STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RONALD J. CLARDY,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 06-2815
	)	
DEPARTMENT OF CORRECTIONS,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

A formal hearing was conducted in the case on December 7, 2006, in Tallahassee, Florida, before Diane Cleavinger, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Ronald J. Clardy, pro se
115 Sioux Trail
Crawfordville, Florida 32327

For Respondent: Joshua E. Laws, Esquire
Florida Department of Corrections
2601 Blair Stone Road
Tallahassee, Florida 32399-2500

STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner has been the subject of an unlawful employment practice based on gender or handicap.

PRELIMINARY STATEMENT

On March 28, 2002, Petitioner, Ronald J. Clardy, filed a Charge of Discrimination with the Florida Commission on Human Relations (FCHR). On May 24, 2002, Petitioner filed an Amended Charge of Discrimination. The Amended Charge of Discrimination alleged that Respondent had subjected Petitioner to unlawful employment actions based on gender, sexual harassment and handicap (obesity) against the Respondent.

On January 30, 2004, the FCHR filed a Notice of Determination: No Cause. Petitioner received a copy of the Determination and was aware that he had 35 days from the date of the Notice to file a Petition For Relief. Thereafter, on March 8, 2004, 38 days after the issuance of the Notice of Determination, Petitioner filed a Petition for Relief alleging the same facts as contained in his earlier Charge of Discrimination.

On March 9, 2004, FCHR properly issued a Final Order of Dismissal finding it had no jurisdiction based on the untimeliness of the Petition For Relief. At some point, Petitioner provided a postal receipt dated within the 35-day time period for filing the Petition For Relief. On March 19, 2004, FCHR issued a Recission of Notice of Dismissal and reopened Petitioner's case. The matter was referred to the Division of Administrative Hearings for a formal hearing.

Respondent filed a Motion to Dismiss based on the untimeliness of the Petition For Relief. An evidentiary hearing was held on the Respondent's Motion to Dismiss. On May 6, 2004, an order was entered finding the Petition For Relief untimely and dismissing same. The matter was transferred to FCHR.

On August 4, 2004, FCHR issued an Order Remanding the Petition For Relief From an Unlawful Employment Practice and jurisdiction was returned to the Division of Administrative Hearings. The matter was set for hearing and Respondent filed a Renewed Motion to Dismiss.

Additionally, on November 5, 2004, Respondent filed a Petition for a Writ of Prohibition in the First District Court of Appeal. The Hearing was continued.

On November, 22, 2004, Respondent's Renewed Motion to Dismiss was granted based on the earlier order of dismissal.

On December 7, 2004, The Respondent's appeal was voluntarily dismissed, in part. Eventually, the entire appeal was dismissed on February 18, 2005.

Simultaneous with the dismissal, Respondent filed a Petition to Review Nonfinal Agency Action with the First District Court of Appeal. The case was placed in abeyance with a status report required at the conclusion of the appeal.

On September 28, 2005, the District Court remanded the case to FCHR. No opinion was attached to the copy of the remand filed with the Division of Administrative Hearings.

On May 25, 2006, the case was closed due to inactivity and the failure to advise the undersigned of the status of the case or whether further proceedings were necessary.

On August 3, 2006, an Order Remanding the Petition was filed with the Division of Administrative Hearings. The case was re-opened on August 4, 2006. The case was then set for hearing.

At the hearing, Petitioner testified in his own behalf and offered four exhibits into evidence. Respondent offered the testimony of one witness. Additionally, two joint exhibits were introduced into evidence.

After the hearing, Petitioner and Respondent filed Proposed Recommended Orders on January 12, 2007.

FINDINGS OF FACT

1. Petitioner is a licensed Registered Nurse. He was hired by Respondent on April 4, 1997, in its medical facility at Gulf Coast Correctional facility. In 2000, Petitioner's supervisor was Pamela Spears, R.N.

2. At some point, Nurse Spears became friends with Chris Miles, a Licensed Practical Nurse, who worked on Petitioner's

shift. Nurse Spears would sometimes talk with this L.P.N. in her office. Somehow, Petitioner felt his authority as the shift nurse was undermined by this relationship. It was not clear from the record what the basis of Petitioner's belief was, but his belief seemed to be related to the fact that Petitioner had to wait to speak with Nurse Spears.

3. On May 5, 2000, Petitioner complained to Nurse Miles that he felt she was being treated with favoritism by Nurse Spears. Apparently, the discussion caused an uproar at the shift change and there was some agreement to swap shifts among the nurses to allow things to cool off.

