STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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| NORA E. BARTOLONE, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| vs. | ) | Case No. 07-0496 |
| | ) | |
| BEST WESTERN HOTELS, | ) | |
| | ) | |
| Respondent. | ) | |
| | ) | |

## RECOMMENDED ORDER

A duly-noticed final hearing was held in this case by Administrative Law Judge T. Kent Wetherell, II, on March 26-27, 2007, in Bartow, Florida.

## APPEARANCES

For Petitioner: Nora E. Bartolone, pro se
119 Alachua Drive Southeast
Winter Haven, Florida 33884

For Respondent: Donald T. Ryce, Esquire
908 Coquina Lane
Vero Beach, Florida 32963

## STATEMENT OF THE ISSUE

The issue is whether Respondent committed an unlawful employment practice against Petitioner.

## PRELIMINARY STATEMENT

On January 8, 2007, the Florida Commission on Human Relations (Commission) issued a "no cause" determination on the employment discrimination complaint filed by Petitioner against

Respondent. On January 22, 2007, Petitioner timely filed a Petition for Relief (Petition) with the Commission.

On January 24, 2007, the Commission referred the Petition to the Division of Administrative Hearings (DOAH) for the assignment of an Administrative Law Judge to conduct a hearing on the Petition pursuant to Section 120.57(1), Florida Statutes. The referral was received by DOAH on January 29, 2007.

The final hearing was scheduled for and held on March 26-27, 2007. At the hearing, Petitioner testified in her own behalf and also presented the testimony of Stephen Zulinski. Respondent presented the testimony of Lin Whitaker, Karen Griffin, Kathleen Knorr, Gary Carter, and Jeffrey Vandiver. Exhibits R1 through R26 were received into evidence.

The three-volume Transcript of the final hearing was filed on May 21, 2007. The parties were given 10 days from that date to file proposed recommended orders (PROs). Petitioner filed letters summarizing her position on May 14 and 23, 2007. Respondent filed a PRO on May 30, 2007. The parties' post-hearing filings have been given due consideration.

All statutory references in this Recommended Order are to the 2006 version of the Florida Statutes.

## FINDINGS OF FACT

1. Respondent operates the Best Western Admiral's Inn and Conference Center in Winter Haven.

2. Petitioner worked as a waitress in the hotel's first floor restaurant from March 8, 2005, through March 18, 2006.

3. Petitioner testified that she was sexually harassed "for months" by Marcus Owens, a cook who worked with her in the restaurant. According to Petitioner, Mr. Owens made vulgar and sexually-explicit comments to her on a number of occasions while they were working together.

4. Petitioner could not recall precisely when the harassment started, but she estimated that it started approximately two weeks after Mr. Owens started working at the restaurant.

5. Mr. Owens started working in the restaurant on July 28, 2005, which means that the harassment would have started in mid-August 2005.

6. Petitioner did not complain about the harassment until November 9, 2005, when she reported it to her supervisor, Cory Meeks.

7. This was the first notice that Respondent had about the alleged harassment. Petitioner's testimony that she complained to the hotel's general manager, Jeffrey Vandiver, about the harassment several weeks prior to her complaint to Mr. Meeks was not persuasive.

8. Petitioner and Mr. Meeks met with the hotel's human resources manager, Lin Whitaker, on the same day that the

complaint was made, November 9, 2005. Ms. Whitaker told Petitioner that she needed to put her complaint in writing for the hotel to take formal action. Petitioner refused to do so because she was scared of retribution by Mr. Owens, even though Mr. Meeks and Ms. Whittaker assured her that she would be protected from Mr. Owens.

9. Petitioner asked Mr. Meeks and Ms. Whitaker to address the situation with Mr. Owens without using her name, which they did. Mr. Owens denied sexually harassing anyone when confronted by Mr. Meeks and Ms. Whitaker.

10. On December 2, 2005, Petitioner again complained to Mr. Meeks about Mr. Owens. She told Mr. Meeks that the harassment had not stopped and that it had gotten worse through even more vulgar comments.

11. Petitioner again did not want a formal investigation into the allegations, but Ms. Whitaker told her that an investigation was required by company policy since this was the second complaint.

12. Mr. Owens was immediately suspended without pay pending the completion of the investigation.

13. The investigation was conducted by Mr. Vandiver, Mr. Meeks, and Ms. Whitaker on December 7, 2005. They first met with Petitioner to get her side of the story. Then, they met separately with Mr. Owens to get his side of the story.

Finally, they interviewed all of the employees who worked with Petitioner and Mr. Owens.

14. This was the first time that Petitioner went into detail about what Mr. Owens had said and done. She stated that, among other things, Mr. Owens asked her whether she had “ever had a black man” and whether her boyfriend “is able to get it up or does he require Viagra.” She also stated that there were no witnesses to the harassment because Mr. Owens was "discreet" about making the comments to her when no one else was around.

