STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BETH THULIN,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 09-0092
	)	
CITY OF FLAGLER BEACH, FL,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

A formal hearing was conducted in this case on March 18 and 19, 2009, in Bunnell, Florida, by Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Thomas A. Delegal, III, Esquire
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Jacksonville, Florida 32202

For Respondent: Michael Bowling, Esquire
Kara Rogers, Esquire
Bell, Roper & Kohlmyer, P.A.
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STATEMENT OF THE ISSUES

The issues are whether Petitioner committed an unlawful employment practice by discriminating against Petitioner based on her sex in violation of Section 760.10(1)(a), Florida

Statutes (2008), and by retaliating against her contrary to Section 760.10(7), Florida Statutes (2008).

PRELIMINARY STATEMENT

On or about May 17, 2008, Petitioner Beth Thulin (Petitioner) filed an Employment Complaint of Discrimination against Respondent City of Flagler Beach, Florida (Respondent). The complaint alleged that Petitioner had been sexually harassed, unfairly disciplined, subjected to different terms and conditions, retaliated against, and constructively discharged.

On December 1, 2008, The Florida Commission on Human Relations (FCHR) issued a Determination: No Cause. On January 5, 2009, Petitioner filed a Petition for Relief with FCHR. The petition was referred to the Division of Administrative Hearings on January 8, 2009.

A Notice of Hearings dated January 23, 2009, scheduled the hearing for March 18, 2009. On March 10, 2009, the undersigned issued an Order granting Respondent's unopposed Request for Additional Hearing Date.

On March 11, 2009, Petitioner filed a Motion for Change of Venue. After a telephone conference on March 12, 2009, the undersigned issued an Amended Notice of Hearing changing the location of the hearing.

During the hearing, Petitioner testified on her own behalf and presented the testimony of four additional witnesses.

Petitioner offered Petitioner's Exhibit Nos. P1 through P8 that were accepted as evidence.

Respondent presented the testimony of six witnesses. Respondent offered Respondent's Exhibit Nos. R1 through R15 that were accepted as evidence.

The Transcript was filed on March 13, 2009. The parties filed their proposed findings of fact and conclusions of law on April 21, 2009.

FINDINGS OF FACT

1. Respondent hired Petitioner as Finance Director in September 2005. Petitioner took the position during a very challenging time because the budget was immediately due, an audit was six months past due, and allegations of embezzlement had been lodged against the former finance director. Petitioner successfully managed these challenges.

2. Petitioner reported directly to the City Manager. The City Manager reported to the City Commissioners. The City Manager directed the day-to-day supervision and management of Petitioner and other department heads.

3. Bill Veach was the City Manager when Respondent hired Petitioner. Mr. Veach gave Petitioner excellent performance evaluations. Additionally, Randy Bush, City Commissioner from 2002 to 2006, and Bob Mish, City Commissioner from 2004 to 2006, commended Petitioner for her work.

4. At the time of the hearing, Ron Vath had been a City Commissioner for eight years. Mr. Vath frequently went to the City Hall to pick up his mail. He often asked Petitioner to compile information or answer questions related to finance matters, especially during budget time. Initially, Mr. Vath was satisfied with Petitioner's work performance.

5. In addition to seeking financial information from Petitioner, Mr. Vath made inappropriate sexual comments to Petitioner. For instance, Mr. Vath would look at Petitioner and say "yum yum." He commented on Petitioner's clothes as being sexy and told her that she "had very nice looking legs."

6. On one occasion, Mr. Vath and Petitioner were standing near the copy machine. Mr. Vath stated in a very low tone, "I don't know what's been going on with my mind lately, it could be the new medication I'm on, but I've been having very erotic dreams lately and you've been in some of them."

7. Sometime in June or July 2006, Mr. Vath was in or near Petitioner's office cubicle discussing some figures. When Mr. Vath became very quiet, Petitioner inquired if he was okay. Mr. Vath then leaned across Petitioner's desk, looked her straight in the eye, and said, "I'm okay, but I have a very big hard on right now." Petitioner pushed her chair away from her desk and told Mr. Vath, "You need to go home and take that up with your wife."

