

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

JEANETTE V. COX, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 08-1117  
 )  
 GULF BREEZE RESORTS )  
 REALTY, INC., )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held on August 26, 2008, in Clearwater, Florida, before Carolyn S. Holifield, Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Jeanette Cox, pro se  
801 Chestnut Street  
Apartment 1603  
Clearwater, Florida 33756

For Respondent: Richard W. Epstein, Esquire  
Myrna L. Maysonet, Esquire  
Greenspoon Marder, P.A.  
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STATEMENT OF THE ISSUE

The issue is whether Petitioner was subjected to a hostile work environment in violation of Subsection 760.10(1), Florida Statutes (2005).<sup>1</sup>

PRELIMINARY STATEMENT

On August 14, 2006, Petitioner, Jeanette Cox (Petitioner), filed a Complaint of Employment Discrimination ("Complaint") with the Florida Commission on Human Relations ("Commission"). The Complaint alleged that Respondent, Gulf Breeze Resorts Realty, Inc. ("Gulf Breeze" or "Respondent"), violated Title VII of the Civil Rights Act of 1964 ("Title VII"), the Age Discrimination in Employment Act, and the Florida Civil Rights Acts of 1992 ("FCRA"), as amended, by discriminating against her on the basis of gender (hostile work environment) and age, and, ultimately, terminating her employment.

The Commission investigated the allegations in the Complaint, and on February 5, 2008, informed the parties that there was no reasonable cause to believe that an unemployment practice occurred in connection with the termination of Petitioner's employment.

On February 29, 2008, Petitioner filed a Petition for Relief which alleged that Respondent violated the FCRA by engaging in an unlawful employment practice based on her age and sex.

On March 4, 2008, the Commission referred the matter to the Division of Administrative Hearings for assignment of an Administrative Law Judge to conduct a hearing. The hearing was initially scheduled for April 30, 2008, but was continued until

July 9, 2008, at the request of Petitioner. On May 8, 2008, Respondent requested a continuance. The request was granted, and the hearing was rescheduled for August 26, 2008.

At hearing, Petitioner testified on her own behalf and presented the testimony of three other witnesses, all of whom are former employees of Gulf Breeze: (1) Inez Verhagen; (2) Michelle Ferrara; and (3) Michael Booth. Respondent presented the testimony of Dale Wagner and Vickie Dockery-Ruiz. The parties' Joint Exhibits 1 through 8, Petitioner's Exhibit 1 and Respondent's Exhibits 1 through 6 were admitted into evidence.

The two-volume Transcript was filed on September 15, 2008. At the conclusion of the hearing, the parties agreed to file proposed recommended orders on October 15, 2008, 30 days after the Transcript was filed. On October 7, 2008, Respondent filed an unopposed motion requesting that the time for filing proposed recommended orders be extended to October 29, 2008. The unopposed motion was granted. Proposed Recommended Orders were timely filed by Petitioner and Respondent and have been considered in the preparation of this Recommended Order.

#### FINDINGS OF FACT

1. Petitioner is a female who was employed by Gulf Breeze as a sales representative from 2003 until her employment was terminated on February 9, 2006. Petitioner was 63 years old

when she was hired to work as a sales representative with Gulf Breeze.

2. Petitioner was an experienced and successful sales representative. In 2004, Petitioner received a "million dollar ring" in recognition of her outstanding sales record with Gulf Breeze.

3. Petitioner is an "aggrieved person" within the meaning of Subsections 760.02(6) and (10), Florida Statutes.

4. Gulf Breeze is a licensed real estate broker that is in the business of selling real estate interests in timeshare resorts. Gulf Breeze conducts this business at an off-site office located at 4300 Duhme Road, Madeira Beach, Florida.

5. The Berkeley Group, Inc., is the parent company of Gulf Breeze and its headquarters is located in Ft. Lauderdale, Florida.

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

7. The Berkley Group purchased Bay and Beach Resort located in Indian Shores as the start-up property for its timeshare sales operation in 2003. That location was eventually replaced by the stand-alone sales center in the Madeira Beach location.