15. Mr. Owens again denied sexually harassing anyone. He acknowledged asking Petitioner whether she had ever dated a black man, but he stated that the question was in response to Petitioner asking him whether he had ever dated a white woman. (Mr. Owens is black, and Petitioner is white.)

16. The other employees who were interviewed as part of the investigation stated that they had not witnessed any sexual harassment or overheard any sexually explicit conversations in the restaurant.

17. Mr. Vandiver, Mr. Meeks, and Ms. Owens concluded based upon their investigation that “there is not enough evidence of sexual harassment to terminate Marcus Owens.” They decided to let Mr. Owens continue working at the hotel, provided that he agreed to be moved to the hotel’s second floor restaurant and that he agreed to attend a sexual harassment training program.

18. On December 8, 2005, Mr. Meeks and Ms. Whitaker conveyed the results of their investigation and their proposed solution to Petitioner. She was "fine" with the decision to move Mr. Owens to the second floor restaurant where she would not have contact with him.

19. On that same day, Mr. Meeks and Ms. Whitaker conveyed their proposed solution to Mr. Owens. He too was "fine" with the decision, and he agreed that he would not go near Petitioner.

20. Mr. Owens came back to work the following day, on December 9, 2005.

21. On December 14, 2005, Mr. Owens was involved in an altercation with Stephen Zulinski, a dishwasher at the hotel and a close friend of Petitioner's. The altercation occurred at the hotel during working hours.

22. Mr. Zulinski testified that the incident started when Mr. Owens made vulgar and sexually explicit comments and gestures about Mr. Zulinski's relationship with Petitioner. Mr. Zulinski was offended and angered by the comments, and he cursed and yelled at Mr. Owens. Mr. Zulinski denied pushing Mr. Owens (as reflected on Mr. Zulinski's Notice of Termination), but he admitted to putting his finger on Mr. Owens' shoulder during the altercation.

23. Mr. Owens and Mr. Zulinski were immediately fired as a result of the altercation.

24. Petitioner continued to work as a waitress at the hotel's first floor restaurant after Mr. Owens was fired.

25. Petitioner received awards from Respondent for having the most positive customer comment cards for the months of October and November 2005, even though according to her testimony she was being sexually harassed by Mr. Owens during those months. She testified that her problems with Mr. Owens affected her job performance only to a "very small degree."

26. Petitioner had no major problems with her job performance prior to December 2005, notwithstanding the sexual harassment by Mr. Owens that had been occurring "for months" according to Petitioner's testimony.

27. Petitioner was "written up" on a number of occasions between December 2005 and February 2006 because of problems with her job performance. The problems included Petitioner being rude to the on-duty manager in front of hotel guests; taking too many breaks and not having the restaurant ready for service when her shift started; failing to check the messages left for room service orders; and generating a guest complaint to the hotel's corporate headquarters.

28. Petitioner was fired after an incident on March 11, 2006, when she left the restaurant unattended on several

occasions and the manager-on-duty received complaints from several hotel guests about the quality of service that they received from Petitioner that night. Petitioner ended up being sent home from work that night because, according to her supervisor, “she was in a crying state,” unable to work, and running off the restaurant’s business.

29. Petitioner’s employment with Respondent was formally terminated on March 18, 2006. The stated reason for the termination was “unsatisfactory work performance” and “too many customer complaints.”

30. None of the supervisors who wrote up Petitioner were aware of her sexual harassment complaints against Mr. Owens.

31. Petitioner claimed that the allegations of customer complaints and poor job performance detailed in the write-ups were “ludicrous,” “insane,” “almost a complete fabrication,” and “a joke.” The evidence does not support Petitioner’s claims.

32. Petitioner admitted to having “severe” bi-polar disorder, and she acknowledged at the hearing and to her supervisor that she was having trouble with her medications over the period that she was having problems with her job performance. For example, the comment written by Petitioner on the January 27, 2006, write-up stated that she was “at a loss” to explain her job performance and that she “hope[d] to have

[her] mental stability restored to what everyone else but [her] seems normalcy."

33. Petitioner worked 25 to 30 hours per week while employed by Respondent. She was paid $5.15 per hour, plus tips, and she testified that her biweekly take-home pay was between $200 and $250.

34. Petitioner applied for unemployment compensation after she was fired. Respondent did not dispute the claim, and Petitioner was awarded unemployment compensation of $106 per week, which she received for a period of six months ending in September 2006.

35. Petitioner has not worked since she was fired by Respondent in March 2006. She has not even attempted to find another job since that time.

36. Petitioner does not believe that she is capable of working because of her bi-polar disorder. She applied for Social Security disability benefits based upon that condition, but her application was denied. Petitioner's appeal of the denial is pending.

