STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PATRICIA DAVIDOWITZ,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 10-1857
	)	
MILLERS ALE HOUSE, INC.,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Administrative Law Judge, John D. C. Newton, II, of the Division of Administrative Hearings, heard this case, as noticed, on August 16, 2010, by video conference at sites in Tallahassee, Florida and West Palm Beach, Florida.

APPEARANCES

For Petitioner: Patricia Davidowitz, pro se
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For Respondent: Christine L. Wilson, Esquire
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STATEMENT OF THE ISSUES

1. Did Respondent, Miller's Ale House, Inc. (Ale House), discriminate against Petitioner, Patricia Davidowitz (Davidowitz), on account of her sex?

2. Did Miller's Ale House retaliate against Ms. Davidowitz for opposing an unlawful employment practice?

PRELIMINARY STATEMENT

On September 4, 2009, Ms. Davidowitz filed a Charge of Discrimination against the Ale House with the Equal Employment Opportunity Commission (EEOC) and the Florida Commission on Human Relations (Commission). The Charge alleged sex discrimination and retaliation. On March 10, 2010, the Commission issued a Determination of No Cause. Ms. Davidowitz filed a Petition for Relief from an Unlawful Employment Practice with the Commission. On April 7, 2010, the Commission transmitted the Petition to the Division of Administrative Hearings (DOAH) to conduct a Final Hearing. The undersigned set the final hearing for June 17, 2010. On June 15, 2010, the undersigned granted Ms. Davidowitz' Second Motion for Continuance and set the final hearing for August 16, 2010. The hearing was held as scheduled.

Ms. Davidowitz testified on her own behalf. She also presented the testimony of Jeffrey Davidowitz; John Desensi, Boynton Beach Ale House General Manger; and Mitch Koenig, Ale House Regional Manager. Ms. Davidowitz's Exhibits 1, 2, 4-6, 8, 10, 11-13 (two letters from Bagel Twins and two letters from Flix Café only), 15 (legal services bills from Christopher

Copeland P.A., W-2s, and pay history only), and 16 were admitted into evidence.

The Ale House presented testimony from Valerie Ensigner, Risk Manager. Ale House Exhibits 1-3, 19, 22, and 23 were accepted into evidence. Both parties made closing arguments.

The Transcript was filed on August 31, 2010. Both parties submitted Proposed Recommended Orders. Ms. Davidowitz filed a Motion to Strike Respondent's Findings of Fact. The motion was denied.

FINDINGS OF FACT

Based on the testimony and other evidence presented at the final hearing and on the entire record of this proceeding, the following findings of fact are made:

1. Ms. Davidowitz worked as a bartender and server at the Ale House in Boynton Beach, Florida, from October 2004 until September 5, 2008. She performed her duties well and provided good service to her customers.

2. For about a year before her discharge, Ms. Davidowitz worked with another female bartender and server, Tisha McKenna. She also performed her duties well and provided good service to her customers.

3. From January 2007 forward, John Desensi was the General Manager of the Boynton Ale House. Although Ms. Davidowitz and Ms. McKenna performed the technical aspects of their jobs well

in the eyes of the General Manager, they feuded with each other. Their behavior interfered with the work environment.

4. In the year preceding Ms. Davidowitz's termination, she and Ms. McKenna had many arguments. For instance, one night they argued about cutting limes. They continued the argument the next day at the bar staff meeting.

5. Around August 19, 2008, Ms. McKenna and Ms. Davidowitz engaged in an unpleasant dispute in front of a customer. Ms. Davidowitz was insisting that the customer produce identification before serving him alcohol. Ms. McKenna came up and told the customer: "F**k that stupid bitch. You can sit at my table." Two managers took the employees outside the restaurant. The managers instructed both that they had to work professionally together or they would be sent home.

6. The same day or the following day, Mr. Desensi spoke to Ms. McKenna and Ms. Davidowitz together. He told them that their feuding was not appropriate and that further outbursts would not be tolerated. Mr. Desensi was very professional and respectful in that meeting.

7. Mr. Desensi had verbally warned both employees several times about their disagreements. He told them that their behavior was unprofessional and disruptive. He also told them that as the disagreements escalated their behavior was affecting guests.

8. Ms. Davidowitz believed that the General Manager favored Ms. McKenna. There is, however, no evidence to support that belief.

9. On September 4, 2008, Ms. Davidowitz noticed that Ms. McKenna was wearing black socks. Ale House uniform policies did not permit black socks. Knowing this, Ms. Davidowitz asked during the pre-shift meeting if black socks were now permitted.

