STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SUSAN KIRBY,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 07-3807
	)	
APPLIANCE DIRECT, INC.,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

A duly-noticed final hearing was held in this case by Administrative Law Judge T. Kent Wetherell, II, on November 5, 2007, in Viera, Florida.

APPEARANCES

For Petitioner: Mauricio Arcadier, Esquire
Allen & Arcadier
700 N. Wickham Road, Suite 107
Melbourne, Florida 32935

For Respondent: Christopher J. Coleman, Esquire
Richard W. Riehl, Esquire
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STATEMENT OF THE ISSUE

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

PRELIMINARY STATEMENT

On July 24, 2007, the Florida Commission on Human Relations (Commission) issued a "no cause" determination on the employment discrimination complaint filed by Petitioner against Respondent. On August 21, 2007, Petitioner timely filed a Petition for Relief with the Commission.

On August 22, 2007, the Commission referred the petition to the Division 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.[1] The referral was received by DOAH on August 24, 2007.

The final hearing was scheduled for and held on November 5, 2007. At the hearing, Petitioner testified in her own behalf and presented the testimony Neina Blizzard, Cynthia Stebbins, and Sam Pak; and Respondent presented the testimony of Kit Royal, Guy Ruscillo, Carissa Howard, and Jeffrey Rock. Petitioner's Exhibits 1 through 3 were received into evidence, as was Respondent's Exhibit 1.

No Transcript of the final hearing was filed. The parties were given 10 days from the date of the hearing to file proposed recommended orders (PROs). Petitioner filed a PRO on November 14, 2007. Respondent filed a PRO on November 16, 2007. The PROs have been given due consideration.

FINDINGS OF FACT

1. Petitioner is a white female.

2. Petitioner worked as a salesperson at Respondent's Melbourne store from April 2006 to September 2006.

3. Petitioner's primary job duty was selling appliances to retail customers. She also performed ancillary duties, such as tagging merchandise, cleaning and organizing the showroom floor, scheduling deliveries, and making follow-up calls to customers.

4. Petitioner was not paid a salary. Her income was solely commission-based. She earned a total of $11,826.14 while working for Respondent, which equates to an average weekly gross pay of $537.55.

5. Petitioner had several managers during the term of her employment. She did not have a problem with any of her managers, except for Jeffrey Rock.

6. Mr. Rock is a black male, and by all accounts, he was a difficult manager to work for. He was "strict"; he often yelled at the salespersons to "get in the box"[2] and "answer the phones"; and, unlike several of the prior managers at the Melbourne store, Mr. Rock held the salespersons accountable for doing their job.

7. Petitioner testified that Mr. Rock "constantly" made sexual comments in the store, including comments about the size of his penis and his sexual prowess; comments about sex acts

that he wanted to perform on a female employee in Respondent's accounting office, Ms. Miho; "stallion" noises directed at Ms. Miho; and a question to Petitioner about the type of underwear that she was wearing.

8. Petitioner's testimony regarding the sexual comments and noises made by Mr. Rock was corroborated by Neina Blizzard, who worked with Petitioner as a salesperson for Respondent and who has also filed a sexual harassment claim against Respondent.

9. Mr. Rock denied making any sexually inappropriate comments or noises in the store. His testimony was corroborated by Guy Ruscillo and Carissa Howard, who worked as salespersons with Petitioner and Ms. Blizzard and who are still employed by Respondent.

10. Petitioner and Ms. Blizzard testified that Mr. Rock gave favorable treatment to Ms. Howard and two other female salespersons with whom he had sexual relationships and/or who found his sexual comments funny. Mr. Rock denied giving favorable treatment to any salesperson, except for one time when he gave a "house ticket"[3] to Ms. Howard because she took herself off the sales floor for six hours one day to help him get organized during his first week as manager at the Melbourne store.

11. Ms. Howard is white. The record does not reflect the race of the other two female salespersons -- Rebecca and Shanna

-- who Petitioner and Ms. Blizzard testified received favorable treatment by Mr. Rock, and the anecdotal evidence of the favorable treatment that they allegedly received was not persuasive.

12. Petitioner did not have any complaints regarding her schedule. Indeed, she testified that Mr. Rock changed her schedule at one point during her employment to give her more favorable hours.

13. Petitioner's testimony about other salespersons having sexual relationships with Mr. Rock and/or receiving favorable treatment from Mr. Rock was based solely upon speculation and rumor. Indeed, Rebecca, one of the salespersons with whom Mr. Rock allegedly had a sexual relationship, was "let go" by Mr. Rock because of the problems with her job performance observed by Petitioner and Ms. Blizzard.

