STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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| CAROLYN M. CLEVELAND, | ) | |
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| Petitioner, | ) | |
| | ) | |
| vs. | ) | Case No. 08-4552 |
| | ) | |
| WESTGATE HOME SALES, INC., | ) | |
| | ) | |
| Respondent. | ) | |
| | ) | |

RECOMMENDED ORDER

A hearing was held pursuant to notice, on February 1 and 2, 2011, in Gainesville, Florida, before the Division of Administrative Hearings by its designated Administrative Law Judge, Barbara J. Staros.

APPEARANCES

For Petitioner: Jennifer Biewend, Esquire
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Gainesville, Florida 32222

For Respondent: Kris B. Robinson, Esquire
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STATEMENT OF THE ISSUE

Is Respondent, Westgate Home Sales, Inc. (Westgate) an employer as defined in section 760.02(7), Florida Statutes (2010), and did Westgate discriminate against Petitioner as alleged in the Employment Complaint of Discrimination?

## PRELIMINARY STATEMENT

On or about February 15, 2008, Petitioner filed a Charge of Discrimination with FCHR naming "Wayne Frier Home Sales, Inc." as the offending employer. The allegations were investigated, and on July 31, 2008, FCHR entered a Determination: No Cause and issued a Notice of Determination: No Cause.

A Petition for Relief was filed by Petitioner on or about August 28, 2008. FCHR transmitted the case to the Division of Administrative Hearings on or about September 17, 2008. A Notice of Hearing was issued setting the case for formal hearing November 19 and 20, 2008. An Unopposed Motion to Continue Hearing was filed and granted. The hearing was rescheduled for February 11 and 12, 2009.

Prior to the hearing, Respondent filed a Motion to Relinquish Jurisdiction, asserting that Petitioner did not work for Wayne Frier Home Sales, Inc., but instead worked for Westgate Home Sales, Inc. Respondent further argued that the case should be dismissed for lack of jurisdiction, as Westgate Home Sales, Inc., employed between five and eight employees at all times material to the charge of discrimination. Respondent asserted that FCHR lacked jurisdiction as Respondent did not have the requisite number of employees as required in section 760.02(7), Florida Statutes. A motion hearing was held telephonically in which the jurisdictional issue was discussed. The undersigned raised the possibility of relinquishing jurisdiction to FCHR for

the purpose of FCHR conducting an investigation as to the issue of whether Respondent had the requisite number of employees (i.e., 15 or more). Both parties preferred that the case remain at DOAH, and the hearing was rescheduled for the purpose of conducting a hearing on the issue of whether Respondent employed 15 or more persons.

Due to the above developments, the hearing was continued again. On the eve of the rescheduled hearing date, Respondent filed a Notice of Withdrawal of Motion to Relinquish Jurisdiction, citing Arbaugh v. Y & H Corp., 546 U.S. 500 (2006). On the basis of Arbaugh, Respondent asserted that the employer status is merely an element of a person's claim for relief and not a matter of jurisdiction. Accordingly, Respondent suggested that the employer status and the merits of the discrimination claim be heard together, which is ultimately what happened.

A telephonic motion hearing was held on March 18, 2009. Subsequently, Petitioner filed an Unopposed Motion to Amend Case Style, requesting that the style of the case be changed to replace the name of Respondent from Wayne Frier Home Sales, Inc., to Westgate Home Sales, Inc. The Motion was granted and the style of the case was changed accordingly. As discovery progressed and mediation took place but was unsuccessful, Motions to Continue were granted and the case was ultimately heard on February 1 and 2, 2011.

At hearing, Petitioner testified in her own behalf and presented the testimony of 12 other witnesses. Petitioner's Exhibits numbered 1 through 12 were admitted into evidence.[1/] Respondent presented the testimony of 8 witnesses. Respondent's Exhibit numbered 1 was admitted into evidence.

A Transcript consisting of four volumes was filed on February 24, 2011. The parties requested 21 days in which to file proposed recommended orders. Due to the complexity of the case and the large number of witnesses, the request was granted. Respondent filed an Unopposed Motion for Extension of Time to File its Proposed Recommended Order. The Motion was granted. The parties filed Proposed Recommended Orders, which have been duly considered in the preparation of this Recommended Order.

Unless otherwise indicated, all references to the Florida Statutes are to 2008.

## FINDINGS OF FACT

1. At all times material to this proceeding, Petitioner was employed by Respondent, Westgate Home Sales, Inc. (Westgate). She worked for Respondent from January 2007 until February 15, 2008.

2. Westgate is located in Gainesville, Florida, and is in the business of selling mobile homes. Petitioner was service manager for Respondent, and her immediate supervisor was Michael Reaves, the lot manager. Westgate is owned by Frier Home Sales, Inc.