8. In 2003, when Petitioner was initially employed by Gulf Breeze, she was hired by Dennis Bill, the project manager or

director of sales for Gulf Breeze. Prior to being employed by Gulf Breeze, Petitioner had worked with Mr. Bill for 15 or 20 years in the timeshare sales business.

9. At Gulf Breeze, the job of the project manager is:  
(1) to oversee and supervise the sales operation and its staff;  
(2) to ensure that the sales staff members are trained and are successfully performing their jobs; and (3) to motivate the sales force.

10. From August or September 2005 through February 2006, Dale Wagner was project manager for Gulf Breeze. As project manager, Mr. Wagner supervised the eight to ten sales representatives in the Gulf Breeze office. Of that number, two-thirds were over 40 years old.

11. During the time Mr. Wagner was project manager, there were noticeable changes in the work environment at the Gulf Breeze office. Those changes included: (1) the excessive use of profanity in the office; (2) the presence and/or consumption of alcoholic drinks in the office or during the workday; (3) the presence of marijuana in the office; and (4) the berating of employees by derogatory name-calling.

12. While he was project manager, Mr. Wagner and a sales manager, Michael Wiseman, used profanity repeatedly and almost everyday in the Gulf Breeze office, including during sales or staff meetings. Mr. Wagner and Mr. Wiseman used the terms

"goddamn" and "f\*\*k," respectively, as part of their general vocabulary.

13. Petitioner sometimes observed that during the workday, it appeared that Mr. Wagner, while project manager, had been consuming some type of alcoholic drink(s). Petitioner and another sales representative sometimes smelled alcohol on Mr. Wagner's breath when he came to the table to work with them on transactions.

14. Mr. Wagner acknowledged that he occasionally had a drink or two at lunch, but denied that he ever consumed alcohol in the office.

15. Petitioner had reason to believe that marijuana was being brought to the Gulf Breeze office by one or more employees and being given or sold to some other employees.

16. Petitioner was very concerned and disturbed by the unprofessional environment at the Gulf Breeze office. Petitioner was especially concerned about Mr. Wagner and Mr. Wiseman using profanity in the office and about her perception that alcohol and/or drugs (marijuana) were being brought into the office by employees. Petitioner reported her concerns to Pam Montanez, the human resources representative at the Gulf Breeze office, at least four times, but did not submit any written complaints to the local or corporate office.

Petitioner did not specify when she reported her complaints to Ms. Montanez.

17. There is no evidence that Ms. Montanez took action to alleviate the conduct that Petitioner reported to her. Consequently, the behaviors and other activities continued to occur in the Gulf Breeze office.

18. Three female sales representations at Gulf Breeze during the time Mr. Wagner was project manager, including Petitioner, viewed his conduct toward women as demeaning.

19. According to Petitioner, when Mr. Wager became project manager, there was "hell to pay every time we went to work." While he was project manager, Mr. Wagner called Petitioner derogatory names and made inappropriate comments to her in the Gulf Breeze office. For example, Mr. Wagner told Petitioner, "Go take your [hormone] medicine and sit down."<sup>2</sup> He also told Petitioner that she was too old to be working and needed to retire. Sometimes when Mr. Wagner walked by Petitioner, he called her an "old hag," "whore," and "slut." When Mr. Wagner made these comments to Petitioner and called her names, other employees were present and heard him.

20. Once when Mr. Wagner and several other male employees were in an office with the door cracked, Michael Booth, a salesman for Gulf Breeze, overheard them discussing how they could get rid of that "old hag" or "old bitch" or "old woman."

Mr. Booth believed that the men in the office were referring to Petitioner. When this conversation took place, Mr. Wagner was not the project manager and had no supervisory responsibility for Petitioner. Also, there is no indication that Petitioner heard this conversation.

21. Prior to being employed by Gulf Breeze, Petitioner had previously worked with Mr. Wagner and had not experienced any problems with him. However, during the time he was project manager, Mr. Wagner's behavior toward Petitioner changed. Although Petitioner did not know the reason for that change, she testified that the negative changes in Mr. Wagner's behavior at work were caused by his alcohol consumption, not to her membership in a protected class.

