STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LINDA CATTANACH,

Petitioner,

vs. Case No. 14-6130

FLORIDA DEPARTMENT OF ELDER AFFAIRS,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, this case was heard on March 31 and May 11, 2015, via video teleconference in Tallahassee and Gainesville,[1/] Florida, before Suzanne Van Wyk, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: M. Linville Atkins, Esquire
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Tallahassee, Florida 32301

For Respondent: Glenn Allen Bassett, Esquire
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STATEMENT OF THE ISSUE

Whether the Petitioner, Linda Cattanach, was subject to an unlawful employment practice by Respondent, Florida Department

of Elder Affairs, based on her sex or in retaliation for her opposition to an unlawful employment practice in violation of section 760.10, Florida Statutes (2013).[2/]

PRELIMINARY STATEMENT

On April 28, 2014, Petitioner filed a complaint of discrimination with the Florida Commission on Human Relations (FCHR) which alleged that Respondent violated section 760.10, by discriminating against her on the basis of her sex and in retaliation.

On October 14, 2014, the FCHR issued a Determination: No Cause and a Notice of Determination: No Cause, by which the FCHR determined that reasonable cause did not exist to believe that an unlawful employment practice occurred. On November 14, 2014, Petitioner filed a Petition for Relief with the FCHR. The Petition was transmitted to the Division of Administrative Hearings to conduct a final hearing.

The final hearing was originally scheduled for March 4 and 5, 2015, live in Tallahassee, but was subsequently rescheduled for March 31, 2015, via video teleconference in Tallahassee and Gainesville, Florida. The final hearing commenced as scheduled, but was not concluded on March 31, 2015. The final hearing was continued to, and concluded on, May 11, 2015.[3/]

At the final hearing, Petitioner testified on her own behalf and offered the testimony of Freadda Zeigler, Respondent's former CARES Regional Program Supervisor; and Taroub King, Respondent's Inspector General. Petitioner's Exhibits P1, P3, P5, and P7 were admitted in evidence. The undersigned also granted Petitioner's request for official recognition of section 110.1091, Florida Statutes, and Florida Administrative Code Rule 60L-35.004.

Respondent presented the testimony of Petitioner and Paula James, Respondent's CARES Program Bureau Chief. Respondent's Exhibits R1, R2, R4 through R7, and R9 through R11 were admitted in evidence.

A one-volume Transcript of the proceedings on May 11, 2015, was filed on June 11, 2015. The one-volume Transcript of the proceedings on March 31, 2015, was not filed until August 31, 2015.

On both June 19 and 30, 2015, the undersigned granted extensions of time for the parties to file proposed recommended orders, which were due on or before July 13, 2015. Respondent timely filed a Proposed Recommended Order on July 13, 2015. Petitioner filed a Proposed Recommended Order on July 14, 2015, which was not opposed by Respondent. Both parties' Proposed Recommended Orders have been considered in preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner, Linda Cattanach, was at all times relevant hereto an employee of the Florida Department of Elder Affairs.

2. Respondent, Florida Department of Elder Affairs (Respondent or Department), is the state agency responsible for administering human services programs for the elderly and for developing policy recommendations for long-term care. See § 430.03, Fla. Stat. (2015).

3. Respondent operates a Comprehensive Assessment and Review for Long-Term Care (CARES) program to assess individuals for Medicaid long-term care services, whether in a nursing facility, in a private home, or in another community setting.

4. The CARES program operates 19 offices statewide and one central office in Tallahassee. Medical assessments are conducted by CARES Assessors (CAs), and Senior CAs. CAs and Senior CAs are supervised by a Program Operations Administrator (POA) in each office, who reports to a Regional Program Supervisor (RPS).

5. The RPS reports to the Deputy Bureau Chief in Tallahassee, who reports to the Bureau Chief; who, in turn, reports to the Division Director for Statewide and Community-Based Services.

6. In January 2013, Petitioner began employment as a CA in Respondent's Gainesville office. Petitioner began in a one-year probationary employment status.

7. The record did not clearly establish how many individuals were employed in the Gainesville office with Petitioner. There was an office assistant, Rose Gonzalez; at least four other CAs, including Justin Keels; a registered nurse; and their supervisor, POA Sam Rutledge.

8. Freadda Zeigler was the RPS for the region, which included the Gainesville, Tallahassee, Pensacola, Jacksonville, and Daytona Beach offices. Ms. Zeigler commuted from her home in Broward County.

9. In Tallahassee, Jay Hudson was the Deputy Bureau Chief, Paula James was the Bureau Chief, Carol Carr was the Deputy Division Director, and Marcy Hajdukiewicz was the Division Director.

10. The Gainesville territory covered from Marion County north to the Florida/Georgia line, west to the Leon County line, and east to the Duval County line.

11. CAs were assigned to particular locations within the office's jurisdiction. CAs traveled to both health care facilities (e.g., nursing homes, assisted living facilities) and private homes to meet with and personally evaluate the needs of the client.

12. Petitioner was primarily assigned to cover facilities in Jasper, Live Oak, Dowling Park, Mayo, and Lake City.

13. Petitioner was in the field conducting evaluations two to three times per week. Her assignments required some long commutes, up to one and one-half hours to Jasper (just south of the Georgia line) and over an hour to Dowling Park and Live Oak.

14. In February 2013, a senior CA position became open in Gainesville. Both Petitioner and Mr. Keels applied and were interviewed for the position. Mr. Keels was selected for the position in March. As senior CA, Mr. Keels did not supervise other CAs in the Gainesville office, but was "put in charge" when Mr. Rutledge was out of the office.

