STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LORIE J. PLEGUE,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 07-4588
	)	
SAVE A LOT/JERRY'S ENTERPRISES,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the final hearing in this proceeding for the Division of Administrative Hearings (DOAH) on December 18, 2007, in Sarasota, Florida.

APPEARANCES

For Petitioner: Lorie Plegue, pro se
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For Respondent: William B. deMeza, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Respondent discriminated against Petitioner on the basis of her race or gender, engaged in sexual harassment, or retaliated against Petitioner in violation of the Florida Civil Rights Act, Chapter 760, Florida Statutes (2006).[1]

PRELIMINARY STATEMENT

On March 11, 2007, Petitioner filed a Charge of Discrimination with the Florida Commission on Human Relations (the Commission). Petitioner also filed a complaint with the Equal Employment Opportunity Commission (EEOC).

The EEOC investigated the complaint, and the investigation did not establish a statutory violation. Pursuant to an agreement between the EEOC and the Commission, the Commission did not conduct an independent investigation. On September 20, 2007, the Commission issued a Right to Sue letter. On October 3, 2007, Petitioner filed a Petition for Relief, and the Commission referred the matter to DOAH to conduct an administrative hearing.

At the hearing, Petitioner appeared and testified in her own behalf, presented the testimony of four other witnesses, and submitted 17 exhibits for admission into evidence. Respondent presented the testimony of four witnesses and submitted eight exhibits for admission into evidence.

The identity of the witnesses and exhibits, and any associated rulings, are set forth in the Transcript of the hearing filed with DOAH on January 22, 2008. Petitioner and Respondent timely filed Proposed Recommended Orders on January 7 and January 24, 2008, respectively.

FINDINGS OF FACT

1. Petitioner is an "aggrieved person" within the meaning of Subsections 760.02(6) and (10). Petitioner is a Caucasian female and filed a complaint of race and gender discrimination, sexual harassment, and retaliation with the Commission.

2. Respondent is an "employer" within the meaning of Subsection 760.02(7). Respondent operates retail grocery stores in several states, including Florida.

3. The evidence, in its entirety, does not establish a prima facie showing of discrimination or retaliation. Nor does the evidence prove that Petitioner was sexually harassed. Finally, there is no evidence that Respondent engaged in an unlawful employment practice within the meaning of Section 760.10.

4. Respondent first employed Petitioner sometime in July 2003 as an "at-will" employee. No written employment contract has ever existed between the parties.

5. Respondent trained and promoted Petitioner to assistant manager of a grocery store. In April 2005, however, Mr. William Reners, Respondent's regional director of operations (RDO), offered Petitioner an opportunity to become the administrative assistant/secretary in Respondent's Regional Office without a decrease in compensation.[2] Petitioner accepted the offer.

6. Petitioner continued her employment as an administrative assistant, and she voluntary resigned on February 5, 2007. Petitioner earned positive performance evaluations and regular raises during her employment.

7. Petitioner's claim of disparate treatment relates to Mr. Cornelius Hicks, an African-American male, who was compensated at a higher level than the compensation Petitioner received. However, Respondent employed Mr. Hicks as a store manager, and Mr. Hicks never voluntarily transferred to a position of administrative assistant.

8. Respondent gave Mr. Hicks an extraordinary raise sometime in late 2006 or early 2007. Mr. Hicks' job performance was "tremendous." Respondent intended the raise as recognition of the duties Mr. Hicks performed as a "floater" manager. The job required Mr. Hicks to manage a number of different stores and to commute long distances, on short notice, and to perform the duties of a floater manager for extended periods.

9. Petitioner first learned of the alleged disparate treatment when Petitioner entered Mr. Reners' office without permission while he was on vacation sometime in January 2007. Petitioner learned of the raise when she discovered relevant paperwork in Mr. Reners' office.

10. Disparate treatment is not evidenced by Respondent's refusal to give Petitioner a merit pay increase after Petitioner earned a Master's of Business Administration (MBA) degree. Mr. David Gerdes, Respondent's vice president for Human Resources, told Petitioner at the time that Respondent did not give raises to employees when they earned college degrees that do not improve an employee's ability to do his/her job. The MBA did not improve Petitioner's ability to carry out her clerical duties as an administrative assistant.

11. Petitioner was aware that Respondent maintains a uniform, written non-discrimination policy and a "zero tolerance" sexual harassment policy. Petitioner knew the policies were posted in all stores and included in annual training sessions. Petitioner knew the company had an "open door" policy by which employees who are not satisfied with answers to their inquiries at the local level are encouraged to contact corporate headquarters in Minnesota. Finally, Petitioner knew that Respondent promptly investigates employees' complaints of discrimination, retaliation, and harassment.