3. As service manager, Petitioner's primary duties were to handle warranty claims and coordinate the set up of a mobile home after it was purchased by a customer. Her work as service manager involved dealings with customers "from set up to service." Her job also involved dealing with several independent contractors.

4. Petitioner worked in the mobile home industry most of her life, as did her family members. She worked at the sales lot which is now Westgate for approximately 18 years. During most of those years, the lot was under different ownership.

5. Petitioner's normal work hours were 9 a.m. to 5 p.m. Monday through Friday, although she would often come in early, stay late, and work on Saturdays. Petitioner's gross earnings were approximately $400 per week.

Facts Related to Requisite Number of Employees

6. In addition to her lot manager, Mr. Reaves, Petitioner worked with James Matthew "Matt" VanEtten (sales manager); Bruce Goodson (sales), Penny Wilkes, (bookkeeper), Dana VanEtten (part-time employee and Matt VanEtten's wife); Doyle Rooks (sales), Dennis Cribbs (sales); Kyle Saborin (sales); and David Walker (sales).

7. There is no dispute that Westgate itself did not employ 15 or more employees during the relevant time period. The dispute concerns whether other entities owned or managed by

certain members of the Frier family should be considered a single-employer for purposes of the Florida Civil Rights Act.

8. William Slaughter is employed by Frier Finance where he is Chief Financial Officer and oversees all of the accounting for approximately 30 companies, which will be referred to as the Frier Companies. Nine of these companies operate out of a location in Live Oak, Florida, including Frier Home Sales, which owns Westgate. The Live Oak location is commonly referred to by current and former employees of Westgate as "the corporate office." Members of the Frier family, specifically Wayne, Todd, and Matt Frier, are owners or directors of all of the companies operating out of the Live Oak location, and most, if not all, of the other Frier Companies. All of the companies have something to do with the mobile home industry. Matthew, Todd, and Wayne Frier are listed as Directors for Frier Home Sales, Inc., in its Articles of Incorporation; Wayne and Matthew Frier are listed as Directors of Westgate Home Sales, Inc.

9. Frier Finance is one of the companies which operates out of the Live Oak location. Frier Finance finances mobile homes for customers, provides floor plan financing for sales lots, and provides management services for sales lots. Frier Finance negotiates things like rates on floor plan contracts, which benefit the individual lots by getting better rates. Each lot signs its own contract with the floor plan lenders.

10. In addition to overseeing the accounting for various companies, Mr. Slaughter is responsible for hiring and overseeing three auditors, who are also employed by Frier Finance. The auditors provide monthly services to the sales lots. They assist in hiring and training bookkeepers for the sales lots, and report the financials to Mr. Slaughter, who in turn provides that information to the Friers.

11. The auditors visit the sales lots three or four times a month conducting audits of sales, theft, inventory, and commissions. Frier Finance was paid a fee for all of the auditing and management services provided to the various sales lots, as well as for financing services.

12. The bookkeepers at the various sales lots fill out the time sheets, and send them to Frier Finance in Live Oak. Specifically, they send the time sheets to Betty Jordan, who is Mr. Slaughter's assistant and is a bookkeeper. She handles bookkeeping and coordinates payroll for many of the sales lots, as well as for Frier Finance, Frier Home Sales, Frier Finance Floor Plan, and Frier Home Sales Floor Plan.

13. The bookkeepers at the sales lots fax timesheets to Ms. Jordan. The timesheet form used by the various lots appears to be the same, but the time sheets reflect a lot number indicating which sales lot is reporting payroll. After receiving the faxes from the sales lots, she gives them to either Matt or Todd Frier, who then gives them back to her. Ms. Jordan then

faxes the payroll information to Oasis Outsourcing, a company located in West Palm Beach, which provides professional employment services, including preparing paychecks.

14. Ms. Jordan also handles purchase orders of mobile homes from the factory. If a lot manager wishes to purchase a mobile home, he or she faxes the purchase order to Ms. Jordan, who then gives it to Todd or Matt Frier, who then initials approval. Ms. Jordan then assigns the purchase order a number, and faxes it back to the requesting lot manager.

15. Ms. Jordan on occasion sends memos to various sales lots regarding payroll procedures. These memos relate to services provided by Frier Finance. Again, Frier Finance is paid a fee for these payroll services.

16. Each sales lot has its own bank account out of which it pays its own operating costs, e.g., utility bills, telephone bills, and advertising. The respective bookkeepers issue checks at the sales location on that entity's bank account, then send them to Live Oak where they are signed by either Mr. Slaughter or one of the Friers, and sent back to the sales location for distribution. A lot manager can only sign checks if he or she is a minority partner in that entity. Approximately seven or eight entities have minority partners, but the record is not clear which ones. The sales lots only issue checks for that lot, none of the other lots. Lots do not comingle their revenues or operating expenses.

