

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

KWASI MALEZI, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 10-2327  
 )  
 DEPARTMENT OF REVENUE, )  
 )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

Administrative Law Judge John D. C. Newton, II, of the Division of Administrative Hearings, held a final hearing in this case in Fort Lauderdale, Florida, beginning on June 21, 2010, and continuing on August 17 and 18, 2010.

APPEARANCES

For Petitioner: Kwasi Malezi, pro se  
201 Northwest 16th Avenue  
Pompano Beach, Florida 33069

For Respondent: Cindy Horne, Esquire  
Department of Revenue  
Carlton Building, 501 South Calhoun Street  
Tallahassee, Florida 32314-6668

STATEMENT OF THE ISSUE

Did Respondent, Department of Revenue (DOR), discharge Petitioner, Kwasi Malezi, because of his sex or in retaliation for him making complaints of discrimination on account of gender and a hostile work environment?

PRELIMINARY STATEMENT

Administrative Law Judge, John D. C. Newton, II, of the Division of Administrative Hearings, heard this case, as noticed, on June 21, 2010 at Fort Lauderdale, Florida. The hearing was continued to August 17 through August 18, 2010, in the same location.

Mr. Malezi presented the testimony of himself and the following witnesses: Pam Dailey, Robert Framingham, Doretha Holmes, Nicola Jackson, Sharon Marshall, and Jackie Mounts.

Mr. Malezi offered the following exhibits that were accepted into evidence: A, B-1, B-2, C-1, C-2, D, E-1, E-2, F-1, F-2, G1, G2, H, H-1, H-2, H-3, H-4, I-1, I-2, J-1, J-2, J-3, K-1, K-2, L, L-1, L-2, L-3, L-4, M, M-1, N-1, N-2, R, S, T, U, V, V-1, W, W-1, X-1, Z, Z-1, Z-2, Z-3, Z-4, and Z-5.

DOR presented the testimony of: Robert Framingham (by deposition), Sharon Marshall, and Jackie Mounts (by deposition.) DOR also entered the following exhibits into evidence: Exhibit 1; Mounts Deposition Exhibits 7, 8, 9, 10, 11, and 12; and Framingham Deposition Exhibits 1, 2, 3, 4, 5, and 6.

The court reporter filed the transcript of the final hearing on September 13, 2010. The parties filed their Proposed Recommended Orders on August 30, and September 23, 2010.

## 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. DOR hired Mr. Malezi to work as a Revenue Specialist II in Child Support Enforcement at its Fort Lauderdale Service Center. Mr. Malezi's one-year probationary period as a career service employee began on his date of hire, October 17, 2008. During an employee's probationary period, the state employer may suspend, demote, discharge, reassign, or take any other employment action, at its discretion. Once an eligible state employee has satisfactorily completed a one-year probation period, the state employer may suspend or dismiss a career service employee only for cause.

2. Mr. Malezi worked as a member of the Court Team. The Court Team represents DOR in Child Support Enforcement hearings. Court Team members provide support to attorneys providing legal representation and provide information to parents and the court as required.

3. Kim Cox, Revenue Specialist II; Andrea Smith, Revenue Specialist II; Gina Rhodes, Revenue Specialist II; Pamela Dailey, Revenue Specialist II; Denise Hunter, Revenue Specialist II; Linda Safari, Revenue Specialist II; and Doretha Holmes, Revenue Specialist III; were the other Court Team members. The

Team Manager position was vacant. The second level Revenue Administrator, Nicola Jackson, Revenue Administrator, consequently also acted as manager of the Court Team. She was Mr. Malezi's supervisor. Sharon Marshall was the Service Center Manager. Ms. Holmes served a lead worker.

4. Mr. Malezi soon exhibited difficulties in relationships with his colleagues. In particular he had a difficult working relationship with Ms. Holmes, a co-worker. Ms. Holmes was not his supervisor. She did not have authority to recommend or take disciplinary action. She did not review or approve his time sheets. Ms. Holmes was not a member of the DOR management team and had no oversight authority.

