STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ARLENE MATVEY, Petitioner, vs. LIMITED EDITION INTERIORS, INC., Respondent.	)	Case No. 10-10098

FINAL ORDER

Pursuant to notice, an administrative hearing commenced by video teleconference on May 10, 2011, between Tallahassee and St. Petersburg, Florida, and concluded telephonically on June 7, 2011, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Sherri K. Adelkoff, Esquire,
Qualified Representative
1159 South Negley Avenue
Pittsburgh, Pennsylvania 15217

For Respondent: Robert G. Walker, Jr., Esquire
Robert G. Walker, P.A.
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STATEMENT OF THE ISSUE

The issue in this case is whether Limited Edition Interiors, Inc. (Respondent), committed an act of unlawful

employment discrimination and an act of retaliation against an employee, Arlene Matvey (Petitioner), in violation of Pinellas County Code sections 70-53(a) and 70-54(1).

PRELIMINARY STATEMENT

Om August 14, 2009, the Petitioner filed a discrimination complaint with the Pinellas County Office of Human Rights (PCOHR), asserting that the Respondent had committed unlawful employment discrimination against the Petitioner. On May 26, 2010, the PCOHR issued a determination of "reasonable cause." The PCOHR attempted to resolve the matter, but such attempts were unsuccessful, and, on November 12, 2010, the PCOHR submitted the case to DOAH for further proceedings.

The administrative hearing was initially scheduled to commence on February 9, 2011, and was subsequently rescheduled on several occasions upon the various requests of the parties.

At the hearing, the Petitioner testified on her own behalf, presented the testimony of seven additional witnesses, and had Exhibits numbered 1 through 5 admitted into evidence. The Respondent presented the testimony of two witnesses. Prior to the hearing, the parties filed a document titled Joint Stipulations of Fact that was marked and admitted as an Administrative Law Judge's (ALJ) Exhibit numbered 1.

The two-volume Transcript of the May 10, 2011, hearing was filed on June 3, 2011, and the one-volume Transcript of the

June 7, 2011, hearing was filed on July 6, 2011. Both parties filed Proposed Recommended Orders that were considered in the preparation of the Recommended Order that was issued on September 22, 2011.

On September 29, 2011, the Petitioner filed exceptions to the Recommended Order specifically related to the proposed remedy set forth in the Recommended Order. The Respondent did not file exceptions to the Recommended Order, but, on October 7, 2011, filed a reply to the Petitioner's exceptions. As discussed herein, the Petitioner's exceptions are hereby rejected. The Findings of Fact set forth in the Recommended Order are adopted and are set forth below.

FINDINGS OF FACT

1. At all times material to this case, the Respondent was an interior furnishings retailer located in Largo, Florida, and owned by William S. Miller (Mr. Miller) and Judith L. Miller (Mrs. Miller), a married couple. Mrs. Miller was the president of the company. Mr. Miller was the secretary/treasurer of the company. Both Mr. and Mrs. Miller were generally present at the business.

2. The Respondent was an "employer" pursuant to the definition of the term set forth within the applicable Pinellas County Code provision.

3. On October 31, 2005, the Respondent hired the Petitioner to work as the office manager and bookkeeper in a full-time, salaried position.

4. The Petitioner's duties included tracking various accounts, preparing sales invoices, preparing the payroll, preparing certain tax records, and general office filing.

5. The Petitioner, a single mother, had been unemployed for an extended period prior to being hired by the Respondent. Both Mr. and Mrs. Miller knew that the Petitioner needed the financial support provided by her job.

6. Mr. Miller was the Petitioner's supervisor. Their work areas were in relatively close proximity, with Mr. Miller occupying an office space with a door and the Petitioner occupying a workstation immediately outside Mr. Miller's office. There was a second workstation also located outside Mr. Miller's office, and, on occasion, a third employee was present in the area.

