

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TONJA J. HUNT,)
)
 Petitioner,)
)
 vs.) Case No. 08-1516
)
 SEARS HOME IMPROVEMENTS, INC.,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on March 4, 2009, in Orlando, Florida, before Susan B. Harrell, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Tonja J. Hunt, pro se
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For Respondent: Donald C. Works, Esquire
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STATEMENT OF THE ISSUES

The issues in this case are whether Respondent committed an unlawful employment practice by discriminating against Petitioner based on sex, whether Respondent was sexually

harassed, and whether Respondent retaliated against Petitioner for making a complaint of sexual harassment.

PRELIMINARY STATEMENT

In October 2006, Petitioner, Tonja J. Hunt (Ms. Hunt), dual-filed a Charge of Discrimination against Respondent, Sears Home Improvement, Inc. (Sears), with the Florida Commission on Human Relations (Commission) and the Equal Employment Opportunity Commission (EEOC). The charge alleged discrimination based on sex. The EEOC investigated the complaint and determined that it was unable to conclude that the information obtained during its investigation established an unlawful employment practice. On February 19, 2008, the Commission issued a Right to Sue to Ms. Hunt.

On March 24, 2008, Ms. Hunt filed a Petition for Relief with the Commission, alleging that Sears had discriminated against her based on sex and that Sears had retaliated against her for filing a charge of sexual discrimination. The Petition for Relief was forwarded to the Division of Administrative Hearings on March 28, 2008, for assignment to an Administrative Law Judge to conduct a final hearing.

The case was assigned to Administrative Law Judge Lawrence P. Stevenson, but was transferred to Administrative Law Judge Susan B. Harrell to conduct the final hearing. The final

hearing was scheduled for May 15, 2008. Ms. Hunt requested and was granted several continuances.

At the final hearing, Ms. Hunt testified on her own behalf and called Deborah Selgado and Zegenya Hunt as witnesses. Petitioner's Exhibits 1 through 4 were admitted in evidence.

At the final hearing, Sears called the following witnesses: Darlene Lighthouse, Luis Saez, Linda Hodahl, Kim Frates, and Keith Wilson. Respondent's Exhibits 1 through 14 were admitted in evidence.

The Transcript was filed on March 16, 2009. The parties agreed to file their proposed recommended orders on or before April 3, 2009. Sears filed its Proposed Recommended Order on March 30, 2009. On April 2, 2009, Ms. Hunt moved for an extension of time to file her proposed recommended order. The motion was granted, and the time for filing proposed recommended orders was extended to April 10, 2009. Ms. Hunt filed her Proposed Recommended Order on April 10, 2009. The parties' Proposed Recommended Orders have been given due consideration in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Ms. Hunt was hired by Sears on January 9, 2006, as an appointment specialist, which is a telemarketer position. Sears provides home improvement products such as siding. The duties of an appointment specialist include calling potential Sears

customers and scheduling appointments for the Sears salespersons and the customers.

2. Each year, the chief executive officer of Sears sends the Sears associates a reaffirmation statement of affirmative action and equal employment opportunity. The letter, which is posted at each call center, states in part:

Our fair employment policies are not new to Sears. These policies prohibit harassment or discrimination against any applicant, associate, vendor, contractor, or customer on the basis of race, color, religion, gender, gender identity, ancestry, national origin, age, disability, veteran status, pregnancy, citizenship, sexual orientation, marital status, ethnicity, or any other reason prohibited by law. These policies also prohibit all forms of retaliation against any individual who complains of being harassed or discriminated against.

3. Each new hire, including Ms. Hunt, is provided with a copy of the Sears harassment policy on their first day of employment. The harassment policy is also posted at each call center. The harassment policy states that Sears prohibits sexual harassment and provides examples of actions that may constitute sexual harassment. Such examples include "[i]nappropriate comments, jokes, or remarks because of or based on a person's status" and "[t]ouching someone in a sexual way, including hugs, kisses, pinches, etc."

4. The Sears harassment policy further requires an employee to take action if the employee:

[F]eel[s] uncomfortable in a situation because of someone's harassing, sexually aggressive, abusive, or discriminatory behavior.

[F]eel[s] that another's harassing, sexually aggressive, abusive or discriminatory comments or actions toward [the employee] or a fellow associate, vendor, customer, etc. are improper in a work environment.