5. In February 2009, Ms. Jackson asked Ms. Holmes if she had supplied a specific document to Mr. Malezi. Ms. Holmes thought she had. She went to Mr. Malezi's cubicle to confirm her memory and locate the document. Ms. Holmes entered Mr. Malezi's cubicle, opened a top compartment of the cubicle, and began searching for the document.

6. Ms. Cox and Ms. Williams saw her there. They stopped outside Mr. Malezi's cubicle to speak to Ms. Holmes. Mr. Malezi found the three of them talking at his cubicle. He was upset by what he viewed as a search of his cubicle by co-workers.

7. On February 13, 2009, Mr. Malezi sent his supervisor, Ms. Jackson, an e-mail complaining that Ms. Holmes had searched

his cubicle with help from Ms. Cox and Ms. Williams. The e-mail did not complain of discrimination on account of sex or other characteristic. The e-mail read as follows:

Hi Ms. Jackson,

When our one on one meeting adjourned this afternoon, I headed back to my cubical [sic]. To my surprise, your [sic] As [sic] Ms. Nicola [sic] was whispering to others he's coming when I arrived at my cubical [sic]. Ms. Holmes and Ms. Cox were at my cubical [sic] searching thru [sic] my space looking for some sort of document. I learned later that my space is government property and it can be searched at any time and by extension anybody. That's fine but why would someone need a lookout if everything is on the up and up? I mentioned [sic] this because if I am going to judge [sic] by my work then public perception should be that it is going to be a fair assessment. There is now a whisper champaign [sic] to tell other workers that they update or are updating trac 55 when there is a continuance date. Beverly our senior clerk was only person [sic] to produce something on it with trac 55 referenced. [F]ortunately, Ms. Change left me her training files and her note indicate [sic] that the court team is to update trac with or without a continuance date with 55. I will you [sic] her (Ms. change [sic]) note if you like. I will end this note with, I am just trying to do my job and I will follow directions from my superiors, I know [sic] I initial my one on one already but I just can't believe that Ms. change [sic] had anything to say about me not following her direction.

8. Ms. Jackson spoke to all the individuals involved. She determined that no one had violated DOR Standards of Conduct.

She determined that Ms. Holmes only looked in a cupboard used to store documents and manuals. Ms. Holmes was looking for a manual that Ms. Jackson had asked about. Ms. Jackson did not take disciplinary action against any of the individuals. Ms. Jackson's handling of the issue was reasonable and even-handed.

9. Also in February, Mr. Malezi complained about scheduling. His complaints recurred during his tenure with DOR. Mr. Malezi complained that he was assigned the most cases each month and attributed that to his gender. Mr. Malezi was wrong.

10. Some months Mr. Malezi was assigned more cases than other members of the team. Some he was not. A number of factors affected scheduling including vacations and employee illness. During a representative seven-month period Mr. Malezi handled the most cases of his seven-person team in only three of the months. Two of those months he only handled four more cases than the person with the next most cases. A third month, he only had three more cases than the person with the second most cases.

11. In addition, the Office of the Attorney General's docketing decisions determined how many cases each worker was responsible for each month, not DOR personnel. Ms. Holmes assisted Ms. Jackson in scheduling different Court Team members to different court days. At the time of the DOR scheduling

decisions neither individual knew how many cases would be heard each day. That was determined later when the lawyers of the Office of Attorney General determined which cases it would call up for hearing which day. After Mr. Malezi complained, Ms. Jackson worked with the Office of the Attorney General to even out the number of cases scheduled for each docket.

12. Like all members of the Court Team, Ms. Malezi was encouraged to nurture good, working relationships with the Assistant Attorneys General representing DOR in the child support hearings. He incorrectly interpreted this as permitting him to question administrative staff at the Office of the Attorney General about hearing scheduling and changes. Consequently, he questioned an administrative staff member, Jeremiah Ortiz, about a canceled hearing.

13. Ms. Jackson had counseled Mr. Malezi about developing his working relationships with lawyers from the Office of the Attorney General. However, Ms. Holmes corrected Mr. Malezi for contacting Jeremiah Ortiz, a docketing paralegal for the Office. Ms. Holmes wanted the docketing communications to route through her. This was reasonable given her responsibility for docketing for the entire team. Also, since Mr. Ortiz was not a lawyer, he was not one of the employees to whom Ms. Jackson had directed Mr. Malezi's attention. Mr. Jackson properly and fairly corrected Mr. Malezi for his communication with Mr. Ortiz.