7. A few months after the Petitioner began employment at the Respondent, Mr. Miller began to make remarks about the Petitioner's physical appearance, particularly her "derriere." The remarks were frequent and were heard by other employees. The Petitioner was offended by the remarks and routinely told Mr. Miller to stop.

8. On more than one occasion, Mr. Miller asked the Petitioner to sit on his lap. The Petitioner objected to Mr. Miller's requests and told him so. On at least one occasion, the exchange between Mr. Miller and the Petitioner was overheard by another employee.

9. At various times, Mr. Miller called male employees and the Petitioner into his office to view sexually-suggestive photographs on his computer, some of which were described as pornographic. The Petitioner and other employees objected to the display of photographs and told him that they objected to his showing them the photos.

10. At other times, Mr. Miller called the Petitioner into his office and showed her pornographic images on his computer screen. She felt disturbed by his behavior and told him of her objection.

11. At times during the Petitioner's employment by the Respondent, Mr. Miller made purposeful and inappropriate physical contact with the Petitioner's body. Such contact included attempts to grab the Petitioner by her waist and to rub his clothed genital area against the Petitioner's clothed buttocks. The Petitioner consistently objected to Mr. Miller's behavior and told him of her objections. Other employees observed Mr. Miller's conduct and the Petitioner's objections to his behavior.

12. On one occasion, Mr. Miller called the Petitioner into his office and told her a joke that included his displaying the outline of his penis through his pants, at which time the Petitioner voiced her objection to Mr. Miller.

13. In September 2007, Mr. Miller appeared at the Petitioner's home, and, while there, he exposed his penis to the Petitioner and attempted to entice the Petitioner into sexual activity. He had not been invited to come to her home, and he left the premises when she directed him to do so.

14. At various times during her employment, Mr. Miller asked the Petitioner to expose her breasts to him, and she objected and declined to do so. She eventually complied with the request on one occasion, because she feared losing her job if she refused. Subsequently, Mr. Miller told a male employee that the Petitioner had acceded to his request to see her breasts. The male employee relayed the conversation to the Petitioner, who felt humiliated by the incident.

15. There was no evidence presented at the hearing to suggest that the Petitioner invited or encouraged Mr. Miller's inappropriate behavior. To the contrary, the evidence establishes that the Petitioner routinely told Mr. Miller of her objections to his conduct at the time it occurred. Because the Petitioner had been unemployed prior to being hired by the

Respondent and was afraid of losing her job, she did not complain to Mrs. Miller about Mr. Miller's conduct.

16. At the beginning of 2008, the Petitioner advised Mr. Miller that she felt he was "sexually harassing" her. Mr. Miller thereafter began to engage in a pattern of verbal harassment directed towards the Petitioner's job performance.

17. He began to assign tasks to the Petitioner unrelated to her prior bookkeeping or office manager duties. She was assigned to monitor the store inventory, prepare sales tags and attach them to floor samples, dust the store, and clean the kitchen. Mr. Miller routinely criticized the Petitioner's work skills, argued with her about the performance of her duties, and called her "stupid."

18. Prior to January 2008, neither Mr. nor Mrs. Miller had expressed any significant dissatisfaction with the quality of the Petitioner's work as office manager or bookkeeper. There was no credible evidence presented at the hearing that the Petitioner was unable or unwilling to perform the office manager and bookkeeper tasks for which she was hired.

19. Indicative of Mr. Miller's general attitude towards the Petitioner, he used a parrot that was kept at the store to intimidate the Petitioner, who was afraid (perhaps irrationally) of the bird. Mr. Miller clearly knew that the Petitioner was fearful of the bird, yet he would stand behind the Petitioner

while she was working and hold the bird near the Petitioner's head, terrifying her.

20. In early 2009, Mr. Miller again called the Petitioner into his office and showed her pornographic images on his computer screen. She again advised him of her objection to his conduct.

21. Prior to 2009, the Petitioner had not talked with Mrs. Miller about her husband's conduct, because the Petitioner remained concerned about losing the job. However, in February 2009, while the two women were both in the store's lunchroom area, the Petitioner advised Mrs. Miller of Mr. Miller's conduct and asked Mrs. Miller to intervene.

