STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CYNTHIA STEBBINS,	)	
Petitioner,	)	
vs.	)	Case No. 08-0394
APPLIANCE DIRECT,	)	
Respondent.	)	

RECOMMENDED ORDER

Pursuant to notice, Jeff B. Clark, duly-designated Administrative Law Judge of the Division of Administrative Hearings, held an administrative hearing in this case on March 3, 2008, in Viera, Florida.

APPEARANCES

For Petitioner: Maurice Arcadier, Esquire
2815 West New Haven Avenue, Suite 303
Melbourne, Florida 32904

For Respondent: Christopher J. Coleman, Esquire
Robert L. Beals, Esquire
Schillinger & Coleman, P.A.
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STATEMENT OF THE ISSUE

Whether Petitioner was subjected to race and gender discrimination, sexual harassment/hostile work environment, and retaliation, as alleged in her Petition for Relief.

PRELIMINARY STATEMENT

On January 22, 2008, Petitioner, Cynthia Stebbins, timely filed a Petition for Relief which alleged unlawful employment practices by Respondent, Appliance Direct, Inc., which included race and gender discrimination, sexual harassment/hostile work environment, and retaliation. The case was forwarded to the Division of Administrative Hearings on January 24, 2008, by the Florida Commission on Human Relations (FCHR). On the same day, an Initial Order was sent to both parties requesting mutually convenient dates for a final hearing.

Based on the response of the parties, the case was scheduled for final hearing on March 3, 2008, in Viera, Florida.

The case was presented as scheduled. Petitioner testified on her own behalf and offered three exhibits, which were received into evidence and marked Petitioner's Exhibits 1 through 3. Respondent presented the testimony of two witnesses: Chuck Thew and Kevin Drako and offered two exhibits, which were received into evidence and marked Respondent's Exhibits 1 and 2.

No transcript was ordered. Both parties timely filed Proposed Recommended Orders.

All references are to Florida Statutes (2006), unless otherwise noted.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing, the following Findings of Fact are made:

1. Petitioner, a 36-year-old Caucasian female, was employed by Respondent as a sales associate. She first worked for Respondent at its Sebastian, Florida, store where she started in June 2006. She voluntarily resigned from the Sebastian store in October 2006 and was hired by Respondent's Merritt Island, Florida, store one week later.

2. Respondent owns and operates an appliance retail store in Central Florida. Respondent employs more than 15 people.

3. At some time during Petitioner's employment, John Barnaba, an operations manager who rotated among several stores, said things to her that she found "unacceptable." For example, "You would look good on my Harley," "You look like a biker chick," and "You must be anorexic." He also clapped his hands behind her and said, "hurry, hurry, hurry."

4. She reported Mr. Barnaba's conduct to Phil Roundy, her manager and manager of the Merritt Island store, who said "That's just the way he is," or words to that effect. She was unaware of any other action undertaken by Mr. Roundy regarding her complaint.

5. In January 2007, Petitioner began a voluntary sexual relationship with Mr. Roundy, which involved at some point,

Petitioner and Mr. Roundy living together. This relationship lasted until April 29, 2007, when the parties separated. She and Mr. Roundy "got back together in May, about a week after her termination." Mr. Roundy did not sexually harass Petitioner based on the voluntary nature of their relationship, nor did he sexually harass Petitioner between April 29 and May 18, 2007.

6. After Petitioner and Mr. Roundy separated, he started treating her "differently." She reports that he became critical of her and would not assist her.

7. Respondent has published an "information resource for common questions and concerns" titled, "Associate Handbook" that addresses sexual harassment and presents a grievance procedure for employees who believe they have been subjected to unfair treatment. It contemplates reporting the unfair treatment to (1) "your immediate manager"; (2) the store manager; or (3) "[s]hould the problem, however, be of a nature which you do not feel free to discuss with your manager, you are encouraged to discuss the problem in confidence directly with Human Resources."

8. Petitioner requested a transfer to another store on May 1, 2007. She requested the transfer before Mr. Roundy started treating her "differently." She called Human Resources on May 9 and 15, 2007; it is unclear as to whether she called to check on the requested transfer or to report the alleged sexual

harassment. She did not timely pursue any recourse suggested in the Associate Handbook.

9. On May 9, 2007, Mr. Barnaba, the operations manager mentioned above, authored an email that characterized several of Petitioner's activities of that work day as "completely unprofessional and insubordinate." The following day, Mr. Roundy emailed his supervisor that Petitioner had gone through his private, business-related emails and discovered Mr. Barnaba's May 9, 2007, email. He also related several incidents that he thought unprofessional and that reflected bad customer service. He advised that Petitioner accused Barnaba and himself of conspiring to try to terminate her.

10. Petitioner was scheduled to work on May 16 and 17, 2007, but did not report to work. She was scheduled to work on May 18, 2007; as a result, Kevin Draco, a risk manager for Respondent, went to the Merritt Island store to interview her. When Petitioner did not appear, management made the decision to terminate Petitioner for "absenteeism."