4. Around May 10, 2000, Nurse Odom filed sexual harassment charges against Petitioner for alleged comments and jokes of a sexual nature ("spanking the monkey", "choking the chicken", cross-dressing inuendos, use of handcuffs during sex, going to naked bars). In addition Nurse Miles filed a hostile work environment complaint against Petitioner because he allegedly threatened to spread rumors about her. Nurse Miles' complaint did not involve sexual harassment. Nurse Nowak filed a sexual harassment complaint against Petitioner, but withdrew her complaint, indicating that she did not have a complaint with Petitioner and that she felt pressure to file her complaint. Nurse Spears did not file any complaint against Petitioner.

Petitioner testified these nurses had been pressured into filing their complaints. However, he had no independent personal knowledge of such pressure and other than hearsay, offered no evidence of such pressure. Respondent, also did not offer any evidence demonstrating that such behavior was sexually harassing, as opposed to simply vengeful and petty behavior by a supervisor.

5. On August 15, 2001, Dr. Gilo in front of co-workers and staff, called Petitioner, who is obese, a "fat lazy bum." Petitioner filed a hostile work environment complaint against Dr. Gilo and an incident report was filed. The evidence demonstrated that Dr. Gilo was known for demeaning or belittling everyone and having a harsh manner. The comment was not related to any of the earlier complaints of the nurses, but to Dr. Gilo's irritation towards Petitioner for calling him at home. There was no evidence that demonstrated this comment constituted discrimination or harassment based on Petitioner's obesity. Likewise, there was no evidence that Petitioner's obesity was a handicap or viewed as a handicap by his employer.

6. Respondent pursuant to its policy on sexual harassment complaints investigated the complaints. Several witness/co-worker statements were taken during the investigation that indicated Mr. Clardy, along with other employees, had made some statements or jokes of a sexual nature. The investigation took

a considerable period of time. Again the record was not clear as to what caused the length of the investigation or whether the length of the investigation was unusual. However, on February 8, 2002, as a result of the investigation, Petitioner received a written reprimand for unspecified sexual jokes or comments. Petitioner filed a grievance regarding the reprimand. The grievance was denied in both Step 1 and Step 2 of the grievance process. There was no evidence that demonstrated either the undertaking of this investigation or the investigation itself constituted sexual harassment.

8. However, on June 10, 2002, Petitioner filed a sexual harassment complaint against Respondent, the complaining nurses and Dr. Gilo for gender and disability discrimination. As with the nurses' complaints, the Respondent, pursuant to its policy, investigated Petitioner's complaints.

CONCLUSIONS OF LAW

9. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. §§ 120.57 and 120.60, Fla. Stat. (2007), and § 760.11, Fla. Stat. (2006).

10. Chapter 760, Florida Statutes, prohibits discrimination in the workplace based on a person's race, gender, religion, national origin or handicap.

11. In this case, Petitioner does not allege harassment based on sexual demands or that the terms or conditions of his employment were conditioned upon compliance with his employer's sexual demands. Burlington Indus, Inc. v. Ellerth, 524 U.S. 742, 753-54 (1998). Instead, Petitioner alleges that he was subjected to a hostile work environment based on other conduct.

12. In order to establish a case of discrimination based on a hostile work environment, Petitioner must prove a hostile work environment that amounts to an alteration in the terms and conditions of employment. Mendoza v. Borden, Inc., 195 F.3d 1238, 1245 (11th Cir. 1999).

13. Under Mendoza Petitioner must establish five elements to demonstrate a hostile work environment claim:

> (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. Id. at 1245. (citing Henson v. City of Dundee, 682 F.2d 897, 903-05 (11th Cir. 1982).

14. Neither Title VII nor Chapter 760 is a federal or state "civility code" that guarantees every employee a sanitized, professional work environment. The Mendoza Court

stated, “We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations.” Oncale v. Sundowner Offihore Services, Inc., 523 U.S. 75, 81 (1998). Simple teasing, offhand comments, and isolated incidents, unless extremely serious, will not amount to discriminatory charges in the terms or conditions of employment. Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998). Nor do such comments or workplace harassment affects a term, condition, or privilege of employment within the meaning of Title VII. Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986). “The critical issue, Title VII’s text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.” Id. (quoting Harris v. Forklift Systems, Inc., 510 U.S. 17, 25 (1993) (Ginsburg J., concurring). In order to establish that the harm alleged was based on his sex, Petitioner ”must show that but for the fact of his sex, he would have not been the object of harassment.” Mendoza, 195 F.3d at 1248 n.5 (quoting Henson, 682 F.2d 904).

15. As indicated above, Petitioner has made no accusations and offered no proof that he was subjected to any sexual advances by any of the Respondent’s employees. Petitioner only claims that he was investigated for sexual harassment and that

this investigation equals gender discrimination. In this regard, Petitioner has not established a prima facie case of discrimination based on sex.