17. Lot managers are typically hired by the Friers, and only the Friers can fire lot managers. The Friers decide where to place lot managers and set the pay rates for the lot managers. The Friers have moved a lot manager from one location to another. These decisions are made by the Friers as officers or managing members of the individual companies. When a lot manager is transferred to a different lot, that manager becomes an employee of the new lot. Similarly, when a bookkeeper splits her time between two lots, her salary was paid half by one lot, and half by the other.

18. Lot managers control the daily operations of the sales lot. Lot managers are responsible for hiring and firing employees at the various lots, with the exception of bookkeepers. If a lot manager wants to fire a bookkeeper, the manager tells Frier Finance and the decision is made there.

19. Lot managers make the decisions as to work schedules, vacations, holiday closures, approval of sick days, and promotions. Decisions regarding lot employees are handled at the individual lots, not in a centralized location.

20. Each lot is separately licensed, has its own sales tax number, "DMV" number, and its own phone number. Each lot "stands or falls" on its own. The lots do not have the same ownership structure.

21. At a time prior to the time relevant to this proceeding, the Frier's corporate structure was different and the companies were, to an extent not clear from the record, more unified. At some point prior to the time-frame material to this case, this large "umbrella" corporation was split or divided into smaller companies. However, there was no evidence that any of the entities were separated or "splintered" with the intention or purpose of defeating anti-discrimination laws. Further, there was no evidence presented that establishes or suggests that the Friers or any of the companies were aware of, condoned, or tolerated the actions complained of by Petitioner herein. On the contrary, when asked on cross-examination if the Friers ever took part in the harassment, Petitioner replied, "No, no, sir. Never."

Facts Related to Sexual Harassment

22. For the majority of the time she worked at Westgate, Petitioner's office was located in an office building that was approximately the size of a double-wide mobile home with additions.

23. Petitioner alleges that the actions and behavior of which she complains began over the last six months she was employed by Westgate. At first, she overheard inappropriate comments about customers. Eventually, the comments, and actions, were also directed at her.

24. As is typical of a sexual harassment case, there is conflicting testimony of exactly what was said and exactly what actions took place. However, in this case, Respondent concedes, at least to some degree, that conversations took place that were inappropriate for the workplace. Respondent asserts, however, that Petitioner was a willing participant in these inappropriate conversations and exchanges.

25. While the inappropriate language and conduct permeated the working environment at Westgate, Petitioner primarily complains about the actions of her supervisor, Mr. Reaves, and a co-worker, Mr. VanEtten. Neither Mr. Reaves nor Mr. VanEtten testified.

26. The earliest offensive conversation Petitioner recalled was a comment made by Mr. VanEtten to her in which he told her he had a fantasy of being with an older woman.[2/] Petitioner replied that he had better have a fantasy about a younger woman (referring to his wife). Petitioner complained to Mr. Reaves, who, according to Petitioner, responded that Matt "liked" her and not to be afraid of Matt because "Matt's got a little dick."[3/]

27. The allegations regarding Mr. VanEtten are numerous: Mr. VanEtten would "act out" things, or perform what Petitioner described as "skits." Many of the skits were not inappropriate and Petitioner found them to be funny. However, she failed to see the humor in "the rabbit," described below, and when it first occurred, told Mr. VanEtten to "get the fuck off of me."

28. Petitioner described Mr. VanEtten, on many occasions, going up to the chair she was sitting in and "humping" it, which he labeled "the rabbit." She also described Mr. VanEtten as a tall, large man. Petitioner is a petite woman. Her allegation regarding Mr. VanEtten's performing "the rabbit" on her chair was corroborated by both of Petitioner's daughters who observed it on visits to their mother's office, as well as by Shiela Nickerson, a friend who cleaned mobile homes at Westgate, and Corey Bryan, the father of one of Petitioner's grandchildren.[4/]

29. In addition to "the rabbit," Petitioner asserts that Mr. VanEtten once wrapped his arms around her while they bumped into each other in the office; offered her money for sex; frequently said to her "show me your pussy"; and, on the last day she worked at the office, dropped his pants and "mooned" her showing his naked buttocks.

30. Regarding Mr. Reeves, Petitioner asserts that he "mooned" her three or four times; used sexually charged expressions such as commenting that Petitioner must be "fucking" one of the contractors, Richard Cowart; asking her to get him an ice cream cone, saying he wanted it "big and sloppy, like a pussy, like a big ole pussy"; telling her she needed to "man up, grow a dick, be a man"; that he had a visual image of her wrapped around his head and him licking her; and frequently making remarks of a sexual nature either towards her or generally in the workplace and not directed at her.

