STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TANIA APONTE,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 10-7920
	)	
WATSON PHARMACEUTICALS, INC.,	)	
	)	
Respondent.	)	
_____	)	

RECOMMENDED ORDER

Administrative Law Judge, John D. C. Newton, II, of the Division of Administrative Hearings, heard this case, as noticed, on April 1, 2011, by video teleconference at sites in Ft. Lauderdale, Florida and Tallahassee, Florida.

APPEARANCES

For Petitioner: Stewart Lee Karlin, Esquire
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For Respondent: Teresa Ragatz, Esquire
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STATEMENT OF THE ISSUES

A. Did sexual harassment of Petitioner, Tania Aponte (Ms. Aponte), if any, create a hostile work environment?

B. Did Respondent, Watson Pharmaceuticals, Inc. (Watson) discriminate against Ms. Aponte based on her gender by terminating her employment in March 2009?

C. Did Watson retaliate against Ms. Aponte for complaining about alleged sexual harassment?

PRELIMINARY STATEMENT

On February 15, 2010, Ms. Aponte executed a Charge of Discrimination against Watson alleging that, in July 2008, her then-supervisor sexually harassed her, that Watson terminated her employment as a Manufacturing Tech I in March 2009, and that her termination constituted gender discrimination and retaliation for having complained about alleged sexual harassment. The Florida Commission on Human Relations (Commission) investigated the complaint. On July 2, 2010, the Commission issued its Notice of Determination that there was no reasonable cause to believe that Watson committed an unlawful employment practice. The Commission dismissed Ms. Aponte's complaint.

Ms. Aponte filed a Petition for Relief from an Unlawful Employment Practice with the Commission on August 5, 2010. The Commission referred the Petition to the Division of Administrative Hearings ("DOAH") on August 16, 2010. The undersigned scheduled the hearing in this matter to begin on November 19, 2010. Due to the unavailability of one of Watson's

witnesses, the hearing was continued to January 7, 2011. Later the hearing was continued to April 1, 2011, on Ms. Aponte's motion. The hearing was held on April 1, 2011, as scheduled.

Ms. Aponte testified on her own behalf. Ms. Aponte offered the following exhibits that were accepted into evidence: Petitioner's Exhibits 1-3, and the time card print-outs for Arnold Phillips, Emile Jean-Phillipe, Arlinson Hernandez, Keisha Noel, Alexis McElhaney, Jennifer Domenech, and Ian Anderson.[1]

Watson presented the testimony of Maritza Pantigozo, Corey Washington, and Tysaun Cook. Watson offered the following exhibits that were accepted into evidence: Respondent's Exhibits 1-85.

Petitioner moved for and was granted an extension of the time for filing a proposed recommended order. The parties timely filed Proposed Recommended Orders that have been considered in the preparation of this Recommended Order.

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. Aponte is a female.

2. Watson is a pharmaceutical company that manufactures generic brand medicines.

3. Ms. Aponte began working for Watson on November 13, 2006, as a Process Operator I. During her employment with Watson, Ms. Aponte received two promotions, first to Process Operator II and then to Manufacturing Tech I. At all times during her employment, Watson categorized Ms. Aponte as a "non-exempt employee." This means her position was not exempt from the federal Fair Labor Standards Act and state wage and hour laws.

4. Watson gave Ms. Aponte a Watson Employee Handbook when she started work. Ms. Aponte signed a receipt for the handbook. The receipt expressly acknowledged her responsibility to read, know, and follow the personnel policies and practices described in handbook.

5. Watson records and tracks its nonexempt employees' time records through the Kronos time recordkeeping system. This computerized system relies upon employees "swiping" their identification cards to "clock in" and "clock out."

6. During her time with Watson, Ms. Aponte accrued paid time off ("PTO") which combined traditional vacation and sick leave. Watson permitted employees to use PTO to take time off without consequence if they followed proper approval procedures.

7. Watson's Policies and Procedures Manual sets forth Watson's attendance policy. Watson's Employee Handbook, which Ms. Aponte received and was bound to read and follow, also sets

forth the attendance policy. The Handbook advises that attendance and punctuality are considered to be part of an employee's overall job performance. It states: "Maintaining a good attendance record is very important." The Handbook also cautions that "excessive or unauthorized absences and/or tardiness may result in disciplinary action, up to and including termination."

8. The Handbook defines an "occurrence," describes when occurrences are incurred, and describes the number of occurrences resulting from specified conduct. Effectively occurrences function as a unit of measure for disciplinary offenses. An employee incurs one half of an occurrence if she is less than two hours late, leaves early, or takes excessively long or frequent breaks.

9. An employee incurs one occurrence if she is absent for a full day or part of a day. An employee also incurs one occurrence if she fails to follow the prescribed call-in procedures. This is in addition to the occurrence incurred for the absence.