12. Mr. Reners is the individual who allegedly discriminated and retaliated against Petitioner. As the RDO, Mr. Reners is responsible for overall management and operation of the 11 grocery stores in Florida. However, Mr. Reners did

not have the authority to discharge full-time employees, including Petitioner.

13. The so-called whistle-blower evidence pertains to various memoranda about store conditions that Petitioner wrote during her employment as an administrative assistant. When Petitioner discussed the issue with Mr. Reners in September 2006, Mr. Reners invited Petitioner to send the memoranda to Mr. John Boogren, Corporate Director of Operations. Mr. Boogren is Mr. Reners' supervisor.

14. Petitioner sent the memoranda to Mr. Boogren. The memoranda discussed what Petitioner thought were poor conditions and operating procedures in Respondent's stores.

15. The evidence of sexual harassment involves uncorroborated allegations by Petitioner that Mr. Tom DeGovanni, a co-worker, patted Petitioner on her head and shoulders, or back, on October 6, 2006. Petitioner complained of the incident, but qualified her complaint by saying that "it was no big deal" and by saying that she did not want the company to take any action. Several days after the alleged incident, however, Petitioner delivered a memorandum to Mr. Reners complaining of the alleged conduct.

16. Respondent investigated the claim of sexual harassment by Mr. DeGovanni in accordance with Respondent's long-standing "zero tolerance" sexual harassment policy. The investigation

did not substantiate Petitioner's allegations. Mr. DeGovanni adamantly denied touching Petitioner, there were no witnesses to the alleged event, and, even though Petitioner and DeGovanni were in front of a security video camera at the time of the alleged event, the touching was not on the videotape.

17. Respondent reminded Mr. DeGovanni of the company's policy against sexual harassment, gave Mr. DeGovanni a written warning, and transferred him to another store location so Petitioner would not have contact with him. Mr. Reners notified corporate headquarters of the complaint, the investigation results, and the corrective action.

18. Petitioner received a satisfactory performance evaluation, a wage increase, and a bonus in December 2006, after her complaint about DeGovanni. Mr. Reners knew of and approved the evaluation, raise, and bonus and could have stopped them if he had wished to do so.

19. Petitioner resigned her employment as Respondent's administrative assistant/secretary on two occasions prior to February 5, 2007. Although Mr. Reners could have accepted both of the prior resignations, he telephoned Petitioner and persuaded her to resume her employment without penalty. However, Mr. Reners warned Petitioner after the second resignation that, if she resigned again, he would accept the resignation.

20. Mr. Reners was on vacation during the week of January 29, 2007. Petitioner had no communication with Mr. Reners during that week. On Saturday, February 3, 2007, Petitioner prepared a letter of resignation and resigned on February 5, 2007.

21. The psychic that Petitioner consults had previously told Petitioner of an impending job termination. Mr. Reners returned from vacation on Monday, February 5, 2007, and commenced a meeting with two other employees to discuss renovations at Respondent's store in Labelle, Florida. Petitioner thought she should be included in the meeting and knocked on the door to the meeting room.

22. Petitioner mistakenly thought the meeting was a staff meeting that often occurred after Mr. Reners returned from a vacation. Mr. Reners explained to Petitioner that there would be a staff meeting afterwards.

23. Petitioner was upset at not being included in the first meeting and viewed her exclusion from the meeting as the job termination predicted by her psychic. Shortly after the first meeting ended, Petitioner walked up to Mr. Reners, handed her store keys to him, said "You win!" and left the building.

24. Petitioner performed her job duties well. Respondent would not have discharged Petitioner on February 5, 2007. Petitioner voluntarily resigned on that day.

CONCLUSIONS OF LAW

25. DOAH has jurisdiction over the parties and the subject matter of this proceeding. §§ 120.569, 120.57(1). The parties received adequate notice of the administrative hearing.

26. Petitioner bears the burden of proof in this proceeding. Petitioner must show by a preponderance of the evidence that Respondent intentionally discriminated against her on the basis of her race or sex or retaliated against her because of activity protected by the discrimination statutes. Reeves v. Sanderson Plumbing Products., Inc., 530 U.S. 133, 142, 120 S. Ct. 2097, 2106 (2000).

27. The burden of proving retaliation follows the general rules enunciated for proving discrimination. Reed v. A.W. Lawrence & Co., 95 F.3d 1170, 1178 (2d Cir. 1996). Federal discrimination law may be used for guidance in evaluating the merits of claims arising under Chapter 760. Tourville v. Securex, Inc., Inc., 769 So. 2d 491 (Fla. 4th DCA 2000); Greene v. Seminole Elec. Co-op. Inc., 701 So. 2d 646 (Fla. 5th DCA 1997); Brand v. Florida Power Corp., 633 So. 2d 504 (Fla. 1st DCA 1994).

