately two years after the alleged harassment purported occurred. The Petitioner admits that when he asked Ms. Marsh to stop touching him in 2003, she stopped.

48. Even if it is assumed that the allegations are true, the totality of the circumstances related to these untimely complaints of sexual harassment do not rise to a sufficient level of severity or pervasiveness to constitute a sexually hostile work environment. See Faragher, supra at 2284; Baskerville v. Culligan Int'l Co., supra at 430 (finding that a Petitioner who was hired as a secretary and assigned to work for a newly hired manager was not subjected to hostile work environment when the manager made numerous sexually suggestive comments); Koelsch v. Beltone Elec. Co., 46 F.3d 705, 708 (7th Cir. 1995) (finding that a supervisor who told the Petitioner he found her attractive, asked her out on dates, stroked her leg on one occasion and grabbed her buttocks on a separate occasion did not commit acts that were severe or pervasive enough to survive

summary judgment); Weiss v. Coca-Cola Bottling Co. of Chicago, 990 F.2d 333, 337 (7th Cir. 1993) (holding a supervisor who jokingly called a Petitioner a "dumb blond," placed his hand on her shoulder several times, placed "I love you" signs in her work area, attempted to kiss her, and asked her out on dates did not create a hostile work environment); Jones v. Clinton, 990 F. Supp. 657, 675 (E.D. Ark. 1998).

49. In light of these rather interesting decisions, it is obvious that the actions about which the Petitioner complains do not rise to the legal standard for a hostile work environment of sexual harassment in that they are not sufficiently pervasive and severe as to constitute a hostile environment or to change the terms and conditions of the Petitioner's employment. Even if they occurred, which is not likely, given the totality of the persuasive, credible evidence, the actions were not sufficiently severe or pervasive to alter the terms and conditions of employment.

The Respondent's Knowledge

50. In order to establish a prima facie case of a hostile work environment, the Petitioner must demonstrate a basis for holding the employer liable. When, as in this case, the alleged harassment is committed by co-workers or third parties if it occurred at all, a petitioner must show that the employer either knew of the harassment, had actual notice, or should have known

by having constructive notice, and then failed to take immediate and appropriate corrective action. Watson v. Blue Circle, Inc., 324 F.3d 1252, 1259 (11th Cir. 2003). Actual notice is established by proof that management knew of the harassment. Id. When an employer has a clear and published policy that outlines the procedures an employee must follow to report suspected harassment and the complaining employee follows those procedures, actual notice is established. Id. Constructive notice, on the other hand, is established when the harassment was so severe or pervasive that management reasonably should have known of it. Id.

51. The Respondent has a sexual harassment policy that strongly prohibits all forms of harassment and sets out complaint procedures for employees to follow in the event they feel they have experienced such harassment. The policy encourages employees to report any complaint to their Human Resource manager or director. Retaliatory action is forbidden against an individual who in good faith reports a perceived violation of the policy. In that policy the Respondent assures that all complaints will be investigated promptly and fully.

52. The Petitioner was given a copy of this policy through the employee handbook when he came to employment with the Respondent. The Respondent also posts the policy on bulletin boards throughout the company. The Petitioner, however, failed

to follow the reporting procedures outlined in the sexual harassment policy and failed to participate in the Respondent's investigation. Additionally, the Petitioner complained to management approximately three years after the alleged conduct took place. The failure to complain in a timely manner was such that the Respondent did not have actual notice of the conduct and hence did not know of the alleged sexual harassment. Furthermore, the alleged sexual harassment was not so severe or pervasive, so that the Respondent should have reasonably known about it by way of constructive notice.

