

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

VANESSA JIMENEZ,)
)
 Petitioner,)
)
 vs.) Case No. 12-2010
)
 WESTGATE RESORTS,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

On August 14 and 15, 2012, an administrative hearing in this case was held by video teleconference in Orlando and Tallahassee, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue in this case is whether the termination of the Petitioner's employment by the Respondent was an act of retaliation against the Petitioner.

PRELIMINARY STATEMENT

On November 10, 2011, Vanessa Jimenez (Petitioner) filed a Charge of Discrimination against Westgate Vacation Villas/Westgate Resorts (Respondent) with the Florida Commission on Human Relations (FCHR). The complaint alleged that the Respondent's termination of her employment was in retaliation for a complaint of discrimination reported to the Respondent's human relations manager on June 6, 2011. The complaint of discrimination is not at issue in this proceeding. After an investigation, the FCHR issued a "Determination: No Cause" on May 12, 2012. The Petitioner filed a Petition for Relief (Petition) requesting an administrative hearing. On June 7, 2012, the FCHR forwarded the Petition to the Division of Administrative Hearings, which scheduled and conducted the proceeding.

At the hearing, the Petitioner presented the testimony of five witnesses and had Exhibits numbered 1 through 14 admitted into evidence. The Respondent presented four witnesses and had Exhibits numbered 5, 6, 19, 21 through 24, 26, 27, 31, 33, 36, and 41 through 43 admitted into evidence.

A Transcript of the hearing was filed on August 29, 2012. Both parties filed proposed recommended orders on September 10, 2012, that have been reviewed in the preparation of this Recommended Order.

Prior to the hearing, the parties filed a Joint Pre-hearing Stipulation containing a statement of admitted facts. The Findings of Fact set forth herein are based upon the statement of admitted facts and the testimony and evidence admitted at the hearing.

FINDINGS OF FACT

1. Beginning on July 16, 2003, the Petitioner became employed by CFI Resorts Management, Inc. (CFI), in the housekeeping department at Westgate Vacation Villas (Villas).

2. CFI employs more than 15 employees and is the operator of the Westgate Resorts/Westgate Vacation Villas.

3. At all times material to this case, CFI maintained a written anti-discrimination policy and established procedures for the reporting of alleged discrimination. The Petitioner received a copy of the written policy when she became employed by CFI at the Villas. The CFI policies were also accessible on the company intranet, to which all employees had access.

4. From 2003 through 2005, the Petitioner attempted to transfer from the housekeeping department to various other departments at the Villas. Her attempts were unsuccessful,

primarily because she lacked the qualifications or experience to perform the jobs she sought.

5. In 2005, while still employed in the housekeeping department, the Petitioner began a consensual sexual relationship with Geoff Price, a supervisor in the security department at the Villas.

6. On February 17, 2006, the Petitioner requested and received a transfer from housekeeping to the Villas security department, where she became employed as a security officer.

7. At the time of the transfer, the Petitioner did not meet basic qualifications for employment as a security officer. She was unable to speak or write English sufficiently to allow her to prepare the reports required by her position. After she began working in the security department, other employees had to assist her in preparing the reports.

8. The Petitioner was routinely late for her assigned work shift, and she sometimes slept on the job.

9. The sexual relationship between the Petitioner and Mr. Price continued after she began her employment in the security department. Other employees were aware that the Petitioner and Mr. Price were engaged in a sexual relationship and were hesitant to complain about her lack of job skills or performance.

10. Security department supervisors were unable to manage the Petitioner because she was involved with Mr. Price. One supervisor testified that the Petitioner was essentially unmanageable because the sexual relationship between the Petitioner and Mr. Price allowed the Petitioner to "get away" with her poor job performance. He testified that other employees had to "walk on egg shells with [the Petitioner] there."

11. The Petitioner received no warnings or written reprimands during her security department employment, and her hourly pay rose from \$9.50 to \$10.57.

12. The Petitioner and Mr. Price engaged in sexual activity two or three times a month, during working and non-working hours, usually in Mr. Price's office or in hotel rooms at the Villas. The Petitioner and Mr. Price also engaged in sexual activity at the home of Clinton Skinner, a security department manager.

13. On three occasions, Mr. Price surreptitiously recorded video of sexual activity between the Petitioner and Mr. Price using a computer located at Mr. Skinner's home. The videos, dated April 26, 2009, February 11, 2010, and March 24, 2010, were recorded without the Petitioner's knowledge.

14. The video recordings were copied onto at least one DVD and were exhibited at the Villas to other employees by Mr. Price.

15. Both the Petitioner and Mr. Price were married to other people during the period they engaged in sexual activity.

16. The Petitioner became aware that other employees had seen the videos, and she complained to Mr. Price about the recording and exhibition of their sexual activity.

17. In May 2011, the Petitioner discontinued the sexual relationship with Mr. Price.

18. On or about June 6, 2011, the Petitioner contacted Roger Cuccaro (director of security at the Villas) and Angel Rivera (CFI's regional human resources director) and complained about the surreptitious recording, the DVD, and the fact that other employees had been allowed to see the video recordings. The Petitioner submitted a written statement of her complaint to CFI a few days later.