22. Mr. Miller had been out of the store for much of February 2009. He returned to work on February 23, 2009, and the Petitioner testified that he left her alone for a few days after his return.

23. However, on March 2, 2009, the Respondent terminated the Petitioner's employment as a salaried, full-time employee, transferred her into an hourly wage position, and reduced her employment hours. She was partially relieved of her bookkeeping responsibilities and was assigned additional store tasks such as moving old boxes and cataloging their contents.

24. The Respondent asserted that the March 2, 2009, action was the result of deteriorating business conditions. The

Respondent asserted that the store revenues had declined and that they were required to reduce payroll costs by reducing personnel. The Respondent failed to provide any credible evidence supporting the assertion that deteriorating sales and income were the rationale behind the alteration of the Petitioner's work responsibilities.

25. After March 2, 2009, Mr. Miller routinely continued to criticize the Petitioner's work performance. On July 23, 2009, Mr. Miller and the Petitioner became engaged in a heated discussion in the office area, during which he referred to her as a "fucking c-nt."

26. Although Mr. Miller testified that he did not intend for the Petitioner to hear his insult, he said it loudly enough to be overheard by another employee who was also in the office area.

27. Mr. Miller had previously used the same phrase to refer to other women, including Mrs. Miller.

28. The Petitioner immediately reacted, screaming at Mr. Miller that he could not use the phrase and stating that she would be filing "a complaint" against him.

29. The Petitioner left the office area and went into the store area, loudly protesting Mr. Miller's insult and intending to advise Mrs. Miller of the incident. Because there were

customers in the store at the time, Mrs. Miller focused more on calming the Petitioner and not disrupting the store.

30. After speaking briefly with Mrs. Miller, the Petitioner returned to the office area to collect her possessions. Mr. Miller approached the Petitioner and placed his hands in the area of her neck, which caused the Petitioner to feel physically threatened. The Petitioner took her possessions and left the store.

31. The Petitioner next returned to work on July 27, 2009, at which time she was told that she was no longer the office manager and bookkeeper.

32. At the hearing, Mr. Miller testified that the Petitioner was removed from the office because the situation had become volatile. Mrs. Miller testified that, because the Petitioner was argumentative, a decision had been made to remove her from the office.

33. On July 27, 2009, when the Petitioner asked Mrs. Miller why she was no longer the office manager, Mrs. Miller said the Petitioner's job had been changed "because of Bill," meaning Mr. Miller.

34. As of July 27, 2009, the Petitioner had no further office management responsibilities and retained only janitorial and store tasks. The Petitioner was also directed to call the

store before coming in to see if she was needed on that day. On some days, the Petitioner was told there was no work for her.

35. On August 14, 2009, the Respondent terminated the Petitioner's employment.

36. There was no credible evidence presented at the hearing that the termination of the Petitioner's employment was related to dissatisfaction with her performance as the Respondent's office manager and bookkeeper, or to the performance of the other tasks that were subsequently assigned.

37. The Respondent asserted that economic conditions caused them to terminate some employees, including the Petitioner, but there was no credible evidence presented to support the assertion. The evidence presented during the hearing established that employees who were terminated were fired for non-performance of their job duties. There was no credible evidence presented at the hearing that the Petitioner's termination or the reduction in her work hours was related to the Respondent's economic condition.

38. At the hearing, employees (both current and former) described Mr. Miller's treatment of women as degrading and humiliating. Employees who worked for the Respondent concurrently with the Petitioner were aware that she was being humiliated by Mr. Miller's behavior.

39. In addition to the Petitioner, Mr. Miller previously assigned janitorial duties to an employee whom he disfavored when he wanted the employee to quit.

40. After the Petitioner's employment was terminated by the Respondent, the Petitioner attempted to obtain another job. During the period of unemployment, the Petitioner received $300.00 per week in unemployment compensation benefits.