14. On May 13, 2010, Ms. Jackson sent all employees an e-mail reminding them of their responsibility to work only during scheduled hours. The e-mail also reminded employees that over-time or work outside of normally scheduled hours had to be approved in advance and that adjustments to account for unavoidable overtime that could not have been pre-approved had to be approved by a supervisor.

15. The e-mail was clear. It said:

Please be advised that there should [be] no one working outside of their normal scheduled work hours unless you have obtained approval to do so from me or your manager. No one should be flexing any time to make adjustments for late arrival or exiting early without approval.

With [the] exception of those individuals who are working overtime on special projects and persons that have approved flex schedules (i.e. 4 day and 4 1/2 day work-week). [sic]

I realize that times may arise when you are forced to stay late because you are interviewing a client. Sometimes it is difficult to avoid such instances, however, I encourage each team to monitor their waiting list as often as possible especially toward the end of the day.

Your cooperation in this matter is greatly appreciated. If you have any questions, please do not hesitate to see me or your manager. Thank you.

16. Mr. Malezi received this e-mail along with the other Court Team members. He chose to interpret it as admonishing



people he believed were not working their full assigned hours and decided it really was not directed at him too. After receiving the e-mail, Mr. Malezi worked outside his scheduled work time, without approval, on at least fifteen different days for periods ranging from fifteen to fifty-seven minutes.

Ms. Jackson learned about this in a memorandum she received from Mr. Malezi later.

17. In May 2009, one of the cases on a docket covered by Mr. Malezi involved a request for payment by a father of full child support. The father, who was the legal father named on the birth certificate, requested a DNA test. The court ordered the test, but then vacated the order because the individual was the legal father. Nonetheless, the test was administered. The results excluded the father as the biological father.

18. Since the individual was the legal father, DOR proceeded to seek retroactive support and medical coverage consistent with its policies. At the hearing Mr. Malezi, without authority and contrary to policies, recommended that the court only require medical support. The court followed his recommendation. Mr. Malezi claimed the Assistant Attorney General handling the case suggested the recommendation. But he was the DOR representative with the duty to ensure DOR acted in compliance with its policies and guidelines.

19. When the order came to DOR, it was flagged as an error and reviewed by Ms. Jackson. She asked Mr. Malezi about the order. He acknowledged making the recommendation to limit the order to medical support because he felt it was inequitable to seek support if the legal father was not the biological father.

20. DOR had a Personal Computer Policy for Users, Policy Number DOR-ITP-001. The policy permitted some personal use of the computer. But it clearly prohibited "activities related to the employee's outside business or commercial activities." The DOR Standards of Conduct include an intranet link for the policy. They also summarize the policy that personal computer use is permitted if "brief, occasional and not inappropriate." Commercial use is inappropriate.

21. On May 19, 2009, Mr. Malezi used the DOR computer and computer network to solicit offers from two companies to lease his Alaska crab harvesting quota. The e-mails caused one of the companies solicited to send a reply by e-mail to the DOR computer and computer system. Mr. Malezi's efforts to lease the quota were a commercial activity unrelated to DOR activities. They violated the DOR policies limiting employee use of computers for non-work communications.

22. DOR Standards of Conduct governing outside employment permit rental of "employee owned real or personal property unless the property is rented to a State of Florida agency or

the lessee is a subject of the employee's official duties." This is an exception to the requirement for prior approval of dual employment. It is not an exception to the limitations on use of the DOR computers and computer system imposed by DOR's Personal Computer Policy for Users.

23. On June 10, 2009, Mr. Malezi placed a memorandum in Ms. Jackson's inbox addressed "to Whom It May Concern." The memorandum expressed his perceptions and complaints about his experience as an employee of DOR.

24. The memorandum read as follows:

6/10/2009 11:10 AM  
From: Kwasi Malezi  
To: whom it may concern; [sic]

Subject: Responding to previous and up to June 10, 2009 one on one meeting.