15. When Petitioner began her employment in Gainesville, she was told that a desk was being ordered for her. She was given a folding table to use in her workspace.

16. Petitioner's workspace was in an open area of the office. Other employees would pass through and occasionally gather in her workspace on breaks or on their way to lunch.

17. Petitioner testified that Mr. Rutledge often came into the open area to interact with other employees around lunchtime to see if anyone wanted to "get food."

Sexual Harassment Claim[4/]

18. One day in late March 2013, Mr. Rutledge and Mr. Keels were in Petitioner's workspace and began discussing a restaurant

with the word "cooter" in its name. During this conversation, the two men stood on opposite sides of Petitioner's worktable, where Petitioner was seated.

19. One of the men asked Petitioner if she knew what the word "cooter" meant, and she responded that she did not. One of the men stated that it meant "vagina."

20. Petitioner testified that she was embarrassed, uncomfortable, and felt trapped at her worktable where the men stood on either side of her.

21. Petitioner did not report this incident to anyone at first. Petitioner testified that she was afraid that if she said anything, she would be fired. Petitioner's ambivalence was due in no small part to the fact that Mr. Rutledge was her supervisor.

22. Petitioner described another incident that occurred shortly before the "cooter" incident. Mr. Rutledge called Petitioner into his office and asked her to look at a picture on his computer screen. The picture was of a woman in a bikini. Mr. Rutledge said something to the effect of "that is what my ex-wife used to look like." Petitioner was embarrassed and left Mr. Rutledge's office.

23. Respondent maintains a sexual harassment policy of which Petitioner was aware. The policy provides, in part, that "[a]ny employee who believes that he or she is the victim of

sexual harassment . . . may make an oral or written complaint to the General Counsel or Director of Internal & External Affairs within 365 days of the alleged discriminatory action."

24. In April 2013, approximately a week after the "cooter" incident, Respondent's Inspector General Taroub King began an investigation of Mr. Rutledge, prompted by an anonymous complaint. Among the allegations investigated were that Mr. Rutledge borrowed money from employees, encouraged employees to participate in an investment scheme (or schemes), and utilized employees to witness signatures and notarize documents of a personal nature. The complaint described Mr. Rutledge as maintaining no management structure, lacking basic documentation, and essentially performing no work of any kind.

25. Petitioner was interviewed in connection with the investigation by Ms. King and another investigator from the Inspector General's office on April 4, 2013.

26. Petitioner was placed under oath and her interview was audio-recorded. Petitioner was questioned about the allegations in the complaint against Mr. Rutledge, and she fully cooperated with the investigators.

27. At the end of the interview, Ms. King asked Petitioner if she had any other information to relay. At that point, Petitioner reported that inappropriate comments and banter of a sexual nature occurred in the office. Petitioner did not report

any other details. Ms. King asked Petitioner for particular examples. In response, Petitioner shared the "cooter" incident and the "bikini" incident.

28. All of the employees in the Gainesville office were interviewed by Ms. King. Mr. Keels was interviewed after Petitioner and was questioned about the "cooter" incident and office banter of a sexual nature.

29. At the final hearing, Petitioner maintained that there was both frequent sexual banter and inappropriate conversations in the Gainesville office. She testified that the staff nurse once referred to a patient as having "balls the size of a bull." She also reported that Mr. Rutledge made hand gestures indicating that Ms. Gonzalez was large-breasted.

30. Petitioner did not share these details with Ms. King during her interview.

31. As with the "bikini" incident, Petitioner was able to walk away from, or otherwise ignore, the comments and gestures of a sexual nature in the workplace.

32. Upon her return to Tallahassee, Ms. King reported her investigative findings to members of Respondent's Human Resources Department, the Deputy Secretary, and the Director of Internal and External Affairs.

33. Petitioner testified that she sent Ms. King an email sometime after her interview asking whether more information was

needed from Petitioner regarding her complaints of inappropriate sexual comments in the workplace. Ms. King denied that Petitioner sent any follow-up email of that nature. Ms. King did recall an email from Petitioner requesting public records.

34. Respondent terminated Mr. Rutledge on April 8, 2013, four days after Petitioner was interviewed by Ms. King.

35. The decision to terminate Mr. Rutledge was made by management in the Tallahassee office. Both Mr. Hudson, the Deputy Bureau Chief, and Ms. James, the Bureau Chief, traveled from Tallahassee to Gainesville to terminate Mr. Rutledge.

36. Ms. Zeigler was likewise present at the Gainesville office for the termination of Mr. Rutledge. However, Ms. Zeigler claimed not to have been informed ahead of time about the termination. She said the appearance of Mr. Hudson and Ms. James at the Gainesville office on April 8, 2013, was a surprise to her.

37. In early May 2013, a significant remodel of the Gainesville office was initiated. The remodel created confusion in the Gainesville office, with furniture being moved around, office files and equipment being boxed up, and the general mess associated with construction in the workplace. At some point, Petitioner lost track of an entire box of her files and later found them on the floor under a pile of chairs she assumed the painters had moved.[5/]

Alleged Acts of Retaliation

38. Respondent named Mr. Keels as Acting POA, effective April 8, 2013. Ms. James testified, credibly, that Mr. Keels was named Acting POA because he was the senior CA in the office.

39. Mr. Keels was questioned about the "cooter" incident during his interview by the Inspector General. Thus, there is sufficient evidence from which the undersigned can infer that Mr. Keels was aware Petitioner had reported the "cooter" incident to the Inspector General during the investigation of Mr. Rutledge.