37. Petitioner testified that one of the reasons that she has not looked for another job is her concern that doing so would undermine her efforts to obtain Social Security disability benefits.

38. Respondent has a general “non-harassment” policy, which prohibits “harassment of one employee by another employee . . . for any reason.”

39. Respondent also has a specific sexual harassment policy, which states that “sexual harassment of any kind will not be tolerated.” The policy defines sexual harassment to include verbal sexual conduct that “has the purpose or effect of interfering with the individual’s work performance or creating an intimidating, hostile, or offensive working environment.”

40. The general non-harassment policy and the specific sexual harassment policy require the employee to immediately report the harassment to his or her supervisor or a member of the management staff.

41. The Standards of Conduct and the Work Rules adopted by Respondent authorize immediate dismissal of an employee who is disrespectful or discourteous to guests of the hotel.

42. The Standards of Conduct also authorize discipline ranging from a written reprimand to dismissal for an employee’s “[f]ailure to perform work or job assignments satisfactorily and efficiently.”

## CONCLUSIONS OF LAW

### A. Jurisdiction

43. DOAH has jurisdiction over the parties to and subject matter of this proceeding pursuant to Sections 120.569, 120.57(1), and 760.11(7), Florida Statutes.

### B. Sexual Harassment Claim

44. Section 760.10(1)(a), Florida Statutes, which is part of the Florida Civil Rights Act (FCRA), provides that it is an unlawful employment practice to "discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . ."

45. The FCRA was patterned after Title VII of the federal Civil Rights Act, so case law construing Title VII is persuasive when construing to the FCRA. See, e.g., Castleberry v. Edward M. Chadbourne, Inc., 810 So. 2d 1028, 1030 n.3 (Fla. 1st DCA 2002).

46. Although Title VII and the FCRA do not mention sexual harassment, it is well-settled that both acts prohibit sexual harassment. See, e.g., Mendoza v. Borden, Inc., 195 F.3d 1238, 1244-45 (11th Cir. 1999) (citing Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993)); Maldonado v. Publix Supermarkets, 939 So. 2d 290 (Fla. 4th DCA 2006).

47. Petitioner alleges a hostile environment sexual harassment claim, which is a claim that is based on "bothersome attentions or sexual remarks that are sufficiently severe or pervasive to create a hostile work environment." Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 751 (1998) (distinguishing hostile environment claims from quid pro quo sexual harassment claims).

48. In order to establish a hostile environment sexual harassment claim, Petitioner must prove:

> (1) the employee is a member of a protected group; (2) the employee was subjected to unwelcome sexual harassment, such as sexual advances, requests for sexual favors, and other conduct of a sexual nature; (3) the harassment was based on the sex of the employee; (4) the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and (5) that the employer knew or should have known about the harassment and took insufficient remedial action.

Maldonado, 939 So. 2d at 293-94. Accord Hadley v. McDonald's Corp., Order No. 04-147 (FCHR Dec. 7, 2004).

49. The requirement that Petitioner prove that the harassment is sufficiently severe or pervasive ensures that the anti-discrimination laws do not become "general civility codes." Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998).

50. The factors to be considered in determining whether the harassment is sufficiently severe or pervasive include:

> 1) the frequency of the conduct; 2) severity of the conduct; 3) whether the conduct was physically threatening or humiliating; and 4) whether the conduct unreasonably interfered with the employee's job performance.

Maldonado, 939 So. 2d at 294. Accord Hadley, supra.

51. There is an affirmative defense to hostile environment sexual harassment claims known as the "Faragher-Ellerth defense" based upon the United States Supreme Court decisions from which the defense developed. See Baldwin v. Blue Cross/Blue Shield of Alabama, 480 F.3d 1287, 1292 (11th Cir. 2007).

52. An employer can avoid liability for sexual harassment based upon the Faragher-Ellerth defense if:

> (1) it exercised reasonable care to prevent and correct promptly any sexual harassing behavior; and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities.

Id. at 1303 (internal quotations omitted). See also Maldanado, 939 So. 2d at 297-98 (employer could not be found liable for sexual harassment where its "corrective action was immediate, appropriate, and reasonably likely to stop the harassment").

53. Respondent has the burden to prove the elements of the Faragher-Ellerth defense. See Baldwin, 480 F.3d at 1303.

54. Applying these standards to the facts of this case, it is determined that Petitioner failed to prove her sexual harassment claim. The evidence fails to establishes that the sexual harassment described by Petitioner was sufficiently

severe or pervasive so as to create a hostile work environment because, among other things, Petitioner testified that the harassment only affected her job performance to "a very small degree." Moreover, the evidence fails to establish that Respondent knew or should have known about the harassment prior to November 9, 2005, and, therefore, its failure to do anything about the harassment prior to that date was not unreasonable or inappropriate.