14. Petitioner's last day of work was Saturday, September 30, 2006. On that day, Petitioner came into the store with Ms. Blizzard at approximately 8:00 a.m. because, according to Petitioner, another manager had changed her schedule for that day from the closing shift to the opening shift.

15. Mr. Rock confronted Petitioner when she arrived, asking her why she came in at 8:00 a.m. since he had put her on the schedule for the closing shift. An argument ensued and Petitioner went into the warehouse in the back of the store to

compose herself. When Petitioner returned to the showroom several minutes later, Mr. Rock was engaged in an argument with Ms. Blizzard.

16. During the argument, Ms. Blizzard demanded a transfer to another store, which Mr. Rock agreed to give her. Then, as a "parting shot," Ms. Blizzard told Mr. Rock that he was a "racist" who was "prejudiced against white women."

17. Ms. Blizzard testified that Mr. Rock told her that she was fired immediately after she called him a racist. Petitioner testified that after Mr. Rock fired Ms. Blizzard, he asked her whether she wanted to be fired too. Petitioner testified that even though she did not respond, Mr. Rock told her that "you are fired too." Then, according to Ms. Blizzard and Petitioner, Mr. Rock escorted them both out of the store.

18. Mr. Rock denies telling Ms. Blizzard or Petitioner that they were fired. He testified that they both walked out of the store on their own accord after the argument.

19. Mr. Rock's version of the events was corroborated by Mr. Ruscillo, who witnessed the argument. Mr. Ruscillo testified that he heard a lot of yelling, but that he did not hear Mr. Rock tell Ms. Blizzard or Petitioner at any point that they were fired.

20. Petitioner and Ms. Blizzard met with an attorney the Monday after the incident. The following day, Petitioner gave

Ms. Blizzard a letter to deliver on her behalf to Respondent's human resources (HR) Department.

21. The letter, which Petitioner testified that she wrote on the day that she was fired by Mr. Rock, stated that Petitioner "was sexually harassed and discriminated against based on being a white female by my manager, Jeff Rock"; that Petitioner "previously reported numerous incidents of this discrimination and sexual harassment to upper management"; and that she was fired "as a result of this discrimination and the refusal to put up with Mr. Rock's sexual advancement."

22. This letter was the first notice that Respondent had of Petitioner's claims of sexual harassment or discrimination by Mr. Rock.

23. Petitioner considers herself to be a very good salesperson, but Mr. Rock described her as an "average" salesperson. Mr. Rock's characterization of Petitioner's job performance is corroborated by Petitioner's acknowledgement that her sales figures were lower than those of at least Mr. Ruscillo, Ms. Blizzard, and Ms. Howard.

24. Petitioner complained to another manager, Al Sierra, about Mr. Rock's management style at some point in mid-September 2006. She did not complain to Mr. Sierra or anyone else in Respondent's upper management about the sexual comments allegedly made by Mr. Rock. Indeed, as noted above, the first

time that Petitioner complained about the sexual comments allegedly made by Mr. Rock was in a letter that she provided to Respondent's HR Department several days after she was fired and after she met with a lawyer.

25. Petitioner testified that she did not complain about the sexual harassment by Mr. Rock because he threatened to fire any salesperson who complained to upper management about the way that he ran the store and because she did not know who to complain to because she never received an employee handbook.

26. There is no evidence that Mr. Rock fired any salesperson for complaining about how he ran the store, and he denied making any such threats. He did, however, acknowledge that he told the salespersons that they were all replaceable. Mr. Rock's testimony was corroborated by Mr. Ruscillo and Ms. Howard, who were at the sales meetings where Petitioner and Ms. Blizzard claim that the threats were made.

27. The training that Petitioner received when she started with Respondent was supposed to include a discussion of Respondent's policies and procedures, including its policy against sexual harassment.

28. The trainer, Kit Royal, testified that he remembered Petitioner attending the week-long training program and that the program did include a discussion of the sexual harassment policy and other policies and procedures. Petitioner, however,

testified that no policies and procedures were discussed during the training program.

29. Petitioner was supposed to have received and signed for an employee handbook during the training program. No signed acknowledgement form could be located for Petitioner, which is consistent with her testimony that she never received the handbook.