40. Petitioner complained that she was ostracized by other employees in Gainesville after Mr. Rutledge was terminated.

41. Petitioner also complained that Mr. Keels treated her unfairly in his capacity as acting POA.

42. First, Petitioner maintained that Mr. Keels increased her caseload, from about 27 to about 44 cases, which made her job very difficult given the lengthy commutes to her assigned facilities.

43. Petitioner introduced no evidence, other than her testimony, that her caseload substantially increased after Mr. Keels became acting POA.

44. Petitioner complained to the Inspector General on April 4, 2013, that her caseload under Mr. Rutledge's supervision was inordinately heavy. Petitioner also shared with

the Inspector General that Mr. Keels, in his capacity as senior CA, was unfair in case distribution.

45. Further, Petitioner testified that although her caseload was heavy in early May, it later declined.

46. The evidence does not support a finding that Mr. Keels assigned Petitioner an inordinately heavy caseload following her complaints to the Inspector General and Mr. Keels' temporary promotion to acting POA.

47. Sometime after Mr. Keels became acting POA, he took away Petitioner's worktable. According to Petitioner, Mr. Keels said he took the table for use in the conference room for "staffings," a term that was not explained by any witness. Petitioner testified there were other tables available in the meeting room which could have been used for that purpose.

48. For the next two months, Petitioner completed her in-office work at a window ledge. She placed her laptop and files on the ledge and utilized extra chairs for additional workspace.

49. In June 2013, Petitioner was presented with a new desk.

Petitioner's Termination

50. During Mr. Rutledge's tenure as POA, the Bureau had rolled out significant changes to the CARES program. Those changes had not been implemented by Mr. Rutledge, much less communicated to the Gainesville staff.

51. After Mr. Rutledge's termination, CARES management began monitoring the Gainesville office very closely.

52. During the next few months, Ms. Zeigler was more frequently present in the Gainesville office and was in almost constant contact with Mr. Hudson regarding the activities of the Gainesville office. However, Ms. Zeigler was unaware of any discussions Mr. Hudson may have had with the Bureau Chief or the Division Director.

53. Shortly after Mr. Rutledge's departure, Ms. Zeigler met with the Gainesville staff to explain new procedures. Among the procedures was a requirement to include on employees' GroupWise calendars, an entry of every planned field visit.

54. The CAs' GroupWise calendars were accessible not only to their immediate supervising POA, but also to the RPS and higher-level managers. The calendar was an important management tool used by Respondent both to perform quality assurance checks and to monitor employee performance.

55. On May 9, 2013, Ms. Zeigler sent the following email to the CAs in Gainesville:

> Good afternoon all,
> As mentioned in the past meeting in your office, it was requested that I be given access to your GroupWise calendars to help monitor accountability for field visits with Specialization.
>
> I would like to thank each of you for adhering to the request, and would like to

> ask each of you to add the following information to your calendars:
>
> First and Last name of client visiting
> Facility name where client will be visited
> Home address if visiting client in the home
> Purpose of visit
> Time of visit (include estimated travel time)
>
> * * *
>
> This information is needed for accountability purposes, and also used to check that assessments are being entered in CIRTS, per the attached CARES policy #PPH Update No2011_2, that is still currently in place.
>
> Effective immediately, I would like for each worker to add this information to their calendars prior to making a visit. You should also add any approved leave time that you will be taking as well. If your visit schedule changes, it needs to be noted on the calendar with the appropriate change. Please revisit this memo for a thorough understanding.

56. On May 14, 2013, Ms. Zeigler sent an email to Petitioner informing Petitioner that information on her calendar was incorrect.

57. On May 31, 2013, Ms. Zeigler issued a formal counseling memorandum to Petitioner for failure to list her client visits on her GroupWise calendar as directed. The following excerpt is especially relevant:

> You were instructed to submit your plans for field visits [sic] travel at least one day in advance of the actual travel. A review of your calendar clearly showed that you either did not put any information on your

> calendar as required and/or you entered incorrect data, for the following dates: April 16, 2013, May 6, 2013, May 7, 2013, May 9, 2013, May 10, 2013, and again on May 14, 2013.

58. At the final hearing, Petitioner did not deny that she failed to enter required information on her calendar. Instead, Petitioner offered a series of excuses, including system connectivity issues, her travel schedule, and confusion regarding a transition from GroupWise to the Outlook calendar system.

59. With regard to connectivity, Petitioner explained that there were problems connecting to the Department's computer system from remote locations and, occasionally, in the Gainesville office.

60. Petitioner likewise testified that she would not return home until 6:00 p.m. or later on days she traveled to Jasper and other remote field locations. Petitioner complained that connectivity issues prevented her access to GroupWise from home, and thus, was unable to enter the visits scheduled for the following day.

61. Petitioner testified that she complained to the information technology department in Tallahassee about connectivity issues and diligently tried to address these concerns.

62. Petitioner introduced in evidence an email exchange between herself and Ms. Zeigler in which she complained about, and Ms. Zeigler resolved, an issue with Petitioner's access to CIRTS – the Department's online case input system.

63. The email string is dated July 17, 2013, well after the date of Petitioner's documented missing calendar entries. Further, the email relates to access to the case input system and is irrelevant to Petitioner's claim of issues with connectivity to the computer system in general.

64. Finally, Petitioner explained that the Department changed from GroupWise to the Outlook system, and she was confused about whether to continue adding entries on her GroupWise calendar during that transition.