16. Moreover, the evidence did not demonstrate that Petitioner was treated any differently than any other Department employee. Serious allegations were made against Petitioner, namely, that he was subjecting his co-workers to unwanted sexual jokes and comments. Pursuant to Respondent's policy, the complaints were taken seriously and investigated. Respondent conducted interviews of the complaining employees and Petitioner. In response, Respondent issued a written reprimand to Petitioner. Respondent followed the same process when Petitioner filed similar allegations against his co-workers. There was no evidence to suggest that any of the methods employed by Respondent in its investigation amounted to discrimination.

17. Finally, in hostile work environment claims, the Petitioner must establish that an employer’s alleged harassing actions towards an employee are sufficiently severe or pervasive to alter the conditions of the Petitioner’s working environment. Mendoza, 195 F.3d at 1245. (citing Meritor, 477 U.S. at 67). As the United States Supreme Court held, “When the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions

of the employment and create an abusive working environment, Title VII is violated." Harris, 510 U.S. at 21.

18. Establishing that harassing conduct was sufficiently severe or pervasive to alter an employee's terms or conditions of employment contains an objective and a subjective component. Mendoza, 195 F.3d at 1246 (citing Harris, 510 U.S. at 21-22). Petitioner must "subjectively perceive" the harassment as sufficiently severe or pervasive as to alter the terms and conditions of employment, and this subjective perception must be objectively reasonable. Mendoza, 195 F.3d at 1246 (citing Harris, 510 U.S. at 21-22). The working environment must be one that a reasonable person would find hostile or abusive, and that the victim subjectively perceived to be abusive. Mendoza, 195 F.3d at 1246 (citing Harris, 510 U.S. at 21). Further, "the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances." Mendoza, 195 F.3d at 1246 (citing Oncale, 523 U.S. at 81) (quoting Harris, 510 U.S. at 23).

19. The United States Supreme Court has identified four factors to determine whether harassment has objectively altered an employee's terms or conditions of employment: (1) The frequency of the conduct; (2) The severity of the conduct; (3) Whether the conduct is physically threatening or humiliating, or

a mere offensive utterance; and (4) Whether the conduct unreasonably interferes with the employee's job performance. Id. (citing Harris, 510 U.S. at 23).

20. Petitioner complains that he was investigated and given a written reprimand. This happened one time. This conduct was not severe; in fact, Petitioner never claims it was severe. The Department was following established polices and procedures that protects both complainants and the subject of the investigation. There was no physically threatening or humiliating conduct by the nurses. The investigation was conducted by the inspectors in the normal course of business, and not in front of Petitioner or his co-workers. Likewise, the comment by Dr. Gilo occurred once and was unrelated to the nurses complaints. The comment did not unreasonably interfere with the employee's job performance. See Weiss v. Coca-Cola Bottling Co. of Chicago, 990 F.2d 333,337 (7th Cir. 1993) (holding Petitioner's claims supervisor repeatedly asked about her personal life, told her how beautiful she was, asked her on dates, called her a dumb blonde, put his hand on her shoulder at least six times, placed "I love you" signs in her work area, and tried to kiss her once at a bar and twice at work were not sufficient for actionable sexual harassment); Adusumilli v. City of Chicago, 164 F.3d 353, 357 (7th Cir. 1998) (holding actions insufficient to support hostile environment claim where co-

employees teased Petitioner, made sexual jokes aimed at her, asked her what “putting one rubber band on top and another on the bottom means,” commented about her low neck tops, repeated staring at her breasts with attempts to make eye contact, and four incidents of touching her arm, fingers or buttocks); Quinn v. Green Tree Credit Corp., 159 F.3d 759,768 (2nd Cir. 1998)(holding that statement that Petitioner had the “sleekest ass” in the office plus single incident of “deliberately” touching plaintiffs “breast with some paper that he was holding in his hand” were insufficient to alter the terms or conditions of the plaintiffs employment); Baskerville v. Culligan Int’l Co., 50 F.3d 428,430 (7th Cir. 1995) (holding insufficiently severe or pervasive to support a hostile-environment claim nine instances of offensive behavior over seven months including pretreated references to plaintiff as a “tilly” and a “pretty girl” and one instance of simulated masturbation); Sprague v. Thorn Americas, Inc., 129 F.3d 1355, 1365-66 (10th Cir. 1997) (holding five “sexually-oriented, offensive” statements over sixteen months insufficient to show hostile environment, even though one of the harasser’s statements occurred while he put his arm around plaintiff, looked down her dress and said, "Well, you got to get it when you can"); Galloway v. General Motors Service Parts Operations, 78 F.3d 1164, 1167-68 (7th Cir. 1996) (holding offensive comments including repeatedly calling the