30. The fact that Petitioner did not receive the employee handbook does not mean that the training program did not include discussion of Respondent's sexual harassment policies. Indeed, Petitioner's testimony that the training program did not include any discussion regarding salary and benefit policies (as Mr. Royal testified that it did) and that she was never told what she would be paid by Respondent despite having given up another job to take the job with Respondent calls into question her testimony that the sexual harassment policy was not discussed at the training program.

31. Petitioner was aware that Respondent had an HR Department because she met with a woman in the HR Department named Helen on several occasions regarding an issue that she had with her health insurance. She did not complain to Helen about the alleged sexual harassment by Mr. Rock, but she did tell Helen at some point that Mr. Rock "was being an ass" and "riding

her," which she testified were references to Mr. Rock's management style not the alleged sexual harassment.

32. Petitioner collected employment compensation of $272 per week after she left employment with Respondent.

33. Petitioner testified that she looked for jobs in furniture sales and car sales while she was collecting unemployment, but that she was unable to find another job for approximately three months because of the slow economy at the time. She provided no documentation of those job-search efforts at the final hearing.

34. Petitioner is currently employed by Art's Shuttle. She has held that job for approximately nine months. Petitioner drives a van that takes cruise ship passengers to and from the airport.

35. The record does not reflect how many hours per week Petitioner works at Art's Shuttle, but she testified that she works seven days a week and earns approximately $500 per week. No written documentation of Petitioner's current income was provided at the final hearing.

36. Respondent has a "zero tolerance" policy against sexual harassment according to its president, Sam Pak. He credibly testified that had he been aware of the allegations of sexual harassment by Mr. Rock that he would have conducted an

investigation and, if warranted, done something to fix the problem.

37. The policy, which is contained in the employee handbook, states that Respondent "will not, under any circumstances, condone or tolerate conduct that may constitute sexual harassment on the part of its management, supervisors, or non-management personnel." The policy defines sexual harassment to include "[c]reating an intimidating, hostile, or offensive working environment or atmosphere by . . . [v]erbal actions, including . . . using vulgar, kidding, or demeaning language . . . ." Mr. Pak agreed that the allegations against Mr. Rock, if true, would violate Respondent's sexual harassment policy.

38. The employee handbook includes a "grievance procedure" for reporting problems, including claims of sexual harassment. The first step is to bring the problem to the attention of the store manager, but the handbook states that the employee is "encouraged and invited to discuss the problem in confidence directly with Human Resources" if the problem involves the manager. Additionally, the handbook states in bold, underlined type that "[a]nyone who feels that he or she . . . is the victim of sexual or other harassment, must immediately report . . . . all incidents of harassment in writing to your manager or the store manager, or if either person is the subject of the complaint, to the president."

39. Mr. Pak had an office at the Melbourne store. He testified that he had an "open door policy" whereby employees could bring complaints directly to him. The only complaint that Mr. Pak ever received about Mr. Rock was from another salesperson, Rod Sherman, who complained that Mr. Rock was a "tough manager." Mr. Pak did nothing in response to the complaint and simply told Mr. Sherman that different managers have different management styles.

CONCLUSIONS OF LAW

40. 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.

41. The Florida Civil Rights Act (FCRA), Part I of Chapter 760, Florida Statutes, was patterned after Title VII of the federal Civil Rights Act, and case law construing Title VII is persuasive when construing the FCRA. See Castleberry v. Edward M. Chadbourne, Inc., 810 So. 2d 1028, 1030 n.3 (Fla. 1st DCA 2002).

42. Petitioner has the ultimate burden to prove her unlawful employment practice claims against Respondent. See St. Mary's Honor Center v. Hicks, 509 U.S. 502, 511 (1993) (reaffirming the proposition that "the Title VII plaintiff at all times bears the 'ultimate burden of persuasion.'").

Racial Discrimination Claim

43. Section 760.10(1)(a), Florida Statutes, provides that it is an unlawful employment practice to "discriminate against any individual with respect to compensation, terms, condition, or privileges of employment, because of such individual's race . . . ."

44. To establish a prima facie case of racial discrimination, Petitioner must prove that (1) she belongs to a group protected by the FRCA; (2) she was qualified for the job from which she was discharged; (3) she was discharged; and (4) her former position was filled by a person outside of her protected class or that she was disciplined differently than a similarly-situated employee outside of her protected class. See Jones v. Lumberjack Meats, Inc., 680 F.2d 98, 101 (11th Cir. 1982); Scholz v. RDV Sports, Inc., 710 So. 2d 618, 623 (Fla. 5th DCA 1998); Cesarin v. Dillards, Inc., Order No. 03-037 (FCHR Apr. 29, 2003) (adopting the Recommended Order in DOAH Case No. 01-4805, but clarifying what must be established as the first element of the prima facie case).