8. After Mr. Vath's inappropriate comment, Petitioner saw James Ramer, Respondent's Water Plant Superintendent. Petitioner told Mr. Ramer that Mr. Vath had made a pass at her.

9. Roger Free was Respondent's Chief of Police until September 2007. Petitioner told Chief Free about Mr. Vath's "hard on" comment. Chief Free advised Petitioner to follow Respondent's procedures and talk to Mr. Veach.

10. A couple of days later, Petitioner verbally reported Mr. Vath's "hard on" comment to Mr. Veach. Mr. Veach suggested that Petitioner file a complaint. Petitioner told Mr. Veach that she did not want to file a written complaint because it might cause her trouble. Mr. Veach honored her request and did not make a written record of the complaint or perform any type of investigation.

11. Bernard Murphy became Interim City Manager in September 2006. When he took the position, Petitioner was introduced to him as "someone people liked and could do good work."

12. In November 2006, Petitioner told Mr. Murphy about Mr. Vath's "hard on" comment. Once again Petitioner decided that she did not want to make a formal complaint followed by an investigation. Mr. Murphy did not make a written record of the allegations, but he told Petitioner to let him know if it happened again.

13. Petitioner requested that Mr. Murphy keep her concern about Mr. Vath's comment confidential. Mr. Murphy honored that request until he learned that Petitioner was telling other city employees and city commissioners. Mr. Murphy then questioned Mr. Vath, who denied making the inappropriate comment.

14. Mr. Vath's attitude toward Petitioner immediately changed. He continued to question Petitioner about her work and to complain to Mr. Murphy about her job performance. However, Petitioner did not experience anymore specific instances of sexually inappropriate comments from Mr. Vath.

15. At all times relevant here, Elizabeth Kania was Mr. Murphy's assistant/human resource director. Months after the incident occurred, Petitioner told Ms. Kania, in an informal conversation, about Mr. Vath's "hard on" comment. Petitioner told Ms. Kania that Petitioner would not report it unless it happened again. Petitioner complained on a regular basis to Ms. Kania about Mr. Vath's questions and requests for additional financial information that added to Petitioner's workload.

16. Elizabeth Mathis was Respondent's utility services manager. Petitioner supervised Ms. Mathis whose workspace was approximately three feet from Petitioner's cubicle. At some point in time, Petitioner told Ms. Mathis about Mr. Vath's sexually inappropriate comment.

17. Kathleen Doyle served as an accountant under Petitioner's supervision. Petitioner complained to Ms. Doyle about one sexually inappropriate comment by Mr. Vath. Ms. Doyle also observed that Petitioner took offense to Mr. Vath's questions.

18. Mr. Murphy, Petitioner, and other members of Petitioner's staff often told off-color jokes to each other. They occasionally used vulgar language and made profane statements in the work place. As a participant in this type of inappropriate office behavior, Petitioner was in no position to complain.

19. Occasionally, Mr. Murphy made specific inappropriate comments that Petitioner never complained of until she resigned. For example, he referred to his former assistant as having big tits. He also stated that his dermatologist was sexy and that a woman in a bathing suit outside his window was attractive. After returning from a humanitarian mission to India, Mr. Murphy stated that Indian women were sensual. These comments occurred over a period of many months.

20. Initially, Petitioner and Mr. Murphy were on a first name basis. However, as time went on, Mr. Murphy began to have justifiable concerns about Petitioner's work performance.

21. At times, Mr. Murphy would become angry and raise his voice at Petitioner. On another occasion, Mr. Murphy

inappropriately used his finger to "flip a bird" at Petitioner as he walked off after a disagreement about Petitioner's work. However, there is no persuasive evidence that Mr. Murphy's inappropriate conduct was in retaliation for Petitioner's allegations against Mr. Vath.

22. Mr. Murphy's only formal disciplinary action against Petitioner concerned an attendance issue. He gave Petitioner a written reprimand on April 8, 2008, because she misrepresented the reason for taking sick leave. Petitioner admits that she was not absent on April 7, 2008 due to illness. Instead, Petitioner was in Savannah, Georgia, interviewing for the position that she presently holds. The greater weight of the evidence refutes Petitioner's claim that she was constructively discharged.

