

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

BRITNEY PINCKNEY, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 10-0533  
 )  
 BURGER KING CORPORATION, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

An administrative hearing was conducted in this case on April 23, 2010, by video teleconference in Tallahassee and Daytona Beach, Florida, before the James H. Peterson, III, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Britney Pinckney, pro se  
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For Respondent: Rene Gonzalez-Llorens, Esquire  
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STATEMENT OF THE ISSUE

Whether Respondent, Burger King Corporation (BKC or Respondent), violated the Florida Civil Rights Act of 1992, Sections 760.01-760.11 and 509.092, Florida Statutes, by

subjecting Petitioner, Britney Pinckney (Petitioner), to sexual harassment constituting discrimination in employment or by constructively discharging Petitioner while she was employed with Respondent.

PRELIMINARY STATEMENT

On June 30, 2009, Petitioner filed a charge of discrimination with the Florida Commission on Human Relations (the Commission), Charge No. 200902327 (Charge of Discrimination). In the Charge of Discrimination, Petitioner alleges that she was sexually harassed by Joseph Kennedy, a shift coordinator, at BKC Restaurant No. 1446, located at 825 Nova Road, Daytona Beach, Florida (the Restaurant), and constructively discharged. As she testified at the Final Hearing, Petitioner asserts that during her three-month period of employment at BKC, Mr. Kennedy made sexually-specific comments to her, as well as committed five incidents which included: (i) and (ii) bumping against Petitioner with his private area on two occasions; (iii) placing his hands on Petitioner's waist while she was counting cash at the front register on one occasion; (iv) placing his hand inside her shirt and rubbing a piece of ice on her chest on one occasion; and (v) grabbing Petitioner inside the cooler and stating that they were "finally alone" on one occasion.

After investigating Petitioner's sexual harassment allegations, on January 5, 2010, the Commission issued a Determination of No Cause, finding that:

complainant's allegations are neither severe nor pervasive enough to constitute sexual harassment or warrant constructive discharge. Most notably, Respondent took corrective action in response to Complainant's concerns by conducting several investigations into her claims and offering her the option of transferring to another work site. This action was reasonable in light of the fact that Complainant's allegations could not be substantiated.

The Commission's Determination notified Petitioner of her right to file a Petition for Relief for a formal administrative proceeding within 35 days of the Notice. On February 3, 2010, Petitioner filed a Petition for Relief and the Commission forwarded the petition to the Division of Administrative Hearings for the assignment of an administrative law judge to conduct an administrative hearing.

At the administrative hearing held in this case on April 23, 2010, Petitioner testified on her own behalf, but did not call other witnesses or offer any exhibits into evidence. Respondent presented the testimony of seven witnesses and offered 28 pre-marked exhibits which were received into evidence as Respondent's exhibits "R.1" through "R.28." In addition, portions of Petitioner's deposition that were read into the record were received into evidence.

The proceedings were recorded and a transcript was ordered. The parties were given until May 22, 2010, within which to submit their respective Proposed Recommended Orders. Respondent timely filed its Proposed Recommended Order on May 21, 2010. Petitioner requested and was granted additional time in which to file her Proposed Recommended Order, which she filed on June 7, 2010. Both parties' Proposed Recommended Orders were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Petitioner's Employment History at BKC

1. On January 17, 2009, Petitioner commenced working as a team member at the Restaurant.
2. The Restaurant's General Manager was Jason Merdes.
3. The Restaurant's Assistant Managers were Heather Thiess and Arlene Rosado.
4. Danny Singh is a BKC Company Business Manager. As a BKC Company Business Manager, Mr. Singh supervised 10 BKC restaurants (and their general managers), including the Restaurant where Petitioner worked.
5. Petitioner last day of work at the Restaurant was April 12, 2009.

BKC's Non-Discrimination and Anti-Harassment Policy

6. As an equal-opportunity employer, BKC strictly prohibits and has zero tolerance towards discrimination, harassment, or retaliation of any kind.

7. BKC's Non-Discrimination and Anti-Harassment Policy is set forth in BKC's Code of Business Ethics and Conduct.

8. BKC's Non-Discrimination and Anti-Harassment Policy sets forth BKC's Equal Employment Opportunity Policy; defines harassment; explains the steps an employee must take to report harassment; and sets forth the complaint procedures.