Please be advised that I am responding to a one on one meeting I had on 6/10/09 with my department head, Nicola Jackson. Let me be clear, I have grave misgiving [sic] on how I have been treated since my arrival at DOR CSE in October 08. My tenure so far has been exemplified by illegal searches of my personal work space to admonishment because I complained about my lack of training.

In addition, I have been told to associate myself with stakeholders who are out of my chain of command and because I have not in the past associated myself with them, I received negative marks on my EEO&D. The truth is I had tried to reach out to these stakeholders; [sic] Jeremiah Ortiz of the AG and I was told that "I am not to contact him or anybody else who is not an attorney on the case I am working again [sic]".

I have been denied breaks because I was working on official DOR business during this time and was not allow [sic] too [sic] take a break when the task was complete. Further, I have been warned by some of my fellow Court team members not too [sic] speak out or alert superiors to problems I see within our process.

I have been given substantially more work assignments than [sic] rest of my team ([sic] I have provided incontrovertible proof -- the dates are March 2 to June 10 2009 [sic]). I am the least experienced member but I am tasked with working substantially more cases than [sic] senior members of the team. It is a glaring comment; [sic] on how things are done on the court team, that the least experienced person does the most work. Therefore it is apparent and most reasonable minds would agree that whoever assigned & approved this amount of work to a neophyte clearly wants failure as a final outcome.

Through out [sic] my tenure at DOR, I have conducted myself with professionalism, [sic] courtesy at all times. Moreover, from day one I arrived at work early and begin [sic] working at my desk before my scheduled work time, but it is still not good enough for my supervisor. I am subject to Nettling [sic], even though others have violated the same work schedule. I am told to establish trust or communications with my team, members. I have helped prep other team members' dockets and I assist them when I know that they are supposed to do their own work. I do not drink alcohol, nor do I gamble at the Hard Rock Casino. I have ask [sic] for guidance or some sort of gauge to determine if I am fitting in as a team member, but I have not been given any direction to improve my purported perceived non-cooperation with some of my team members. Let me end this note with hope that the reader of this

letter will fully investigate my claim and take the appropriate actions.

It is with deep regret that I make the following statement in 2009. Let me be clear, I believe that I am being mistreated because of my sex. I am the only male in my section. I have never been late to work, in fact I have been early, I am the least experience [sic] member but I am tasked with substantially more work then [sic] the females on my team and finally, I have been subject to illegal searches.

25. Ms. Jackson gave the memorandum to Ms. Marshall, the Service Center Manager. Ms. Marshall referred Mr. Malezi's complaints to Jackie Mounts, Discrimination and Sexual Harassment Intake Officer for the DOR Office of Inspector General. Once management refers a complaint of discrimination to the Inspector General, management sets the matter aside and defers to the Inspector General to investigate it. Ms. Jackson and Ms. Marshall did not inform Ms. Holmes or any other Court Team member of Mr. Malezi's complaint.

26. Ms. Mounts conducted a preliminary review of the complaint. She determined that it did not provide sufficient information to refer the complaint to investigations. She twice sought additional information from Mr. Malezi to no avail.

27. The Office of Inspector General provided Mr. Malezi the Department's discrimination complaint form and the web address for the Department's on-line reporting system to

initiate a formal complaint. He did neither. Consequently the Office of Inspector General closed the matter.

28. On October 19, 2009, Ms. Mounts sent Mr. Malezi a letter advising him the case was closed. The letter also reminded him of his right to file a complaint with the Equal Employment Opportunity Commission and the Florida Commission on Human Relations and provided the applicable deadlines.

29. Ms. Marshall also sent Mr. Malezi a memorandum on June 19, 2009 addressing his complaints and accurately describing what DOR had done to address them.

30. Ms. Marshall's letter accurately stated that Mr. Malezi's June 10 letter was the first she learned that he had been arriving early and working before his scheduled hours. Ms. Marshall correctly reminded Mr. Malezi that DOR was required to accurately compensate employees for all hours worked. Her letter directed him to immediately cease working hours outside his regularly scheduled work hours unless authorized. And Ms. Marshall directed Mr. Malezi to the location of the DOR work hour policy on the intranet. Finally, Ms. Marshall directed Mr. Malezi to identify the dates and amount of time he worked each day that he had arrived early and submit the information to his supervisor "as quickly as possible." This was necessary so that DOR could fulfill its obligation under the Fair Labor Standards Act to compensate him for all hours worked.

