STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MICHELE PRICE,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 07-5677
	)	
FLAGLER COUNTY SCHOOLS,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

On April 16-18, and May 21-23, 2008, a hearing was held in Bunnell, Florida, pursuant to the authority set forth in Sections 120.569 and 120.57(1), Florida Statutes. The case was considered by Lisa Shearer Nelson, Administrative Law Judge.

APPEARANCES

For Petitioner: Michele Price, pro se
16 Burma Place
Palm Coast, Florida 32137

For Respondent: Kristy J. Gavin, Esquire
Gobelman, Love, Gavin,
Wasilenko & Broughan, LLC
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STATEMENT OF THE ISSUE

Whether Respondent has committed an unlawful employment practice in violation of Chapter 760, Florida Statutes (2006), and if so, what remedy should be ordered?

PRELIMINARY STATEMENT

This case originated with the filing of a complaint with the Florida Commission on Human Relations (the Commission) asserting that Flagler County Schools (the School District) discriminated against Petitioner on the basis of her sex and that she was constructively discharged as a result of actions taken in retaliation because she filed a claim of sexual harassment. The case was forwarded to the Division of Administrative Hearings for assignment of an administrative law judge on December 13, 2007.

Both parties indicated that three days would be sufficient for conducting the hearing in this case. Hearing was originally noticed for February 13-15, 2008. At the request of Petitioner, the matter was continued and rescheduled for April 16-18, 2008.

On April 9, 2008, both parties filed their witness lists. On April 10, 2008, Respondent filed a Motion to Quash Subpoenas Ad Testificandum, requesting that those subpoenas directed toward students be quashed because they were under eighteen and had not been interviewed by the Commission during its investigation. Argument was heard on the Motion at the beginning of the hearing, and at that time, the Motion was denied. Both parties were reminded that this is a de novo proceeding, and not an appeal of the decision of the Commission.

The hearing could not be completed in three days, and an additional three days was scheduled for May 21-23, 2008. During the course of the proceedings, Petitioner presented the testimony

of 22 witnesses, including herself. Petitioner's Exhibits numbered 1-3, 6, 9, 11-12, 14, 16-18, 22-23, and 26 were admitted into evidence. Petitioner's Exhibits numbered 4-5, 7-8, 10, 13, 15, 19-21, 24-25 were rejected. Respondent presented five witnesses, and Respondent's Exhibits numbered 1-31 were admitted. The proceedings were transcribed and the filing of all twelve volumes of the transcript was completed on June 16, 2008.

On June 19, 2009, Petitioner requested a 30-day extension of time from the previously established deadline of June 30, 2008, for filing proposed recommended orders. The Motion indicated that Respondent was opposed to the extension of time, but no written opposition was filed. An extension of time was granted up to and including July 21, 2008.

Both parties timely filed Proposed Recommended Orders. Both submissions have been carefully considered in light of the testimony and exhibits submitted in this proceeding in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is a female formerly employed by the School District. From February 2006 to April 18, 2007, she was employed as a paraprofessional in the special education unit at Flagler Palm Coast High School.

2. Petitioner is an "aggrieved person" within the meaning of Section 760.02(6) and (10), Florida Statutes, in that

Petitioner is female and filed a complaint of gender discrimination and retaliation with the Commission.

3. Respondent is an "employer" within the meaning of Section 760.02(7), Florida Statutes.

4. From the inception of her employment and until March 13, 2007, Ms. Price was assigned as a paraprofessional (parapro) in Mr. Robert Rinker's classroom. Ms. Price had not been in the work force for several years before taking the job at Flagler Palm Coast High School and was taking classes at night to obtain her teaching degree.

5. Mr. Rinker teaches in what was described as a self-contained classroom for students who are classified as emotionally handicapped in the exceptional education program. At Flagler Palm Coast High School, at least some of the students in the program would attend classes in the 300 building of the campus, and would have fewer classes and teachers compared to a traditional schedule. However, students would not necessarily be limited to one classroom all day. They could, for example, have classes with other special education teachers in the 300 building.

6. Parapros are evaluated by the assistant principal. While teachers with whom the parapro worked might be asked to provide input for evaluations, the teachers are not considered to be their supervisors.

7. Ms. Price was in the classroom with Mr. Rinker during first and second periods, between classes, and during lunch. During third and fourth period, Mr. Rinker supervised students in the gym while Ms. Price remained in the classroom with students who did not go to the gym.