22. Mr. Wagner disputes Petitioner's statement that his conduct at work was affected by his consumption of alcohol.

23. Inez Verhagen, a sales representative, described Mr. Wagner's management style as "management by intimidation." This description is based on the manner in which Mr. Wagner regularly communicated with Ms. Verhagen.

24. While project manager, Mr. Wagner yelled at Ms. Verhagen everyday and, sometimes, did so in the presence of clients.

25. On one occasion, Mr. Wagner once came to the table where Ms. Verhagen was meeting with two clients and began



yelling and screaming at her and then walked away. Given the lapse in time, Ms. Verhagen could not recall the reason Mr. Wagner was yelling at her. After Mr. Wagner left the table, one of the clients at the table, Beverly, asked Ms. Verhagen, "Does he always treat you this way?" Ms. Verhagen answered, "Yes, ma'am, he does." The client then asked Ms. Verhagen, "How do you stand this?" "You need to get out of here before you have a bleeding ulcer."

26. While employed at Gulf Breeze, Ms. Verhagen complained to Ms. Montanez about Mr. Wagner's repeated verbal abuse toward her. Ms. Montanez never followed up with Ms. Verhagen, and it appears that nothing was ever done to address the complaints. Moreover, throughout Ms. Verhagen's employment, Mr. Wagner's conduct did not change.

27. During the time Mr. Wagner was project manager, Ms. Verhagen never heard him yell at any of the male sales representatives. Thus, she believed that male employees at Gulf Breeze were excluded from and not subjected to Mr. Wagner's intimidating management style.

28. As a result of Mr. Wagner's behavior toward her, Ms. Verhagen voluntarily left her job at Gulf Breeze.

29. Michelle Ferrara was a sales representative at Gulf Breeze in the Fall of 2005, when Mr. Wagner became project manager. According to Ms. Ferrara, after Mr. Wagner assumed

that position, the work environment at Gulf Breeze was not "pleasant" and "a lot of constant degrading comments" were made in the workplace. Ms. Ferrara also believed that Mr. Wagner sometime treated her unfairly and did not implement policies consistently.

30. At Gulf Breeze, new sales representatives sometimes worked with managers on sales presentations. When these presentations resulted in a sale, the practice at Gulf Breeze was for the commission to be shared between the manager and the new sales representative. Ms. Ferrara participated in such a presentation, but was told by Mr. Wagner, then project manager, that she would not receive any part of the commission because the male manager with whom she had worked believed that she [Ms. Ferrara] did not deserve it.

31. While he was project manager, Mr. Wagner yelled at, embarrassed, and berated Ms. Ferrara many times.

32. In one instance, Mr. Wagner called Ms. Ferrara into his office. At the time, there were two male employees sitting in Mr. Wagner's office. Ms. Ferrara did not testify as to the substance of Mr. Wagner's comments to her. Nonetheless, Ms. Ferrara recalled clearly that Mr. Wagner "just tore into [her]" and "embarrassed and berated" her in the presence of the two male employees.

33. A new employee at Gulf Breeze approached Ms. Ferrara and asked if Gulf Breeze provided formal training. Ms. Ferrara believed that formal training involved structure and training in a classroom setting at designated and extended time frames (i.e., most of the day). Since no such training was provided at Gulf Breeze, Ms. Ferrara told the new employee that there was no formal training and that new employees simply learned on the job. Apparently, Mr. Wagner overheard and disagreed with Ms. Ferrara's response to the new employee. To express his disagreement with Ms. Ferrara's response, Mr. Wagner "grabbed" Ms. Ferrara and "just started screaming" at her.

34. In another incident, Ms. Ferrara arrived at work about 8:13 a.m., but did not immediately go into the Gulf Breeze office. Instead, she stayed in her car "to do something." (Employees were required to be in the office by 8:15 a.m.). It is unknown how long Mr. Ferrara stayed in her car, but when she got out of her car and went into the Gulf Breeze office, a male employee entered the building just before she did. As the male employee signed in, Ms. Ferrara was a few feet behind him, waiting to sign in for work. Mr. Wagner approached Ms. Ferrara and asked her, "What [were] you doing?" Mr. Wagner then told Ms. Ferrara, "You shouldn't be in your car. You're supposed to be in here." Although Ms. Ferrara and the male employee came into the office about the same time, Mr. Wagner said nothing to

the male employee. Ms. Ferrara believed it was inappropriate for Mr. Wagner to make the foregoing comments to her because there were customers in the immediate vicinity. She also believed that it was unfair to make any statements to her and not to the male employee since they both came into the office about the same time.