41. As of November 9, 2006, the Petitioner earned a bi-weekly salary of $1,600.00 from the Respondent. As of February 1, 2006, the Respondent provided health insurance coverage for the Petitioner as a benefit of her employment and continued such coverage after her termination and through December 31, 2009.

42. As of April 29, 2010, the Petitioner became employed by Gentry Printing Company as a full-time bookkeeper earning $15.00 per hour and working a 40-hour week. On July 17, 2010, the Petitioner received a raise from Gentry Printing Company to $16.00 per hour for the 40-hour week. Gentry Printing Company withholds $22.50 from the Petitioner's weekly income as her contribution to the medical insurance program.

43. At the hearing, the Petitioner presented testimony related to damages. The evidence established that the Petitioner was entitled to an award of $32,745.00 in back pay.

44. The Respondent presented no corresponding evidence or testimony related to damages.

CONCLUSIONS OF LAW

45. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. §§ 120.65(7), Fla. Stat. (2010), & Pinellas Cnty. Code §§ 70-77(e)-(h).

46. Pinellas County Code section 70-52 identifies the purpose of the relevant county code sections as follows:

> (a) The general purposes of this division are to:
>
> (1) Provide for execution within the county of the policies embodied in the Federal Civil Rights Act of 1964, as amended.
>
> (2) Secure for all individuals within the county the freedom from discrimination because of race, color, religion, national origin, sex, sexual orientation, age, marital status, or disability in connection with employment, and thereby to promote the interests, rights and privileges of individuals within the county.
>
> (b) This division shall be liberally construed to preserve the public safety, health and general welfare, and to further the general purposes stated herein.
>
> (c) The enforcement of this division may be delegated by interlocal agreement to other units of local government or to nonprofit corporations.

47. Pinellas County Code section 70-53 identifies unlawful discriminatory employment practices and provides, in relevant part, as follows:

> (a) Unlawful discrimination in employment practices.
>
> (1) Employers. It is a discriminatory practice for an employer to:
>
> a. Fail or refuse to hire, discharge, or otherwise discriminate against an individual with respect to compensation or the terms, conditions, or privileges of employment because of race, color, religion, national origin, sex, sexual orientation, age, marital status, or disability; or
>
> b. Limit, segregate, or classify an employee in a way which would deprive or tend to deprive an individual of employment opportunities or otherwise adversely affect the status of an employee because of race, color, religion, national origin, sex, sexual orientation, age, marital status, or disability.
>
> c. The above described prohibited discrimination on the basis of sex includes sexual harassment, including same-sex sexual harassment, and pregnancy discrimination.

48. The Petitioner bears the ultimate burden of proving the unlawful discriminatory employment practice by a preponderance of the evidence. Earley v. Champion Int'l Corp., 907 F.2d 1077, 1081 (11th Cir. 1990). The shifting burden framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), is generally used in analyzing a complaint of employment discrimination. The Petitioner must initially

establish a prima facie case of discrimination. Once the employee establishes a prima facie case, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the employment action taken; then, the employee bears the ultimate burden of persuasion to establish that the employer's proffered reason for the action taken is merely a pretext for discrimination.

49. Because the purpose of the cited Pinellas County Code provisions is to implement the Federal Civil Rights Act of 1964, federal civil rights law is instructive in reviewing disputes arising through PCOHR enforcement of the county code. Title VII prohibits an employer from discriminating against a person based on the person's race, color, religion, sex, or national origin, or from retaliating against an employee for reporting discrimination. 42 U.S.C. §§ 2000e-2(a)(1) & 3(a). Sexual harassment is a form of sex discrimination prohibited by Title VII. Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 64, (1986).