23. Petitioner first reported her allegation of sexually offensive behavior against Mr. Murphy in her resignation letter dated April 22, 2008. Specifically, Petitioner claimed that Mr. Murphy spoke about women as being "sensual" and that he made comments about bodily characteristics of women. Petitioner complained about Mr. Murphy's management style of verbal abuse as being belittling, demeaning, and offending.

24. City Commissioner Jane Mealy investigated the complaints contained in Petitioner's resignation letter.

Ms. Mealy was unable to substantiate the allegations of sexually inappropriate and harassing behavior.

25. Petitioner had been looking for another job for over one and one-half years because of her low tolerance to criticism. Petitioner resigned her employment with Respondent only after she received an offer of employment from her current employer, Chatham Area Transit Authority.

26. At all relevant times, Petitioner was aware of Respondent's sexual harassment policy. The policy defines sexual harassment as "[u]nwelcome sexual advances of whatever nature, requests for sexual favors or other verbal or physical conduct of a sexual nature." See Section 2-200, Personnel Code of City of Flagler Beach (Personnel Code). Section 2-202 of the Personnel Code states as follows:

> (a) The city shares a common belief that each employee should be able to work in an environment free of discrimination, and any form of harassment, based on race, color, religion, age, sex, pregnancy, national origin, handicap or marital status.
>
> (b) To help assure that none of our employees feel that they are being subjected to harassment and in order to create a comfortable work environment, the city prohibits any offensive physical written or spoken conduct regarding any of these items, including conduct of a sexual nature. This includes:
>
> (1) Unwelcome or unwanted advances, including sexual advances.
>
> (2) Unwelcome requests or demands for favors, including sexual favors.

(3) Verbal or visual abuse or kidding that is oriented toward a prohibited form of harassment, including that which is sexually oriented and considered unwelcome.

(4) Any type of sexually oriented conduct or other prohibited form of harassment that would unreasonably interfere with work performance.

(5) Creating a work environment that is intimidating, hostile, abusive or offensive because of unwelcome or unwanted conversation, suggestions, requests, demands, physical contact or attentions, whether sexually oriented or other related to a prohibited form of harassment.

(c) If an employee believes that he or she is being subjected to any of these forms of harassment, or believes that he or she is being discriminated against because other employees are receiving favored treatment in exchange for sexual favors, he or she must bring this to the attention of appropriate persons in management. The very nature of harassment makes it virtually impossible to detect unless the person being harassed registers his or her discontent with the city's representative. Consequently, in order for the city to deal with the problem, the employee must report such offensive conduct or situation to the city manager.

(d) A record of the complaint and the findings will become a part of the file and will be maintained separately from the employee's personnel file.

(e) It is understood that any person electing to utilize this complaint resolution procedure will be treated courteously, the problem handled swiftly and confidentially, and the registering of a complaint will in no way be used against the employee, nor will it have an adverse impact on the individual's employment status.

CONCLUSIONS OF LAW

27. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this case pursuant to Sections 120.569, 120.57(1), and 760.11, Florida Statutes (2008).

28. Section 760.10(1)(a), Florida Statutes (2008), states as follows:

> (1) It is an unlawful employment practice for an employer:
> (a) To discharge or to fail or refuse to hire any individual, or otherwise to 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.

Additionally, it is unlawful for an employer to retaliate against any person because that person has opposed any practice which is an unlawful employment practice. § 760.10(7), Fla. Stat. (2008).

29. The Florida Civil Rights Act (FCRA), Sections 760.01 through 760.11, Florida Statutes (2008), as amended, was patterned after Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. 2000 et seq. Federal case law interpreting Title VII is applicable to cases arising under the FCRA. See Green v. Burger King Corp., 728 So. 2d 369, 370-371 (Fla. 3rd DCA 1999);

Florida State Univ. v. Sondel, 685 So. 2d 923 (Fla. 1st DCA 1996).

30. Petitioner has the burden of proving by a preponderance of the evidence that Respondent discriminated or retaliated against her. See Florida Dep't of Transportation v. J.W.C. Company, Inc. 396 So. 2d 778 (Fla. 1st DCA 1981).