8. Stan Hall also teaches special education in the 300 building of Flagler Palm Coast High School. During Ms. Price's employment, he was assisted by a parapro named Kathy Picano. Ms. Picano sometimes visited Ms. Price in Mr. Rinker's classroom. She is significantly younger than both Ms. Price and Mr. Rinker.

9. Mr. Rinker is a jovial man and a veteran teacher. He coaches soccer and has coached basketball. He is well liked by his peers and by the students he teaches. Mr. Rinker often tells jokes and stories, and sometimes his jokes are "off color" or of a sexual nature. The jokes and stories are told to both male and female colleagues and not in the presence of students. No other staff member had ever told Mr. Rinker that his jokes were offensive and no one had ever complained to supervisory personnel that they were offended by Mr. Rinker's behavior.

10. Mr. Rinker sometimes used the phrase, "a good lovin' is the universal cure." He testified that he had heard this phrase since his childhood from his older relatives, and simply meant that when someone is having a bad day, a hug or other encouragement helps make things better. The remark could be addressed to students and staff alike. He did not mean anything

sexual by the phrase, and others hearing the phrase did not interpret it as a sexual remark. Mr. Rinker's testimony is credited.

11. Ms. Price, however, was offended by Mr. Rinker's jokes. She testified that nearly every conversation with Mr. Rinker became focused on sex. According to Ms. Price, the first week she worked with Mr. Rinker, they were discussing mailboxes in the classroom, and he stated, "let's talk about the box you are sitting on." She understood that he was referring to her vagina. Ms. Price stated that she was shocked by this statement, but did not say so because it was her first week on the job. Mr. Rinker does not remember ever making such a statement. Whether or not this incident actually happened, it occurred over a year prior to Ms. Price's complaint to either the School District or the Commission.

12. Also that first week, Ms. Price mentioned in the classroom that she had a headache, and in response Mr. Rinker rubbed her shoulders or neck. Ms. Price was offended but did not tell Mr. Rinker his touch was unwelcome.

13. Ms. Price claims that while things were not too bad the first semester she worked with Mr. Rinker, eventually it got to the point where she was unable to have a conversation with Mr. Rinker without it focusing on sex. She claimed that he sometimes purposefully rubbed up against her in the classroom.[1/]

In order to avoid talking to him or being physically close to him, she moved her desk to another part of the room. While she claimed the situation was intolerable, she did not report Mr. Rinker's behavior to any supervisor and did not tell him she was offended by his conduct.

14. Kathy Picano and Ms. Price sometimes spent time together in Mr. Rinker's classroom. Mr. Rinker sometimes told jokes in Ms. Picano's presence and sometimes "invaded her personal space." He acknowledged that he might have patted her on the back in passing as part of a greeting, but Ms. Picano described the touch as no different from what she might have received from her grandmother. Although Ms. Picano did not particularly care for Mr. Rinker's jokes, she attributed them to being "just his personality." She was not offended by Mr. Rinker's behavior and, before being questioned with respect to Ms. Price's complaint in this case, never complained about it to him or anyone else in authority at the school. She acknowledged hearing Mr. Rinker make the "good lovin" comment, but found it endearing, as opposed to harassing. Ms. Price, however, was deeply offended by what she viewed as Mr. Rinker's behavior toward Ms. Picano.

15. The things with which she took offense did not stop with Mr. Rinker's jokes or the attention she perceived that he gave to Ms. Picano. She did not think that Mr. Rinker or Mr. Hall did an adequate job of teaching, and was upset that

Mr. Hall's students were allowed, on occasion, to come to Mr. Rinker's classroom to finish assignments because they were disruptive. She did not appreciate the way Mr. Peacock, the assistant principal, performed his job and believed there was an unwritten code where coaches and athletes did not have to follow the same rules as others on campus.

16. Perhaps most of all, she was offended because students in Mr. Rinker's classroom talked about sex too much and she did not believe that he did enough to stop it. In her view, this was exacerbated when Mr. Hall's students were allowed to come over and finish work. Further, she believed that the students were using the computers in the classroom to access inappropriate videos and music that were offensive.

17. Computers were in the classroom for students to complete assignments and to do research for school projects. When they were finished with their work, students sometimes played games on the computers and checked sports sites. Sites such as "myspace," however, were blocked in accordance with school policy. While Ms. Price claimed the students were using the computers for inappropriate purposes, she admitted that she could not see what was on the computer screens from where she sat in the classroom. The testimony of the students did not corroborate her claim. All stated computers were used for school work and when school work was finished, to play games as stated

above. Only one student indicated that he watched music videos. All the others denied doing so.