9. BKC's Non-Discrimination and Anti-Harassment Policy explains that harassment complaints may be reported to a supervisor, a manager (including assistant managers, general managers, and CBMs), a human resources representative, BKC's Chief Ethics and Compliance officer, or BKC's Toll-Free Reporting Line.

10. Petitioner received BKC's Non-Discrimination and Anti-Harassment Policy through several ways. Petitioner first received a copy of BKC's Non-Discrimination and Anti-Harassment Policy prior to her first day of work at the Restaurant. Petitioner signed an acknowledgment on December 17, 2008, attesting to having read, received, and understood BKC's Code of Business Ethics and Conduct, which included BKC's Non-Discrimination and Anti-Harassment Policy.

11. In addition, throughout the time Petitioner was employed at the Restaurant, BKC's Non-Discrimination and Anti-Harassment Policy was posted on the wall in the Restaurant's crew area, and was accessible to all employees.

12. Petitioner also received BKC's Employee Handbook (called the Team Member Playbook) which contains BKC's Non-Discrimination and Anti-Harassment Policy, as evidenced by an acknowledgement signed by Petitioner on December 17, 2008, attesting to her receipt of the Team Member Playbook and the Non-discrimination and Anti-Harassment Policy. The acknowledgement signed by Petitioner states:

My signature below indicates that I have received a copy of the BKC Team Member Playbook. I understand that it is my responsibility to read and abide by its contents, particularly the following: Anti-Harassment, including the "We're Listening" toll-free reporting line and Equal Employment Opportunity.

13. Petitioner was also aware of the "We're Listening" Poster that was on the wall in the Restaurant during her employment with BKC. The "We're Listening" Poster displays a toll-free telephone number that employees can call to complain about any incidents, including harassment or discrimination. The "We're Listening" Poster also had two business card slots containing the business cards and telephone numbers of Mr. Singh and BKC's local Human Resources representative.

14. In addition, Petitioner testified that when she started working, Mr. Singh informed her and the other employees that if anything made them feel uncomfortable, he was the person to speak with and he would handle the situation.

Petitioner's Performance

15. During the three months that she worked at BKC, Petitioner received verbal and written warnings from Ms. Thiess for her repeated absences and lateness. At the final hearing, Petitioner admitted that she had problems with lateness and tardiness, and that Ms. Thiess spoke to her about being tardy.

Joseph Kennedy (the accused harasser)

16. Joseph Kennedy is a disabled employee and also suffers from a facial disfigurement. He has worked for BKC for approximately five years. Mr. Kennedy is a shift coordinator, which is an hourly position, but not a member of the Restaurant's management.

17. Despite his disability and disfigurement, as well as working 40 hours a week, Mr. Kennedy has taken college courses during the past several years. He obtained a bachelor's degree in December 2009.

18. During the past five years that he has worked at BKC, Mr. Kennedy has been supervised by female managers and has worked along female employees, all of whom have a favorable

opinion of Mr. Kennedy and have never witnessed any sexually harassing behavior or comments made by Mr. Kennedy.

19. Specifically, during the two-and-a-half years that she supervised and worked with Mr. Kennedy, Ms. Thiess has never witnessed Mr. Kennedy rub himself against anyone; inappropriately touch anyone; make a sexually harassing or offensive comment; make a sexually harassing or offensive joke; or grab anyone inappropriately.

20. Ms. Thiess has not received any employee complaints against Mr. Kennedy for any sexually harassing or offensive conduct or comment. Ms. Thiess testified that Mr. Kennedy is "strictly professional" and she has never had a problem with him.

21. Ms. Rosado, who has supervised and worked with Mr. Kennedy for the past four or five years, has never witnessed Mr. Kennedy rub himself against anyone; inappropriately touch anyone; make a sexually harassing or offensive comment; make a sexually harassing or offensive joke; or grab anyone inappropriately.

22. Excluding the claim that Petitioner raised after her last day of work at the Restaurant, Ms. Rosado has not received any employee complaints against Mr. Kennedy for any sexually harassing or offensive conduct or comment.