31. Petitioner can establish a case of discrimination or retaliation through direct evidence or circumstantial evidence. See Holifield v. Reno, 115 F.3d 1555, 1561-1562 (11th Cir. 1997). In this case, Petitioner has not shown any direct evidence of discriminatory or retaliatory intent.

32. Under McDonnell Douglas Corp v. Green, 411 U.S. 792, 802-805 (1973), an employment discrimination case based on circumstantial evidence involves the following burden-shifting analysis: (a) the employee must first establish a prima facie case of discrimination; (b) the employer may then rebut the prima facie case by articulating a legitimate, nondiscriminatory reason for the employment action in question; and (c) the employee then bears the ultimate burden of persuasion to establish that the employer's proffered reason for the action taken is merely a pretext for discrimination.

Sexual Harassment and Sex

33. To prove a prima facie case of sexual harassment, Petitioner must establish the following: (a) she belongs to a

protected group; (b) she was subjected to unwelcome harassment; (c) the harassment was based on her gender; (d) the harassment was sufficiently severe or pervasive to alter the terms and conditions of her employment and create an abusive working environment; and (e) a basis for holding Respondent liable. See Gupta v. Florida Bd. of Regents, 212 F.3d 571. 582-583 (11th Cir. 2000).

34. Proof that sexually harassing conduct was sufficiently severe or pervasive so as to alter the terms or conditions of employment includes a subjective and objective component. The employee must subjectively perceive the harassment as sufficiently severe and pervasive and this subjective perception must be objectively reasonable, i.e. an environment that a reasonable person would find hostile or abusive. See Mendoza v. Borden, Inc., 195 F.3d 1238, 1245 (11th Cir. 1999).

35. In determining whether harassment objectively alters an employee's terms or conditions of employment, the following factors must be considered: (a) the frequency of the conduct; (b) the severity of the conduct; (c) whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and (d) whether the conduct unreasonably interferes with the employee's job performance. See Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993).

36. Here, Mr. Vath's sexually inappropriate comments were intermittent at most. While Petitioner may have been offended, there is no credible evidence that Mr. Vath's comments interfered with Petitioner's job performance. For the most part, Petitioner was offended by and sensitive to criticism of her work by Mr. Murphy. It was not Mr. Vath's occasional comments that created what Petitioner perceived as a hostile work environment.

37. Additionally, Petitioner has not shown that Mr. Murphy's inappropriate comments about women were as severe or pervasive as to create a hostile or abusive work environment. Mr. Murphy made the offensive utterances over the course of many months. Petitioner did not complain about these statements until she resigned.

38. Mr. Murphy apparently lost his temper with Petitioner and embarrassed her by raising his voice and finding fault with her work in public. The most persuasive evidence indicates that Mr. Murphy's criticisms were not related to Petitioner's sex or any other protected basis.

Retaliation

39. To support a prima facie case of retaliation, Petitioner must prove the following elements: (a) she participated in a protected activity; (b) she was subjected to an adverse employment action; and (c) the existence of a causal

link between the protected activity and the adverse action. See Pipkins v. City of Temple Terrace, 267 F.3d 1197, 1201 (11th Cir. 2001).

40. An employee, like Petitioner, who makes an informal complaint but does not want an investigation conducted cannot claim that the informal complaint amounted to protected activity for the purposed of making a claim of retaliation. See Alabama Dept. of Pub. Safety, 64 F. Supp. 2d 1215, 1233 (M.D. Ala. 1999).

41. Mr. Murphy had legitimate non-discriminatory, non-retaliatory, reasons for criticizing Petitioner's work and for giving her a written reprimand. There is no persuasive evidence that Mr. Murphy's reasons for these actions were a pretext for discriminatory or retaliatory intent.

RECOMMENDATION

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

RECOMMENDED:

That the Florida Commission on Human Relations dismiss the Petition for Relief with prejudice.

DONE AND ENTERED this 22nd day of May, 2009, in Tallahassee, Leon County, Florida.

SUZANNE F. HOOD
Administrative Law Judge
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Filed with the Clerk of the
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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.