65. In the May 31, 2013, counseling memorandum, Ms. Zeigler referred to the program's transition from the GroupWise to the Outlook calendaring system, as follows:

> The Microsoft Outlook Email and Calendar program was installed on all computers in DOEA, migrating existing GroupWise information to the new Outlook program on May 28, 2013. Instruction videos and online documentation were made available to all DOEA employees to learn how to utilize the new program. You were instructed to give proxy access to the RPS via email from the acting Supervisor. It is evident that you were successful in accessing the Outlook Calendar, as you sent the RPS a request to share your calendar on May 30, 2013. On the same date, you left the office to go to the field at 12:55 p.m., and failed to

> update/place any information on your calendar before departing. The sign in sheet indicated that you were going to a nursing facility. This repeated failure to comply with procedures is unacceptable. As a result of this failure, your supervisor was unaware of what facility and/or client you were seeing and how long it would take time wise for the field visit. You effectively prohibited your supervisor from knowing your whereabouts and/or the client(s) to be seen.

66. In light of the facts, Petitioner's alleged confusion about whether to continue adding information to her GroupWise calendar is not credible. Petitioner did not send an Outlook calendar-sharing invite to Ms. Zeigler until May 30, 2013, well after her missing GroupWise calendar entries of April 16 and May 6, 7, 9, 10, and 14, 2013.

67. Further, Petitioner failed to calendar her appointments the same day she sent Ms. Zeigler the calendar-sharing invitation, thus belying any excuse that she had connectivity issues, at least on that particular date.

68. In an effort to minimize the significance of her failure to document her field visits on her calendar, Petitioner testified that she noted her field visits on a daily sign-in log physically maintained in the Gainesville office. Petitioner introduced a composite exhibit purporting to be copies of the daily sign-in logs from April, May, June, and July 2013.

69. Even if the exhibit was reliable evidence of Petitioner's whereabouts, the logs are irrelevant to the issue of whether Petitioner complied with the electronic calendaring requirement.

70. No evidence was introduced to support a finding that the daily sign-in log was an acceptable alternative to Ms. Zeigler's specific, clear, and repeated direction to all Gainesville employees to use their GroupWise, and later Outlook, calendars to note their planned field visits with required details.

71. The evidence conflicted as to whether Ms. Zeigler's May 31, 2013, counseling memorandum constituted discipline. Petitioner testified that the memorandum was a training tool.

72. Ms. Zeigler testified alternately, and with hesitancy, that the memorandum was "almost like a verbal warning type of thing," and "unofficially formal." On cross-examination, Ms. Zeigler testified, "I don't think that that would be a reason to fire somebody after one counseling memo. I mean that would be absurd."

73. Ms. James testified that the memorandum constituted a first-step disciplinary action. Ms. James explained that a counseling memorandum is preceded by a verbal warning from the supervisor.

74. The Department's disciplinary policy was not introduced in evidence.

75. In light of Petitioner's probationary employment status, the issue of whether the counseling memorandum constituted discipline is largely irrelevant. The counseling memorandum is evidence of poor job performance during Petitioner's probationary employment period.

76. At some point after Mr. Rutledge's termination, the Department advertised for the open POA position. Both Petitioner and Mr. Keels applied for the position.

77. Mr. Hudson and Ms. Zeigler conducted interviews for the position. Petitioner was not responsive to Ms. Zeigler's efforts to schedule Petitioner's interview for the position.

78. Eventually, Ms. Zeigler did interview Petitioner for the position. Ms. Zeigler also interviewed Mr. Keels.

79. In June 2013, Ms. Zeigler prepared performance evaluations of the Gainesville staff. Ms. Zeigler had little knowledge of staff performance prior to Mr. Rutledge's termination, as Ms. Zeigler was new to the region. Ms. Zeigler gave all the Gainesville employees ratings of "3," satisfactory performance, across the board.

80. In late July 2013, Ms. Carr and Ms. Hajdukiewicz from the Tallahassee office came to the Gainesville office and personally terminated Mr. Keels.

81. Ms. James did not directly make the decision to terminate Mr. Keels, but she agreed with the decision. Ms. James stated that Mr. Keels was terminated based on his actions after he became acting POA in Gainesville. Ms. James did not elaborate and neither counsel asked any follow-up question.

82. On July 31, 2013, Ms. Carr and Ms. James came to the Gainesville office from Tallahassee, met with Petitioner, and offered her a choice of resignation or termination. Petitioner chose termination.

83. That same day, after leaving the office, Petitioner called the Department of Human Resources and requested to change her termination to resignation. The request was granted.

84. Petitioner did not ask why she was being terminated or asked to resign. Petitioner testified that neither Ms. Carr nor Ms. James gave her a reason.

85. Ms. Zeigler resigned from the Department in October 2013. The circumstances of Ms. Zeigler's resignation were not introduced in evidence. In that regard, Ms. Zeigler testified as follows:

> I had a lot of questions with the State that probably should not come up here, but there are a lot of questionable things that were going on with the State at the time which led to my resignation. So I did not question it. I did not question [Petitioner's] termination based off of my

> ability to run the office, because I almost felt like it was being run above me.[6/]

86. Ms. Zeigler's testimony was introduced in support of Petitioner's claims. However, Ms. Zeigler had difficulty recalling events, including the timing of relevant events. Of note, Ms. Zeigler testified that she was the RPS for Gainesville about a year, meaning she would have begun in the position in October 2012. Later, she testified that Mr. Rutledge was terminated "not long after I was there [as RPS]." Her testimony was hesitant, hedging, and sometimes conflicting. Ms. Zeigler testified that she was in daily contact with Mr. Hudson about issues in the Gainesville office after Mr. Rutledge was terminated, but claimed to have had no advance notice of either Mr. Keels' or Petitioner's termination.