10. The Handbook establishes call-in procedures. It requires an employee who is going to be unexpectedly absent to speak directly to her supervisor within 30 minutes of the scheduled start time, not leave a voice mail message. If the employee cannot reach the supervisor, then she is to speak to

the next level of management or a member of the human resources department. A voice mail message is acceptable only if the employee has tried and failed to reach her supervisor, the next level of management, and the human resources department.

11. The call-in procedure is only for unexpected absences. The Handbook requires, whenever possible, that employees request and receive advance written approval for an absence. Unless otherwise specified by a supervisor, Watson employees, including Ms. Aponte, were required to obtain 24 hours advance approval of an absence.

12. The Handbook also provides that any absence or tardiness from work not approved in advance will result in an attendance occurrence.

13. The Handbook also establishes what constitutes "excessive absenteeism." An employee is considered to be excessively absent if that employee incurs seven or more attendance occurrences within a rolling 12-month period.

14. Ms. Aponte knew that excessive absenteeism would result in disciplinary action, up to and including termination of employment. She also knew of the "occurrence" system and standards.

15. Throughout her employment with Watson, Ms. Aponte had a chronic absenteeism problem. The problem persisted regardless of who supervised Ms. Aponte.

16. Ms. Anna Bohorquez was Ms. Aponte's first supervisor. On October 25, 2007, Ms. Bohorquez presented Ms. Aponte with a counseling memorandum, emphasizing the importance of attendance and punctuality. The memorandum stated that, over the last quarter, Ms. Aponte had several days on which she had not reported to work. It documented that Ms. Aponte had been counseled about her attendance.

17. The memorandum concluded with the bold face heading **"Consequence should incident occur again:"** followed by the statement: "If further violations of this nature and/or violations of other company policies, GMPs, SOPs [occur, they] will result in further disciplinary action up to and including termination of employment."

18. Ms. Aponte admits that, as of October 2007, she certainly knew the importance of complying with attendance policies and the seriousness of the potential consequences of continuing to violate Watson's attendance policy.

19. Ms. Aponte's June 18, 2008, performance review by Ms. Bohorquez recorded Ms. Aponte's lack of dependability, defined as "[r]egular, punctual attendance and timely return from breaks; willingness to work overtime." The plan of action for improvement or progress specified Ms. Aponte's need to improve her punctuality and attendance.

20. On or about June 25, 2008, Ms. Bohorquez counseled Ms. Aponte again about attendance and provided her a verbal warning. The basis for the warning was that, during the rolling year, Ms. Aponte had accrued 21 and one-half occurrences. Ms. Bohorquez provided a Corrective Action Notice. The Notice accurately stated that the issues of attendance and punctuality had been discussed with Ms. Aponte in the past, that Ms. Aponte previously had been counseled for her attendance on October 25, 2007, and that her attendance had not improved.

21. The Notice specifically stated: "Tania is expected to improve her attendance drastically and comply with Watson's Attendance and Punctuality policy at all times."

22. The "Plan for Improvement" in the Notice stated bluntly:

> It is imperative that Tania improve her attendance immediately. She must fully comply with the Watson's Attendance and Punctuality [sic], as unplanned absences are not allowed. Further violation of this policy will result in further disciplinary action up to and including termination.

23. After Ms. Aponte's annual performance review, Ms. Bohorquez and another supervisor, Corey Washington, switched shifts for a couple of months. During that time Ms. Aponte reported to Mr. Washington. Her attendance problems continued.

24. Ms. Aponte worked an eight-hour shift. Like all employees she was permitted to take two 30-minute breaks during

her shift. On July 17, 2008, Mr. Washington issued Ms. Aponte a Corrective Action Notice for exceeding her break time. The written warning stated that Ms. Aponte left for her break at 4:45 p.m. and returned to the floor at 6:00 p.m., taking a break of one hour and 15 minutes. Ms. Aponte had been on her break with a male co-worker, Arlinson Hernandez. Mr. Washington issued Mr. Hernandez an identical written warning for exceeding his break time.

25. After receiving the written warning, Ms. Aponte went to the Human Resources Department to complain that the written warning issued by Mr. Washington was too harsh. She requested that it be downgraded to a verbal warning. Ms. Aponte met with Maritza Pantigozo, Senior Human Resources Representative. Ms. Aponte admitted that she had taken an excessively long break. She just claimed that her break had not been as long as stated in the Corrective Action Notice. However, although the Corrective Action Notice provides that Ms. Aponte could place a written response to the disciplinary action in her human resources file, she never did so.

26. Ms. Pantigozo denied Ms. Aponte's request to downgrade the warning because of Ms. Aponte's record of corrective actions and attendance problems. Human Resources downgraded Mr. Hernandez's written warning to a verbal warning because,

unlike Ms. Aponte, he had a clean file and had not established a pattern of excessive absenteeism.

