STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AMANDA ATKINSON,

Petitioner,

vs. Case No. 13-2880

STAVRO'S PIZZA, INC.,

Respondent.
_____/

SUMMARY FINAL ORDER

Pursuant to notice, this cause was heard by W. David Watkins, the assigned Administrative Law Judge of the Division of Administrative Hearings (DOAH), on September 12, 2013, via video teleconference with sites in Daytona Beach and Tallahassee, Florida.

APPEARANCES

For Petitioner: Matthew E. Romanik, Esquire
Damore, Delgado, Romanik & Rawlins, PLC
227 Seabreeze Boulevard
Daytona Beach, Florida 32118

For Respondent: Kelly Parsons Kwiatek, Esquire
Cobb Cole
150 Magnolia Avenue
Daytona Beach, Florida 32115-2491

STATEMENT OF THE ISSUE

The issue for determination in this proceeding is whether Respondent retaliated against Petitioner in violation of the Florida Civil Rights Act of 1992, based upon her complaints

about a coworker's conduct perceived by Petitioner to be sexual harassment.

PRELIMINARY STATEMENT

On January 10, 2013, Petitioner filed a Charge of Discrimination with the Florida Commission on Human Relations (Commission). Following its investigation of the matter, on June 20, 2013, the Commission issued a "no cause" determination. Dissatisfied with the Commission's finding, Petitioner filed a Petition for Relief (Petition) with the Commission on July 24, 2013, seeking relief from an alleged unlawful employment practice.

The Commission transmitted the Petition to DOAH on July 30, 2013, where it was assigned to the undersigned for purposes of an administrative hearing and issuance of a recommended order. On August 5, 2013, the parties filed a joint motion for a summary hearing, which was granted by Order dated August 12, 2013.

The hearing was held as noticed on September 12, 2013, pursuant to section 120.574, Florida Statutes.[1/] At the conclusion of the hearing it was announced that the parties would have 20 days from the date of transcript filing to submit proposed final orders. Both parties availed themselves of this opportunity, and both Proposed Recommended Orders have been

carefully considered in the preparation of this Summary Final Order.

FINDINGS OF FACT

Based on the testimony and documentary evidence presented at hearing, the demeanor and credibility of the witnesses, and on the entire record of this proceeding, the following findings of fact are made:

1. Petitioner, a female, was employed as a server with Respondent from May 6, 2011, through September 29, 2012.

2. Respondent, Stavro's Pizza, Inc., is a restaurant located in New Smyrna Beach, Florida. Respondent employs more than 15 individuals at any given time and therefore is subject to the Florida Civil Rights Act of 1992. §§ 760.01-760.11, Fla. Stat.

3. Early on the morning of Friday, September 27, 2012, it was reported to Martha Trimble, long-time General Manager of Respondent, that a "weird conversation" took place between Petitioner and another employee, Brian Hayes, the previous evening.[2/] During this conversation, Mr. Hayes allegedly told Petitioner that "he knew everything about her, including where she lived, and that her favorite color was blue." Mr. Hayes also allegedly told Petitioner that he was soon to be the new manager of the restaurant.

4. Ms. Trimble approached Petitioner later that day about the alleged incident with Mr. Hayes, and while Petitioner admitted she had had a strange conversation with Mr. Hayes, she denied that she was upset by it. Nonetheless, Ms. Trimble told Petitioner she would investigate the matter and that she took it seriously.

5. Later that same day Ms. Trimble also questioned Mr. Hayes, who denied making the reported comments. And while Ms. Trimble was aware that Petitioner had voluntarily given Mr. Hayes her address,[3/] out of caution, Ms. Trimble placed Mr. Hayes on leave while she continued her investigation.

6. The following day, Saturday, September 28, 2012, there was a mandatory meeting for all employees of Respondent. The meeting was mandatory because Ms. Trimble had been made aware of horseplay among some employees, and was concerned that staff training had been inadequate. Notice of the meeting was conspicuously posted in the restaurant for two weeks prior to the meeting. The notice explained that the meeting was mandatory and that all employees were to attend unless they contacted Ms. Trimble prior to the meeting to be excused.

7. Petitioner did not attend the Saturday meeting and was not excused in advance. Four other employees contacted Ms. Trimble ahead of time and explained that they would be

unable to attend due to schedule conflicts. Those employees were excused.