50. In order to support a hostile environment claim under Title VII based on sexual harassment by a supervisor, an employee must establish the following elements: (1) that he or she belongs to a protected group; (2) that the employee has been subject to unwelcome sexual harassment, such as sexual advances, requests for sexual favors, and other conduct of a sexual

nature; (3) that the harassment must have been based on the sex of the employee; (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) a basis for holding the employer liable. Mendoza v. Borden, Inc., 195 F.3d 1238 (11th Cir. 1999). The Petitioner, as a female, is clearly a member of a protected class.

51. As to the second element, the evidence establishes that the Petitioner was subjected to unwelcome sexual harassment of a serious and continuing nature. The fact that, after Mr. Miller's repeated requests, the Petitioner exposed her breasts to him on one occasion does not indicate that Mr. Miller's behavior was solicited or encouraged by the Petitioner, or that she was not offended by his conduct See Henson v. City of Dundee, 682 F.2d 897, 903-05 (11th Cir. 1982).

52. As to the third element, Mr. Miller's conduct was clearly based on her gender.

53. As to the fourth element, the Petitioner "must establish not only that she subjectively perceived the environment as hostile and abusive, but also that a reasonable person would perceive the environment to be hostile and abusive." Gupta v. Fla. Bd. of Regents, 212 F.3d 571, 583 (11th Cir. 2000). In evaluating the objective severity of the harassment, one must consider, among other factors: "(1) the

frequency of the conduct; (2) the severity of the conduct; (3) whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and (4) whether the conduct unreasonably interferes with the employee's job performance." Id. at (citing Mendoza v. Borden, Inc., 195 F.3d 1238, 1245 (11th Cir. 1999)). In this case, the offensive conduct was frequent, severe, humiliating, and interfered with the Petitioner's performance of her responsibilities. A reasonable person would perceive Mr. Miller's conduct towards the Petitioner to be hostile and abusive.

54. As to the fifth element, the employer is liable, because the sexual harassment was committed by an owner and officer of the Respondent.

55. The Respondent offered no legitimate non-discriminatory rationale to counter the evidence related to Mr. Miller's conduct. He engaged in a pattern of sexual harassment against the Petitioner over an extended period. Such harassment towards the Petitioner included derogatory remarks, exposure of his genitals, and uninvited physical contact. Other employees observed portions of Mr. Miller's conduct towards the Petitioner and testified at the hearing as to their observations. The Respondent has violated Pinellas County Code section 70-53(a).

56. Pinellas County Code section 70-54, prohibiting retaliation against a person who has opposed a discriminatory practice, states that it is an unlawful discriminatory practice for a person to commit the following:

> (1) Retaliate or discriminate against a person because he or she has opposed a discriminatory practice, or because he or she has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this division;
>
> (2) Aid, abet, incite, or coerce a person to engage in an unlawful discriminatory practice;
>
> (3) Willfully interfere with the performance of a duty or the exercise of a power by the commission or one of its staff members or representatives; or
>
> (4) Willfully obstruct or prevent a person from complying with the provisions of this division or an order issued thereunder.

57. The Petitioner's retaliation claim is also analyzed according to the McDonnell Douglas burden-shifting framework. An employee may establish a prima facie case of retaliation by showing that (1) the employee engaged in statutorily-protected expression; (2) the employee suffered an adverse employment action; and (3) there is some causal relationship between the two events. Holifield v. Reno, 115 F.3d 1555, 1566 (11th Cir. 1997).

58. When the Petitioner advised Mr. Miller on July 23, 2009, that she would be filing a complaint against him, the Petitioner was engaged in a statutorily-protected expression.

59. Upon the Petitioner's return to work on July 27, 2009, the Petitioner was informed that she was no longer employed as the Respondent's office manager and bookkeeper and that she would be working on an as-needed basis to perform janitorial and inventory tasks. The Petitioner's working hours (and correspondingly her income) were reduced. Approximately two weeks later, the Respondent terminated the Petitioner's employment. A reasonable employee would have found the employment change to be significant and materially adverse. See Burlington N. & Sante Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006).