23. Ms. Rosado testified that Mr. Kennedy is a "good guy, quiet, kind of off to himself."

24. Frances Randolph, who has worked with Mr. Kennedy at the Restaurant for one-and-a-half years, has never witnessed Mr. Kennedy rub himself against anyone; inappropriately touch anyone; make a sexually harassing or offensive comment; make a sexually harassing or offensive joke; or grab anyone inappropriately. Ms. Randolph testified that Mr. Kennedy is a "very good worker. He takes pride in his team, and works with his crew members, and he's very quiet and he observes all the policies. He don't play."

25. Another co-worker, Ebonee Smith, who worked at the Restaurant with Mr. Kennedy for one-and-a-half years, has never witnessed Mr. Kennedy rub himself against anyone; inappropriately touch anyone; make a sexually harassing or offensive comment; make a sexually harassing or offensive joke; or grab anyone inappropriately. In her testimony regarding Mr. Kennedy, Ms. Smith said, "I think he's a sweetheart, I don't have any problems with him."

26. Ms. Casey Barrell, who worked with Mr. Kennedy at the Restaurant for one-and-a-half years and also attended school with Petitioner, has never witnessed Mr. Kennedy rub himself against anyone; inappropriately touch anyone; make a sexually harassing or offensive comment; make a sexually harassing or

offensive joke; or grab anyone inappropriately. According to Ms. Barrell, Mr. Kennedy "is very secluded, he keeps to himself more than with anybody else."

29. In addition to the Restaurant's female co-workers and supervisors, Mr. Singh similarly agrees that Mr. Kennedy has been a good and professional employee. During the five years that he has supervised the Restaurant and worked with Mr. Kennedy, Mr. Singh has never witnessed Mr. Kennedy rub himself against anyone; inappropriately touch anyone; make a sexually harassing or offensive comment; make a sexually harassing or offensive joke; or grab anyone inappropriately.

30. Moreover, other than Petitioner's allegations raised after her last day of work at the Restaurant, Mr. Singh has not received any employee complaints against Mr. Kennedy for any inappropriate touching or for making a sexually harassing or offensive comment or joke. In Mr. Singh's opinion, Mr. Kennedy "goes by the book" and is reliable.

Petitioner's Report Regarding Mr. Kennedy

31. Petitioner's last seven days of employment were March 29, March 30, March 31, April 5, April 11, and April 12. On one of these last seven days, Petitioner approached Ms. Rosado and stated that she felt "uncomfortable" working with Mr. Kennedy.

32. Petitioner, however, did not complain to Ms. Rosado that Mr. Kennedy had inappropriately touched her, placed ice inside her shirt, or that he had made any inappropriate or sexually harassing comment. Rather, Petitioner only complained that she felt "uncomfortable" working with Mr. Kennedy.

33. Ms. Rosado informed Petitioner that she would immediately relay Petitioner's concern to the Restaurant's General Manager, Mr. Merdes. Then, Ms. Rosado immediately reported Petitioner's concern to Mr. Merdes, who investigated the allegations on that same day.

34. Mr. Merdes spoke with Petitioner the very next day.

#### Petitioner's Resignation

35. Petitioner did not return to work after April 12, 2009, her last date of employment, because she decided to resign. Petitioner was scheduled to work on April 14 and 15, 2009, but failed to show up to work.

36. On April 17, 2009, Petitioner visited the Restaurant and informed Mr. Merdes that she was resigning. At that time, Petitioner complained to Mr. Merdes that "she does not appreciate the way [Mr. Kennedy] looks at her. He tends to brush against her. He bumps into her and he picks on her as coming to work, or making her do more stuff in the restaurant."

37. Based on these allegations, first raised by Petitioner on April 17, 2009, Mr. Merdes informed Mr. Singh.

Mr. Singh's Investigation of Petitioner's Allegations

38. The very next day, April 18, 2009, Mr. Singh and Mr. Merdes met with Mr. Kennedy to discuss Petitioner's April 17, 2009 allegations. Mr. Kennedy denied the allegations.

39. In addition, Mr. Singh spoke with Ms. Rosado and Ms. Thiess about Petitioner's April 17, 2009, allegations. Ms. Rosado and Ms. Thiess confirmed to Mr. Singh that they had not witnessed any improper behavior by Mr. Kennedy.

40. Thereafter, Mr. Singh telephoned Petitioner once or twice a day to discuss her April 17 allegations, but Petitioner did not respond.

41. Mr. Merdes and Ms. Thiess also telephoned Petitioner several times. Although they left voice messages, Petitioner did not return their telephone calls.