CONCLUSIONS OF LAW

11. DOAH has jurisdiction over the parties to and subject matter of this proceeding pursuant to Section 120.569 and Subsections 120.57(1) and 760.11(7), Florida Statutes (2007).

12. Subsection 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 . . . ."

13. 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. Castleberry v. Edward M. Chadbourne, Inc., 810 So. 2d 1028, 1030 n.3 (Fla. 1st DCA 2002).

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

15. Petitioner alleges a hostile work environment/sexual harassment claim, which, by definition, 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. Ellerth, 524 U.S. 742, 751 (1998) (distinguishing hostile environment claims from quid pro quo sexual harassment claims).

16. 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 Corporation, Order No. 04-147 (FCHR Dec. 7, 2004); Natson v. Eckerd Corp., 885 So. 2d 945, 947 (Fla. 4th DCA 2004).

17. 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).

18. 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; Hadley, supra.

19. The evidence fails to establish that the sexual harassment described by Petitioner was sufficiently severe or pervasive so as to create a hostile work environment. Petitioner participated in a consensual sexual relationship with her supervisor; there is no evidence that she did not welcome this relationship. She then complains that she was treated "differently." She also claimed sexual harassment by a second employee; that particular complaint does not appear to be severe or pervasive. The evidence fails to establish that Respondent knew or should have known about the harassment prior to Petitioner's termination on May 18, 2007, and, therefore, its failure to do anything about the harassment prior to that date was not unreasonable or inappropriate.

20. 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. Baldwin v. Blue Cross/Blue Shield of Alabama, 480 F.3d 1287, 1292 (11th Cir. 2007).

21. 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; Maldanado, 939 So. 2d at 297-98.

22. Applying these standards to the facts of this case, Petitioner failed to meet her burden to prove her sexual harassment claim. Even if it was determined that Petitioner had established a prima facie case of sexual harassment, which she did not, Respondent met its burden to prove the Faragher-Ellerth defense. The evidence establishes that Respondent has a procedure in place for Petitioner to avail herself, but she failed to take advantage of that procedure. Petitioner failed to take advantage of employer-provided opportunities on the job for preventing, correcting, or addressing alleged acts of sexual harassment because Petitioner never made a formal or informal report of such behavior to appropriate management or Human Resources, as provided in Respondent's Associate Handbook.

23. Subsection 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] . . . ."

24. To establish a prima facie case for retaliation under Subsection 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. 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).

25. Petitioner in the instant matter was not involved in a protected activity for which alleged retaliation occurred. Because of this, Petitioner failed to make a prima facie case of retaliation. Tatt v. Atlanta Gas Light Company, 2005 WL 1114356 (11th Cir. 2005).

26. If Petitioner establishes a prima facie case, the burden shifts to Respondent to proffer a legitimate, non-retaliatory reason for the adverse employment action. Rice-Lamar v. City of Ft. Lauderdale, 853 So. 2d 1125, 1132-33. If Petitioner fails to establish a prima facie case, as in the instant case, the burden never shifts to Respondent.

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

28. 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. St. Mary's Honor Center v. Hicks, 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 fact finder must believe the [Petitioner's] explanation" of retaliation. Id. at 519.

29. Petitioner failed to prove the first element of her prima facie case. There is no evidence that Petitioner engaged in any statutorily protected conduct prior to her termination on May 18, 2007.

30. There was no evidence presented that Respondent was made aware of Petitioner's alleged sexual harassment allegations in a timely manner.

31. Petitioner failed to establish that there was a casual link between an alleged protected activity and an alleged adverse employment action, because Petitioner did not report allegations of sexual harassment to Respondent and Petitioner was not subjected to an adverse job action based on the alleged protected activity.

32. 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 absenteeism.

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

34. Subsection 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 race, [or] color . . . ."

35. In order to establish a prima facie case for wrongful discrimination by direct evidence, a plaintiff must present evidence that the employer acted with a discriminatory motive. This evidence "must not only speak directly to the issue of discriminatory intent, it must also relate to the specific employment decision in question." Bush v. Barnett Bank of Pinellas County, 916 F. Supp. 1244, 1252 (Fla. 1996).

36. The protection against intentional racial discrimination applies to both minority and non-minority employees. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 278 (1976). In that regard, where the Petitioner alleges a claim of reverse discrimination, as here, she must prove that

she: (1) belongs to a class; (2) was qualified for the job; (3) was adversely treated at the job; and (4) minority group members were treated more favorably in terms, conditions or privileges of employment. Wilson v. Bailey, 934 F.2d 301 (11th Cir. 1991).

37. Petitioner presented no evidence concerning a racial discrimination claim.

RECOMMENDATION

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

RECOMMENDED that the Florida Commission on Human Relations issue a final order dismissing the Petition for Relief with prejudice.

DONE AND ENTERED this 4th day of April, 2008, in Tallahassee, Leon County, Florida.

JEFF B. CLARK
Administrative Law Judge
Division of Administrative Hearings
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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.