[B]elieve[s] that another's harassing, sexually aggressive, abusive, or discriminatory behavior impairs the [employee's] ability to do [his or her] job, or

[W]ants the harassing, sexually aggressive, abusive, or discriminatory behavior to stop.

5. If an employee believes that a violation of the harassment and discrimination policy has occurred, the Sears harassment policy tells the employee to take the following actions:

Explain the situation to your immediate supervisor or manager.

If you are not satisfied with your supervisor's or manager's response, or if you are uncomfortable speaking with him or her, immediately contact his or her manager or your human resources representative.

If you still find that sufficient attention has not been given to your complaint, or if you are uncomfortable talking with someone in your unit, associates should contact the company's the EthicsAssist Line at 1-800-BASSIST or Associates Services at 1-888-88sears.

6. Sears has a progressive discipline policy and a progressive progress policy. Employees are given coaching discussions and verbal performance memos for the first step. The second step, third, and fourth steps are performance plans for improvements. The last step is a final warning.

7. Sears has a dress code policy. On April 6, 2006, Ms. Hunt was sent home because she was in violation of the dress code policy.

8. On April 13, 2006, a coaching discussion was held with Ms. Hunt concerning her productivity. Ms. Hunt was not meeting the daily requirements for making calls. The minimum standard was 165 calls out daily and 12 appointments. Ms. Hunt was averaging approximately 78 calls per day.

9. On May 15, 2006, Ms. Hunt received a step-two performance plan for improvement for not adhering to the Sears attendance policies. The performance plan stated the performance issues as follows:

Tonja's attendance does not meet company expectations. Since the beginning of her employment Tonja has had multiple occurrences. On 01-30 scheduled court date, 02-10 out due to a family emergency, 02-21 out due to a court hearing for her daughter, 03-06 out due to daughter personal issues, 03-30 called running late, 04-14 late, 04-19 late, 04-24 thru 04-25 out due to oral surgery. Tonja does not have any time available to her an[d] any further occurrences will count as separate occurrences.

10. On June 1, 2006, Ms. Hunt received a verbal performance memo for not meeting the company requirements for productivity. Her productivity for April was .05, which was below the company minimum of 1.3.

11. In October 2006, Ms. Hunt received a step-three performance plan for improvement. The performance issues were described as follows:

Tonja's productivity for the month of September was that of 0.64 which is well below company minimums of 1.3 and a company goal of 1.8. Tonja's attendance has yet to improve. Since 05-15-06 Ms. Hunt has had 12 additional occurrences.

12. On November 7, 2006, Ms. Hunt received a step-four performance plan for improvement due to work performance and misconduct. The performance issues were described as follows:

Work Performance:

Below monthly minimum standard of 1.3;
Tonja's results--.60 has not met standards since hire date.

Attendance:

10/27/06, instructions given to Tonja to call in by noon on Monday & speak to Luis. Previously warned of attendance on 10/9/06 & 5/15/06.

Failed to follow directive
Could not be reached until 11/1

Misconduct:

10/27/06, received multiple complaints regarding inappropriate comments of a sexual nature to other associates on the call floor.

Upon investigation, behavior was in violation of company policy.

11/3/06, Tonja instructed by Management and HR not to discuss investigation with other associates.

Complaints received regarding Tonja not following this directive and discussing the matters of the investigation with other associates.

13. On November 13, 2006, Ms. Hunt was given a performance memo which served as a "final warning." The memo stated the reasons for the final warning as follows:

As stated in the PPI Written Step IV document issued on 10-03-06, there were to be no more attendance occurrences. According to the timekeeping system, you clocked in 40 minutes late on 11-09-06. This memo serves as your final warning. Another attendance occurrence will result in immediate separation.

14. On January 17, 2007, Ms. Hunt received her annual performance evaluation, which rated her on nine areas of performance. Ms. Hunt received an overall performance evaluation of two, which meant that improvement was needed. She received a rating of one in the areas of productivity, availability, and adherence to policy. A rating of one signifies that the performance is unacceptable.

15. Sears terminated Ms. Hunt's employment effective January 23, 2007, for poor performance.

16. When Ms. Hunt began her employment with Sears, she worked in a unit in which Mr. Royston Kenneth Khadaroo was the team leader. As team leader, Mr. Khadaroo would provide

assistance to the other employees concerning the work assignments. He was not a supervisor and had no authority to fire, discipline, or otherwise affect the terms and conditions of employment of the other employees in the unit.