35. Mr. Wagner, while project manager, would comment that "she [Ms. Ferrara] is in la-la land."

36. Ms. Ferrara never reported any of the foregoing incidents to Ms. Montanez or to anyone in corporate headquarters. However, as a result of Mr. Wagner's conduct, Ms. Ferrara voluntarily left her job at Gulf Breeze.

37. Mr. Wagner also made offensive comments to Mr. Booth, who was employed as a sales representative at Gulf Breeze from about March 2005 through January 2006. Initially, Mr. Bill was the project manager and Mr. Booth's supervisor. In August or September 2005 until January 2006, Mr. Wagner replaced Mr. Bill as project manager and was Mr. Booth's supervisor.

38. Throughout Mr. Booth's employment at Gulf Breeze, including the period when Mr. Wagner was project manager, Mr. Wagner made inappropriate comments to Mr. Booth. For example, Mr. Wagner would make comments about Mr. Booth's sexuality and would refer to him (Booth) as a "fag" or "queer." Mr. Wagner would call Mr. Booth those names when he walked past

him (Booth) in the office. Mr. Wagner also made comments such as "I'm not picking on you because you're a fag" and "I don't have anything against homos."<sup>3</sup>

39. Mr. Booth made several complaints to Ms. Montanez, some of which concerned Mr. Wagner's inappropriate conduct toward him (Mr. Booth) and toward Petitioner. In response to at least one of Mr. Booth's complaints about Mr. Wagner, Ms. Montanez told him that she would call someone in Ft. Lauderdale (the corporate office), that "we're going to handle it," and that she would then get back with him. Later, Mr. Montanez reported to Mr. Booth that she had contacted the corporate office and was told that the local office should handle the matter and "to keep the corporate office out of it."

40. Mr. Wagner testified that the sale of timeshare interests is a difficult and stressful job. Sales representatives in the business must convince prospective customers to purchase a product that they do not need (i.e., luxury item). Gulf Breeze incurs an upfront expense before a prospective customer walks in the door. Thus, the pressure on the sales representatives is increased by the fact that only one out of eight to one out 12 sales presentations result in a sale. The project manager must ensure that sales representatives are trained, motivated, and performing their jobs.

41. Mr. Wagner does not deny that, as project manager, he sometimes yelled at sales representatives. According to Mr. Wagner, he "raise[d] his voice" when talking to employees to get them motivated and to "try to get them in the right direction."

42. According to Mr. Wagner, every sales representative at Gulf Breeze receives training in the proper methods for conducting sales. Gulf Breeze expects its sales representatives to be courteous to the customers and to refrain from twisting the customers' arms in order to make a sale.

43. Florida law allows a purchaser of a timeshare interest ten days to rescind the purchase. Sales representatives at Gulf Breeze are told that they are not to "pitch rescission" when making a sales presentation. The term "pitch rescission" refers to a technique in which the sales representative induces the customer to purchase a timeshare interest by using the cancellation as a sales tool.

44. The project manager is authorized to impose disciplinary action against a sales representative who violates the prohibition against "pitching rescission," or any other company procedure. Gulf Breeze has no disciplinary guidelines and the project manager has the discretion to impose whatever disciplinary action he believes is appropriate.

45. On or about February 8, 2006, Mr. Wiseman told Mr. Wagner that he had observed Petitioner pitching rescission to a customer in order to induce a purchase. At the time, Petitioner's cancellation rate for purchases was 80 percent, while the average cancellation rate for other sales representatives was between 18 percent and 22 percent. In light of the foregoing, Mr. Wagner decided to meet with Petitioner.