plantiff a "sick bitch" insufficient under Harris became not necessarily gender-related); Hopkins v. Baltimore Gas & Electric, Co., 77 F.3d 745, 753-54 (4th Cir. 1996) (holding evidence that the harasser "bumped into [the plaintiff], positioned a magnifying glass over the [the plaintiff's] crotch, flipped his tie over to see its label, gave him a congratulatory kiss in the receiving line at [a] wedding, and stared at him in the bathroom" insufficient to establish violation of Title VII); Kidwai v. McDonald's Corp., No. 93-1720, 1994 WL 136971 (45th Cir. 1994) (holding insufficient under Harris seven incidents, including one instance in which harasser asked plaintiff whether "she was in bed with someone"); see also DeAgnelis v. El Paso Mun. Police Ass'n., 51 F.3d 591, 593 (5th Cir. 1995) ("A hostile environment claim embodies a series of criteria that express extremely insensitive conduct against women, conduct so egregious as to alter the conditions of employment and destroy their equal opportunity in the workplace."); Indest v. Freeman Decorating, Inc., 164 F.3d 258, 263 (5th Cir. 1999) ("All of the sexual hostile environment cases decided by the Supreme Court have involved patterns of allegations of extensive long lasting, unredressed, and uninhibited sexual threats or conduct that permeated the plaintiffs' work environment.")

21. Plaintiff's claim of discrimination based on handicap also fails for the same reasons as his claim of sex

discrimination. First, he failed to produce competent substantial evidence that his obesity constituted a disability of handicap under chapter 760 or Title VII. The ADA and subsequent federal regulations define disability as either (1) physical or mental impairment that substantially limits one or more major life activities of such individual; (2) a record of a physical or mental impairment that substantially limits one or more major life activity of such individual; or (3) being regarded as having a physical or mental impairment that substantially limits one or more major life activities of such individual. E.g. Carr v. Publix Super Markets, Inc., 170 Fed. Appx. 56, 58-59 (11th Cir. 2006); Hilburn v. Murata Electronics North America, Inc., 181 F.3d 1220, 1229 (11th Cir. 1999) ("Regardless of whether [Plaintiff] is proceeding under a classification or a misclassification theory, the record-of-impairment standard is satisfied only if she actually suffered a physical impairment that substantially limited one or more of her major life activities. The impairment indicated in the record must be an impairment that would substantially limit one or more of the individual's major life activities.") 29 C.F.R. § 1630, App. § 1630.2(k) (1997); Colwell v. Suffolk County Police Dep't., 158 F.3d 635, 645 (2nd Cir. 1998); Davidson v. Midelfort Clinic, Ltd., 133 F.3d 499, 510 n.7 (7th Cir. 1998); Sherrod v. American Airlines, Inc., 132 F.3d 1112, 1120-21 (5th Cir. 1998);

West v. Town of Jupiter Island, 146 F. Supp. 2d 1293, 1300-01 (S.D. Fla. 2000); 42 D.S.C. Section 12102(2) (2005); see 34 C.F.R. Section 104.3(j)(1) (2005); Bragdon v. Abbott, 524 U.S. 624, 631 (1998); Quick v. Tripp, Scott, Conklin & Smith, P.A., 43 F. Supp. 2d 1357, 1366 (S.D. Fla. 1999). As indicated there was no evidence that Petitioner's obesity limits any major life activity.

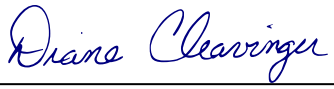
22. Finally, Dr. Gilo's one-time comment simply does not rise to the level of discrimination. The comment may be rude or offensive, but it does not demonstrate discrimination based on Petitioner's obesity. See Higdon v. Jackson, 393 F.3d 1211, 1219 (11th Cir. 2004) ("[Plaintiff] alleges that [co-worker] was rude, but this court has repeatedly stated that the civil rights laws were not intended to be a 'civility code.'"); Davis v. Town of Lake Park, Fla., 245 F.3d 1232, 1239 (11th Cir. 2001) ("'Title VII is neither a general civility code nor a statute making actionable the 'ordinary tribulations of the workplace.'") (citations omitted); Anderson v. Coors Brewing Co., 181 F.3d 1171, 1178 (10th Cir. 1999) (citations omitted). Given Petitioner's lack of evidence, the Petition For Relief should be dismissed.

RECOMMENDATION

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

RECOMMENDED that Respondent enter a final order affirming its decision that Petitioner is not eligible for services.

DONE AND ENTERED this 7th day of March, 2007, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.