17. Beginning in May 2006, Ms. Hunt claims that Mr. Khadaroo began to sexually harass her.¹ According to Ms. Hunt, Mr. Khadaroo made the following statements to her: "I think you are pretty" and "I think you must be cold." Ms. Hunt took the second statement to mean that he was referring to her nipples. Ms. Hunt claims that on one occasion, he made a measurement using his finger and thumb. She took the action to mean that he was referring to the length of her crotch. On another occasion, Ms. Hunt claims that while Mr. Khadaroo was giving her a ride to her car that he put his hands between her legs.

18. Prior to August 2006, Ms. Hunt made no attempt to advise her supervisor or other management at Sears concerning Mr. Khadaroo's actions. In August 2006, Mr. Khadaroo approached Darlene Lighthouse, who was one of Ms. Hunt's supervisors and told Ms. Lighthouse that Ms. Hunt had been making accusations against him and that he wanted the issue to be addressed by upper management. Mr. Khadaroo also advised Luis Saez, who was another of Ms. Hunt's supervisors, that he wanted an

investigation because Ms. Hunt had been making complaints against him.

19. After Mr. Khadaroo complained to Ms. Lighthouse, she sent him home and talked to Ms. Hunt. Ms. Hunt told Ms. Lighthouse that Mr. Khadaroo had been sexually harassing her. Ms. Lighthouse sent Ms. Hunt home and began an investigation into the allegations.

20. Up until Ms. Hunt's claims, there had been no complaints from any employee concerning Mr. Khadaroo. Ms. Lighthouse's investigation did not reveal any witnesses to Ms. Hunt's allegations. There was no evidence to support or refute Ms. Hunt's claims of sexual harassment. It was a case of "he said, she said."

21. To alleviate the situation, management decided to move Ms. Hunt from the unit in which Mr. Khadaroo worked. Ms. Hunt's workstation was moved so that she worked a few rows away from Mr. Khadaroo. After the investigation, Ms. Hunt did not experience any further unwelcome advances or comments from Mr. Khadaroo.

22. On October 12, 2006, Ms. Hunt filed a Charge of Discrimination with the Commission, alleging that Sears had discriminated against her based on her sex.

CONCLUSIONS OF LAW

23. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat. (2008).

24. Ms. Hunt contends that Sears sexually discriminated against her by subjecting her to a sexually hostile work environment and retaliated against her for filing a Charge of Discrimination. Subsections 760.10(1)(a) and (7), Florida Statutes (2006), provide:

(1) It is an unlawful employment practice for an employer:

(a) To discharge or to fail to refuse to hire any individual, or otherwise discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.

* * *

(7) It is an unlawful employment practice for an employer, an employment agency, a joint labor-management committee, or a labor organization to discriminate against any person because that person has opposed any practice which is an unlawful employment practice under this section, or because that person has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section.

25. The Florida Civil Rights Act of 1992, Section 760.01, et seq., Florida Statutes, is modeled after Title VII of the

Civil Rights Act of 1964, 42 U.S.C. Section 2000, et seq.; therefore, case law interpreting Title VII is also relevant to cases brought under the Florida Civil Rights Act. Florida Department of Community Affairs v. Bryant, 586 So. 2d 1205, 1209 (Fla. 1st DCA 1991).

26. In a discrimination case, the petitioner has the initial burden of establishing a prima facie case of discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). If the petitioner proves a prima facie case of discrimination, the burden shifts to the employer to proffer a legitimate, non-discriminatory reason for the action it took. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). The employer's burden is always one of production, not persuasion, as it always remains the petitioner's burden to persuade the fact finder that the proffered reason is a pretext and that the employer intentionally discriminated against the petitioner. Id. at 252-256.

27. The required elements of a prima facie case for retaliation are: (1) Petitioner participated in a protected activity, (2) Petitioner suffered an adverse employment action, and (3) there is a causal connection between participation in the protected activity and the adverse employment action. See Gupta v. Fla. Board of Regents, 212 F.3d 571, 587 (11th Cir.

2000); Farley v. Nationwide Mutual Ins., 197 F.3d 1322, 1336 (11th Cir. 1999).