31. In addition to Mr. VanEtten and Mr. Reaves, Petitioner also complained about harassment by a salesman, Bruce Goodson. She related one instance when Kevin Turner, a serviceman from a carpet cleaning company, was there to clean carpet. Mr. Goodson told him, in a joking fashion but in Petitioner's presence, that Petitioner would do a lap-dance for him. Mr. Turner corroborated this allegation. Mr. Goodson did not testify.

32. Petitioner's testimony regarding the above-described incidents was credible and largely unrebutted.

33. Other witnesses corroborated Petitioner's depiction of the sexually-charged comments that were prevalent at Westgate. Ms. Nickerson, who assisted in cleaning mobile homes, complained of inappropriate comments by both Mr. VanEtten (stating in her presence and in the presence of Petitioner that he was horny) and Mr. Reaves (telling her how pretty her breasts were and how good her ass would look while he was hitting it from the back, and offering to put her up in a house if she slept with him); and generally that "every time I went there it was sexual comments being said."

34. Kelly Oldman is one of Petitioner's daughters. She cleaned mobile homes for Westgate as an independent contractor. Ms. Oldman also was the recipient of many sexually charged comments by Mr. VanEtten (e.g., making obscene gestures with his mouth and gesture "nasty like he wanted you to masturbate him"; that he "grabbed his stuff" and asked if she or her mother would

"help him relieve some pressure on this thing"; that he would often grind his genitals toward her; and that everything he did was sexually driven); and Mr. Reaves (telling her she needed a "sugar daddy"; hearing him on one occasion tell her mother to show him her pussy); and that she was called "bootylicious" by them and by some of the salesmen there. Petitioner frequently complained to Ms. Oldman about the office atmosphere.

35. It must be noted that Ms. Oldman began working at Westgate at her mother's suggestion. Ms. Oldman had just become single and needed to earn money in addition to another job she had. Petitioner warned her daughter about the behavior at Westgate and, despite this behavior, spoke to Mr. Reeves about hiring her daughter to clean mobile homes. Kelly was hired to clean homes as an independent contractor.

36. There is no real dispute that off-color jokes and office banter of a sexual nature were prevalent at Westgate. However, Respondent points to what it perceives to be Petitioner's participation in and contribution to much of the sexually charged office environment.

37. Petitioner acknowledges that she used profanity in the workplace; that she sometimes laughed at jokes of a sexual nature; that she, at the time, sometimes found those jokes to be funny; and that she had a flirtatious relationship with Mr. Cowart, an independent contractor.

38. Petitioner also acknowledges that her actions were not always appropriate. She described one incident that she readily admits was inappropriate. Once when she was particularly disgusted with a comment by a contractor (not an employee of Westgate) in reference to her wearing shorts during off hours that her "pussy was clean as a whistle," and to Mr. Reaves responsive comment that her "kitty-cat was clean as a whistle," she reached into her pants, grabbed some pubic hairs, and threw them at the contractor who made the comment.

39. Petitioner also acknowledges that occasionally her grandchildren were at her office. For example, she would pick up a grandchild from daycare and keep the child at her office until her daughter got off work; or, her daughter would drop by with her grandchildren. Petitioner acknowledged that the guys would "straighten up" when her grandchildren were present.

40. Dennis Cribbs, who worked at Westgate at least some of the time Petitioner worked there, described her language as "a lot of sexual innuendo" and, regarding her language, that he "never heard a woman speak like that."

41. Mark Denmark, a detective with the Gainesville Police Department, had occasion to stop by Westgate and described the office conversation there as containing jokes, comments, innuendo, and banter of a sexual nature, all of which Petitioner participated.

42. David Walker, also worked at Westgate when Petitioner worked there. He is now vice president of a mobile home lot which is a competitor of Westgate. His office was near Petitioner's, and he observed her participate in office banter, conversations, and just "normal gossip stuff" of a sexual nature. He described her language as "vulgar" and that it bothered him so much to be next to her office that he asked to be moved to another part of the building. Mr. Walker acknowledged that he was one of the persons who called Ms. Oldman "bootylicious."

43. Mr. Cowart, who acknowledged some sort of relationship with Petitioner, provided similar testimony regarding Petitioner's participation in office banter, etc., of a sexual nature.[5/]

44. Petitioner wanted a "transfer" to another lot, and attempted to call Todd Frier about this. She left messages without detail as to why she was calling. She did not talk to Mr. Frier about a transfer, as her call was not returned.

45. Following that and toward the end of her employment, Petitioner discussed with Mr. Reaves whether she could move her office to the back building where Penny Wilkes worked. He agreed to let her do that. However, that office was not finished prior to her ending her employment.