18. There is no question that the students in Mr. Rinker's class sometimes talked about sex and used profanity in the classroom.[2/] One of the classes was a health class. The students were teenagers, many of whom had significant emotional problems with little or no support at home. Some of their individual education plans addressed the problem of too much use of profanity, with a goal of reducing its use in the classroom setting. Staff who testified all stated that trying to eliminate the use of profanity entirely was probably not a realistic goal, but modifying behavior to reduce it was. Their testimony is credited.

19. Ms. Price was not the only one who complained about students talking about sex in the classroom. Barbara Ryan was another parapro who sometimes worked in Mr. Rinker's classroom. She agreed that the students sometimes talked about sex and remembered a particular incident where she thought the discussion was particularly explicit and she said something to Mr. Rinker. He told the students involved to "knock it off."

20. In December 2006, an anonymous call came in to Ms. Myra Middleton at the District office complaining about inappropriate language used by students in the 300 building. Ms. Middleton referred the person to Mr. Peacock in accordance with School District policy. She spoke to Mr. Peacock, who said he would

take care of it. After the phone call, Mr. Peacock went to each of the classrooms in the 300 building and spoke to the students about the inappropriateness of using profanity and talking about sex in the classroom. There was no evidence, however, that the anonymous call was placed because of conduct occurring in Mr. Rinker's classroom.

21. The talk by students did not necessarily stop after Mr. Peacock spoke to the students. However, the more credible evidence is that these conversations did not involve the entire class, but rather small groups of students. Several students testified they never heard talk about sex in the classroom. The conversations that did occur took place while other conversations were also taking place. When Mr. Rinker heard the conversations, he told students to stop. There is no credible evidence that Mr. Rinker heard each conversation that Ms. Price heard or that he deliberately chose not to address the students' behavior. Nor is there any evidence that the students' discussions regarding sex were in any way directed toward her.

22. Mr. Rinker was not particularly computer literate. As a consequence, Ms. Price entered all of the students' grades in the computer. She had access to Mr. Rinker's password and would print out his e-mail. In early March, 2007, Mr. Rinker received an e-mail from Mr. Peacock's secretary directing that he see Mr. Peacock regarding his evaluation. Ms. Price did not believe that Mr. Peacock intended to complete the required observation

for Mr. Rinker's evaluation, and this offended her. Ms. Price answered the e-mail as if she were Mr. Rinker, noting that no observation had yet taken place. This conduct violated the written standards applicable to parapros.

23. Mr. Peacock discovered that Ms. Price, and not Mr. Rinker, had responded to his secretary's e-mail. On March 9, 2007, Mr. Peacock called Ms. Price into his office and told her that it was improper for her to send e-mails under Mr. Rinker's name. During the meeting, Ms. Price explained that she was inputting grades, attendance and all other computer data. Mr. Peacock advised that additional training would be made available for Mr. Rinker, but that she was not to perform his duties.

24. Ms. Price was under the impression that she was receiving a reprimand. She also felt that Mr. Rinker, who was also counseled by Mr. Peacock, did not defend her as vigorously as he should, and that he was the one who should be in trouble. In fact, Mr. Rinker told Mr. Peacock that Ms. Price had his permission to use his password for the computer and that she was very helpful.

25. Ms. Price's reaction to this incident was well out of proportion to the incident itself. Moreover, she did not appear to recognize that what she did in signing Mr. Rinker's name to the e-mail was wrong. She was crying, both after the meeting and into the next week.

26. The meeting with Mr. Peacock took place on a Friday. On Monday, Ms. Price was on a previously-scheduled day off. On Tuesday, she was still upset to the point of tears, and went to see Sue Marier, the ESE Department head. Although she was told repeatedly, both by Ms. Marier and by Mr. Peacock, that she was not being formally reprimanded for the incident, she continued to believe she was being treated unfairly. She told Mr. Rinker, Ms. Marier and Mr. Peacock that if she was going down, then so was Mr. Rinker.

27. The following day, March 14, 2007, Ms. Price went to the principal, Nancy Willis, and complained that Mr. Rinker had been sexually harassing her since the beginning of her employment.

28. Ms. Willis advised Ms. Price to put her complaint in writing, which she did. The complaint was forwarded immediately to the district office for investigation. During the investigation, Mr. Rinker was suspended with pay. Mrs. Willis also asked Ms. Price if she wanted to be moved to a different classroom, and Ms. Price indicated she did not want to be around Mr. Rinker.