53. The Respondent first became aware of the Petitioner's allegations that co-workers questioned his sexuality on October 12, 2004. When the Respondent attempted to investigate the complaint, the Petitioner did not cooperate. He refused to disclose the specifics of his complaint, including the names of co-workers who made the alleged comments. The Respondent informed the Petitioner that if he did not cooperate, his complaint could not be investigated properly. The Petitioner's failure to cooperate means that he cannot prove that the Respondent failed to take immediate and appropriate corrective action. Indeed, the Respondent exercised reasonable care to prevent and correct such conduct by implementing and administering a strict sexual harassment policy and attempting to investigate the complaints even though the complaints did not

rise to the level of sexual harassment so as to warrant an investigation. See Keenan v. Allan, 889 F. Supp. 1320, 1376 (E.D. Wash. 1995) (holding that regardless of the truth of the allegation an employer has no duty to respond to them if they do not rise to the level of sexual harassment).

54. The Respondent first learned of the Petitioner's allegation of the 2003 sexual harassment by Ms. Marsh on May 19, 2005, during a performance discussion. The Petitioner made the complaint to Mr. York, who is not his supervisor, while they were discussing various customer complaints regarding the Petitioner's poor performance. The Petitioner told Mr. York that the reason the manager complained about his service is because he had refused her sexual advances. This comment was the first time the Petitioner had made such an allegation, even though he had been working with the same manager for years and had been written up previously based on her complaints about poor service. The Petitioner never made a complaint regarding these allegations to the Human Resources Manager or to the Human Resources Director, as the Respondent's policy required. Moreover, the Petitioner never then explained what these alleged sexual advances consisted of, or when they allegedly occurred. Therefore, the Petitioner failed to follow the policy for reporting complaints of sexual harassment. The Petitioner's stale complaint regarding alleged sexual harassment that

occurred three years earlier did not provide the Respondent with actual or constructive notice of the hostile work environment claim, so that the Respondent cannot be liable as a matter of law, even if the allegations were not time-barred and insufficiently severe or pervasive.

The Retaliation Claim

55. In order to establish a prima facie case of retaliation, the Petitioner must show that "(1) he engaged in a statutorily protected expression; (2) that he suffered an adverse employment action; and (3) there is some causal relationship between the two events." Johnson v. Booker T. Washington Broadcasting Service, Inc., supra. Complaining to a supervisor about sexual harassment is a statutorily protected expression.

56. The Petitioner cannot satisfy the third element of his prima facie case of retaliation. To do so, the Petitioner must, at a minimum, establish that the Respondent was aware of his protected activity and took an adverse employment action because of that protected activity. Raney v. Vinson Guard Service, 120 F.3d at 1197, (citing Goldsmith v. City of Atmore, 996 F.2d 1155, 1163 (11th Cir. 1993). The Petitioner must therefore demonstrate that the Respondent's knowledge of his allegations and his termination from the company are not wholly unrelated, and that there is some causal connection. Simmons v. Camden

County Board of Education, 757 F.2d 1187, 1189 (11th Cir. (date), cert. denied, 474 U.S. 981 (1985). Additionally, since corporate defendants act only through authorized agents, the Petitioner must show that the corporate agent who took the adverse action was aware of the Petitioner's protected expression and acted within the scope of his or her agency relationship when taking the employment action in question. See Goldsmith v. City of Atmore, supra.

57. Based on the Petitioner's own testimony, the only evidence to support his retaliation claim is that his route was "cut" and that he was terminated. Other than his own self-serving and conclusory allegations or opinions, the Petitioner has not produced any evidence of a causal connection between his complaints of sexual harassment on October 12, 2004, and May 19, 2005, and his subsequent "re-route" and termination. The Petitioner's route was reduced as part of Pepsi's annual re-routing program, which applied equally to all Pre-sell CRs. The Petitioner had requested that his route be reduced. Further, the Petitioner was terminated because of service deficiencies. Therefore, the Petitioner can not show the necessary causal connection to satisfy his prima facie case of retaliation.

