STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JENNIFER HATFIELD,

Petitioner,

vs. Case No. 14-4046

SOUTHEAST COMPOUNDING PHARMACY,

Respondent.
_____/

RECOMMENDED ORDER

On November 4, 2014, an administrative hearing in this case was held by video teleconference in Tampa and Tallahassee, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Antonios Poulos, Esquire
Poulos Law Firm
1502 West Busch Boulevard
Tampa, Florida 33612

For Respondent: Christina Harris Schwinn, Esquire
Pavese Law Firm
1833 Hendry Street
Post Office Drawer 1507
Fort Myers, Florida 33901

STATEMENT OF THE ISSUE

The issue in this case is whether the Respondent committed an unlawful employment practice against the Petitioner.

PRELIMINARY STATEMENT

On January 30, 2014, Jennifer Hatfield (Petitioner) filed a Complaint of Employment Discrimination with the Florida Commission on Human Relations (FCHR). The complaint alleged that the Petitioner had been the subject of sexual harassment and retaliation as an employee of Southeast Compounding Pharmacy (Respondent).

On July 22, 2014, the FCHR issued a "Notice of Determination: No Cause" stating that there was "no reasonable cause to believe that an unlawful employment practice occurred."

On August 26, 2014, the Petitioner filed a Petition for Relief with the FCHR. On August 27, 2014, the FCHR forwarded the Petition to the Division of Administrative Hearings, which scheduled and conducted the proceeding.

At the hearing, the Petitioner testified on her own behalf. The Respondent presented the testimony of five witnesses and had Exhibits numbered 1 through 5, and 7, 8, and 10 admitted into evidence.

The Transcript of the hearing was filed on November 21, 2014. On December 1, 2014, the Respondent filed a Proposed Recommended Order that was reviewed in the preparation of this order.

FINDINGS OF FACT

1. At some time prior to August of 2013, the Petitioner and Respondent discussed the Petitioner's potential employment as a "Pharmacy Sales Representative" for the Respondent.

2. The Respondent eventually offered such employment to the Petitioner, the terms of which were set forth in a letter (hereinafter "agreement") from the Respondent (identified therein as "SCP, LLC" or "company") to the Petitioner.

3. The agreement stated as follows:

> Your job title will be Pharmacy Sales Representative and your duties include all aspects of sales and marketing to physicians and patients SCP, LLC can provide for. You will be responsible for producing leads and establishing new pharmacy sales as well as maintaining all existing accounts. You will report to members of SCP, LLC. You may be assigned other duties as needed and your duties may also change on reasonable notice, based on the needs of the company and your skills, as determined by the company.

4. The agreement provided that the Petitioner would be paid an annual base salary of $45,000, and a commission "based on the total sales of compounded products sold to all accounts you are managing." The salary was to be paid bi-weekly. The commission was to be paid quarterly.

5. The agreement stated that the Petitioner would receive an additional $250 per month for the purposes of obtaining private health insurance, and that the additional payment would

cease if a company health insurance plan became available to employees.

6. The agreement stated that the Petitioner would also have access to an expense account, including a company credit card, and receive either a car or a paid car allowance from the Respondent.

7. The agreement specifically provided as follows:

> YOUR EMPLOYMENT WITH THE COMPANY IS AT-WILL. IN OTHER WORDS, EITHER YOU OR THE COMPANY CAN TERMINATE YOUR EMPLOYMENT AT ANY TIME FOR ANY REASON, WITH OR WITHOUT CAUSE AND WITH OR WITHOUT NOTICE.

8. According to the agreement, the Petitioner's employment was to commence on September 3, 2013.

9. Although the Petitioner was dissatisfied with the salary structure offered by the Respondent and believed that the offer was below her market value, the Petitioner signed the agreement on August 1, 2013, and accepted the employment terms set forth therein.

10. The Petitioner's dissatisfaction with her income was a continuing issue during her employment. The Petitioner repeatedly requested that her base salary be increased, but the Respondent was unprofitable and was unwilling to agree to the Petitioner's request.

11. Although the Petitioner initially developed some marketing materials for the Respondent, the Respondent was not

satisfied with the Petitioner's overall job performance. Additionally, there appears to have been disagreement between the Petitioner and the Respondent as to the responsibilities of her employment, including continuing friction between the Petitioner and her supervisor.

12. On several occasions, the supervisor requested that the Petitioner come into the office during working hours to meet with him. The Petitioner apparently believed that her time was better utilized meeting with prospective clients; however, some of the prospective clients sought products that, for a variety of reasons, the Respondent could not supply. In any event, rather than come into the office as requested by her supervisor, the Petitioner chose to communicate with him by "after hours" email or by telephone. The supervisor was dissatisfied by the Petitioner's failure to comply with his request.

13. At some point in December of 2013, the Respondent determined that the Petitioner's performance was not satisfactory and that a change needed to occur.

14. The Petitioner was advised of the Respondent's dissatisfaction in a meeting on December 5, 2013, between the Petitioner and a representative of the Respondent.

15. After being advised that some type of change was going to occur, the Petitioner raised a number of complaints about her supervisor. The Petitioner complained that the supervisor used

profanity, that he had hung up on her during a telephone call, and that, on one occasion, he had patted her on the head in an apparently demeaning manner.