29. Mrs. Willis went to Sue Marier, the ESE Department Head, and asked where there was a need for a parapro so that Ms. Price could be transferred. At the time of the request, Ms. Marier did not know that Ms. Price had filed the complaint regarding sexual harassment and thought Ms. Price was still upset

over the computer e-mail incident. She told Mrs. Willis that the greatest need was in the class for autistic children, and Ms. Price was transferred to that class. A decision had been made to add more staff, including another teacher, for that area, but positions had not yet been advertised.

30. Parapros do not generally have the right to choose their assignments. They are placed in the classroom with the greatest need. At the time of Ms. Price's transfer, the autistic classroom was the classroom with the greatest need.

31. This transfer did not result in a change in pay or status. There were significantly fewer students in the autistic class than in Mr. Rinker's class, and at least one of the students had a one-on-one aide in the classroom. While there was a slight change in schedule, it was not significant, and she remained a parapro at the same rate of pay. Both Sue Marier and Nancy Willis went by at different times to check on Ms. Price in her new placement. The more credible evidence indicates that Ms. Price did not complain about being in this classroom.

32. The School District has two policies that deal with sexual harassment: Policy number 662, entitled Prohibition of Sexual Harassment - Employees, and Policy number 217, entitled Prohibiting Discrimination, Including Sexual and Other Forms of Harassment. It is unclear why the School District has both at the same time. The definitions regarding sexual harassment in both policies are similar, with Policy number 217 being slightly

more detailed. The complaint procedure outlined in Policy number 217 is clearly more detailed, and it cannot be said that it was followed to the letter in this case. However, Policy number 217 was amended after the investigation took place in this case. No testimony was presented to show whether the more detailed procedures presently listed in Policy number 217 were in place at the time of the investigation. Further, the documents related to the investigation reference Policy number 662, as opposed to Policy number 217. It is found that the investigation was conducted in accordance with Policy number 662, and that to do so was appropriate.

33. Ms. Price’s complaint of sexual harassment was investigated by April Dixon and Harriet Holiday. Over the course of the next several days, both Mr. Rinker and Ms. Price were interviewed (separately) as well as several other staff members. Those staff members included Sue Marier, Kathy Picano, Donna Dopp, Stan Hall, Pat Barile (Sue Marier's assistant), Mr. Tietema (another teacher), and Barbara Ryan. The investigation conducted was reasonable, given the allegations by Ms. Price.

34. Ms. Price's written complaint stated that Mr. Rinker made inappropriate sexual comments; that he rubbed up against her on numerous occasions; that Mr. Rinker allowed the students to talk in the classroom using sexually explicit language and had made no effort to stop it; and that he had made inappropriate sexual comments to Ms. Picano.

35. Policy number 662 provides in pertinent part:

> (2) Sexual harassment consists of unwelcome sexual advances, requests for sexual favors and other inappropriate oral, written or physical conduct of a sexual nature when:
>
> (a) submission to such conduct is made, either explicitly or implicitly, a term or condition of employment (or of an individual's education).
>
> (b) submission to or rejection of such conduct is used as the basis for an employment or employment decisions affecting that individual; or such conduct substantially interferes with an employee's work performance, or creates an intimidating, hostile or offensive work environment.
>
> (3) Sexual harassment, as defined above, may include but is not limited to the following:
>
> · verbal harassment or abuse;
> · pressure for sexual activity;
> · repeated remarks to a person with sexual or demeaning implications;
> · unwelcome or inappropriate touching;
> · suggesting or demanding sexual involvement accompanied by implied or explicit threats concerning one's employment.
>
> * * *
>
> (5) Procedures. -- Any employee who alleges sexual harassment by any staff member must report the incident directly to the building principal or the employee's immediate supervisor. Alternatively, the employee may make the report to the Assistant Superintendent of Instructional Accountability. Filing a complaint or otherwise reporting sexual harassment will not affect the individual's status, future employment or work assignments.
> The right of confidentiality, both of the complaint and of the accused will be respected, consistent with the Board's legal obligations, and with the necessity to

> investigate allegations of misconduct and take corrective action when this conduct has occurred.
>
> In determining whether alleged conduct constitutes sexual harassment, the totality of circumstances, the nature of the conduct, and the context in which the alleged conduct occurred will be investigated. The Superintendent or designee has the responsibility of investigating and resolving complaints of sexual harassment.
>
> (6) A substantiated charge against a Board employee shall subject such employee to disciplinary action, including but not limited to warning, suspension or termination, subject to applicable procedural requirements.