42. In addition, Ms. Thiess sent text messages to Petitioner, but Petitioner never responded.

Petitioner's Transfer to a Different BKC Restaurant

43. After leaving voice messages that were unanswered, Mr. Singh spoke on the telephone with Petitioner's mother. Petitioner subsequently telephoned Mr. Singh. During that telephone conversation, Petitioner explained that she did not like the way Mr. Kennedy rubbed against her, but she did not provide any specifics and could not identify any witnesses who

saw this alleged improper conduct. Petitioner did not mention the alleged ice or cooler incidents to Mr. Singh.

44. During the conversation, Petitioner informed Mr. Singh that she wanted a transfer to another restaurant, and suggested BKC Restaurant 4646, which was closer to her house and where she knew employees. Mr. Singh agreed to transfer Petitioner to BKC restaurant 4646.

45. On April 23, 2009, BKC Restaurant 4646 was having a "team rally," which is a mandatory attendance event for employees where they have a pep talk on sales and other issues. Mr. Singh asked Petitioner to meet him at BKC Restaurant 4646's April 23, 2009, team rally so that Petitioner could attend and they could continue discussing her April 17 allegations after the team rally.

46. On April 23, 2009, Mr. Singh and Petitioner met at BKC Restaurant 4646 and spoke about the allegations. Petitioner, however, could not provide any specific times or identify any witnesses who saw the alleged incidents. Again, Petitioner did not mention the alleged ice incident, the cooler incident, or any sexually harassing comments.

47. Mr. Singh spoke with Terrell Bolden, who is the general manager of BKC Restaurant 4646, and informed him of Petitioner's transfer to that restaurant.

48. After meeting Petitioner at BKC Restaurant 4646 on April 23, 2009, Mr. Singh returned to the Restaurant to investigate Petitioner's allegations. The investigation did not confirm the allegations or reveal any wrongdoing by Mr. Kennedy.

Petitioner Failed to Report for Work at BKC Restaurant 4646

49. Despite receiving approval to transfer to Restaurant 4646, Petitioner never showed up to work at BKC Restaurant 4646. Mr. Singh had provided Petitioner with the telephone numbers for BKC Restaurant 4646, but she never called.

50. After Petitioner had not shown up for a week, Mr. Singh telephoned Petitioner about starting work at BKC Restaurant 4646, but was unable to reach her and she never returned his telephone call.

51. At the final hearing, Petitioner denied that she met with Mr. Singh on April 23, 2009. Petitioner's testimony, however, confirmed that Mr. Singh proposed a transfer to BKC Restaurant 4646 and that he asked her to get back to him on the transfer. She also testified that she chose not to accept the transfer, "Because I was afraid if I go there, then they'll know what happened at the other restaurant and I'll feel even more uncomfortable."

52. According to Petitioner, after Mr. Singh offered her a transfer, she declined. Petitioner's testimony confirmed,

however, that Mr. Singh called after offering her the transfer, but she never returned his telephone call.

The Injunction Petitioner Sought Against Mr. Kennedy

53. On May 28, 2009, Petitioner filed an ex parte Petition for Injunction for Repeat Violence against Mr. Kennedy in the Circuit Court of Volusia County, Florida.

54. Despite the fact that she had not had any contact with Mr. Kennedy since her last day of work on April 12, 2009, Petitioner swore, under oath, in her petition for the injunction that she "genuinely fears repeat violence" by Mr. Kennedy.

55. The court scheduled a hearing on the injunction. Mr. Kennedy, along with his witnesses, attended the hearing. Petitioner, however, failed to show up at the hearing, and the court denied a permanent injunction.

Petitioner's Evidence Regarding the Alleged Incidents of Harassment and Offensive Comments

First Alleged Incident

56. Petitioner testified about five incidents of "harassment" that she said occurred while she was employed at the Restaurant. As to the first alleged incident, Petitioner testified that Mr. Kennedy passed next to her while she was working at the sandwich board, brushed up against her, and kept walking. Petitioner testified that, before she could even say anything, Mr. Kennedy had already walked away.

57. The BKC kitchen area is a confined space where, during peak hours, nine employees work and it is possible that bumping occurs due to the kitchen's small size. In fact, Ms. Thiess testified that she has been bumped into by other employees due to the confined space. Petitioner admitted that the area near the sandwich board is a tight area with limited space.