Respondent's Articulated Reason for the Termination

58. Even if the Petitioner established a prima facie case of retaliation, which he did not, the Respondent can still rebut

the presumption of retaliation by introducing evidence of legitimate reasons for the adverse employment action. Sullivan v. National R.R. Passenger Corp., 170 F.3d 1056, 1058-59 (11th Cir. 1999). If legitimate reasons are offered by an employer the presumption of retaliation disappears. Raney v. Vinson Guard Service, supra. The employee must then show that the proffered reason for taking the adverse action was actually a pretext for prohibited retaliatory conduct. Olmstead v. Taco Bell Corp., 141 F.3d 1457, 1460 (11th Cir. 1998). The Petitioner is then required to come forward with some concrete evidence to establish that the proffered reason is not the true reason, but rather a pretext for what amounted to discriminatory conduct, in this instance retaliation. See Davis v. AT&T, 846 F. Supp. 967, 969 (M.D. Fla. 1993). The Petitioner must at least establish "sufficient evidence to find that the employer's asserted justification is false . . .". Reeves v. Sanderson Plumbing Products, Inc., 120 S. Ct. 2097, 2108 (2000). The ultimate burden of persuading the trier of fact that the employer intentionally retaliated against the Petitioner (or that the sexual harassment itself occurred) remains at all times with the claimant. St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

59. In this case, the Respondent has articulated a legitimate and non-retaliatory business reason for its

termination of the Petitioner's employment. That is, the Petitioner was written up and ultimately terminated for continued sub-standard performance. The Petitioner had a long documented record of service deficiencies to customers. In fact, the Petitioner received written discipline five different times over about a two-year period of his employment for similar complaints from customers. The Respondent followed its progressive disciplinary policy in administering discipline to the Petitioner. Indeed, most of the Petitioner's discipline was imposed before any of his stale complaints of alleged sexual harassment were lodged. Moreover, the Petitioner's allegation of sexual harassment only arose in response to severe discipline and possible termination, which calls his motivation and veracity in making the complaints into serious question. Accordingly, the Respondent's decision to terminate him was the result of a legitimate, non-discriminatory business reason, wholly unrelated to the complaints about sexual harassment. The same conclusion holds true for the allegedly retaliatory re-routing decision.

60. A plaintiff's "subjective conclusion" that the defendant's action was discriminatory, without supporting evidence, is not sufficient to establish pretext . . . ". Carter v. City of Miami, 870 F.2d 578, 585 (11th Cir. 1985). A mere suspicion that the defendant discriminated against the

plaintiff, or the Respondent against the Petitioner, is insufficient. Walker v. NationsBank of Florida, N.A., 53 F.3d 1548, 1558 (11th Cir. 1995). A reason cannot be proved to be "a pretext for discrimination unless it is shown both that the reason was false, and that discrimination was the real reason." St. Mary's Honor Center v. Hicks, supra. These same principles apply to retaliation cases as well. The Petitioner clearly did not prove that the Respondent's reasons for its decisions were false or that the Respondent was motivated by illegal retaliation.

61. In summary, the Petitioner has not established a prima facie case with regard to his claim of sexual harassment and his claim of resulting retaliation. The Respondent, on the other hand, has adduced an adequate body of evidence of legitimate, non-discriminatory business reasons for the employment action it took, i.e. termination. The Petitioner did not then go forward with any persuasive evidence other than his own unsupported, self-serving opinion, which is not accepted, which would show that the stated legitimate, non-discriminatory reason offered by the employer Respondent was a pretext for what really amounted to discrimination.

RECOMMENDATION

Having considered the foregoing findings of fact, conclusions of law, the evidence of record, the candor and

demeanor of the witnesses, and the pleadings and arguments of the parties, it is, therefore,

RECOMMENDED: That a final order be entered by the Florida Commission on Human Relations dismissing the Petition for Relief in its entirety.

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

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

Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of September, 2006.

COPIES FURNISHED:

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

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

James E. Gonzales
26437 Troon Avenue
Sorrento, Florida 32757

Nicole Alexandra Sbert, Esquire
Jackson Lewis LLP
390 North Orange Avenue
Orlando, Florida 32802

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.