46. During the last week of employment at Westgate, Petitioner was encouraged by "everyone" to quit and was being treated "really, really bad." Her office had been packed and it

appeared to her she was losing her job. She had a conversation with Mr. Reaves in which she informed him she was going to file a complaint. Instead of firing her, he offered a "promotion" to her in sales. Petitioner believed that this was not a genuine offer, as she is bad in math and her experience was in service, not sales. She told him he was "fucked up."

47. Petitioner described her leaving Westgate as follows: "I was fired. At that point I thought I was fired. Now looking at it, no. . ." ". . . I didn't get fired. I got manipulated out of there."

CONCLUSIONS OF LAW

48. For purposes of this proceeding the Division has jurisdiction over the parties and the subject matter pursuant to sections 120.569, 120.57(1), and 760.11, Florida Statutes.

49. A threshold question in this case is whether Respondent meets the definition of employer as defined in section 760.02(7). Traditionally, this issue has been treated as jurisdictional. Reeves v. DSI Security Servs., 331 F. App'x 659, 2009 U.S. App. (11th Cir. 2009) ("We treat the question of whether a defendant meets the statutory definition of 'employer' as a threshold jurisdictional matter under Title VII.") However, the United States Supreme Court opinion in Arbaugh v. Y & H Corp., supra, indicates otherwise, as the Court treats this issue as simply as element of a person's claim for relief. Accord, Morrison v. Amway, 323 F.3d 920 (11th Cir. 2003). In any event, it must be

determined whether Respondent is an "employer" subject to the Florida Civil Rights Act of 1992. Section 760.02(7) defines "employer" as follows:

> 'Employer' means any person employing 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such a person.

50. Petitioner bears the burden to establish her claim consistent with the criteria above. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Texas Dep't of Comty. Aff. v. Burdine, 450 U.S. 248 (1981). It is Petitioner's burden to establish the existence of an integrated enterprise, as will be discussed more fully herein. Guaqueta v. Universal Beverages, LLC, 2010 U.S. Dist. LEXIS 69660 (S.D. Fla. 2010) (citing Cardinale v. S. Homes of Polk Cnty., Inc., 310 F. App'x 311, 312 (11th Cir. 2009)). Petitioner must establish this proof by a preponderance of the evidence. § 120.57(1)(j), Fla. Stat.

51. The Florida Civil Rights Act is patterned after Title VII, and federal discrimination law should be used as guidance when construing Florida's law. Brand v. Florida Power Corp., 633 So. 2d 504, (Fla. 1st DCA 1994); see Sch. Bd. of Leon Cnty. v. Hargis, 400 So. 2d 103 (Fla. 1st. DCA 1981).

52. "The ultimate touchstone under [the law] is whether an employer has employment relationships with 15 or more individuals for each working day in 20 or more weeks during the year in question." Walters v. Metropolitan Educational Enterprises,

Inc., 519 U.S. 202, 212 (1997). This is codified in section 760.02(7).

53. Petitioner asserts that when the employees of the "Frier companies" are added together within the relevant time period, this total would meet the definition of "employer" set out in Section 760.02(7) as to the requisite number of employees.

54. For Petitioner to be able to include the employees of the other "Frier companies" in the count to establish the statutory requirement by complying with the definition of "employer" at section 760.02(7), they must by extension of Title VII case law meet the "single employer" or "integrated enterprise" test. This test is one established in relation to Title VII actions. In that setting it is recognized by the courts as being part of a "liberal construction" pertaining to the term "employer" set forth in Title VII. See Reeves v. DSI Security Services, supra, and Lyes v. the City of Rivera Beach, Florida, 166 F.3d 1332, 1341 (11th Cir. 1999). The court in Lyes explained at 1341:

> In keeping with this liberal construction, we sometimes look beyond the nominal independence of an entity and ask whether two or more ostensibly separate entities should be treated as a single, integrated enterprise when determining whether a plaintiff's "employer" comes within the coverage of Title VII.
>
> We have identified three circumstances in which it is appropriate to aggregate multiple entities for the purposes of counting employees. First, where two ostensibly separate entities are 'highly integrated with

> respect to ownership and operations,' we may count them together under Title VII. McKenzie, 834 F.2d at 933 (quoting Fike v. Gold Kist, Inc., 514 F.Supp. 722, 726 (N.D.Ala.), aff'd, 664 F.2d 295 (11th Cir. 1981)). This is the 'single employer' or "integrated enterprise" test. . . . .
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> * * *
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> The issue before us involves the "single employer" test. In determining whether two non-governmental entities should be consolidated and counted as a single employer, we have applied the standard promulgated in NLRA cases by the National Labor Relations Board. See, e.g., McKenzie, 834 F.2d at 933. This standard sets out four criteria for determining whether nominally separate entities should be treated as an integrated enterprise. Under the so-called "NLRB test," we look for "(1) interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control." . . .