58. Although an employee was working next to Petitioner (about four feet away) and could see her at the time of the first alleged incident, Petitioner testified that no one witnessed this first alleged incident. In addition, Petitioner did not complain to any manager at BKC and did not contact the toll-free telephone reporting number at the time of the first alleged incident.

#### Second Alleged Incident

59. As to the second alleged incident, Petitioner testified that she was bagging some items at the front counter and Mr. Kennedy allegedly bumped and rubbed into her. According to Petitioner, this incident happened while six employees were working at the Restaurant and occurred at the front counter in view of customers. Petitioner further testified that no employees or customers complained about the second alleged incident.



60. Petitioner did not complain to any manager at BKC and did not contact the toll-free telephone reporting number at the time of the second alleged incident.

#### Third Alleged Incident

61. As to the third alleged incident, Petitioner testified that Mr. Kennedy allegedly touched her side while she was counting cash at the front counter register. The third alleged incident purportedly happened while six employees were working at the Restaurant and occurred at the front counter in view of customers. Petitioner testified, however, that no employees or customers complained about the third alleged incident.

62. Petitioner did not complain to any manager at BKC and did not contact the toll-free telephone reporting number at the time of the third alleged incident.

#### Fourth Alleged Incident

63. As to the fourth alleged incident, Petitioner testified that the top button of her three-button polo shirt was unbuttoned while she was working at the front counter, and that Mr. Kennedy purportedly placed his hand inside her polo shirt and rubbed a piece of ice on her chest.

64. Petitioner testified that the fourth alleged incident occurred in April, but before April 12, 2009, her last day at the Restaurant. Accordingly, the fourth alleged incident could

only have occurred on April 5 or 11, the only days that Petitioner worked in April.

65. Since the alleged fourth incident purportedly happened at the front counter, it would have been in plain view for customers and other employees to see Mr. Kennedy place his hand inside Petitioner's polo shirt and rub ice on her chest. Petitioner testified, however, that no employees or customers complained of or reported the fourth alleged incident.

66. Petitioner further testified that employee Frances Randolph witnessed the fourth alleged incident. In her testimony at the final hearing, however, Ms. Randolph denied that the alleged fourth incident ever took place.

67. Petitioner did not complain to any manager at BKC and did not contact the toll-free telephone reporting number at the time of the fourth alleged incident.

#### Fifth Alleged Incident

68. As to the fifth and last alleged incident, Petitioner testified that on April 12, 2009, her last day of work at BKC, Mr. Kennedy followed her into the cooler, grabbed her, and stated that they were finally alone. Petitioner testified that she pushed Mr. Kennedy and walked out of the cooler area.

69. Petitioner, however, did not complain to any manager at BKC and did not contact the toll-free telephone reporting number at the time of the fifth alleged incident.

### Alleged Offensive Comments

70. Petitioner also testified that Mr. Kennedy made offensive jokes and comments from time to time. Petitioner only identified one comment that she claimed was overheard by another employee, Ms. Randolph. Petitioner testified that she requested a tampon from Ms. Randolph, Ms. Randolph stated that she had tampons in her truck, and Mr. Kennedy purportedly made an offensive remark.

71. Ms. Randolph, however, denies ever hearing the offensive remark from Mr. Kennedy, denies that any conversation involving a tampon occurred, and moreover, states that she did not even own a vehicle at the time of the alleged offensive comment.

72. Petitioner testified that she did not complain to any manager at BKC and did not contact the toll-free telephone reporting number at the time of any alleged sexually harassing or offensive comments.

### Credibility determinations

73. Mr. Kennedy denied the allegations and testified that he had not rubbed himself against Petitioner, had not inappropriately touched her, had not grabbed or accosted her while they were in the cooler, and had not made offensive comments to Petitioner or told her sexually offensive jokes.

74. In light of the testimony of other witnesses regarding Mr. Kennedy's behavior, the testimony contradicting Petitioner's allegations, the improbability that all of the incidents could have occurred without others complaining, the circumstances surrounding the injunction sought by Petitioner, and the timing of Petitioner's report of the alleged incidents, it is found that Petitioner's testimony lacks credibility.