19. CFI commenced an investigation into the Petitioner's allegations.

20. Mr. Price was to be interviewed on June 16, 2011, but he resigned immediately prior to the interview and refused to cooperate in the investigation.

21. The investigation soon expanded to a review of the Villas' security department operations, and numerous employees were interviewed.

22. The investigation revealed the extent of the sexual activity between the Petitioner and Mr. Price and revealed that other co-workers had engaged in similar sexual activity. Additionally, investigators learned that two sexually-involved

employees had engaged in an incident of physical violence while at work.

23. CFI investigators also discovered that the Petitioner was unqualified for the position she held, was frequently late for her shift, and was unable to perform essential tasks of her position without assistance from other employees and that she, and other security department employees, would sleep while on the job.

24. CFI investigators reviewed usage of the company email system and discovered that some security department employees, including the Petitioner, had used office computers and email to send numerous explicit pornographic photographs to co-workers and to other persons beginning in 2008 and continuing through 2009.

25. CFI policy prohibits use of office email for various non-business purposes, including dissemination of discriminatory, hostile, suggestive or otherwise inappropriate email.

26. After reviewing the results of the investigation, and in consultation with the corporate human resources director, Mark Waltrip, the chief operating officer for CFI, decided that he needed to "clean house" in the security department.

27. CFI attempts to create a wholesome "family-type" atmosphere for guests staying at its properties. The security department is an important element in maintaining such an environment. Mr. Waltrip reasonably believed that the behavior

of numerous security department employees was contrary to the expectations of CFI and was detrimental to operation of the resort.

28. CFI terminated the employment of Security Director Cuccaro, Human Resources Regional Director Rivera, and Security Manager Skinner.

29. All security department employees who participated in the dissemination of the pornographic email, including the Petitioner, were terminated from employment.

30. CFI terminated the employment of other security department employees for various reasons related to the operations of the department.

31. At the hearing, Mr. Waltrip testified that he would have fired Mr. Price had he been presented with the opportunity to do so.

32. The Petitioner's employment by CFI was terminated on August 17, 2011.

33. The Petitioner presented no credible evidence that any of the terminations, including her own, were unreasonable or unwarranted.

34. There was no evidence presented that any of the employees who engaged in dissemination of the pornographic email were not terminated from employment.

35. The evidence failed to establish that CFI terminated the Petitioner's employment in retaliation for her complaint about Mr. Price's surreptitious recording of their sexual encounters and subsequent exhibition of the DVD.

CONCLUSIONS OF LAW

36. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. §§ 120.569 & 120.57, Fla. Stat. (2012).

37. Chapter 760, Part I, Florida Statutes (2011), sets forth the Florida Civil Rights Act of 1992 (Act). Florida courts have determined that Title VII federal discrimination law should be used as guidance when applying the provisions of the Act. Fla. Dep't of Cmty. Aff. v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991); Sch. Bd. of Leon Cnty. v. Hargis, 400 So. 2d 103 (Fla. 1st DCA 1981).

38. Section 760.10(7) states that it is "an unlawful employment practice for an employer . . . to discriminate against any person because that person has opposed any practice which is an unlawful employment practice."

39. The Respondent is an "employer" as defined in section 760.02(7).

40. To establish a prima facie case of retaliation under section 760.10(7), the Petitioner must demonstrate: (1) that she engaged in statutorily-protected activity; (2) that she suffered

an adverse employment action; and (3) that the adverse employment action was causally related to the protected activity. Harper v. Blockbuster Entm't Corp., 139 F.3d 1385 (11th Cir. 1998), cert. denied, 525 U.S. 1000 (1998). Assuming the Petitioner establishes a prima facie case, the Respondent must then 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 Petitioner must then respond by demonstrating that the Respondent's asserted reasons for the adverse action are pretextual. Id.

41. In this case, the Petitioner has failed to establish a prima facie case of retaliation. While the Petitioner's termination from employment was clearly an adverse employment action, the Petitioner's complaint of June 6, 2011, was not about an unlawful employment practice. The Petitioner's actual complaint was about Mr. Price's surreptitious recordings of their sexual activity and the exhibition of the recordings to co-workers. The Respondent's termination of the Petitioner's employment was based on a pattern of her clearly inappropriate conduct.

42. Had the Petitioner established a prima facie case of retaliation, the Respondent would have been required to articulate a legitimate, nondiscriminatory reason for the adverse employment action. At the hearing, the Respondent presented

sufficient evidence to demonstrate that the Respondent was fully justified in terminating the Petitioner's employment. She was not qualified for the position and was unable to perform basic requirements of her job. She regularly engaged in sexual activity with a co-worker at the workplace and during working hours. She was often late for her work shift and sometimes slept on the job. She, along with a number of other security department employees, disseminated numerous explicit pornographic photographs to co-workers and to other persons through the office email system.

43. There was no evidence whatsoever that the Respondent's asserted rationale for the termination of the Petitioner's employment was a pretext for retaliation.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations enter a final order dismissing the Petitioner's complaint against the Respondent.

DONE AND ENTERED this 20th day of September, 2012, 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
Division of Administrative Hearings
this 20th day of September, 2012.

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.