36. After investigation of Ms. Price's complaints, April Dixon discussed her findings with Mr. Delbrugge, the School District Superintendent. She also turned over to him all of the transcripts of taped interviews and her conclusions regarding the investigation. She concluded, and he agreed, that the investigation showed Mr. Rinker told inappropriate jokes in the workplace but that in all other respects Ms. Price's complaints were not substantiated. The investigation also revealed that Ms. Price also used profanity and occasionally told sexually-related jokes in the workplace.

37. The Superintendent decided that the appropriate penalty (in addition to the suspension with pay already imposed) was to reprimand Mr. Rinker with a letter in his file; to require him to receive additional training on sexual harassment; to warn him that further complaints would result in termination; and to place

him on probation for the remainder of the school year. This discipline was consistent with the School District's collective bargaining agreement concerning discipline of instructional staff.

38. Mr. Rinker was informed of this result March 19, 2007, and completed the sexual harassment training as required. Ms. Price was notified informally of the results of the investigation that same day. She received official notification by letter dated May 3, 2007.

39. Ms. Price was very dissatisfied with the results of the investigation and the action taken by the School District. She felt that Mr. Rinker should be fired. It is clear, after hearing, that nothing less then Mr. Rinker's termination would appease her.

40. Ms. Price was also unhappy with her new placement. She did not like being in the classroom with the autistic students and felt they were dangerous. She felt that she should have been allowed to remain in her original classroom and Mr. Rinker should have been removed. After less than three weeks, she tendered her resignation. This three-week period included one week off for Spring Break and some personal leave days taken due to Ms. Price's husband having a stroke. Her resignation is dated April 18, 2007, but her last day working in the classroom was approximately April 6, 2007.

41. Ms. Price's resignation was voluntary. While there was some belief that she left because of her husband's stroke, Ms. Price disputes that assertion and insists that it was because of the conditions in the new classroom to which she was assigned. Her resignation letter, however, references neither reason. It states:

> Dear Ms. Willis:
>
> It is with sincere regret that I am writing this letter of resignation as an ESE Para Professional for Flagler Palm Coast High School. Please accept this as such. I do apologize for the short notice. I would also like to take this opportunity to express to you my appreciation of your handling of my complaint.
>
> You are the only one who has validated me as a person and as a worthy employee. I only had a brief encounter with you but it was enough for me to know that working directly under you would have been a pleasure as well as a great learning experience as I respect your leadership abilities.
>
> I recognize that this is a trying situation for all involved and that you have done your very best to rectify the matter under the circumstances. It is important for me to let you know that whatever happens in the future in regards to my claim, this is no way a reflection on you. I truly hope that you can appreciate my position and the importance of making positive changes for the future.

42. Based upon the evidence presented, it is found that Ms. Price resigned for a variety of reasons, including her husband's stroke and her unhappiness with the new placement.

However, her dissatisfaction with the handling of the complaint regarding Mr. Rinker and his continued employment was at least a part of her decision.

43. Ms. Price was not subjected to an adverse employment action as a result of her complaint. To the contrary, school officials transferred her to another classroom at her request. The conditions in the new classroom setting were not onerous.

CONCLUSIONS OF LAW

44. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with Sections 120.569 and 120.57(1), Florida Statutes (2008).

45. Section 760.10(1)(a), Florida Statutes (2006), provides that it is an unlawful employment practice to discriminate against an individual "with respect to compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." The Florida Civil Rights Act is patterned after Title VII of the Federal Civil Rights Act, and case law construing Title VII is persuasive when construing Chapter 760, Florida Statutes. Castleberry v. Edward M. Chadbourne, Inc., 810 So. 2d 1028, 1030 n.3 (Fla. 1st DCA 2002).

46. Both the federal and Florida Civil Rights Acts prohibit sexual harassment. Mendoza v. Borden, Inc., 195 F.3d 1238, 1244-45 (11th Cir. 1999); Maldonado v. Publix Supermarkets, 939 So. 2d 290 (Fla. 4th DCA 2006).