8. When Ms. Trimble contacted Petitioner later in the day, Petitioner told Ms. Trimble that she had been ill, and in bed all day.

9. That evening Ms. Trimble also reviewed the security camera video of the one hour period the previous Thursday during which Petitioner and Mr. Hayes had been alone in the restaurant, and during which the suspect comments had reportedly been made. In reviewing the video, Ms. Trimble specifically watched for physical contact, lingering conversations, and body language. At hearing, Ms. Trimble related her observations from the restaurant video as follows:

> So I watched the tape. Brian basically stayed back in the kitchen.
>
> Uh, we have side work we do. We make garlic bread. We make boxes. We do little oil containers for to-go salads.
>
> And Brian was back doing that almost the entire time.
>
> Once I saw him go up to the waitress station and get a beverage and bring it back.
>
> Amanda basically was at the register. She would come back every once in a while, hang a ticket, kind of stand there and chitchat until, uh – until, uh, a salad was given to her or something like that.

> So, um, but mainly they were both in their own areas. I did not see anything that indicated that there was anything improper going on.

10. Following her review of the surveillance video Ms. Trimble concluded that there was no basis to believe that Mr. Hayes had engaged in any form of sexual harassment against Petitioner.

11. The following day, Sunday, September 29, 2012, Ms. Trimble met with Petitioner regarding her absence from the mandatory meeting the day before. At this meeting Ms. Trimble informed Petitioner that because she failed to attend the mandatory meeting without being excused, and had failed to even call Ms. Trimble to explain she was ill and would be unable to attend, her employment was terminated.

12. A former employee of Respondent, Lindsey Yauch, testified on behalf of Petitioner. Ms. Yauch testified that she had once missed a mandatory meeting called by Ms. Trimble but had not been fired as a result. However, on cross-examination Ms. Yauch could not remember the purpose, date, or any other details surrounding the meeting.

13. Ms. Trimble's testimony regarding the meeting that Ms. Yauch missed was more precise. Ms. Trimble recalled that it was a "safe-staff meeting", which is a food-handler's course that all employees must take. Because all 27 of Respondent's

employees were required to take the class, it was offered on two separate dates, and employees were permitted to choose which session they would attend. Ms. Yaugh had chosen to attend the first session, but overslept and missed the class as a result. Since a second class offering was still available, Ms. Yaugh was permitted to attend the second session, which she did.

14. There is no credible evidence in this record that Petitioner was treated differently than other similarly situated employees when she was terminated for missing a mandatory meeting.

15. At hearing Ms. Trimble testified that Petitioner's termination had nothing to do with her gender or the alleged comments made by Brian Hayes. Rather, Petitioner's termination was the result of her missing a mandatory staff meeting without excuse. This testimony is credible.

16. To his credit, in his closing statement counsel for Petitioner candidly acknowledged that, even if true, the comments made by Mr. Hayes would not constitute sexual harassment.

CONCLUSIONS OF LAW

17. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to section 120.57(1), Florida Statutes.

18. The Florida Civil Rights Act of 1992 provides the substantive state law governing this matter. §§ 760.01-760.11, Fla. Stat.

19. Section 760.10(7) provides:

> (7) It is an unlawful employment practice for an employer, an employment agency, a joint labor-management committee, or a labor organization to discriminate against any person because that person has opposed any practice which is an unlawful employment practice under this section, or because that person has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section.

20. Petitioner initially filed a Charge of Discrimination with the Commission for discrimination based on sex, specifically sexual harassment, and retaliation based on a complaint of sexual harassment. However as noted, at hearing Petitioner conceded that the allegations against Mr. Hayes did not rise to the level of sexual harassment, and Petitioner therefore withdrew her claim of sex discrimination against Respondent. As such, this Summary Final Order addresses only retaliation based on her report of sexual harassment.

21. Section 760.10(1)(a), which prohibits employers from discriminating against an individual with respect to his or her employment based upon sex, is derived from Title VII of the Federal Civil Rights Act. Russell v. KSL Hotel Corp., 887 So. 2d 372 (2004). Further, "[i]t is well settled that when

Florida statutes are adopted from an act of Congress, the Florida Legislature also adopts the construction placed on that statute by the federal courts insofar as that construction is not inharmonious with the spirit and policy of Florida's general legislation of the subject." Id. (citing Green v. Burger King Corp., 728 So. 2d 369,370-71 (Fla. 3d DCA 1999)).