28. Ms. Hunt has failed to establish a prima facie case of retaliation. She did file a claim of sexual harassment which is a protected activity, and she was terminated from her employment with Sears. Ms. Hunt did not establish that there was a causal connection between her termination and the filing of a sexual harassment complaint. Her employment was terminated for poor performance. Her problems with productivity were documented as early as April and June 2006, well before she filed a discrimination complaint, and continued throughout her employment with Sears. Ms. Hunt was given performance plans in October and November 2006 for the correction of her productivity problems, but Ms. Hunt continued to fall below the company standards.

29. To establish a claim of sexual harassment, Petitioner must prove the following elements: (1) Petitioner belonged to a protected group, (2) Petitioner has been subjected to unwelcome harassment, (3) the harassment must have been based on the sex or race 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) the employer is responsible for such environment under either a theory of vicarious or of direct

liability. Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1275 (11th Cir. 2002); Mendoza v. Borden, Inc., 195 F.3d 1238, 1245 (11th Cir. 1999).

30. In Miller v. Kenworth of Dothan, Inc., the court discussed an employer's liability for a hostile work environment based on the theories of vicarious and direct liability.

An employer "is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee." Faragher v. City of Boca Raton, 524 U.S. 775, 807, 118 S.Ct. 2275, 2292-93, 141 L. Ed. 2d 662 (1998). The employer will be strictly liable for the hostile environment if the supervisor takes tangible employment action against the victim. See id. at 807, 118 S.Ct. 2293. However, when an employee has established a claim for vicarious liability but where no tangible employment action was taken, a defending employer may raise as an affirmative defense to liability or damages: "(a) that the employer exercised reasonable care to prevent and correct promptly any . . . harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." Id. at 807, 118 S.Ct. at 2292-93. Where the perpetrator of the harassment is merely a co-employee of the victim, the employer will be held directly liable if it knew or should have known of the harassing conduct but failed to take prompt remedial action. See Breda v. Wolf Camera & Video, 222 F.3d 886, 889 (11th Cir. 2000).

31. In the instant case, Ms. Hunt has failed to establish that Sears was liable for Mr. Khadaroo's actions. Ms. Hunt did not inform management for Sears until several months after Mr. Khadaroo began to make inappropriate remarks to her. Up until Ms. Hunt's complaint, Sears had no knowledge of any inappropriate behavior by Mr. Khadaroo to anyone employed at Sears. When management for Sears became aware of Ms. Hunt's allegations, Sears immediately began an investigation. Both Ms. Hunt and Mr. Khadaroo were interviewed. No other witnesses were located who could substantiate Ms. Hunt's allegations. In order to remedy the situation between Ms. Hunt and Mr. Khadaroo, Ms. Hunt was taken out of the unit in which Mr. Khadaroo worked and was physically moved to a location in which she would not have to work near Mr. Khadaroo as she had before her complaint. After the investigation, Ms. Hunt did not have any further incidents with Mr. Khadaroo.

32. Because Sears' actions in response to Ms. Hunt's complaint immediately and permanently ended the alleged harassment, Sears did what was required under the law and cannot be found liable for harassment by Mr. Khadaroo. See Hill v. American General Finance, Inc., 218 F.3d 639, 644 (7th Cir. 2000) (noting that employer, who acted in response to a claim of harassment by immediately investigating and transferring the alleged harasser "reacted with commendable alacrity in almost

textbook example of what is supposed to happen"); Kilgore v. Thompson & Brock Management, Inc., 93 F.3d 752, 754 (11th Cir. 1996) (holding that employer was not liable where it immediately began investigation into allegations of harassment); Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311, 1316 (11th Cir. 1989) (holding that employer not liable for harassment because it took prompt remedial action including interviewing employees, reprimanding accused, and assuring employees that harassment would cease).

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered dismissing Ms. Hunt's Petition for Relief.

DONE AND ENTERED this 15th day of April, 2009, in Tallahassee, Leon County, Florida.



SUSAN B. HARRELL
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Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of April, 2009.

ENDNOTES

^{1/} Ms. Hunt's testimony at final hearing concerning the length of time she had been sexually harassed differed from the statement she made in her Charge of Discrimination filed on October 12, 2006. Her Charge of Discrimination stated that she had been subjected to inappropriate sexual innuendos and remarks from about July through August 2006.

^{2/} Unless otherwise indicated, all references to the Florida Statutes are to the 2006 version.

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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.