75. On the other hand, Mr. Kennedy's testimony in this proceeding is credited, and it is found that Mr. Kennedy did not inappropriately rub up against Petitioner, did not put ice on Petitioner, did not inappropriately touch or grab Petitioner, did not make any sexually harassing or offensive comments or jokes to Petitioner or in Petitioner's presence, and did not grab Petitioner while they were in the cooler at the Restaurant.

76. In sum, it is found, as a matter of fact, that Mr. Kennedy did not sexually harass Petitioner.

#### CONCLUSIONS OF LAW

77. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to Section 120.569 and Subsection 120.57(1), Florida Statutes (2009),<sup>1/</sup> and Florida Administrative Code Rule 60Y-4.016(1).

78. The State of Florida, under the legislative scheme contained in Sections 760.01-760.11 and 509.092, Florida

Statutes, known as the Florida Civil Rights Act of 1992 (the Act), incorporates and adopts the legal principles and precedents established in the federal anti-discrimination laws specifically set forth under Title VII of the Civil Rights Act of 1964, as amended. 42 U.S.C. § 2000e, et seq. The Florida law prohibiting unlawful employment practices is found in Section 760.10, Florida Statutes. This section prohibits discrimination against any individual with respect to compensation, terms, conditions, or privileges of employment because of such individual's sex. § 760.10(1)(a), Fla. Stat. Florida courts have held that decisions construing Title VII of the Civil Rights Act of 1964, as amended, should be used as guidance when construing provisions of the Act. See, e.g., Florida Department of Community Affairs v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991).

Petitioner Failed to Establish Sexual Discrimination

79. The United States Supreme Court has held that sexual harassment that creates a hostile or abusive work environment is a form of sex discrimination. See Meritor Savings Bank v. Vinson, 477 U.S. 57, 64 (1986). In this case, Petitioner alleges that the alleged harassment was by a co-worker, Mr. Kennedy, as opposed to a manager or supervisor. In order to prevail, Petitioner must first establish a prima facie<sup>2/</sup> case by

a preponderance of the evidence.<sup>3/</sup> As noted by Florida's Fourth District Court of Appeal:

Where harassment is [allegedly] perpetrated by a co-worker (as opposed to a supervisor or manager), to establish a hostile work environment sexual harassment claim, an employee must show: (1) the employee is a member of a protected group; (2) the employee was subjected to unwelcome sexual harassment, such as sexual advances, requests for sexual favors, and other conduct of a sexual nature; (3) the harassment was based on the sex of the employee; (4) the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and (5) that the employer knew or should have known about the harassment and took insufficient remedial action. See *Speedway SuperAmerica, LLC v. Dupont*, 933 So. 2d 75, 80 (Fla. 5<sup>th</sup> DCA 2006); see also *Natson v. Eckerd Corp.*, 885 So. 2d 945, 947 (Fla. 4<sup>th</sup> DCA 2004) (citing *Breda v. Wolf Camera & Video*, 222 F.3d 886, 889 n.3 (11<sup>th</sup> Cir. 2000) and *Castleberry v. Edward M. Chadbourne, Inc.*, 810 So. 2d 1028, 1029-30 (Fla. 1st DCA 2002)).

Maldonado v. Publix Supermarkets, 939 So. 2d 290, 293-94 (Fla. 4th DCA 2006).

80. The Petitioner failed to present evidence sufficient to establish her claim of sexual harassment that constituted a hostile or abusive work environment. As noted in the Findings of Fact, above, Petitioner's testimony, which was the only evidence submitted by Petitioner in this case to support her allegations that she had been sexually harassed by Mr. Kennedy,

was not credible. In contrast, Mr. Kennedy's testimony that he did not sexually harass Petitioner was credible and credited.

81. Even if Petitioner had established that she was sexually harassed by Mr. Kennedy, she failed to provide a basis to hold BKC liable. That is because Petitioner failed to establish that BKC "knew or should have known about the harassment and took insufficient remedial action." Id. Therefore, Petitioner further failed to provide a basis for finding BKC liable.

82. In fact, rather than showing that BKC knew about the alleged harassment, the evidence showed that, despite being aware of BKC's anti-harassment policy and reporting procedures from a number of sources, Petitioner failed to timely take advantage of those policies and procedures. Petitioner did not advise BKC about the alleged harassment until after her last day of work. Even then, BKC took prompt remedial action by offering Petitioner a transfer, even before undertaking an investigation which ultimately failed to substantiate Petitioner's allegations. BKC's remedial action was sufficiently "immediate, appropriate, and reasonably likely to stop the [alleged] harassment, thereby [further] precluding any finding of liability." Id. at 297.