46. When Petitioner arrived at work on the morning of February 9, 2006, Mr. Wagner told her to come into his office to meet with him and two sales managers, Larry VonStein and Mr. Wiseman. Mr. Wagner did not tell Petitioner the reason he wanted to meet with her. Moreover, there is no evidence that Petitioner knew the reason Mr. Wagner wanted her to come into his office.

47. Mr. Wagner wanted the two sales managers in the meeting with Petitioner so that they were "aware of what was happening" and to ensure that "everyone was on the same page."

48. Petitioner told Mr. Wagner that she did not want to meet alone with three men. Mr. Wagner then ordered Petitioner to go downstairs and sit in her car until Ms. Montanez got to the office. He indicated that when Ms. Montanez arrived, they would go to her office and talk. It is unclear why Mr. Wagner required Petitioner to wait in her car, rather than in the Gulf Breeze office.

49. Petitioner did not leave the building and go to her car as Mr. Wagner had ordered. Petitioner got a chair and sat in the back of the room where a regular sales meeting was being held and told Mr. Wagner that she was not leaving. At some point, Petitioner apparently became upset and/or agitated, and according to Mr. Wagner, "threw a fit" and was screaming and disrupting the sales meeting. This episode lasted for about ten minutes. After Petitioner refused to leave, the situation escalated when Mr. Wagner threatened to call the police, presumably to have Petitioner removed from the Gulf Breeze office. Petitioner responded by telling Mr. Wagner that he could call the police, but she was not leaving.

50. Mr. Wagner contacted Ms. Montanez on her cell phone and asked her to come in early to help him deal with Petitioner. Before the call was completed, Petitioner also spoke with Ms. Montanez. After talking with Ms. Montanez, the situation apparently calmed down, and Petitioner went downstairs and waited for Ms. Montanez to arrive at the office.

51. After Ms. Montanez arrived at the Gulf Breeze office, she and Petitioner went upstairs to Ms. Montanez' office, where they were later joined by Mr. Wagner. The issue that Mr. Wagner had initially planned to discuss with Petitioner, the charge that she had "pitched rescission during a presentation," was



never addressed. Instead, during the meeting, Mr. Wagner terminated Petitioner's employment for insubordination.<sup>4</sup>

52. Mr. Wagner initially intended to talk to Petitioner about the charge that she had pitched rescission, but did not plan to terminate her for issues related to that charge.

53. Gulf Breeze has an anti-discrimination policy which expressly prohibits discrimination based on race, color, religion, sex, age, handicap, national origin, marital status or veteran status.

54. The anti-discrimination policy is included in the employee manual which is disseminated to employees who must acknowledge, in writing, receipt of the policy. Gulf Breeze also provides a separate statement to its employees notifying them, again, of the company's anti-discrimination policy and reporting procedures.

55. Gulf Breeze's anti-discrimination policy provides that an employee should report any problems or allegations of discrimination and harassment to the employee's direct supervisor, the on-site human resource representative, or the corporate human resource director. The employee may also notify the company of alleged discrimination by anonymously completing a form provided in or on the back of the Employee Handbook.

56. Petitioner received the Employee Handbook and the company's workplace harassment policy and signed a document

acknowledging receipt of the Employee Handbook and Gulf Breeze's anti-discrimination policy.

57. Vickie Dockery-Ruiz is the corporate human resource director, has held that position since 1999, and works out of the corporate office in Ft. Lauderdale, Florida.

58. To facilitate employee communication and resolution of disputes, each resort has its own on-site human resources representative (human resources manager). At all times relevant to this proceeding, Ms. Montanez was the human resources manager for Gulf Breeze. Prior thereto, Ms. Montanez served in that same position at the Bay and Beach location.

59. Petitioner was familiar with the Gulf Breeze anti-discrimination policy and knew how to file a charge of discrimination and/or harassment. In fact, Petitioner had filed a written complaint on or about September 19, 2005, against a co-worker, Joel Zackheim. Petitioner sent the complaint to Ms. Dockery-Ruiz at the corporate office and to Ms. Montanez at the Gulf Breeze office.