87. As such, the undersigned finds Ms. Zeigler's testimony to be both unreliable and unpersuasive. Ms. Zeigler's counseling memorandum to Petitioner regarding calendaring is credible evidence of Petitioner's job performance which cannot be discounted by Ms. Zeigler's after-the-fact, and apparently biased, testimony.

CONCLUSIONS OF LAW

88. Sections 120.569 and 120.57(1), Florida Statutes (2015), grant the Division of Administrative Hearings

jurisdiction over the subject matter of this proceeding and of the parties hereto.

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

90. Section 760.10(1) provides, in pertinent part:

> (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.

I. Sexual Harassment Claim

91. "The FCRA [Florida Civil Rights Act] is patterned after Title VII; federal case law on Title VII applies to FCRA claims." Hinton v. Supervision Int'l, 942 So. 2d 986, 989 (Fla. 5th DCA 2006) (citing Guess v. City of Miramar, 889 So. 2d 840, 846 n.2 (Fla. 4th DCA 2005)).

92. "It 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.

93. To state a Title VII claim of a hostile work environment based on sex, a plaintiff must demonstrate that her "workplace [was] permeated with discriminatory intimidation, ridicule, and insult" that was "'sufficiently severe or pervasive to alter the conditions of [her] employment and create an abusive working environment.'" Budik v. Howard Univ. Hosp., 986 F. Supp. 2d 1, 7 (D.C. Cir. 2013) (citing Harris v. Forklift Sys., 510 U.S. 17 (1993)).

94. To satisfy this requirement, Petitioner must show that: (1) she is a member of a protected class; (2) she was subject to unwelcome sexual harassment; (3) the harassment was based on her protected status; (4) the harassment affected a term, condition, or privilege of her employment; and (5) the employer knew or should have known of the harassment, but failed to take any action to prevent the harassment. Jones v. Billington, 12 F. Supp. 2d 1, 11 (D.D.C. 1997), aff'd, No. 98-5014, 1998 U.S. App. LEXIS 15459 (D.C. Cir. June 30, 1998).

95. Petitioner is a female, thus, a member of a protected class.

96. In evaluating Petitioner's allegation that she was subject to sexual harassment, "the court looks to the totality of the circumstances, including the frequency of the discriminatory conduct, its severity, its offensiveness, and whether it interferes with an employee's work performance."

Baloch v. Kempthorne, 550 F.3d 1191, 1201 (D.C. Cir. 2008) (citing Faragher v. Boca Raton, 524 U.S. 775, 787-88 (1998)). "Except in extreme circumstances, courts have refused to hold that one incident is so severe to constitute a hostile work environment. Even a few isolated incidents of offensive conduct do not amount to actionable harassment." Stewart v. Evans, 275 F.3d 1126, 1134 (D.C. Cir. 2002) (citations omitted).

97. Petitioner testified about four instances of comments or conversations of a sexual nature in her workplace during the first four months she was employed there. The behavior was relatively infrequent.

98. Petitioner was not amused by, but nevertheless able to ignore and walk away from, Mr. Rutledge's hand gestures regarding Ms. Gonzalez's breasts, and Ms. Gonzalez's comment about the relative size of a client's "balls." These comments were not directed at Petitioner, nor were they frequent enough for the undersigned to find that they permeated the workplace, creating a hostile work environment.

99. Similarly, the isolated "bikini" incident was mild, at best. Mr. Rutledge did not comment specifically about any part of the female body and did not use vulgar or obscene language. Petitioner found nothing particularly objectionable about the photograph itself, other than it being shown in the office.

Petitioner did not feel threatened or coerced. Petitioner promptly left Mr. Rutledge's office and returned to her work.

100. The "cooter" incident is slightly more problematic under the analysis. The language used was, undoubtedly, based on Petitioner's protected status as a woman. Petitioner was seated while the two men stood on either side of her worktable in close proximity. Petitioner felt "trapped" and could not simply walk away from the objectionable behavior.

101. However, the incident did not alter the terms or conditions of her employment. The single incident, although unpleasant, unprofessional, and in poor taste, was isolated. Petitioner was not required to endure repeated instances of the same or similar behaviors. Petitioner was out of the office two-to-three days a week conducting field evaluations of clients and frequently did not return to the office in the evenings.

102. Finally, the record is clear that the Department took action to end the behaviors as soon as it was reported. Mr. Rutledge was terminated a mere four days after Petitioner disclosed these incidents to the Inspector General.

103. Petitioner did not carry her burden to prove she was subject to unlawful sexual harassment in the workplace. Based on the totality of the circumstances, comments of a sexual nature were infrequent (to the extent Petitioner was present in the office to observe them), were not generally directed at

Petitioner based on her sex, were not severe in nature, and did not alter the terms or conditions of her employment.

II. Retaliation Claim

104. Section 760.10(7), Florida Statutes, provides as follows:

> 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.

105. In construing 42 U.S.C. § 2000e-3(a) (2012), the Eleventh Circuit has held that:

> The statute's participation clause 'protects proceedings and activities which occur in conjunction with or after the filing of a formal charge with the EEOC.' . . . The opposition clause, on the other hand, protects activity that occurs before the filing of a formal charge with the EEOC, such as submitting an internal complaint of discrimination to an employer, or informally complaining of discrimination to a supervisor.