83. In sum, Petitioner failed to establish that she was subjected to sexual harassment constituting a hostile or abusive environment in the workplace, or that BKC should be liable to Petitioner for sexual discrimination under Section 760.10, Florida Statutes.

Petitioner Failed to Establish Constructive Discharge

84. To prove constructive discharge, Petitioner must demonstrate that BKC deliberately made her working conditions so intolerable that a reasonable person in her position would be compelled to resign. Doe v. Dekalb County School Dist., 145 F.3d 1441, 1450 (11th Cir. 1998). According to the United States Eleventh Circuit Court of Appeals:

In assessing constructive discharge claims, we do not consider a plaintiff's subjective feelings about his employer's actions. Rather, we determine whether "a reasonable person in [the plaintiff's] position would be compelled to resign."

Doe, 145 F.3d at 1450 (citing Steele v. Offshore Ship., Inc., 867 F.2d 1311, 1317 (11th Cir. 1989)).

85. Petitioner has not demonstrated that a reasonable person in her position would be forced to resign, particularly in light of the finding that the alleged sexual harassment did not take place. Moreover, since BKC transferred her to a different restaurant after she made allegations on April 17, 2009, nothing in the record indicates that BKC treated



Petitioner so poorly that a reasonable employee in her position would have felt compelled to resign. To the contrary, the evidence shows that BKC took appropriate action to ensure that Petitioner had a full opportunity to communicate her concerns, that her allegations were promptly investigated, and that sufficient remedial measures were taken to assure that the alleged sexual harassment, if true, would not continue.

86. Rather than take advantage of a new opportunity to work in one of BKC's restaurants away from the alleged perpetrator and closer to her home, Petitioner refused to return to work. The evidence does not support an inference that Petitioner's decision to abandon her job was effectively coerced by BKC's actions. Accordingly, Petitioner has failed to establish a constructive discharge claim.

#### Conclusion

Petitioner failed to prove her Charge of Discrimination and it is otherwise concluded that Respondent, Burger King Corporation, did not violate the Florida Civil Rights Act of 1992, Sections 760.01-760.11 and 509.092, Florida Statutes, and is not liable to Petitioner, Britney Pinckney, for sexual harassment constituting discrimination in employment, or constructive discharge while Petitioner was employed with Burger King Corporation.

RECOMMENDATION

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

RECOMMENDED that the Florida Commission on Human Relations enter a Final Order dismissing Petitioner's Charge of Discrimination and Petition for Relief consistent with the terms of this Recommended Order.

DONE AND ENTERED this 18th day of June, 2010, in Tallahassee, Leon County, Florida.



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JAMES H. PETERSON, III  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 18th day of June, 2010.

ENDNOTES

<sup>1/</sup> Unless otherwise indicated, all references to the Florida Statutes are to the 2009 version. All references to Florida Administrative Code or federal statutes and rules are to their current, effective versions.

<sup>2/</sup> Generally, for discrimination in employment claims, the federal courts have utilized a three-part "burden of proof"

pattern developed in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973), applies. Under that pattern:

First, [Petitioner] has the burden of proving a prima facie case of discrimination by a preponderance of the evidence. Second, if [Petitioner] sufficiently establishes a prima facie case, the burden shifts to [Respondent] to "articulate some legitimate, nondiscriminatory reason" for its action. Third, if [Respondent] satisfies this burden, [Petitioner] has the opportunity to prove by a preponderance that the legitimate reasons asserted by [Respondent] are in fact mere pretext.

McDonnell Douglas, 411 U.S. at 802, 804, 93 S. Ct. at 1824, 1825). While perhaps appropriate to apply in some contexts, in this case, as Petitioner has failed to make out a even a prima facie case, the shifting of burden pattern has not been further applied or elaborated in this Recommended Order.

<sup>3/</sup> McDonnell Douglas, 411 U.S. at 802; § 120.57(1)(j), Fla. Stat. That is, Petitioner has the burden of proving her case by "the greater weight of the evidence," or evidence that "more likely than not" tends to prove her case. See Gross v. Lyons, 763 So. 2d 276, 280 n.1 (Fla. 2000).

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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.