47. There are two types of sexual harassment claims: 1) quid pro quo claims, which are based on threats that are carried out or fulfilled, and 2) hostile work environment claims, which are based on "bothersome attentions or sexual remarks that are sufficiently severe or pervasive to create a hostile work environment." Maldonado, 939 So. 2d at 293. Petitioner alleges that she was subjected to sexual harassment through a hostile work environment.

48. In order to establish a hostile work environment claim where the alleged harassment is imposed by a co-worker as opposed to a supervisor or manager, Petitioner must show that 1) the employee is a member of a protected group; 2) the employee was subject to unwelcome sexual harassment, such as sexual advances, requests for sexual favors, or 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 or 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. Id. at 293-94.

49. Petitioner has demonstrated that she is a member of a protected group, in that she is female. She was not subject to sexual advances or requests for sexual favors, but was subject to other conduct of a sexual nature, in that Mr. Rinker sometimes told sexual jokes in her presence, and an isolated neck/shoulder

rub. It is questionable whether it can be said that the conduct was based upon her sex, because the evidence shows that the jokes were told in the presence of both male and female staff. Compare Baldwin v. Blue Cross/Blue Shield, 480 F.3d 1287, 1302 (11th Cir. 2007)(a sexual harassment plaintiff must show that similarly situated persons not of her sex were treated differently and better: "An equal opportunity curser does not violate a statute whose concern 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.").

50. Regardless, Petitioner's more significant problems are with the fourth and fifth components of her claim. The requirement that Petitioner show that the harassment was sufficiently severe or pervasive to alter a term or condition of employment is a high burden, designed to prevent anti-discrimination laws from becoming a general civility code. Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998). "Properly applied, they will filter out complaints attacking the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing." Id.; Gupta v. Florida Board of Regents, 212 F.3d 571, 583 (11th Cir. 2000).

51. In determining whether the harassment was sufficiently pervasive to alter a petitioner's terms or conditions of employment, the conduct must be considered from both a subjective

and objective viewpoint. The employee must subjectively perceive the harassment as sufficiently severe, which Ms. Price certainly did. In addition, however, the subjective perception must be objectively reasonable. In other words, the environment must be one that a reasonable person would find hostile or abusive. Gupta, 212 F.3d at 586; Mendoza v. Borden, Inc., 195 F.3d 1238, 1246 (11th Cir. 1999).

52. Whether a reasonable person would find the environment hostile or abusive, requires that the totality of the circumstances must be considered. The factors to examine include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993); Mendoza, 195 F.3d at 1246.

53. Consideration of these factors compels the determination that Petitioner has not demonstrated that the conduct was pervasive and severe. The conduct at issue involved casual jokes by Mr. Rinker and sexual chatter by adolescent students, and an isolated shoulder/neck rub. The more credible evidence is that it occurred on occasion as opposed to on a daily basis. The conduct was not physically threatening or humiliating, but could be more aptly characterized as offensive utterances. Credible testimony indicate that she appeared to enjoy, rather than be offended by, the isolated neck/shoulder

rub. Finally, there was no credible evidence that the conduct interfered with Petitioner's work performance.

54. The undersigned has carefully considered the cases describing sexual harassment to determine whether the conduct at issue here could be considered severe and pervasive. In this instance, not all of Petitioner's assertions have been credited. The inescapable conclusion is that conduct much more severe than what Ms. Price alleges, assuming all of her allegations were credited, have been found not to meet the standard for severe and pervasive sexual harassment. Petitioner has not demonstrated that Mr. Rinker's conduct and that of the students under his supervision created such a severe and pervasive environment so as to alter the conditions of her employment. Compare Webb-Edwards v. Orange County Sheriff's Office, 525 F.3d 1013 (11th Cir. 2008)(comments were taunting and boorish but not threatening or humiliating, or ones a reasonable person would find hostile or abusive); Gupta v. Board of Regents, 212 F.3d 571 (11th Cir. 2000); Mendoza v. Borden, Inc., 195 F.3d 1238, 1246-47 (11th Cir. 1999)(and cases described therein); Maldonado v. Publix Supermarkets, 939 So. 2d 290 (Fla. 4th DCA 2006).

55. Likewise, Petitioner has not demonstrated that Respondent knew or should have known of the harassment and took insufficient or remedial action. In this case, Petitioner did not complain about Mr. Rinker's conduct despite the fact that she claimed it had been going on for over a year. No one in

authority at Flagler Palm Coast High School was aware of any problem between Mr. Rinker and Petitioner.[3/] Section 761.11(1), Florida Statutes, requires that complaints be filed within 365 days from the alleged violation. Even assuming that Mr. Rinker made the "mailbox" comment, which was crude and boorish, it is both outside the time frame for filing this complaint, and, taken either alone or in conjunction with other conduct proven in this case, does not rise to the level of pervasive and severe conduct that alters a term or condition of employment.