Muhammad v. Audio Visual Servs. Group, 380 F. App'x 864, 872 (11th Cir. 2010) (citations omitted). The division of section 760.10(7) into the "opposition clause" and the "participation clause" is recognized by Florida state courts. See Blizzard v. Appliance Direct, Inc., 16 So. 3d 922, 925-26 (Fla. 5th DCA

2009). In explaining the difference between the two clauses, the Second District Court of Appeal has held that:

> FCRA's "opposition clause [protects] employees who have opposed unlawful [employment practices]." However, opposition claims usually involve "activities such as 'making complaints to management, writing critical letters to customers, protesting against discrimination by industry or by society in general, and expressing support of coworkers who have filed formal charges.'" Cases involving retaliatory acts committed after the employee has filed a charge with the relevant administrative agency usually arise under the participation clause.

Carter v. Health Mgmt. Assoc., 989 So. 2d 1258, 1263 (Fla. 2d DCA 2008) (citations omitted).

106. In order to establish a prima facie claim of retaliation under the participation clause, Petitioner, "in addition to filing formal charges with the Equal Employment Opportunity Commission (EEOC) or its designated representative, [] was required to demonstrate: (1) a statutorily protected expression; (2) an adverse employment action; and, (3) a causal connection between the participation in the protected expression and the adverse action." Hinton, 942 So. 2d at 990.

107. Respondent's alleged acts of retaliation occurred prior to Petitioner filing her Employment Claim of Discrimination with the FCHR. "The participation clause includes activity done in connection with proceedings conducted

by the federal government and its agencies: an employee has invoked the jurisdiction of the federal government through its agency, the EEOC. And we have held that expansive protection is available for these adjudicative kinds of proceedings run by the government." EEOC v. Total Sys. Servs., 221 F.3d 1171, 1175-76 (11th Cir. 2000). Therefore, Petitioner's claim does not fall under the participation clause.

108. Claims under the opposition clause are not subject to the same degree of "expansive protection" that comes about after a claim of discrimination is filed with the appropriate civil rights agency. Rather:

> Opposition clause acts, however, are taken outside of the context of a government review and, instead, are taken in the context of the ordinary business environment and involve employers and employees as employers and employees.

Total Sys. Servs., 221 F.3d at 1176 (citing Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d 1354, 1361 (11th Cir. 1999). "Complaining about allegedly unlawful conduct to company management is classic opposition activity." Wasek v. Arrow Energy Servs., 682 F.3d 463, 469 (6th Cir. 2012).

109. It is irrelevant in this case that Petitioner did not report Mr. Rutledge's actions on her own initiative, but waited until asked by the Inspector General for any other information regarding Mr. Rutledge's workplace behavior.

> [A] person can oppose [for purposes of 42 U.S.C.S. § 2000e-3(a)] by responding to someone else's question just as surely as by provoking discussion, and nothing in the statute requires a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks a question.

Crawford v. Metro. Gov't of Nashville & Davidson Cty., 555 U.S. 271, 277-78, 284 (2009).

110. Further, "there is no qualification on who the individual doing the complaining may be or on the party to whom the complaint is made known--i.e., the complaint may be made by anyone and it may be made to a co-worker, newspaper reporter, or anyone else about alleged discrimination against oneself or others[.]" Johnson v. Univ. of Cincinatti, 215 F.3d 561, 580 (6th Cir. 2000) (citing the EEOC Compliance Manual, p. 8006).

111. 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.

112. 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 (1973). The McDonnell Douglas framework has been used in retaliation cases in which the Petitioner relies on circumstantial evidence. See Laincy v.

Chatham Cnty. Bd. of Assessors, 520 F. App'x 780 (11th Cir. 2013); Bryant v. Jones, 575 F.3d 1281 (11th Cir. 2009).

113. 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. 2003).

A. Prima Facie Retaliation

114. In order to establish a prima facie case of retaliation under McDonnell Douglas, Petitioner must demonstrate by a preponderance of the evidence: "(1) that [she] engaged in statutorily protected expression; (2) that [she] suffered an adverse employment action; and (3) that there is some causal relationship between the two events." Holifield v. Reno, 115 F.3d 1555, 1566 (11th Cir. 1997) (citations omitted); see also Pennington v. City of Huntsville, 261 F.3d 1262 (11th Cir. 2001); Muhammad, 380 F. App'x at 872; Tipton v. Canadian Imperial Bank of Com., 872 F.2d 1491 (11th Cir. 1989).

1. Statutorily-Protected Activity

115. Not every act an employee takes in opposition to discrimination is a protected activity. Laincy, 520 Fed. App'x. at 782 (citing Butler v. Ala. Dep't of Transp., 536 F.3d 1209, 1214 (11th Cir. 2008)). The employee must show: "(1) that she had a subjective good-faith belief 'that [her] employer was engaged in unlawful employment practices'; and (2) that her belief, even if mistaken, was objectively reasonable in light of the record." Id. (emphasis added). "On a claim for retaliation, the standard is not whether there is a valid hostile work environment claim, but whether [Petitioner] had a good-faith reasonable belief that she was the victim of such harassment." Lipphardt v. Durango Steakhouse of Brandon, Inc., 267 F.3d 1183, 1188 (11th Cir. 2001).