45. Petitioner failed to establish a prima facie case of racial discrimination.[4] She presented no credible evidence that she was treated differently than any similarly situated non-white employee. Indeed, Ms. Howard, one of the employees who

Petitioner alleged was treated more favorably by Mr. Rock was also white.

46. Because Petitioner failed to present a prima facie case of racial discrimination, the burden never shifted to Respondent to proffer a non-discriminatory reason for Petitioner's termination under the framework established in McDonnell Douglass Corporation v. Green, 411 U.S. 792 (1973). See St. Mary's Honor Center, 509 U.S. at 510 n.3.

Sexual Harassment Claim

47. Section 760.10(1)(a), Florida Statutes, 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 . . . ."

48. Although Title VII and the FCRA do not mention sexual harassment, it is well-settled that both acts prohibit sexual harassment. See 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).

49. 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).

50. 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).

51. 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). This requirement is regarded "as crucial, and as sufficient to ensure that courts and juries do not mistake ordinary socializing in the workplace -- such as male-on-male horseplay or intersexual flirtation -- for discriminatory 'conditions of employment.'" Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 81 (1998).

52. 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.

53. An employer can avoid liability for sexual harassment 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." Baldwin v. Blue Cross/Blue Shield of Alabama, 480 F.3d 1287, 1303 (11th Cir. 2007). 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").

54. Applying these standards to the facts of this case, it is determined that Petitioner failed to meet her burden to prove her sexual harassment claim.

55. First, the evidence is not persuasive that Mr. Rock made the sexually inappropriate comments attributed to him by Petitioner and Ms. Blizzard and, even if he did so, the fact that none of the other salespersons who testified at the final hearing ever heard him make such comments demonstrates that the

comments were not sufficiently severe or pervasive so as to create a hostile work environment.

56. Second, the evidence fails to establish that Respondent knew or should have known about the sexual harassment. Therefore, its failure to do anything about the harassment was not unreasonable or inappropriate.

57. Third, Petitioner unreasonably failed to take advantage of corrective opportunities by not reporting the alleged sexual harassment by Mr. Rock to the HR Department, another manager, or Mr. Pak. Petitioner's testimony that she did not report the sexual harassment because she was afraid of retaliation by Mr. Rock is unpersuasive because that fear did not stop her from complaining to Mr. Sierra and Helen in the HR Department about Mr. Rock's management style and the fact that he "was being an ass."

Retaliation Claim

58. 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] . . . ."

59. To establish a prima facie case for retaliation, 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).

60. 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. See Bartolone v. Best Western Hotels, Case No. 07-0496, 2007 Fla. Div. Adm. Hear LEXIS 338, at ¶ 59 (DOAH June 8, 2007), adopted, Order No. 07-045 (FCHR Aug. 24, 2007).

61. Petitioner failed to establish a prima facie case of retaliation.

62. First, there is no evidence that Petitioner engaged in any statutorily protected conduct (as distinguished from complaints regarding Mr. Rock's management style) prior to September 30, 2007, when, according to Petitioner, she was fired. Indeed, Petitioner acknowledged that she did not complain about the alleged sexual harassment until after she was fired.

63. Second, even if Petitioner's complaints to Mr. Sierra or Helen in the HR Department regarding Mr. Rock's management style could somehow be considered statutorily protected conduct, there is no evidence that Petitioner's firing was in any way related to those complaints because Mr. Rock credibly testified that he was unaware of the complaints.

Summary

64. Petitioner is not entitled to any relief in this proceeding because, as discussed above, she failed to prove her claims.

65. It is not necessary to reach the issue of damages because Petitioner failed to prove her claims. See Bartolone, supra, FHCR Order No. 07-045, at 3.

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 26th day of November, 2007, in Tallahassee, Leon County, Florida.

T. KENT WETHERELL, II
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of November, 2007.

ENDNOTES

[1]/ All statutory references in this Recommended Order are to the 2007 version of the Florida Statutes.

[2]/ The “box” is an area at the front of the store where salespersons were stationed to meet customers as they entered the store.

[3]/ A “house ticket” is a sale that is supposed to be credited to the store, rather than to a salesperson.

[4]/ Petitioner conceded this issue in her PRO, which states (at page 1) that Petitioner “was unable to present evidence concerning Race discrimination, and as such, Race discrimination will not be addressed in this proposed finding submission.”

COPIES FURNISHED:

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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.