28. Petitioner can meet her burden of proof with either direct or circumstantial evidence. Damon v. Fleming Supermarkets of Florida, Inc., 196 F.3d 1354, 1358 (11th Cir. 1999), cert. denied, 529 U.S. 1109 (2000). Direct evidence must

evince discrimination or retaliation without the need for inference or presumption. Standard v. A.B.E.L. Services., Inc., 161 F.3d 1318, 1330 (11th Cir. 1998). In other words, direct evidence consists of "only the most blatant remarks, whose intent could be nothing other than to discriminate," Earley v. Champion Int'l Corp., 907 F.2d 1077, 1081 (11th Cir. 1990). By analogy, direct evidence of retaliation must be equally egregious.

29. There is no direct evidence of discrimination or retaliation in this case. In the absence of direct evidence, Petitioner must meet her burden of proof by circumstantial evidence.

30. Circumstantial evidence of discrimination or retaliation is subject to the burden-shifting framework of proof established in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973); Reed, 95 F.3d at 1178. Petitioner must first establish a prima facie case of discrimination or retaliation. McDonnell Douglas, 411 U.S. at 802; Munoz v. Oceanside Resorts, Inc., 223 F.3d 1340, 1345 (11th Cir. 2000), and her failure to do so ends the inquiry. See Ratliff v. State, 666 So. 2d 1008, 1013 n.6 (Fla. 1st DCA 1996), aff'd, 679 So. 2d 1183 (1996) (citing Arnold v. Burger Queen Sys., 509 So. 2d 958 (Fla. 2d DCA 1987)). If Petitioner establishes a prima facie case, the burden shifts to Respondent to articulate

a legitimate, non-discriminatory, non-retaliatory reason for the challenged action. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 257, 101 S. Ct. 1089, 1096 (1981); Munoz, 223 F.3d at 1345; Turlington v. Atlanta Gas Light Co., 135 F.3d 1428, 1432 (11th Cir. 1998), cert. denied, 119 S. Ct. 405 (1998). Petitioner must then prove by a preponderance of evidence that the reasons offered by Respondent for its actions are mere pretexts. Id.

31. In order to establish a prima facie case of race discrimination, a preponderance of the evidence must show that Petitioner is a member of a protected class, that she suffered an adverse employment action, that she received disparate treatment compared to similarly-situated individuals in a non-protected class, and that there is sufficient evidence of bias to infer a causal connection between her race or sex and the disparate treatment. Rosenbaum v. Southern Manatee Fire and Rescue Dist., 980 F. Supp. 1469 (M.D. Fla. 1997); Andrade v. Morse Operations, Inc., 946 F. Supp. 979, 984 (M.D. Fla. 1996). A preponderance of the evidence does not show that Petitioner received disparate treatment compared to similarly situated individuals or that the alleged disparate treatment is causally connected to Petitioner's race or sex. Failure to establish the last prong of the conjunctive test is fatal to a claim of discrimination. Mayfield v. Patterson Pump Co., 101 F.3d 1371

(11th Cir. 1996); Earley, supra. See also Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997).

32. A preponderance of the evidence does not establish a prima facie case of sexual harassment. The alleged one-time contact by Mr. DeGovanni was not "sexual" and was not sufficiently severe or pervasive to constitute "sexual harassment" as a matter of law. See, e.g., Mendoza v. Borden, Inc., 195 F.3d 1238, 1245 (11th Cir. 1999), cert. denied, 529 U.S. 1068 (2000) (actionable harassment must be "sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment"); Gupta v. Florida Board of Regents, 212 F.3d 571, 583 (11th Cir. 2000), cert. denied, 531 U.S. 1076 (2001) ("Innocuous statements or conduct, or boorish ones that do not relate to the sex of the actor or of the offended party are not counted").

33. Respondent maintained an effective and well-known "zero tolerance" sexual harassment policy. When Petitioner complained of the alleged offensive behavior, Respondent reacted quickly and effectively. Respondent cannot be held liable for the alleged conduct of Mr. DeGovanni. Burlington Industries v. Ellerth, 542 U.S. 742, 118 S. Ct. 2257 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 118 S. Ct. 2275 (1998).

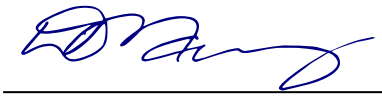
34. Petitioner did not establish a prima facie case of retaliation. A preponderance of evidence does not show that Petitioner suffered an adverse employment action.

RECOMMENDATION

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

RECOMMENDED that the Commission enter a final order finding Respondent not guilty of the allegations against Respondent and dismissing the Charge of Discrimination and Petition for Relief.

DONE AND ENTERED this 28th day of February, 2008, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of February, 2008.

ENDNOTES

[1/] References to chapters, sections, and subsections are to Florida Statutes (2006) unless stated otherwise.

[2/] An administrative assistant makes approximately 50 percent less than a store manager.

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.