55. Even if it was determined that Petitioner had established a prima facie case of sexual harassment, Respondent met its burden to prove the Faragher-Ellerth defense. The evidence establishes that the corrective action taken by Respondent -- both after Petitioner's initial complaint and after her second complaint -- was immediate, appropriate, and reasonably likely to stop Mr. Owens from harassing Petitioner. Indeed, on both occasions, Petitioner agreed to the corrective action taken by Respondent.

56. In sum, there is no basis to impose liability on Respondent for the sexual harassment allegedly suffered by Petitioner.

C. Retaliation Claim

57. Section 760.10(7), Florida Statutes, provides that it is an unlawful employment practice to "discriminate against any

person because that person has opposed any practice which is an unlawful employment practice under [the FCRA] . . . ."

58. To establish a prima facie case for retaliation under Section 760.10(7), Florida Statutes, Petitioner must demonstrate that (1) she engaged in a statutorily protected activity; (2) she suffered an adverse employment action; and (3) there is a causal relation between the two events. See Hinton v. Supervision International, Inc., 942 So. 2d 986, 990 (Fla. 5th DCA 2006); Guess v. City of Miramar, 889 So. 2d 840, 846 (Fla. 4th DCA 2004). With respect to the third element, Petitioner must only prove that the protective activity and the negative employment action "are not completely unrelated." See Rice-Lamar v. City of Ft. Lauderdale, 853 So. 2d 1125, 1132-33 (Fla. 4th DCA 2003).

59. If Petitioner establishes a prima facie case, the burden shifts to Respondent to proffer a legitimate, non-retaliatory reason for the adverse employment action. See Rice-Lamar, 853 So. 2d at 1132-33. If Petitioner fails to establish a prima facie case, the burden never shifts to Respondent.

60. The ultimate burden of persuasion remains with Petitioner throughout the case to demonstrate a discriminatory motive for the adverse employment action. Id. See also Reeves v. Sanderson Plumbing Products, 530 U.S. 133 (2000); St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

61. To do so, Petitioner must prove by a preponderance of the evidence that the reason proffered by Respondent is “false” or “unworthy of credence” and that the real reason that she was fired was retaliation for her complaints about the sexual harassment by Mr. Owens. See St. Mary’s Honor Center, 509 U.S. at 507-08, 515-17. Proof that "the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the [Petitioner’s] proffered reason [of retaliation] . . . is correct." Id. at 524. It is “not enough . . . to disbelieve the employer; the factfinder must believe the [Petitioner’s] explanation” of retaliation. Id. at 519 (emphasis in original).

62. Petitioner proved the first two elements of her prima facie case. The evidence establishes that Petitioner engaged in a statutorily-protected activity by complaining to the hotel’s management staff about Mr. Owens conduct and that she suffered an adverse employment action when she was fired by Respondent.

63. Petitioner failed to prove the third element of her prima facie case. The evidence fails to establish any relationship whatsoever between Petitioner’s complaints about Mr. Owens conduct in November and December 2005 and her firing in March 2006.

64. Even if it was determined that Petitioner had established a prima facie case, Respondent met its burden to

proffer a legitimate, non-retaliatory reason for the adverse employment action taken against Petitioner. Specifically, Respondent presented credible evidence showing that Petitioner was fired for poor job performance, not her complaints against Mr. Owens.

65. Petitioner failed to prove that the reasons presented by Respondent for her firing were "false," "unworthy of credence," or otherwise pretextual.

66. In sum, Petitioner failed to prove her retaliation claim under Section 760.10(7), Florida Statutes.

D. Relief

67. Petitioner is not entitled to any relief in this proceeding because she failed to prove her claims.

68. Even if Petitioner had proved her claims, she would not have been entitled to an award of monetary damages because she made no effort to look for other employment after she was fired, but rather affirmatively chose not to look for another job in an effort to bolster her claim for Social Security disability benefits. See, e.g., Ford Motor Company v. E.E.O.C., 458 U.S. 219, 231-32 (1982) (holding that the plaintiff in an employment discrimination case is required to mitigate her damages by attempting to obtain other suitable employment, and the failure to do so results in the forfeiture of the right to back pay); Weaver v. Casa Gallardo, Inc., 922 F.2d 1515, 1527

(11th Cir. 1991); Miller v. Marsh, 766 F.2d 490, 492 (11th Cir. 1985); Champion International Corp. v. Wideman, 733 So. 2d 559, 561 (Fla. 1st DCA 1999).

## RECOMMENDATION

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

RECOMMENDED that the Commission issue a final order dismissing the Petition for Relief with prejudice.

DONE AND ENTERED this 8th day of June, 2007, in Tallahassee, Leon County, Florida.

S

T. KENT WETHERELL, II
Administrative Law Judge
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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.