56. Once she filed a complaint with Ms. Willis, the School District took immediate action to investigate her claim. Mr. Rinker was suspended with pay while the matter was investigated. Ultimately, he was reprimanded and placed on probation, with the warning that any further complaints would result in his termination.

57. Petitioner objected strenuously to both the quality of and the results of the investigation by the School District. Baldwin v. Blue Cross/Blue Shield, 480 F.3d 1287 (11th Cir. 2007), is instructive on both counts. In Baldwin, the investigation conducted was similar to that conducted by the School District. In rejecting Baldwin's challenge to the reasonableness of the procedures used, the Eleventh Circuit stated:

> The first reason is there is nothing in Faragher or Ellerth[4] decisions requiring a company to conduct a full-blown, due process, trial-type proceeding in response to

> complaints of sexual harassment. All that is required of an investigation is reasonableness in all of the circumstances, and the permissible circumstances may include conducting the inquiry informally in a manner that will not unnecessarily disrupt the company's business, and in an effort to arrive at a reasonably fair estimate of truth.
>
> * * *
>
> We will not hold that the investigation does not count, as Baldwin urges us to, because the investigators did not take more notes, because the discussion among them was not more thorough, or because they did not give more weight to a particular factor, such as Barclay's initial impression that the answers of one of the employees seemed rehearsed. To second guess investigations on grounds like these would put us in the business of supervising internal investigations conducted by company officials into sexual harassment complaints. We already have enough to do, and our role under the Faragher and Ellerth decisions does not include micromanaging internal investigations. Instead, we look only to the overall reasonableness of the investigation under the circumstances, and this investigation was reasonable.

480 F.3d at 1304-1305. The same can be said with respect to the investigation conducted by the School District in this case.

58. The Eleventh Circuit also stated that if the remedial result is adequate, then the reasonableness of the investigation becomes irrelevant. Like Petitioner, Baldwin also challenged the remedy imposed. Petitioner felt Mr. Rinker should have been fired. As a preliminary matter, Petitioner does not get to choose the remedy or decide its adequacy. Baldwin, 480 F.3d at 1306. The question to be answered is whether the remedy selected

by the School District was "reasonably likely to prevent the misconduct from recurring." Id. at 1305, quoting Kilgore v. Thompson & Brock Mgmt., Inc., 913 F.2d 463, 465 (7th Cir. 1990). The measures imposed, i.e., a reprimand, probation, review of sexual harassment policies and a warning that further impermissible conduct would result in termination, clearly are measures designed to stop the conduct about which Petitioner complained.

59. After carefully examining the entire record, evaluating the credibility of the witnesses' testimony and competency of the evidence presented, Petitioner has not demonstrated that she was subjected to sexual harassment by means of a hostile and offensive workplace actionable under Chapter 760, Florida Statutes.

60. Sexual harassment claims are also subject to the affirmative defense known as the "Faragher-Ellerth" defense based on United States Supreme Court decisions from which the defense was fashioned. An employer can avoid liability for sexual harassment where 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, 480 F.3d 1287, 1303 (11th Cir. 2007). As can be seen from the Baldwin decision, there is some overlap with respect to the final element for demonstrating sexual harassment (that the employer knew or should have known,

and took insufficient remedial action) and the Faragher-Ellerth defense. In this case, the result is the same.

61. The School District had at least one policy prohibiting sexual harassment that was available to all employees. It had a policy for reporting harassment and encouraged that reporting to be prompt. Petitioner did not notify any supervisor that she felt harassed for well over a year from the first incident, and continued not to tell anyone until such time as she felt she was in trouble for an unrelated incident. Once she did complain, the School District acted promptly to remedy the situation. The School District has met its burden in demonstrating that the elements of the affirmative defense have been proven.

62. Finally, Petitioner claims that she suffered retaliation for complaining about Mr. Rinker, in the form of her transfer to the autistic classroom. She claims that this transfer constituted a change in the terms and conditions of her employment and that the change was so deplorable it resulted in her constructive discharge.

63. Section 760.10(7), Florida Statutes (2007), prohibits discrimination against any person because that person has opposed any practice which is an unlawful employment practice under the Florida Civil Rights Act.