16. The Respondent had a written "zero tolerance" policy prohibiting all forms of harassment, including sexual harassment. The policy prohibited any form of retaliation against an employee who complained that he or she was a target of harassment. The Respondent also had a written "open door" policy that provided a specific procedure for resolving employment-related disputes.

17. The Petitioner was specifically advised of such policies during an orientation process that occurred at the commencement of her employment with the Respondent. Additionally, the Petitioner received written copies of all relevant policies from the Respondent's human resource director.

18. There is no evidence that, prior to learning on December 5, 2013, that her employment was in jeopardy, the Petitioner advised any representative or employee of the Respondent that she objected to the supervisor's alleged behavior.

19. After the meeting on December 5, the Petitioner wrote an email to company officials dated December 17, 2013, wherein she asserted that she had "closed" a number of accounts on behalf of the Respondent, and suggested that her contribution to the company was being undervalued. She also requested reevaluation

of her compensation because she believed the commission structure was inadequate.

20. The Respondent apparently disagreed with the Petitioner because few actual sales resulted from the Petitioner's "closed" accounts. Accordingly, during a meeting with Respondent's representatives on December 20, 2013, the Petitioner was advised that her employment was officially being terminated.

21. Central to the Respondent's decision was the lack of revenue generated by the Petitioner's sales and the unprofitability of the company. The Petitioner's failure to comply with the requests of her supervisor also provided a basis for her termination from employment.

22. During the meeting on December 20, the Petitioner restated the complaints she had first addressed during the meeting on December 5, and raised a number of additional complaints, including allegations of harassment or sexual harassment by her supervisor or another employee.

23. There is no evidence that, prior to learning on December 20, 2013, that her employment was being terminated, the Petitioner had advised any representative or employee of the Respondent that she had been harassed in any manner by her supervisor or by any other employee of the Respondent.

24. The alleged perpetrators of the harassment dispute the Petitioner's assertions.

25. The evidence fails to establish that any of the alleged acts of harassment or sexual harassment actually occurred.

26. In a memorandum to the Petitioner dated December 20, 2013, the Respondent advised the Petitioner that her termination package would include salary payments for three weeks (one week of "final" pay and two weeks of severance pay), additional payment for 27 hours of accrued paid time off and unused comp time, and a total commission payment of $31.97.

27. By letter to the Respondent dated December 27, 2013, the Petitioner restated the alleged harassment referenced herein and requested that she receive an additional two weeks of severance pay.

28. The Respondent ultimately paid the Petitioner a total of four weeks of severance pay.

29. The evidence fails to establish that the termination of the Petitioner's employment by the Respondent was related to any complaint of harassment or sexual harassment, or was retaliatory in any manner.

CONCLUSIONS OF LAW

30. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat. (2014).

31. Chapter 760, Part I, Florida Statutes, sets forth the Florida Civil Rights Act of 1992 (the "Act"). Section 760.10 provides in relevant part as follows:

> (1) It is an unlawful employment practice for an employer:
> (a) To discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.
>
> * * *
>
> (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.

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

33. 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. Affairs 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).

34. In order to support a hostile work 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).

35. The Petitioner, as a female, is clearly a member of a protected class. The evidence fails to establish that the Petitioner was subjected to harassment of any type, and therefore, the Petitioner's claims of hostile work environment and harassment must fail.

36. 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.), 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 Respondent's asserted reasons for the adverse action are pretextual. Id.

37. In this case, the Petitioner has failed to establish a prima facie case of retaliation. While the Petitioner's termination from employment was an adverse employment action, the evidence establishes that the termination was due to the Petitioner’s inability to meet the requirements of her employment.

38. The Respondent was clearly dissatisfied with the Petitioner’s job performance and so advised the Petitioner on December 5, 2013, after which the Petitioner began to complain about her supervisor. When the Respondent advised the Petitioner on December 20, 2013, that her employment was officially being terminated, the Petitioner’s complaints escalated to include sexual harassment by her supervisor and another employee.

39. It is not possible to conclude that the Respondent terminated the Petitioner’s employment termination in retaliation for the harassment complaint when the Petitioner did not complain about the harassment until the termination occurred. In any event, the evidence fails to establish that the Petitioner was

subjected to any harassment, including sexual harassment, by her supervisor or any other employee of the Respondent.

40. 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 justified in terminating the Petitioner's employment.

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 5th day of January, 2015, in Tallahassee, Leon County, Florida.

William F. Quattlebaum

WILLIAM F. QUATTLEBAUM
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of January, 2015.

COPIES FURNISHED:

Cheyanne Michelle Costilla, General Counsel
Florida Commission on Human Relations
Room 110
4075 Esplanade Way
Tallahassee, Florida 32399
(eServed)

Christina Harris Schwinn, Esquire
Pavese Law Firm
1833 Hendry Street
Post Office Drawer 1507
Fort Myers, Florida 33901
(eServed)

Antonios Poulos, Esquire
Poulos Law Firm
1502 West Busch Boulevard
Tampa, Florida 33612
(eServed)

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.