27. When Ms. Aponte requested downgrade of the warning and in a subsequent meeting, she also claimed that Mr. Washington had once asked her if she was having phone sex with her boyfriend when she was talking on the telephone during work hours. Watson investigated the complaint in accordance with its sexual harassment policies.

28. No persuasive evidence establishes that Mr. Washington made that comment or any of the other inappropriate comments that Ms. Aponte now claims he made. The timing of Ms. Aponte's claims, the fact that personal telephone use during work hours was not permitted, and the demeanors of Mr. Washington and Ms. Aponte when testifying are persuasive evidence that he did not make the comments alleged.

29. Shortly afterwards, Mr. Washington and Ms. Bohorquez switched back to their original shifts. Ms. Bohorquez once again supervised Ms. Aponte.

30. On October 27, 2008, Ms. Bohorquez issued Ms. Aponte a Corrective Action Notice because Ms. Aponte had accrued 13 occurrences for attendance during the 12-month rolling year. Five of the occurrences had been incurred since Ms. Bohorquez had issued her last warning to Ms. Aponte in June 2008. The Notice stated in bold print that any future incident of this or

similar nature may result in additional corrective action, up to and including termination.

31. On December 2, 2008, Ms. Bohorquez issued a Corrective Action Notice to Ms. Aponte. Ms. Bohorquez issued the Notice because Ms. Aponte had incurred 10 and one-half occurrences during the 12-month rolling year for attendance and punctuality. The Final Written Warning noted that, on November 30, 2008, Ms. Aponte had reported to work three hours late without authorization. It also noted occurrences for dress code violations and product production procedure violations in addition to Ms. Aponte's absenteeism violations.

32. The "Plan for Improvement" section of the notice stated: "A Final written warning is being issued to Tania for attendance and punctuality. She is expected to drastically improve and sustain her attendance pattern immediately to avoid termination."

33. On December 18, 2008, Ms. Bohorquez issued an addendum to the December 2 Notice. The addendum corrected the Notice to state that an audit of Ms. Aponte's attendance records determined that Ms. Aponte had incurred 13 occurrences in the prior 12 month rolling period, not the 10 and one-half reported in the December 2 Notice.

34. The addendum reiterated the previous warnings about the importance of attendance and the likelihood of termination with any further occurrences. It stated:

> Tania must fully comply with Watson's Attendance and Punctuality Policy. This includes being present for work and arriving on time, and timely returns from breaks. If Tania earns 1.0 occurrence she will reach the next level of disciplinary action, which is termination.

Ms. Aponte understood that she would be terminated if she incurred just one more occurrence.

35. Ms. Bohorquez issued the Notice because of Ms. Aponte's work record, including her chronic absenteeism. There is no persuasive evidence that the Notice was related in any way to Ms. Aponte's complaint about Mr. Washington.

36. After she received the December 2008 Final Written Warning from Ms. Bohorquez, Watson transferred Ms. Aponte, at her request, to the second shift under the supervision of Tysaun Cook.

37. When Ms. Aponte started working on Mr. Cook's shift, he received her employee packet. From it Mr. Cook learned that Ms. Aponte was on a final written warning. Mr. Cook spoke to Ms. Aponte about her attendance and made sure that she understood that another occurrence could result in her termination.

38. On March 4, 2009, while under Mr. Cook's supervision, Ms. Aponte incurred another occurrence. She did not come to work that day and did not seek or receive approval to take the time off.

39. Ms. Aponte knew in advance that she was going to miss work on March 4, 2009. She planned to miss work that day to attend school orientation. Ms. Aponte also knew that she had used up all of her accrued PTO.

40. On March 3, 2009, Ms. Aponte spoke to Ms. Pantigozo in Human Resources. At the time Ms. Pantigozo was not the Human Resources representative responsible for the division where Ms. Aponte worked. Ms. Aponte did not ask Ms. Pantigozo for authorization to take March 4 off or advise her that she intended to miss work on March 4. And Ms. Pantigozo did not tell Ms. Aponte that she could miss work on March 4. Ms. Aponte spoke to Ms. Pantigozo solely to try to determine if she could get away with missing work that day under the occurrence accounting system. Her conversation with Ms. Pantigozo consisted of general inquiries about the occurrence and attendance policies.

41. On March 4, 2009, Ms. Aponte did not come to work. She left a voice mail message for Mr. Cook that she would not be coming to work that day. This violated Watson's call-in policy, because Ms. Aponte did not speak to Mr. Cook directly, attempt

to speak with the next level supervisor, or, failing that, speak to a Human Resources representative.