60. The complaint arose out of an incident which occurred during a staff or sales meeting during which Mr. Zackheim intentionally pulled a chair from under Petitioner, resulting in her falling on the floor.

61. In her written complaint, Petitioner recounted the incident and noted that Mr. Zackheim had pulled a chair over her

leg and in a very loud voice, called her a "damn bitch."

Petitioner reported that as a result of Mr. Zackheim's actions, she sustained an injury to her leg which was diagnosed as a contusion and required medical care.<sup>5</sup>

62. Petitioner's September 19, 2005, complaint was promptly investigated, and Ms. Montanez issued a written response on or about September 29, 2005. The response noted that Petitioner's diagnosis had been confirmed as had Mr. Zackheim's actions. As a result of his actions, Mr. Zackheim was put on unpaid leave from October 2, 2005, through October 9, 2005, and warned that another incident such as this could be grounds for termination. Mr. Zackheim was also advised to be respectful to fellow employees and to maintain a positive attitude in the working environment.

63. Petitioner's September 19, 2005, complaint did not include any allegations of harassment or other wrong doing by Mr. Wagner.

64. On or about February 9, 2006, after she was terminated, Petitioner called Ms. Dockery-Ruiz and reported actions which she believed to constitute sexual harassment that had occurred while she (Petitioner) was employed at Gulf Breeze. Ms. Dockery-Ruiz requested that Petitioner write a letter detailing her specific allegations. Petitioner complied with that request and made allegations of sexual harassment.

Although Petitioner had been terminated, the president of the company investigated the allegations of sexual harassment at Gulf Breeze. The investigation concluded that there was no sexual harassment.

65. Except for one incident that involved a Gulf Breeze employee, Mr. Zackheim, Ms. Dockery-Ruiz was never notified of any of the alleged activities Petitioner discussed after [Petitioner's] termination.

66. Soon after Mr. Wagner terminated Petitioner's employment with Gulf Breeze, his employment with the company also ended.<sup>6</sup> Mr. Wagner was re-employed by the parent company and is at working at a resort in Orlando, Florida.

#### CONCLUSIONS OF LAW

67. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding pursuant to Section 120.569 and Subsection 120.57(1), Florida Statutes (2008).

68. Subsection 760.10(1)(a), Florida Statutes, 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 individuals . . . sex . . . [and] age." The FCRA 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. Chadbourne, 810 So. 2d 1028, 1030, n. 3 (Fla. 1st DCA 2002).

69. Both the federal and FCRA prohibit sexual harassment. Mendoza v. Borden, Inc., 195 F.3d 1238, 1244-45 (11th Circuit 1999); Maldonada v. Publix Supermarkets, 939 So. 2d 290 (Fla. 4th DCA 2006).

70. 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, citing Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 751 (1998).

71. A hostile work environment claim is established upon proof that "the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1275 (11th Cir. 2002).

72. In order to establish a prima facie case in a hostile work environment claim, Petitioner must show that: (1) she belongs to a protected group; (2) she has been subject to unwelcome harassment; (3) the harassment was based on her sex;

(4) the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment; and (5) the employer is responsible for such environment under a theory of vicarious or of direct liability. Miller, 277 F.3d at 1275; Mendoza, 195 F.3d at 1245.

73. Petitioner has demonstrated that she is a member of a protected group in that she is a female.

74. Petitioner presented no evidence that she was subjected to sexual advances or requests for sexual favor, but claims that she was subject to other conduct of a sexual nature in that Mr. Wagner persistently cursed and used profanity and called her derogatory names (i.e., whore, slut and bitch).

75. It does not appear that the conduct (cursing and using profanity and name-calling) was based on Petitioner's sex or had any gender-related connotation. The evidence established that Mr. Wagner cursed and used profanity in the office and in staff meetings in the presence of employees regardless of their gender. 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.").

76. Similarly, Mr. Wagner's conduct, as it relates to his calling Petitioner various derogatory names, does not necessarily include a sexual or other gender-related connotation. See Mendoza, 195 F.3d at 1247-48, citing Galloway v. General Motors Services Parts Operations, 78 F.3d 1164, 1167-68 (7th Cir. 1996)(noting that the term "sick bitch" is not necessarily a sexual or gender-related term.)