22. Pursuant to section 760.10(7), it is an unlawful employment practice for an employer to discriminate against any person because that person has made a charge of conduct which is prohibited under section 760.l0(1)(a).

23. In order to prevail, Petitioner has the ultimate burden of proving by a preponderance of the evidence that Respondent committed an unlawful employment practice by retaliating against her. Fla. Dep't of Transp. v. J.W.C. Co. 396 So. 2d 778 (Fla. 1st DCA 1981).

24. No credible direct or statistical evidence of unlawful retaliation exists in this case. Therefore, a finding of discrimination, if any, must be based on circumstantial evidence.

25. The burden and order of proof in discrimination cases involving circumstantial evidence is set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973). The McDonnell Douglas framework has been used in retaliation cases in which the Petitioner relies on circumstantial evidence.

Laincy v. Chatham Cnty. Bd. of Assessors, 520 Fed Appx. 780, 781 (11th Cir. 2013) (citing Bryant v. Jones, 575 F.3d 1281, 1307-08 (11th Cir.2009)).

26. To demonstrate retaliation under McDonnell Douglas, Petitioner must first establish a prima facie case of retaliation. Thereafter, the employer may offer legitimate, nondiscriminatory reasons for its employment action. If the employer does that, in order to prevail, Petitioner must establish that the employer's articulated legitimate, nondiscriminatory reasons were a pretext to mask unlawful discrimination. Smith v. J. Smith Lanier & Co., 352 F.3d 1342 (11th Cir. 2000).

27. To establish a prima facie case of retaliation, Petitioner must show that: 1) she was engaged in an activity protected under Title VII; 2) she suffered an adverse employment action; and 3) there was a causal connection between the protected activity and the adverse employment action. See Pennington v. City of Huntsville, 261 F.3d 1262 (11th Cir. 2001). To satisfy the causal connection requirement, Petitioner must establish that the protected activity and the alleged retaliatory action are not completely unrelated. Wideman v. Wal-Mart Store, Inc., 141 F.3d 1453 (11th Cir. 1998). Notably, the person who engaged in the alleged conduct must be aware of

the protected activity. Gupta v. Fla. Bd. of Regents, 12 F.3d 571 (11th Cir. 2000).

28. As for the statutorily protected expression, not every act an employee takes in opposition to discrimination is protected. Laincy, 520 Fed. Appx. At 782 (citing Butler v. Ala. Dep't of Transp., 536 F.3d 1209, 1214 (l1th Cir.2008)). The employee must show: (1) that he had a subjective good-faith belief "that his employer was engaged in unlawful employment practices"; and (2) that his belief, even if mistaken, was objectively reasonable in light of the record. Id. (emphasis added).

29. Likewise, not every discriminatory comment made by a coworker constitutes an unlawful employment practice. Laincy, 520 Fed. Appx. At 782 (citation omitted). Rather, to establish a claim of a hostile work environment sexual harassment, the employee "must show that the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Id. (quotation omitted). Thus, the courts have held that a "derogatory remark by a co-worker, without more, does not constitute an unlawful employment practice" and opposition to such a remark, consequently, is not statutorily protected conduct." Id. (quotation omitted).

30. More specifically, the objective severity of the harassment must be judged from the perspective of a reasonable person in the Petitioner's position, taking into consideration all the circumstances, which are determined by a review of four factors: 1) the frequency of the conduct; 2) the severity of the conduct; 3) whether the conduct was physically threatening or humiliating; and 4) whether the conduct unreasonably interfered with the employee's job performance. Maldonado v. Publix Supermarkets, 939 So. 2d 290, 294 (Fla. 4th DCA 2006) (citing Mendoza v. Borden. Inc., 195 F.3d 1238, 1246 (11th Cir.1999)).