42. As significantly, the absence did not qualify for reliance on the call-in policy because it was not an unexpected absence. Both Ms. Aponte's testimony and her Proposed Recommended Order acknowledge that, at the least, she knew on March 3, 2009, that Ms. Aponte intended to miss work on March 4, 2009. But she did not attempt to contact her supervisor until March 4, 2009.

43. Mr. Cook advised Human Resources of Ms. Aponte's violation of policy. He recommended that Watson follow the governing procedures and terminate Ms. Aponte. Her employment history of excessive absenteeism, the fact that she was on final warning, and the incurrence of another occurrence were the sole reasons that Mr. Cook recommended termination.

44. Watson terminated Ms. Aponte approximately eight months after her single complaint that Mr. Washington made an inappropriate comment to her. During those eight months, two different supervisors assessed occurrences against her for absenteeism and warned her that further unapproved absences could result in termination.

45. By Ms. Aponte's own testimony, the final occurrence violated Watson's attendance policies. She admits that she planned in advance to miss work to attend school orientation.

And she admits that she did not attempt to notify her supervisor until the day of the absence although attending the orientation was not an unexpected absence.

46. There is no persuasive evidence that Watson terminated Ms. Aponte because of her unfounded complaint about Mr. Washington. The persuasive evidence establishes that Watson terminated Ms. Aponte in full compliance with its policies and procedures for her accrued occurrences and her documented record of excessive absenteeism.

47. No persuasive evidence established that Watson treated Ms. Aponte differently than similarly situated males.

48. Ms. Aponte identified eight employees she maintains were similarly situated employees not in her protected class who Watson treated differently. They are: Ian Anderson, Jennifer Domenech, Arlinson Hernandez, Alexis McElhaney, Keisha Noel, Emile Jean-Phillipe, Arnold Phillips, and Valmyr Vavick. Only Ian Anderson, Arlinson Hernandez, Emile Jean-Phillipe, Arnold Phillips, and Valymr Vavick were proven to be male. Persuasive evidence did not establish that they were similarly situated to Ms. Aponte or whether they were disciplined and to what degree.

CONCLUSIONS OF LAW

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

50. 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) makes it unlawful for an employer to discriminate against any person because that person has opposed an unlawful employment practice.

51. 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.

52. The Florida Legislature patterned Chapter 760 after Title VII of the Civil Rights Act of 1964, as amended. Consequently, Florida courts look to federal case law when interpreting Chapter 760. Valenzuela v GlobeGround N. Am., LLC., 18 So. 3d 17, 20 (Fla. 3d DCA 2009).

Discrimination Claim

53. A party may prove unlawful sex discrimination by direct or circumstantial evidence. Carter v. City of Miami, 870

F.2d 578, 581 (llth Cir. 1989). Direct evidence did not establish unlawful discrimination in this case.

54. The evidence established, as set forth in the findings of fact, that Watson discharged Ms. Aponte in compliance with its policies and procedures for her chronic, documented absenteeism. It also established that Watson provided Ms. Aponte clear and ample notice that her poor attendance was a significant issue and would result in termination if it did not improve.

55. 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 N. Am., LLC., 18 So. 3d 17, 21 (Fla. 3rd DCA 2009); Wascura v. City of South Miami, 257 F.3d 1238, 1242 (11th Cir. 2001). Facts that are sufficient to establish a prima facie case must be adequate to permit an inference of discrimination. Id.

56. The record is not sufficient to establish a prima facie case.

57. Ms. Aponte argues that Watson treated her differently than similarly situated male employees. But the facts established by the persuasive evidence do not support the argument. Only five of the employees identified as similarly situated were proven to be males. The scant evidence about their employment at Watson was not sufficient to establish that they were similarly situated or treated differently.

Retaliation Claim

58. Ms. Aponte did not establish that Watson retaliated against her for complaining of gender discrimination. 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.

59. Ms. Aponte's complaint about Mr. Washington was a statutorily protected activity. Her discharge is an adverse employment action. But the adverse employment action was not related to her complaint about Mr. Washington. Therefore she did not establish a prima facie case of retaliation.

Hostile Work Environment

60. Ms. Aponte 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 that creates 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. Aponte was not subjected to unwelcome sexual harassment. She claims that Mr. Washington made many sexual comments to her, including asking her if she was having phone sex. The claims were not proven by persuasive evidence. Consequently she did not establish her hostile work environment claim.

61. The facts do not support Ms. Aponte'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 Tania Aponte in FCHR Case Number 2010-01250.

DONE AND ENTERED this 31st day of May, 2011, in Tallahassee, Leon County, Florida.

JOHN D. C. NEWTON, II
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of May, 2011.

ENDNOTE

[1] Due to inconsistencies in the transcript and the manner in which the exhibits were numbered, the exhibit numbers for the employee time records are less than clear. Consequently, for clarity of the record they are identified by the employee name.

COPIES FURNISHED:

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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.