10. Ms. McKenna was not at the meeting. She later learned of the question and became very upset. Ms. McKenna spoke to Mr. Desensi about the incident that same day. She told him that she "wanted to kick Ms. Davidowitz's ass." Ms. McKenna quit that day.

11. Mr. Desensi was angry. He believed that Ms. Davidowitz had repeatedly needled Ms. McKenna to the point that she quit. He asked Ms. Davidowitz to come to his small, closed office. His agitation was visible.

12. Mr. Desensi asked Ms. Davidowitz what she meant by the "black socks" question. Ms. Davidowitz answered that it was a legitimate uniform policy question. Mr. Desensi replied: "You know god damn well who you were talking about. You were just being a bitch"

13. Ms. Davidowitz then began telling Mr. Desensi that Ms. McKenna was harassing her and selling drugs. Mr. Desensi

got more and more upset, saying again: "You're just being a bitch."

14. In the office Mr. Desensi continued chastising Ms. Davidowitz for just over five minutes. A video recording of the incident shows that Mr. Desensi's conduct and demeanor were angry if not menacing. It also shows he did not touch or attempt to touch Ms. Davidowitz or take any action with sexual overtones. He was standing, shaking his hands, pointing, pacing, and leaning toward her.

15. Ms. Davidowitz was backed against the door. Once when she tried to leave, Mr. Desensi reached past her to shove the door closed. Near the end of the meeting, Ms. Davidowitz advised Mr. Desensi that his conduct was unprofessional and that she was going to report him to higher management. As she left the office Mr. Desensi said: "Sorry I called you a bitch."

16. Ms. Davidowitz was visibly upset. She approached the shift manager, Mr. George Sfetsas, and asked if she could go home. He asked if she was alright. Ms. Davidowitz again asked if she could go home. Mr. Sfetsas authorized her to leave.

17. After leaving the restaurant on September 4, 2008, Ms. Davidowitz called Assistant General Manager Ed Reynes and Regional Manger Mitch Koenig and told them about the incident. Mr. Koenig told her to take the following day off while he investigated. Ms. Davidowitz never returned to the Ale House.

18. Following that conversation, Mr. Koenig spoke to Mr. Desensi. In that conversation Mr. Desensi told Mr. Koenig that he did not want Ms. Davidowitz working in the Boynton Beach Ale House any longer. He had decided he would no longer tolerate Ms. Davidowitz's disruptive behavior or employ Ms. Davidowitz. Mr. Koenig said he was going to offer Ms. Davidowitz a job at another Ale House in the area.

19. On September 5, 2009, Mr. Koenig called Ms. Davidowitz. Mr. Koenig told her that he did not think it was a good idea for her to continue working at the Boynton Beach Ale House. Later in the conversation he made it clear that Ms. Davidowitz could not work at the Boynton Beach Ale House any more.

20. Mr. Koenig offered to transfer Ms. Davidowitz to an Ale House located in west Boca Raton, Florida. The position was a full-time job with pay similar to the pay at the Boynton Beach restaurant. The job responsibilities were similar too. The West Boca Raton Ale House is about ten minutes farther from Ms. Davidowitz's home than the Boynton Beach Ale House. Mr. Koenig also offered to serve as a job reference for Ms. Davidowitz if she sought work elsewhere.

21. Ms. Davidowitz said she would think about the transfer offer. She also said, "I'm not going to go lightly. I am going

to go kicking and screaming." She never accepted the transfer offer.

22. In September 2009, after Mr. Koenig told her she was terminated from the Boyton Beach Ale House, Ms. Davidowitz called and spoke to Valerie Ensinger, Risk Manager for Ale House. Ms. Davidowitz told Ms. Ensinger of her termination and the events preceding it. Ms. Davidowitz told Ms. Ensinger that Ms. McKenna had been harassing her and stealing from Ale House. She also told Ms Ensinger that she thought that Ms. McKenna was a favored employee. Ms. Ensinger asked her to write the information down and get back in touch. Ms. Davidowitz did not contact Ms. Ensinger again.

23. Since rejecting the offer of work at the West Boca Raton Ale House and her termination from the Boynton Beach Ale House, Ms. Davidowitz has been regularly employed.
Ms. Davidowitz found work at OS Restaurant Services, Inc., d/b/a Carrabbas Italian Grill (Carrabbas) the day after her conversation with Mr. Koenig. She worked at Carrabbas until February 2009. Ms. Davidowitz left Carrabbas to take a supervisory position at Char Hut. She worked there until Char Hut closed. Since then Ms. Davidowitz has worked at Sneaky Pete's.