31. "'[S]imple teasing,' offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment." Maldonado, 939 So.2d at 294 (quoting Faragher v. City of Boca Raton, 524 U.S. 775, 788, (1998)). In other words, it is objectively unreasonable to believe that a coworker's single use of discriminatory language "is enough to permeate the workplace with 'discriminatory intimidation, ridicule, and insult' and to 'alter the conditions of the victim's employment and create an abusive working environment.'" Laincy, 520 Fed. Appx. At 782 (citation omitted) (emphasis added).

32. In this case, the claimed statutorily protected activity is reporting to Ms. Trimble the "weird conversation"

that took place between Petitioner and Mr. Hayes on September 26, 2012. Petitioner conceded during the hearing that the reported comments by Mr. Hayes did not subjectively rise to the level of sexual harassment, and the undersigned finds that any allegation that Respondent was engaged in unlawful employment practices, i.e. Mr. Hayes sexually harassing Petitioner, is not objectively reasonably given the facts found herein.[4/]

33. Inasmuch as Petitioner did not establish that she had a subjective good-faith belief that Respondent was engaged in unlawful employment practices and that such belief was not objectively unreasonable, Petitioner's opposition to the "weird conversation" with Mr. Hayes is not a statutorily protected expression. Thus, Petitioner failed to establish a prima facie case of retaliation based on sex.

34. Assuming arguendo that Petitioner had established a prima facie case of retaliation based on the report of sexual harassment, the burden would then shift to Respondent to proffer a legitimate reason for the adverse employment action, i.e. termination of employment. Assuming Respondent does proffer a legitimate reason for the adverse employment action, the burden then shifts back to Petitioner to prove by a preponderance of the evidence that the "legitimate reason" is merely a pretext for the prohibited, retaliatory conduct. Russell, 887 So. 2d at

879-80 (citing Sierminski v. Transouth Fin. Corp., 216 F.3d 945, 950 (11th Cir.200)).

35. To meet the requirements of the pretext step, Petitioner must produce sufficient evidence for a reasonable fact-finder to conclude that the employer's legitimate, nondiscriminatory reason was "a pretext for discrimination." Laincy, 520 Fed. Appx. At 781 (citing Vessels v. Atlanta Indep. Sch. Sys., 408 F.3d 763, 771 (11th Cir.2005)). "Provided that the proffered reason is one that might motivate a reasonable employer, an employee must meet that reason head on and rebut it, and the employee cannot succeed by simply quarreling with the wisdom of that reason." Id. (citing Chapman v. A1 Transp., 229 F.3d 1012, 1023 (11th Cir.2000) (en banc). Rather, the plaintiff must show "such weaknesses, implausibilities, inconsistencies, incoherencies or contradictions in the employer's proffered legitimate reasons ... that a reasonable fact finder could find them unworthy of credence." Id. (citing Vessels, 408 F.3d at 771)).

36. Even had Petitioner proved a prima facie case of retaliation, Respondent provided a nondiscriminatory reason for terminating her. Specifically, Petitioner was not excused from, did not attend, and did not notify Ms. Trimble of her not being able to attend Respondent's mandatory meeting on September 28,

2012. Further, there is no evidence that the reason provided by Respondent is a pretext for discrimination.

ORDER

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

ORDERED that the petition of Amanda Atkinson is DISMISSED.

DONE AND ORDERED this 29th day of October, 2013, in Tallahassee, Leon County, Florida.

W. DAVID WATKINS
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of October, 2013.

ENDNOTES

[1/] Unless otherwise noted, all statutory references herein are to the 2013 version of the Florida Statutes.

[2/] This information was reported to Ms. Trimble, second-hand, by another employee, in whom Petitioner had confided.

[3/] Mr. Hayes was looking for a place to live closer to the restaurant. The apartment complex in which Petitioner lived had availability, so Petitioner wrote down the name and phone number

of the complex on a piece of paper and asked Ms. Trimble to give it to Mr. Hayes. Ms. Trimble then stapled the paper to Mr. Hayes' timecard to ensure he would get it.

[4/] Even had the undersigned concluded that Petitioner had been the victim of sexual harassment in the workplace, it could be argued that Petitioner did not "oppose" the harassment since it was reported to Ms. Trimble by a third party, and Petitioner did not disclose the incident until questioned about it by Ms. Trimble.

COPIES FURNISHED:

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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 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 Appeal must be filed within 30 days of rendition of the order to be reviewed.