77. Petitioner has established that she has been subject to unwelcome harassment.

78. The third element to establish hostile work environment requires that Petitioner complaint of conduct must be based upon sex. The primary inquiry as to whether conduct is "based upon sex" is determining that "but for the fact of her sex [Petitioner] would not have been the object of harassment." Henson v. City of Dundee, 682 F.2d 897, 903-904 (11th Cir 1982).

79. In this case, Petitioner has not established that Mr. Wagner's cursing, which she had to endure on an almost daily basis and his sporadic derogatory name-calling, were motivated by gender considerations. Therefore, Petitioner failed to establish the third element, and her hostile work environment claim is legally deficient.

80. Assuming, though not concluding, that Petitioner has met the first three elements, she must next establish the fourth and fifth elements of her claim.

81. The fourth element that requires Petitioner to establish harassment was sufficiently severe or pervasive to alter the terms and conditions 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).

82. To establish that the harassing conduct is sufficiently severe or pervasive to alter the employees' terms of employment requires a subjective and objective analysis. Mendoza, 195 F.3d at 1246. Petitioner, as the employee, must: (1) subjectively perceive the harassment as sufficiently severe and pervasive to alter the terms and conditions of employment; and (2) a reasonable person in her position, considering all the circumstances, would also perceive the harassment as sufficiently severe and pervasive to alter the terms and conditions of employment. Id.

83. In determining whether the harassment objectively altered an employee's terms of conditions of employment, the following factors must be considered: (1) the frequency of the conduct; (2) the severity of the conduct; (3) whether the



conduct is physically threatening or humiliating or a mere offensive utterance; and (4) whether the conduct unreasonably interferes with the employee's job performance. Id. at 1246.

84. The conduct must be examined in context, not as isolated acts, and determine, under the totality of the circumstances, whether the harassing conduct is sufficiently severe or pervasive to alter the employer's employment and create a hostile or abusive working environment.

85. The evidence presented by Petitioner did not establish that the alleged conduct was sufficiently severe or persuasive to alter the terms and conditions of her employment. The evidence established that Mr. Wagner's used profanity on an almost daily basis, but did not show that his using profanity was physically threatening or humiliating and unreasonably interfered with Petitioner's job performance. Petitioner did not establish the frequency with which Mr. Wagner called her offensive or derogatory names. However, assuming that such name-calling occurred frequently, the evidence did not establish that it was physically threatening or humiliating. The derogatory names Mr. Wagner called Petitioner are more akin to offensive utterances. Petitioner presented no evidence to establish that Mr. Wagner's derogatory name-calling unreasonably interfered with Petitioner's job performance.

86. A reasonable person could not conclude that the employer's conduct, if it occurred as described by Petitioner was sufficiently severe and pervasive so as to affect a term or condition of her employment.

87. Assuming, but not concluding, that Petitioner met the first four elements necessary to establish a claim of hostile work environment, she must next establish that Gulf Breeze is responsible for such environment and liable for the harassing conduct.

88. The evidence shows that Gulf Breeze had a policy and procedures in place for reporting and preventing sexual harassment. Faragher, 524 U.S. at 807; Burlington Industries, 524 U.S. at 765. The evidence established that Petitioner was aware of the procedures and followed those procedures when she filed a complaint against a co-worker in September 2005, when she was working at Gulf Breeze. However, the evidence showed that Petitioner failed to take advantage of policy and related procedures by failing to report her allegations against Mr. Wagner before she was discharged on February 9, 2006. Based on the evidence presented, Petitioner failed to prove her claim of hostile work environment.

89. Petitioner has not produced any competent evidence that she was subject to a hostile work environment created by sexual harassment. While working for a "harsh," "demeaning,"

and "intimidating" supervisor may create an intolerable working environment, such a scenario is not actionable under Title VII or under the FCRA, where all employees, regardless of gender, are subjected to the same harsh and disparaging treatment. It is not within the authority of this tribunal to second-guess Respondent's tolerance of Mr. Wagner's rude and disrespectful behavior to its employees.