116. The standard requires an intensely fact-specific analysis. In Laincy, the court found that plaintiff did not engage in a protected activity because his belief that his co-workers' allegedly harassing comments constituted an unlawful employment practice was objectively unreasonable, where it was limited to three innocuous comments asking him if he was dating someone. Laincy, 520 Fed. App'x. at 783. See also MacKenzie v. Denver, 414 F.3d 1266, 1281 (10th Cir. 2005) (plaintiff's claim of age harassment was both subjectively and objectively unreasonable where she likewise lobbed age-related comments at

her supervisor, thus participating in a form of "mutual bantering"); Atkinson v. Stavro's Pizza, Inc., Case No. 13-2880 (Fla. DOAH Jan. 29, 2015) (petitioner's complaint of sexual harassment based on a single "weird conversation" between petitioner and another employee, in which the other employee stated he "knew everything about her, including where she lived, and that her favorite color was blue," was objectively unreasonable).

117. Petitioner's claim is distinguishable from the cited examples. Petitioner had been subject to at least one instance in which she felt "trapped" by her supervisor's conversation with another male employee that involved derogatory language in reference to a female body part, and which was specifically directed at her based on her sex. Petitioner credibly testified that she was at least concerned about, if not frightened, to report her supervisor's conduct. Petitioner established a subjective good faith belief for her report of sexual harassment.

118. As to the objective reasonableness of Petitioner's claim, the particular circumstance of the Inspector General's investigation cannot be overlooked. Petitioner was placed under oath in a recorded interview as part of an investigation into her supervisor's conduct. An objective person could reasonably believe that her supervisor's conduct was relevant to a claim of

hostile work environment or other harassment under investigation. Petitioner established an objectively reasonable belief for her claim.

119. Thus, Petitioner established that she engaged in a statutorily-protected activity when she reported the "cooter" incident and the "bikini" incident to the Inspector General.

2. Adverse Employment Action

120. The Supreme Court has rejected law that limits "adverse employment action" to only "ultimate employment decisions," such as hiring, failure to hire, discharge, and compensation. Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 60 (2006). The protection is broader and includes any conduct which is "materially adverse"--any action which "well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" Id. at 68 (citations omitted). Whether an employer's action could dissuade a reasonable employee, situated similarly to the plaintiff, from making a charge of discrimination, is an objective determination. See Tepperwien v. Entergy Nuclear Operations, Inc., 663 F.3d 556, 567 (2d Cir. 2011).

121. Petitioner claims that Respondent engaged in a series of retaliatory actions against Petitioner after her report of sexual harassment to the Inspector General on April 4, 2013, culminating in her dismissal on July 31, 2013. The alleged

retaliatory acts include: Respondent's promotion of Mr. Keels as acting POA, thus as Petitioner's supervisor, even if only temporarily; Mr. Keels' significant increase to Petitioner's workload; Mr. Keels' removal of her worktable; Petitioner's ostracism by co-workers; and Petitioner's termination by Respondent on July 31, 2013.

122. Temporary promotion of Mr. Keels to acting POA was not materially adverse to Petitioner. While Mr. Keels had the temporary title of acting POA, the evidence is clear that Ms. Zeigler was in charge of reforming the wayward Gainesville office, gathering the employees to communicate neglected information about a new program, reviewing employee calendars to keep an eye on their whereabouts, preparing and issuing counseling memoranda, and conducting overdue performance evaluations.

123. Further, it is not likely that Petitioner could be dissuaded from opposing unlawful employment actions by the temporary promotion of Mr. Keels. Respondent had just terminated the supervisor about whom Petitioner had complained and Mr. Keels was a logical choice for the acting position while management struggled to reign in an office which had apparently "gone rogue." Mr. Keels was not the wisest choice, but that fact alone does not render the action of appointing Mr. Keels "materially adverse" to Petitioner.

124. Petitioner's claim that her workload was significantly increased by Mr. Keels was unfounded, as explained in the Findings of Fact herein.

125. Mr. Keel's removal of Petitioner's worktable was an adverse employment action. There can be no doubt that taking an employee's desk away and forcing them to work from a window ledge for two months, even if they are only in the office two-to-three days a week, materially alters the employee's working conditions. This act was taken by Mr. Keels, with knowledge that Petitioner had complained about the "cooter" incident, and only very shortly after he was temporarily promoted to the position of acting POA.

126. Petitioner's claim that she was ostracized by her co-workers does not constitute an adverse employment action. Mere avoidance or isolation of any employee has consistently been held not to qualify as materially adverse pursuant to Burlington N. & Santa Fe Ry., 548 U.S. at 68, that the "decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work." See also MacKenzie, 414 F.3d at 1266 (supervisor's "silent treatment" of employee following employee's grievance against him was insufficient to constitute an adverse employment action); Flannery v. TWA, 160 F.3d 425, 428 (8th Cir. 1998) (shunning is not an adverse employment action where the

plaintiff did not allege that the ostracism resulted in a reduced salary, benefits, seniority, or responsibilities); Smart v. Ball State Univ., 89 F.3d 437, 441 (7th Cir. 1996) ("[w]hile adverse employment actions extend beyond readily quantifiable losses, not everything that makes an employee unhappy is an actionable adverse action. Otherwise, minor and even trivial employment actions that 'an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit.'" (citation omitted)).

127. Petitioner's termination from employment on July 31, 2013, was an adverse employment action. Despite Respondent's argument that Petitioner's choice to resign constituted a voluntary separation,[7/] Petitioner's resignation was a constructive termination of employment. See Odom v. Citigroup Glob. Mkts., Inc., 62 F. Supp. 1330, 1339 (N.D. Fla. 2014); Boland v. Div. of Emergency Mgmt., Case No. 11-5198 n.3 (Fla. DOAH Jan. 26, 2012)(Fla. FCHR Apr. 23, 2012) (citing Le Dew v. Unemployment Appeals Com., 456 So. 2d 1219, 1223-24 (Fla. 1st DCA 1984)); and Long v. Chipola Coll., Case No. 08-4797 (Fla. DOAH Nov. 29, 2009)(Fla. FCHR Feb. 16, 2010).