31. Ms. Marshall's memorandum reminded Mr. Malezi, accurately, that Ms. Jackson had looked into his complaint that his cubicle had been searched. Ms. Marshall pointed out that Ms. Jackson had looked into the complaint at the time and determined that Ms. Holmes had looked in an overhead bin for an agency manual but had not searched his cubicle, doing things like opening desk drawers.

32. Addressing the workload complaints, Ms. Marshall accurately reminded Mr. Malezi that Ms. Jackson had addressed the discrepancy in docket size and case numbers and had told him that in their June 10, 2009, meeting. She also pointed out that the docket size variances affected all the Court Team members not just him.

33. Ms. Marshall's letter accurately described Mr. Malezi's difficulty, despite counseling, demonstrating teamwork and establishing professional relationships, as follows:

Demonstrating teamwork and establishing professional relationships are crucial components of success. Although you may have assisted a co-worker or two, we have identified that this is an area still in need of improvement. An example would be your very limited, if any, participation in team meetings and discussions. You have failed to establish the same rapport that your peers have developed with our Legal Service Provider, the Office of Attorney General (OAG). Our efforts are in partnership with the OAG and the

relationships and trust formed helps us to perform the duties entrusted to us.

34. Mr. Malezi did not comply with Ms. Marshall's direction to submit information as quickly as possible about the time he had worked outside of his scheduled work hours. Instead he sent an e-mail vaguely reiterating that since he started work in October 2008 he was usually at work by 7:00 a.m. every day, often by 6:30 a.m. His e-mail states that until May 2009, he was attending to personal matters or general education before his scheduled work time. It further states that by May 2009, he was working on DOR business in the time before his scheduled start time of 8:00 a.m. This means that Mr. Malezi was working outside his scheduled hours without authority after receipt of Ms. Jackson's memorandum reminding employees that they should not work outside their scheduled work hours.

35. Mr. Malezi went on to say he could not tell how long a task took. His e-mail reveals no sign of any effort by Mr. Malezi to determine what he did on any day or how long it took. Mr. Malezi concludes asking Ms. Marshall to accept his e-mail as compliance with her request. It was not compliance with Ms. Marshall's request, and did not reflect even a cursory effort to comply. Furthermore, either Mr. Malezi was dishonest in his response or he was dishonest in his June 10 memorandum



when he stated "from day one I arrived at work early and begin [sic] working at my desk before my scheduled work time . . ."

36. Because Mr. Malezi did not cooperate in efforts to determine how many additional hours he had worked, Ms. Marshall sought information and assistance from the Office of Inspector General. By reviewing records obtained from the Department of Children and Families of access to the Department's FLORIDA data base system, she made the best possible judgment about Mr. Malezi's additional hours. DOR paid him for those hours.

37. On August 7, 2009, Mr. Malezi sent Ms. Jackson an e-mail complaining that his co-worker Ms. Holmes had "just excoriated" him in front of the office. He said he was not sure what Ms. Holmes said but thought she was accusing him of saying something to another co-worker. Mr. Malezi said he felt Ms. Holmes was creating a hostile environment and wanted her to stop. Mr. Malezi did not claim that any of Ms. Holmes's alleged remarks related to his gender in any way. The e-mail and the statements Mr. Malezi made when he spoke to Ms. Jackson about the matter were not complaints about different treatment because of his gender or claims of retaliation.

38. Ms. Jackson called Mr. Malezi and Ms. Holmes into her office on August 10, 2009, to discuss the matter. She listened carefully to each employee's version of events.

39. Mr. Malezi claimed that Ms. Holmes was yelling at him in a hallway about a conversation he had with another employee and that he was behind "some mess." Ms. Holmes said she was suspicious of Mr. Malezi because she saw him whispering when he was usually quite loud. Ms. Holmes said she told him and the person he was speaking to that their complaining was driving Ms. Jackson crazy.