24. In 2008 Ms. Davidowitz earned $17,777.12 from employment with Ale House, Applebee's, and Carrabbas combined.

She earned $13,057.20 from her nine months of employment with Ale House in 2008. Assuming that Ms. Davidowitz would have earned the monthly average of compensation from those nine months for the last three months of 2008, she would have earned $17,405.60 that year if she remained employed at the Ale House.

25. In 2009, Ms. Davidowitz earned $28,079.00 from her employment at Carrabbas, Char-Hut, and Sneaky Petes. In 2009 Ms. Davidowitz earned $10,301.88 more than she earned in 2008. Ms. Davidowitz also earned $10,673.40 more in 2009 than she would have earned if she had remained employed by the Ale House.

26. Ms. Davidowitz never complained that while she worked at Ale House that she was treated differently than any male employee. She does not maintain in this proceeding that while she worked at Ale House she was treated differently than any male employee. There is no evidence that Ms. Davidowitz was treated differently than any male employee.

27. Ms. Davidowitz filed her complaints with the EEOC and the Commission on September 8, 2009. The complaints allege that she was terminated and harassed on account of her sex. They also allege that Ale House retaliated against her for complaining about unlawful harassment. The Commission issued a determination of No Cause to believe that Ms. Davidowitz was the subject of discrimination or retaliation.

28. There was no persuasive evidence sufficient to prove that Ms. Davidowitz's gender was a factor in the decision to terminate her employment at the Boynton Beach Ale House.

29. There is no persuasive evidence sufficient to prove that Ale House terminated Ms. Davidowitz from employment at the Boynton Beach Ale House because of her complaints about Mr. Desensi or Ms. McKenna.

30. There is no evidence that that Ms. Davidowitz was treated differently than male employees.

31. There was no evidence sufficient to prove that Ale House created a hostile work environment.

CONCLUSIONS OF LAW

32. Ms. Davidowitz advances two claims. First, she maintains that Ale House discriminated against her on account of her sex by creating a hostile work environment through harassing her and by discharging her. Second, she claims that Ale House retaliated against her for complaining of unlawful harassment.

33. Sections 120.569 and 120.57(1), Florida Statutes (2010) grant DOAH jurisdiction over the subject matter of this proceeding and of the parties.

34. Section 760.10 (1)(a), Florida Statutes (2009) makes it unlawful for an employer to take adverse action against an individual because of the individual's sex. Section 760.10(7) Florida Statutes (2009), makes it unlawful for an employer to

discriminate against any person because that person has opposed an unlawful employment practice.

35. Section 760.11(7), Florida Statutes (2009), permits a party who receives a no cause determination to request a formal administrative hearing before the Division of Administrative Hearings. "If the administrative law judge finds that a violation of the Florida Civil Rights Act of 1992 has occurred, he or she shall issue an appropriate recommended order to the commission prohibiting the practice and recommending affirmative relief from the effects of the practice, including back pay." Id.

36. Florida's Chapter 760 is patterned after Title VII of the Civil Rights Act of 1964, as amended. Consequently, Florida courts look to federal case law when interpreting Chapter 760, Florida Statutes (2009). Valenzuela v GlobeGround North America, LLC., 18 So. 3d 17 (Fla. 3rd DCA 2009).

37. A party may prove unlawful sex discrimination by direct or circumstantial evidence. Smith v. Fla. Dep't of Corr., Case No. 2:07-cv-631, (U.S. Dist. Ct. M. Dist, Fla. May 27, 2009); 2009 U.S. Dist. LEXIS 44885 (U.S. Dist. Ct. M. Dist, 2009). Direct evidence did not establish unlawful discrimination by direct evidence.

38. The direct evidence established, as set forth in the findings of fact, that Mr. Desensi lost control of his temper

and behaved unprofessionally the last day of Ms. Davidowitz's employment when he decided to terminate her. But there is no evidence that his decision to terminate her was due to her sex. The findings of fact show that decision to terminate Ms. Davidowitz was due to her participation in the long-running feud with Ms. McKenna and its effect on the work place, culminating in Ms. McKenna quitting.

39. To prove unlawful discrimination by circumstantial evidence, a party must establish a prima facie case of discrimination by a preponderance of the evidence. If successful, this creates a presumption of discrimination. Then the burden shifts to the employer to offer a legitimate, non-discriminatory reason for the adverse employment action. If the employer meets that burden, the presumption disappears and the employee must prove that the legitimate reasons were a pretext. Valenzuela v GlobeGround North America, LLC., 18 So. 3d 17 (Fla. 3rd DCA 2009). Facts that are sufficient to establish a prima facie case must be adequate to permit an inference of discrimination. Id.

40. The findings of fact here are not sufficient to establish a prima facie case. The facts found that relate to Ms. Davidowitz's sex shows that on the day he decided to terminate her employment, Mr. Desensi was extremely angry and twice called her a "bitch" during their final conversation.