55. "The totality of the circumstances controls, thus, no single factor is conclusive, and the presence of all four factors is not necessary to a finding of single employer." E.E.O.C. v. Dolphin Cruise Line, Inc., 945 F. Supp. 1550 (S.D. Fla. 1996).

56. In determining whether the interrelation of operations factor is met, courts look to whether the companies share employees and resources. Guaqueta, supra (citing Walker v. Boys & Girls Club of Am., 38 F. Supp. 2d 1326, 1331 (M.D. Ala. 1999)), "[T]he National Labor Relations Board has identified seven indicia of interrelatedness: (1) combined accounting records; (2) combined bank accounts; (3) combined lines of credit; (4) combined payroll preparation; (5) combined

switchboards; (6) combined telephone numbers and (7) combined officers.")

57. Applying the above analysis, Westgate did not share combined bank accounts, switchboards, or telephone numbers. As for accounting records, Frier Finance provided accounting services, for a fee, but there is no evidence that establishes that the accounting records were "combined." That is, although the accountants were centrally located, the preponderance of the evidence indicates that the accounts were maintained separately. Similarly, while the various lots used Frier Finance to negotiate financing, the manager of the individual lot had to sign the financing contract.

58. The various corporate entities sent their payroll to Frier Finance, which, in addition to Oasis Outsourcing, processed payroll for a fee. However, while the payroll of the various entities were processed in one central location, the preponderance of the evidence indicates that the payrolls of the various lots were not combined. Rather, the checks are issued from individual company accounts. See Guaqueta, supra, at 20, citing Fike v. Goldkist, Inc., 514 F. Supp. 722, at 726-727 (N.D. Ala. 1981) (finding no integrated enterprise where '[a]lthough [the first company] prepared the [second company's] salaried payroll, [the first company] was fully reimbursed by [the second company] for this and all other services provided by [the first company].").

59. The evidence did establish that the entities had common officers or owners, which will be discussed in more detail below (in analyzing the third factor), in that the Friers were officers, directors, or owners of most, if not all, of the companies.

60. The centralized control of labor relations factor looks at "which company has the power to hire and fire employees and control employment practices." Guaqueta, supra, at 20 (citing Fike at 727 "[T]he 'control' of labor relations is not potential control but active control of day-to-day labor relations.")

61. The preponderance of the evidence established that the control of day-to-day labor relations was not centralized. While the Friers hired the lot managers, the lot managers generally had the authority to manage day-to-day operations of the lots.

62. The common management factor looks for common directors and officers. Id. (citing Fike, supra, at 727 "Cases treating two separate corporate entities as a single employer have placed heavy emphasis on the existence of common directors and officers.")

63. The preponderance of the evidence established that the separate corporate entities had common directors and officers.

64. Finally, the last factor to consider is common ownership and financial control. Courts have held that a finding of common ownership or financial control alone is insufficient to establish the single employer or integrated enterprise criterion

absent proof of the other factors. Guaqueta, supra, at 24, and see Cardinale v. S. Homes of Polk Cnty, Inc., 310 F. App'x 311, 312-313 (finding that defendants are not an integrated enterprise where plaintiff was only able to show one factor, common ownership.).

65. The preponderance of the evidence established that there is common ownership among the various companies, but did not establish common financial control. The court's analysis in Guaqueta comparing the holdings in two cases is instructive regarding financial control:

> In Player v. Nations Biologies, Inc., 993 F. Supp. 878, 883 (M.D. Ala. 1997), the plaintiff established financial control where the main company maintained a centralized account pooling the profits of all the other companies to cover the losses of the less successful companies. By contrast in Fike, the district court did not find common ownership where one company did not exercise financial control over the other company, revenues and operating expenses were not comingled, and one company did not borrow funds from the other. 514 F. Supp. at 727.

66. In the instant case, there was no centralized account pooling profits, and revenues and operating expenses were not comingled. The record is not entirely clear as to whether Frier Finance actually loans money to sales lots or simply negotiates financing arrangements on behalf of sales lots.

67. This case does not neatly fit into any of the factual scenarios of the case law discussed above. Certainly, there is the common thread of the members of the Frier family having

ownership or being officers of the various companies. However, the more detailed analysis of the factors set forth in the case law discussed above reveals that there is more separation among the companies than what initially appears to be the case.

68. It is concluded that, in balance, having applied the criteria set forth in the case law analyzed above, Petitioner did not carry her burden of establishing that Respondent has the requisite number of employees as contemplated in section 760.02(7).

69. Recognizing that FCHR has final order authority in this case and may or may not agree with this conclusion, the following are conclusions of law regarding whether or not Petitioner met her burden of establishing sexual harassment.