40. Ms. Jackson told Mr. Malezi and Ms. Holmes she would write up notes of the meeting and look into the incident further. She also emphasized to them the importance of demonstrating DOR values and always dealing with each other in professional manner. She told Ms. Holmes that staff may communicate with each other in low tones if they choose and that it was no concern of hers. Ms. Jackson told both of the employees that if they had important conversations or disputes that they should be held in a private place or brought to a supervisor.

41. Ms. Jackson investigated further as she said she would. After conducting her investigation, Ms. Jackson concluded that Ms. Holmes had acted inappropriately. She took corrective action. On August 19, 2009, Ms. Jackson issued a Coaching Memo to Ms. Holmes advising her that her behavior was not acceptable. The memorandum stated that Ms. Holmes' behavior

was "rude, disrespectful, lacked good judgment and clearly violated the Departments' [sic] Standards of Conduct."

42. In September, 2009, Mr. Malezi complained to Ms. Jackson about being sent alone to cover a "mass contempt hearing." This is a hearing where a number of cases in which courts have issued orders to show cause why a person should not be held in contempt for failure to comply with a court order are called up for hearing the same day. Ms. Jackson scheduled Mr. Malezi to cover the hearing because she had noticed that he had not yet shared that Court Team duty.

43. By this time Mr. Malezi had worked on the Court Team for eleven months. He had considerable experience handling hearings of all sorts, including contempt hearings. Mr. Malezi had been adequately trained for all types of hearings, although he had not "shadowed" this particular version of a hearing. At that point Mr. Malezi was the only Court Team member who had not handled mass contempt hearings.

44. Mr. Malezi handled the hearing successfully without incident or disruption. Nonetheless, he complained about having been sent to it. Ms. Jackson responded to his complaint by apologizing for not being aware that he had not shadowed a "mass contempt" hearing. She, however, correctly asserted that his months of experience and training had prepared him adequately for the "mass contempt" hearing. According to his own

statements Mr. Malezi was capable and handled the hearing just fine.

45. Although Mr. Malezi had thirty days notice of the assignment, had reviewed the docket to prepare for the hearing, and had a repeatedly demonstrated the ability and willingness to complain of Court Team operations, he did not question the assignment or seek assistance before the hearing. It was only after the hearing that he sent an e-mail, following a discussion with Ms. Jackson, repeating his complaints. His e-mail went on to reiterate his view of the difficulties he was having as a Court Team employee and reveal that he thought Ms. Holmes had scheduled him for the hearing.

46. It said:

I believe that the person who assigned me this docket knew full well the negative ramifications if I did not conduct myself in an adroit manner. Ms. Jackson, I have to proffer this statement to you; If [sic] these glaring violations of protocol continue unchecked, how can I move forward. [sic] I feel that I must proactively defend myself from forces that mean me ill will. Furthermore, what does this say about team cohesiveness and respect for your leadership if someone under your process is actively trying to undermine another team member for some vindictive reason. Can you imagine and or visualize what could have happened if I was not up to the challenge for Mass Contempt?

In conclusion, I hope that you monitor and peruse the calendar dockets & assignments to make sure that everyone is being treated

with fairness. For my part, I pledge to unilaterally put all perceived; misdeeds against me in the past, and start anew.

47. Pam Dailey is the only employee who Mr. Malezi claims was similarly situated to him and treated more favorably than him. She was not similarly situated. Like Mr. Malezi, Ms. Dailey was a probationary employee. Unlike him she did not have a lengthy record of disregard for DOR policies. Ms. Dailey worked outside of her assigned hours three times during her probationary period. She was corrected for this. But those were her only policy violations.

48. Ms. Dailey also signed up for a state employee discount from a cellular telephone service provider. She received an e-mail from the provider at her work account confirming her employment and consequent eligibility for the discount. This was a permitted personal communication under DOR policies. It is not similar to Mr. Malezi's use of the computer to market his crab harvesting quota.

49. Before Mr. Malezi's probation period expired, DOR decided to terminate his employment. Because he was on probation, DOR did not need to have just cause or a reasonable basis for discharging him.