60. As to the causal-relationship between the events, courts have construed the element broadly. A petitioner merely has to demonstrate that the protected activity and the adverse action are not completely unrelated. Higdon v. Jackson, 393 F.3d 1211, 1220 (11th Cir. 2004). The time that elapses between the employee's protected activity and the adverse action is significant. A "close temporal proximity" between the employee's protected activity and the employer's adverse action may be sufficient circumstantial evidence to create a genuine issue of material fact of a causal connection. Brungart v.

BellSouth Telecomms., Inc., 231 F.3d 791, 799 (11th Cir. 2000). On the other hand, a substantial delay between the protected activity and the adverse action may cause the complaint of retaliation to fail. Higdon, 393 F.3d at 1220-21. Here, on the day the Petitioner returned to work after advising that she would be filing a complaint against Mr. Miller, the Petitioner's work hours and income were reduced. About two weeks later, she was fired. The evidence establishes that she was fired because, after years of being harassed by Mr. Miller, she threatened to file the complaint against him.

61. A prima facie case of retaliation having been established by the Petitioner, the burden shifts to the Respondent to provide a legitimate, non-discriminatory reason for the employment action. At the hearing, the Respondent asserted that reduction of the Petitioner's working hours and subsequent termination were unrelated to the events of July 23, 2009, and were nothing more than a response to a business climate that, according to the Millers, required them to reduce their workforce and cut salary costs. There was no credible evidence presented to establish that any other full-time employees were terminated based on an economic downturn. The Millers' testimony regarding the reasons for termination of the Petitioner's employment was not supported by any documentation, was self-serving, and lacked credibility. It has been rejected.

62. The evidence establishes that the Respondent terminated the Petitioner's employment as retaliation for the Petitioner's threat to file a complaint against the Respondent, thereby violating Pinellas County Code section 70-54(1). The Petitioner advised Mr. Miller on July 23, 2009, that she would be filing a complaint against his conduct. When she returned to work on July 27, 2009, her employment as the Respondent's office manager was over, and she was assigned a reduced work schedule of janitorial and other basic tasks. On August 14, 2009, the Respondent terminated the Petitioner's employment.

63. Under Pinellas County Code section 70-78, an Administrative Law Judge has the authority to award actual damages caused by a violation of the applicable code provisions as well as reasonable costs and attorney's fees incurred to pursue a claim of discrimination. At the hearing, the Petitioner presented evidence related to the subject of damages. The Respondent presented no testimony in this regard.

64. Based on the evidence presented at hearing, the Petitioner is entitled to $26,761.00 in "termination back pay" and $5,984.00 in "reduced salary back pay" for a total back pay award of $32,745.00.

65. The Petitioner was represented during a portion of this proceeding by a qualified representative who is not entitled to an award of attorney's fees.

66. As set forth in the Petitioner's exceptions to the Recommended Order, the Petitioner seeks to have her request for "front pay" addressed in this Order. In situations where reinstatement to employment is within the remedies available to address unlawful employment discrimination or an act of retaliation, front pay is an equitable remedy available when reinstatement is inappropriate due to the circumstances of an individual case. Front pay is simply money awarded for lost compensation during the period between judgment and reinstatement, or in lieu of the reinstatement. Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843, 846 (2001). Here, the relevant Pinellas County ordinance does not provide for employment reinstatement as a remedy to discriminatory conduct. Accordingly, front pay is unavailable, and the Petitioner's request for front pay is denied.

ORDER

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

A. The Respondent violated Pinellas County Code sections 70-53 and 70-54.

B. The Respondent shall pay to the Petitioner the sum of $32,745.00 plus interest at the prevailing statutory rate.

DONE AND ORDERED this 18th day of October, 2011, in Tallahassee, Leon County, Florida.

William F. Quattlebaum

WILLIAM F. QUATTLEBAUM
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 18th day of October, 2011.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a Notice of Administrative Appeal with the agency clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the appellate district where the party resides. The Notice of Administrative Appeal must be filed within 30 days of rendition of the order to be reviewed.