These findings of fact establish only that Mr. Desensi lost his patience and his temper with the long-running, unprofessional feud between two employees and decided to discharge one after the other quit thus relieving himself of a person with a history of difficult behavior in the work place.

Hostile Work Environment

41. Ms. Davidowitz advances a sexually hostile work environment claim. Under Title VII and Section 760.10, Florida Statutes (2009), a plaintiff can establish gender discrimination through sexual harassment by the creation of a hostile work environment, by showing:

> (1) that she belongs to a protected group; (2) that she has been subjected to unwelcome sexual harassment; (3) that the harassment was based on her sex; (4) that 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 a basis for holding the employer liable exists.

Cotton v. Cracker Barrel Old Country Store, Inc., 434 F.3d 1227, 1231 (11th Cir. 2006). Ms. Davidowitz was not subjected to unwelcome sexual harassment.

42. If Mr. Desensi's temper outburst her last day of employment is assumed to be unwelcome sexual harassment, it was not sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive

working environment. Determining whether harassing conduct is sufficiently severe or pervasive to alter the terms and conditions of employment has a subjective and objective component. The plaintiff must subjectively perceive the environment to be abusive. And the conduct must be severe or pervasive enough to create an objectively hostile or abusive work environment. Blackmon v. Wal-Mart Stores East, L.P., Case No. 09-11953; 358 Fed. Appx. 101 (11th Cir. December 23, 2009). The single incident on the last day of Ms. Davidowitz's employment is not objectively severe enough to establish a hostile work environment. See Smith v. Fla. Dep't of Corr., 2009 U.S. Dist. LEXIS 44885 (U.S. Dist. Ct. M. Dist, (2009),(stuffed monkey left for days in African-American employee's work place despite complaints was insufficient evidence of harassment to preclude grant of summary judgment); Agee v. Potter, Case No. 06-12391, 216 Fed. Appx (11th Circ. February 5, 2007). 837 (abusive conduct, including shouting and threat to "take care of you," did not make summary judgment for employer an error.)

Retaliation

43. The court in Blizzard v. Appliance Direct, Inc., 16 So. 3d 922, 926 (Fla. 5th DCA 2009), described the analysis required for a retaliation claim. The opinion says:

> To establish a prima facie case of retaliation under section 760.10(7), a plaintiff must demonstrate: (1) that he or she engaged in statutorily protected activity; (2) that he or she suffered adverse employment action; and (3) that the adverse employment action was causally related to the protected activity. See Harper v. Blockbuster Entm't Corp., 139 F.3d 1385 (11th Cir.), cert. denied, 525 U.S. 1000, 119 S. Ct. 509, 142 L. Ed. 2d 422 (1998). Once the plaintiff makes a prima facie showing, the burden shifts and the defendant must articulate a legitimate, nondiscriminatory reason for the adverse employment action. Wells v. Colorado Dep't of Transp., 325 F.3d 1205, 1212 (10th Cir. 2003). The plaintiff must then respond by demonstrating that defendant's asserted reasons for the adverse action are pretextual. Id.

44. Ms. Davidowitz claims that her complaints to Mr. Koenig and to Ms. Ensigner were complaints about sex discrimination and therefore were statutorily protected activity and that she suffered adverse employment action because of them. The facts found do not establish a complaint about sex discrimination.

45. Ms. Davidowitz complained of plainly unprofessional conduct by Mr. Desensi, including use of foul language, and harassment by Ms. McKenna, a co-worker with whom she was feuding. A single incident of unprofessional behavior that included use of foul language by an angry supervisor, even the term "bitch" directed at a female twice in a single

conversation, would not amount to discrimination on account of gender.

46. The adverse employment action here is termination from the Boynton Beach Ale House. By the time Ms. Davidowitz spoke to Mr. Koenig, the decision to terminate her from the Boynton Beach Ale House had been made. Therefore her complaint to Mr. Koenig could not have been the cause for her termination.

47. When Ms. Davidowitz spoke to Ms. Ensinger, Ms. Davidowitz had already been terminated. Consequently, the termination could not have been causally related to her conversation with Ms. Ensinger.

48. The facts do not support Ms. Davidowitz's claims of sexual discrimination and retaliation.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations deny the Petition of Patricia Davidowitz in FCHR Case Number 2009-02875.

DONE AND ENTERED this 17th day of September, 2010, in Tallahassee, Leon County, Florida.

JOHN D. C. NEWTON, II
Administrative Law Judge
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Filed with the Clerk of the
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this 17th day of September, 2010.

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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.