50. The memorandum from Peg Hutchinson, Revenue Program Administrator II, to Ann Coffin, Director, Child Support Enforcement, requesting Mr. Malezi's termination stated reasons

for his termination. They were (1) working unauthorized hours and not obeying directions to document the time worked so that DOR could fulfill its legal obligation to pay for time worked; (2) using the DOR computer to solicit lease proposals for an Alaska crab quota he held; (3) supporting in a court proceeding downward modification of a child support obligation without authority and contrary to DOR guidelines; and (4) a conclusion that managers could not rely up on Mr. Malezi to conform to DOR rules and policies. The facts in this case fully support all four reasons for termination.

51. Mr. Malezi filed a complaint with the Florida Commission on Human Relations. The Commission investigated his complaint and issued a Determination of No Cause on March 22, 2010.

#### CONCLUSIONS OF LAW

52. Sections 120.569 and 120.57(1), Florida Statutes (2010), grant the Division of Administrative Hearings jurisdiction over the subject matter of this proceeding and of the parties.

53. Mr. Malezi advances two claims. First, he maintains that DOR discriminated against him on account of his sex by creating a hostile work environment through harassment and by discharging him. Second, he claims that DOR retaliated against him for complaining of discrimination. Mr. Malezi has the

burden of proving his claims by a preponderance of the evidence. Florida Department of Transportation v J.W.C Company Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

54. 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.

55. Section 760.11(7), Florida Statutes (2010), 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.

56. 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. Valenzuela v GlobeGround North America, LLC., 18 So. 3d 17 (Fla. 3d DCA 2009).

57. 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 (M.D., Fla. 2009). Mr. Malezi did not prove unlawful discrimination by direct evidence. There are no facts such as statements about his sex or assignment of stereotypical, sex-based job duties that support a conclusion that DOR discriminated against Mr. Malezi on account of his gender.

58. 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.

59. Mr. Malezi argues that he was treated differently than a similarly situated female employee, Ms. Dailey, and that the disparate treatment establishes a prima facie case. In order to



establish a prima facie case of disparate treatment based on gender discrimination, Mr. Malezi must prove that: (1) he is a member of a protected class; (2) he was qualified for his position; (3) he suffered an adverse employment action; and (4) similarly situated employees outside his protected class were treated more favorably. See Rice-Lamar v. City of Ft. Lauderdale, 232 F.3d 836, 842-43 (11th Cir. 2000).

60. Mr. Malezi is a member of a protected class and suffered an adverse employment action. DOR accepts that he was qualified for his position. But he has not satisfied the fourth element -- the "similarly situated" element -- necessary to establish a prima facie case of gender discrimination. Ms. Daily was not similarly situated. Ms. Dailey was also on probation. But she did not have the extensive record of problems and offenses that Mr. Malezi had. She had only three incidents of working outside her scheduled hours, for which she was corrected. Mr. Malezi had many more. In addition, he had acted against DOR policy in a court case, had a history of difficult relationships with co-workers, made false representations about working outside scheduled hours, and used DOR computers in violation of DOR rules.

61. The findings of fact here are not sufficient to establish a prima facie case. As already noted, Mr. Malezi was not the subject of any comments about his gender and did not

receive assignments that would indicate consideration of his gender. In addition, Mr. Malezi was not treated differently than any similarly situated female employee. The facts demonstrate that he was a difficult employee who repeatedly demonstrated that he would not accept and be governed by the management and policies of DOR.

62. Ms. Malezi 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 [or he] belongs to a protected group;
- (2) that she [or he] has been subjected to unwelcome sexual harassment;
- (3) that the harassment was based on [his or] 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). Mr. Malezi was not subjected to unwelcome sexual harassment.

63. 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.

64. The facts show that Mr. Malezi engaged in protected activity and that he suffered adverse employment action. The facts do not establish any causal relationship between his complaints of sex discrimination and his discharge. The facts establish that Mr. Malezi was an unsatisfactory employee who was terminated during his probationary period.

65. Application of the governing law to the facts does not support Mr. Malezi'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 issue its Final Order denying Mr. Malezi's Petition for Relief.

DONE AND ENTERED this 12th day of October, 2010, in Tallahassee, Leon County, Florida.



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JOHN D. C. NEWTON, II  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 12th day of October, 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.