Hostile Work Environment--Sexual Harassment

70. To prevail on her claim of discrimination, Petitioner must present either direct evidence of discrimination or circumstantial evidence that creates an inference of discrimination. Reeves v. C.H. Robinson Worldwide, Inc., 594 F.3d 798, 813 (11th Cir. 2010); Reeves v. DSI, 331 F. App'x at 662 (citing Hinson v. Clinch Cnty., Ga. Bd. of Educ., 231 F.3d 821, 827-28 (11th Cir. 2000)).

71. Direct evidence is evidence which, if believed, would prove the existence of discrimination without inference or presumption. Holifield v. Reno, 115 F.3d 1555, 1561-1562 (11th Cir. 1997).

72. Usually, direct evidence is not available and the claimant must rely on circumstantial evidence to prove discriminatory intent. Holifield v. Reno, 115 F.3d at 1561-1562. The shifting burden framework set forth in McDonnell Douglas Corp. v. Green, supra, is generally used in which Petitioner must establish a prima facie case of discrimination. Once Petitioner establishes a prima facie case, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the employment action taken; then, the employee bears the ultimate burden of persuasion to establish that the employer's proffered reason for the action taken is merely a pretext for discrimination.

73. To establish a prima facie case of a hostile work environment caused by sexual harassment, Petitioner must show that: she belongs to a protected group; she was subjected to unwelcome sexual harassment (e.g., sexual advances, requests for sexual favors, and other conduct of a sexual nature); the harassment was based on the sex (gender) of the employee; the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and show a basis for holding Respondent liable (i.e., the employer knew or should have known of the harassment and failed to take prompt remedial action). Reeves v. C.H. Robinson Worldwide, Inc., 594 F.3d 798, 808 (11th Cir. 2010); Morgan v. Fellini's Pizza, Inc., 64 F. Supp. 2d 1304

(N.D. Ga. 1999). Where the perpetrator of the harassment is merely a co-employee of the complainant, the employer will be held liable if it knew or should have known of the harassing conduct but failed to take prompt remedial action. Hardin v. Waste Mgt. Inc. of Fla. 2010 U.S. Dist. LEXIS 73418 (N.D. Fla. 2010) (citing Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1278 (11th Cir. 2002)).

74. There is no dispute that Petitioner, as a female, is a member of a protected class. There is dispute, however, whether Petitioner meets the second element. That is, by her own conduct, has Petitioner established that the behavior was unwelcome? A court may consider whether the plaintiff or petitioner participated in the very conduct of which she complains. Balletti v. Sun-Sentinel Co., 909 F. Supp. 1539 (S.D. Fla. 1995)

75. To constitute harassment, the conduct must be unwelcome "in the sense that the employee did not solicit it or incite it, and in the sense that the employee regarded the conduct as undesirable or offensive." Morgan, 64 F. Supp. 2d at 1309 (citing Henson v. City of Dundee, 682 F.2d 897, 903-05 (11th Cir. 1982)).

76. In analyzing whether complained of conduct was unwelcome, courts look at the entire context of the alleged harassment. See Meritor Savings Bank FSB v. Vinson, 477 U.S. 57, 69 (1986) at 69. "It does not follow, however, that the 'use of

foul language or sexual innuendo in a consensual setting' waives that plaintiff's legal protections against unwelcome harassment." Morgan, 64 F. Supp. 2d at 1309-1310.

77. While Petitioner's behavior was far from exemplary, she did not welcome the conduct. When Mr. VanEtten first demonstrated "the rabbit," Petitioner's objection to this (telling him to "get the fuck off of me") was clear as a bell. Further, she complained to her supervisor who, besides not taking remedial action, replied with his own inappropriate comment. Moreover, upon reviewing the entire context of the harassment as set forth above, the undersigned finds that Petitioner was subjected to unwelcome harassment.

78. As to the third factor, the conduct was clearly based on her gender. While using curse words or even sexual slang does not necessarily constitute gender-based harassment, the language and conduct was clearly and frequently gender-specific. See Reeves v. C.H. Robinson, 594 F.3d 798 at 804. (Plaintiff identified a substantial corpus of gender-derogatory language addressed specifically to women.)

79. The Eleventh Circuit set out a thorough framework for analyzing the fourth factor. As the Court explained in Reeves v. C.H. Robinson, 594 F.3d 798, at 808-809:

> Either severity or pervasiveness is sufficient to establish a violation of Title VII. (citation omitted) In evaluating allegedly discriminatory conduct, we consider its 'frequency . . .; 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. at 23 [1993], quoted in Mendoza [v. Borden, Inc.], 195 F.3d at 1258 [1999](Tjoflat, J., concurring in part, and dissenting in part).

Moreover, the plaintiff must prove that the environment was both subjectively and objectively hostile. Id., at 21-22. "The employee must 'subjectively perceive' the harassment as sufficiently severe and pervasive to alter the terms or conditions of employment, and this subjective perception must be objectively reasonable." Mendoza, 195 F.3d at 1246 (quoting Harris, 510 U.S. at 21-22). . . . "[T]he objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.' "Oncale, 523 U.S. at 81 (quoting Harris, 510 U.S. at 23).