64. To establish a prima facie case for retaliation, Petitioner must demonstrate 1) that she engaged in a statutorily protected activity; 2) that she suffered an adverse employment

action; and 3) that there was a causal relation between the two events. Gupta, 212 F.3d at 587; Jones v. Flagship International, 793 F.2d 714 (5th Cir. 1986); Hinton v. Supervision International, Inc., 942 So. 986, 990 (Fla. 5th DCA 2006); Guess v. City of Miramar, 889 So. 2d 840, 846 (Fla. 4th DCA 2004). With respect to the causal relationship between the protected activity and the adverse employment action, Petitioner need only prove that the two events are not completely unrelated. Rice Lamar v. City of Fort Lauderdale, 853 So. 2d 1125, 1132-33 (Fla. 4th DCA 2003).

65. If Petitioner establishes a prima facie case, the burden shifts to Respondent to proffer a legitimate, non-retaliatory reason for the adverse employment action. The ultimate burden of persuasion remains with Petitioner throughout the case to demonstrate a discriminatory motive on the part of the Respondent for the adverse employment action. St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

66. An adverse employment action is an ultimate employment decision, such as termination or failure to hire, or other conduct that alters the employee's compensation, terms, conditions, or privileges of employment, deprives Petitioner of employment opportunities or adversely affects her status as an employee. Conduct that falls short of an ultimate employment decision must "meet some threshold level of substantiality . . . to be cognizable under the anti-retaliation clause." Gupta, 212

F.3d at 587, quoting Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1453, 1456 (11th Cir. 1998).

67. Petitioner claims that her transfer into the autistic classroom was an adverse employment decision. It was not. As stated in the findings of fact, Petitioner's transfer to another classroom was at her request. She was transferred from one special education classroom to another. While the challenges presented in each room were different, challenges existed in both. In Gupta v. Board of Regents, the petitioner claimed that her teaching assignments, including not assigning a class she wanted to teach, were adverse employment decisions. The Eleventh Circuit rejected this argument, stating that a university can assign its professors to teach the classes it needs them to teach. 212 F.3d at 588. The same can be said here. Respondent can assign its staff to those areas where student need is the greatest, and it did so.

68. Because Petitioner did not suffer an adverse employment action, she has not presented a prima facie case for retaliation. Her claim in this respect must be rejected.

RECOMMENDATION

Upon consideration of the facts found and conclusions of law reached, it is

RECOMMENDED:

That a final order be entered by the Florida Human Relations Commission dismissing Petitioner’s complaint in its entirety.

DONE AND ENTERED this 8th day of August, 2008, in Tallahassee, Leon County, Florida.

LISA SHEARER NELSON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of August, 2008.

ENDNOTES

[1/] Ms. Price's allegation that Mr. Rinker constantly deliberately rubbed up against her was not credible. First, no information was presented regarding when this conduct occurred, either in terms of the dates or general timeframe, or when it occurred during the day, such as before or between classes, during lunch, or any other time. Likewise, no testimony was provided regarding where it supposedly occurred or how she reacted when it happened. No other person ever witnessed physical contact between the two of them other than a neck rub, which the witness indicated Ms. Price appeared to enjoy. Likewise, credible testimony was presented that no one ever observed any particular problems with respect to the interaction between Mr. Rinker and Ms. Price. The undersigned had the opportunity to observe both individuals over the course of the hearing. Ms. Price is not one to hide her feelings. It is inconceivable that she could have been enduring the kind of behavior she described without some outward sign of her discomfort.

[2/] Ms. Price also alleged that when she found that students had written sexually-oriented profanity on some of the desks in the classroom, Mr. Rinker made a comment in front of the students that indicated Mr. Rinker wanted to engage in sexual intercourse with her, consistent with the profane statement on the desk. Her assertion was not corroborated by any of the students who testified. While there was testimony that the desks had profanity

written on them, the more credible evidence is that Mr. Rinker worked to clean the language off the surface of the desk. Other allegations not specifically discussed in this Order are rejected because there was no competent, credible evidence to support them.

[3/] There is evidence that Kathy Picano and Petitioner discussed Mr. Rinker's propensity to tell jokes and agreed that the jokes were sometimes disgusting. However, there is no credible evidence that Ms. Price confided in anyone else regarding her distaste for the jokes or that she confided in anyone at all regarding her other claims.

[4/] Faragher v. City of Boca Raton, 524 U.S. 775 (1198); and Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998).

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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.