90. In addition to her claim of hostile work environment, Petitioner alleges that Respondent terminated her employment on the basis of her age.

91. To establish a prima facie case of discriminatory discharge, Petitioner must show that: (1) she is a member of a protected class; (2) she qualified for the job from which they were fired; and (3) the misconduct for which she was discharged was nearly identical to that engaged in by an employee outside the protected class who was retained. See Nix v. WLCY Radio/Rahall Communications, 738 F.2d 1181 (11th Cir. 1984).

92. Petitioner has met its burden as to the first two elements. She is a member of a protected class and age in that she is over 40 years old. Petitioner has also established that she is qualified for the job of sales representative from which she was fired.

93. To establish the third element, Petitioner must prove that the misconduct for which she was fired was nearly identical

to that engaged in by an employee outside the protected class whom the employer retained. To prove this element, Petitioner presented evidence that Mr. Zackheim engaged in intentional conduct (pulling a chair from under Petitioner and then pulling the chair over her leg) for which Respondent suspended him for a week with no pay. Petitioner also established that she was fired for insubordination (failing to comply with her supervisor's instructions to leave the office). These acts are not "nearly identical." However, Petitioner failed to establish a key component of this element--Mr. Zackheim's age. Thus, it can not be determined that he is under 40, and outside the protected class.

94. Assuming that Petitioner established the elements of a prima facie case of discrimination, Respondent has met its burden by articulating a legitimate, non-discriminatory explanation of the action taken. Respondent presented ample evidence that its motivation for terminating Petitioner was reasonable and not motivated by Petitioner's age. Petitioner was terminated for insubordination after she refused to leave the building after being asked to do so.

95. Having articulated legitimate, non-discriminatory reasons for its challenged actions, the burden then shifted to Petitioner to demonstrate that the employer's proffered reasons for taking actions were actually a pretext for discrimination.

Petitioner failed to present any evidence that the adverse employment actions taken were pretextual. Therefore, her claim must fail.

RECOMMENDATION

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

RECOMMENDED that a final order be issued by the Florida Commission on Human Relations dismissing Petitioner's Petition for Relief.

DONE AND ENTERED this 29th day of January, 2009, in Tallahassee, Leon County, Florida.

*Carolyn S. Holifield*

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CAROLYN S. HOLIFIELD  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 29th day of January, 2009.

ENDNOTES

<sup>1/</sup> All statutory references are to Florida Statutes (2005), unless otherwise noted.

<sup>2/</sup> The record indicates that Petitioner believed that Mr. Wagner was referring to her "hormone" medication.

<sup>3/</sup> Mr. Booth made numerous complaints about Mr. Wagner's inappropriate sexual comments to Ms. Montanez, who "typed up" about five of the complaints. Mr. Booth and Mr. Wagner met with Ms. Montanez several times to resolve the issue, but to no avail. Immediately after the meetings, Mr. Wagner would not engage in the inappropriate and increasingly offensive conduct, but a few days later, he would resume his past inappropriate behavior. Mr. Booth left in January 2006, as a result of Mr. Wagner's behavior.

<sup>4/</sup> Mr. Wagner described Petitioner's offending conduct as "ranting and raving" and "just being insubordinate." Mr. Wagner indicated that he could not tolerate Petitioner's attitude or the way she had acted "in front of the customer." (There was no evidence that any customers were present during the episode.)

<sup>5</sup> Petitioner's complaint stated that while she was in the parking lot that day, Mr. Zackheim shot a bird [with his fingers] at her. In the complaint, Petitioner wrote that "many times" when she was leaving work for the day, Mr. Zackheim would tell her, "Don't come back. You're fired." Petitioner's written complaint noted that she had reported her issues with Mr. Zackheim to Mr. Wagner, who was project manager, but that despite Mr. Wagner's meeting with Petitioner and Mr. Zackheim, the issues were not resolved to her satisfaction.

<sup>6/</sup> There was conflicting testimony concerning his termination. Mr. Wagner testified that his separation from the company was a voluntary and mutual decision. Ms. Dockery-Ruiz testified that the decision to terminate Mr. Wagner was a company unilateral decision.

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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.