In a case like this, where both gender-specific and general, indiscriminate vulgarity allegedly pervaded the workplace, we reaffirm the bedrock principle that not all objectionable conduct or language amounts to discrimination under Title VII. Although gender-specific language that imposes a change in the terms or conditions of employment based on sex will violate Title VII, general vulgarity or references to sex that are indiscriminate in nature will not, standing alone, generally be actionable. Title VII is not a "general civility code." (citations omitted). . . As we observed in Baldwin v. Blue Cross/Blue Shield of Alabama, "Title VII does not prohibit profanity alone, however profane. It does not prohibit harassment alone, however severe and pervasive. Instead, Title VII prohibits discrimination, including harassment that discriminates based on a protected category such as sex." 480 F.3d [1287] at 1301-02 [11th Cir. 2007]. . . . Title VII's test instead 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." (citation omitted).
>
> Nevertheless, a member of a protected group cannot be forced to endure pervasive, derogatory conduct and references that are gender-specific in the workplace, just because the workplace may be otherwise rife with generally indiscriminate vulgar conduct. Title VII does not offer boorish employers a free pass to discriminate against their employees specifically on account of gender just because they have tolerated pervasive but indiscriminate profanity as well. . . .
>
> As the Supreme Court has observed, "[t]he real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." (citations omitted) Thus, we proceed with '[c]ommon sense, and an appropriate sensitivity to social context,' to distinguish between general office vulgarity and the "conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive." Oncale [v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998)], 523 U.S. at 82, (observing that harassment with sexual connotations is not by itself sexual harassment).

80. The evidence established that the harassing conduct was pervasive, in that the conduct described above was frequent and humiliating.[6/] The evidence further established that the environment was subjectively hostile. Further, a reasonable person in Petitioner's position, considering all of the circumstances, would find the atmosphere hostile. Petitioner was subjected to humiliating and degrading conduct in a way that the conditions of her male co-workers were not. It was a "workplace that exposed [Petitioner] to disadvantageous terms and conditions

of employment to which members of the other sex were not exposed." Reeves v. C.H. Robinson, 594 F.3d 798 at 813, and was pervasive enough to alter the terms and conditions of her employment.

81. Finally, her employer knew about the misconduct as she complained to her supervisor about the unwelcome conduct and her supervisor was one of the persons who took part in the harassing behavior.[7/]

82. Petitioner has met her burden of establishing a prima facie case of a hostile work environment based upon sexual harassment.[8/] Respondent offered no legitimate non-discriminatory reason for its actions.

## RECOMMENDATION

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

RECOMMENDED:

That a final order be entered by the Florida Commission on Human Relations finding that, based upon Petitioner's failure to show that the Respondent is "an employer" as defined in section 760.02(7), that the Employment Complaint of Discrimination be dismissed.

DONE AND ENTERED this 5th day of May, 2011, in Tallahassee, Leon County, Florida.

BARBARA J. STAROS
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of May, 2011.

ENDNOTES

[1/] Two exhibits were mistakenly referenced as Petitioner's Exhibit 11 during the hearing. The exhibit admitted on page 519 of the Transcript should have been referenced as Petitioner's Exhibit 12.

[2/] According to the date of birth indicated on her Employment Charge of Discrimination, Petitioner was in her mid-40s at the time.

[3/] While Mr. Reaves did not testify, a brief portion of his testimony from another proceeding was admitted into evidence in which he denied that she complained to him. He did, however, acknowledge telling her that if a person who was causing trouble went to Wayne Frier about it, he would pack up their stuff before they got back from complaining.

[4/] Mrs. VanEtten believes that "the rabbit" describes a quick rearranging of furniture in a mobile home. It is unlikely, however, that Mr. VanEtten would perform "the rabbit, "as described by Petitioner, in Mrs. VanEtten's presence.

[5/] Danny Jones' testimony regarding Petitioner's behavior is disregarded as not credible.

[6/] There was some evidence that the conduct was physically

threatening, in that Petitioner is a petite woman and Mr. VanEtten was described as a tall, large man. However, her testimony focused on her humiliation, rather than a feeling of being physically threatened.

[7/] Had the conclusion of the threshold issue been otherwise, an examination of whether the Friers knew or should have known about the behavior would be appropriate. There is no evidence that they knew. Indeed, Petitioner tried to call one of them and was unsuccessful. Under the operational structure that exists, i.e., the lot managers having control of the day-to-day operations, there is nothing to indicate that the Friers should have known about the behavior at Westgate.

[8/] Petitioner did not pursue her retaliation claim.

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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.