128. Petitioner satisfied her burden to establish the second prong of a prima facie case of unlawful retaliation--she suffered an adverse employment action when Mr. Keels took away her worktable and when she was terminated on July 31, 2015.

3. Causal Connection

129. Petitioner must next prove, by a preponderance of the evidence, a causal connection between her protected activity--reporting alleged acts of sexual harassment discrimination on April 4, 2013,--and the adverse employment actions.

130. In her Proposed Recommended Order, Petitioner argued that the proximity in time between Petitioner's protected conduct and her termination "indicates a causal connection."[8/] Respondent countered that the time frame of more than three and one-half months is not a short enough time frame from which to infer causation under 11th Circuit court precedent.

131. The 11th Circuit summarized the temporal proximity "test" in Thomas v. Cooper Lighting, Inc., 506 F.3d 1361, 1364 (11th Cir. 2007):

> The burden of causation can be met by showing close temporal proximity between the statutorily protected activity and the adverse employment action. See Brungart v. BellSouth Telecomms., Inc., 231 F.3d 791, 798-99 (11th Cir. 2000). But mere temporal proximity, without more, must be 'very close.' Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 273, 121 S. Ct. 1508, 1511, 149 L. Ed. 2d 509 (2001) (internal citations omitted). A three to four month disparity between the statutorily protected expression and the adverse employment action is not enough. See id. (citing Richmond v. ONEOK, 120 F.3d 205, 209 (10th Cir. 1997) (3 month period insufficient) and Hughes v. Derwinski, 967 F.2d 1168, 1174-75 (7th Cir. 1992) (4 month period insufficient)). Thus, in the absence of other evidence tending to

> show causation, if there is a substantial delay between the protected expression and the adverse action, the complaint of retaliation fails as a matter of law. See Higdon v. Jackson, 393 F.3d 1211, 1220 (11th Cir. 2004) (citing Wascura v. City of South Miami, 257 F.3d 1238, 1248 (11th Cir. 2001)).

132. In the case at hand, Petitioner proved, and Respondent did not deny, that Mr. Keels took Petitioner's worktable shortly after he became acting POA. The proximity in time between Petitioner's protected activity and the adverse action is sufficient for an inference of causation.

133. The proximity in time between Petitioner's report of sexual harassment on April 4, 2013, and her termination on July 31, 2013, is not sufficient for the same inference. Where some time elapses between when employer learns of a protected activity and subsequent adverse employment action, Title VII plaintiff claiming retaliation must couple temporal proximity with other evidence of retaliatory conduct to establish causality. Van Buren v. Ohio Dep't of Pub. Safety, 996 F. Supp. 2d 648 (S.D. Ohio 2014).

134. Petitioner introduced no direct evidence of retaliatory animus against her by either Ms. Zeigler or Respondent's upper-level management. The evidence did not support a finding that Mr. Keels had any role in the decision to terminate Petitioner.

135. As to removal of Petitioner's desk, Petitioner proved all three elements of a prima facie case of retaliation.

136. As to her termination, Petitioner failed to prove the element of causation. Thus, Petitioner did not prove a prima facie case of retaliation with regard to her termination.

B. Legitimate Non-Discriminatory Reason

137. Assuming, arguendo, that Petitioner had established a prima facie case of retaliation in relation to her termination, the burden would then shift to Respondent to proffer a legitimate reason for the adverse employment action. 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 v. KSL Hotel Corp., 887 So. 2d 372 (Fla. 3d DCA 2004) (citing Sierminski v. Transouth Fin. Corp., 216 F.3d 945, 950 (11th Cir. 2000)).

138. Respondent's proffered legitimate non-discriminatory reasons for terminating Petitioner were Petitioner's failure to comply with Respondent's policy to put all information regarding field evaluations on her GroupWise, and later, Outlook calendar; and Petitioner's lack of responsiveness to Ms. Zeigler's emails regarding her application for the permanent POA position.

139. Respondent offered credible testimony regarding the importance of the calendaring policy in the form of testimony from both Ms. Zeigler, who was most sympathetic to Petitioner, and Ms. James, who participated in Petitioner's termination. A preponderance of the evidence supported a finding that Petitioner did not comply with the calendaring policy, despite both repeated reminders to do so and a written counseling memorandum on the subject.

140. Thus, Respondent met its burden to produce evidence of a legitimate non-discriminatory reason for Petitioner's termination.

141. Petitioner produced no evidence of a legitimate non-discriminatory reason for Mr. Keels' removal of Petitioner's worktable. The statement that Mr. Keels took the table for staffing, although admissible as an exception to the hearsay rule, was not credible evidence on which to base a finding that a legitimate reason existed.

C. Pretext

142. 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, non-discriminatory reason was "a pretext for discrimination." Laincy, 520 F. App'x. 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. Rather, the plaintiff must show "such weaknesses, implausibilities, inconsistencies, incoherencies or contradictions in the employer's proffered legitimate reasons . . . that a reasonable factfinder could find them unworthy of credence." Id.

143. Petitioner introduced a plethora of evidence to prove that her termination was a mere pretext for retaliatory discharge.

144. First, Petitioner argued that her most recent performance evaluation, documenting her "satisfactory" work performance, belied Respondent's proffered reason for terminating Petitioner based on her performance. That argument is neither credible nor persuasive. Ms. Zeigler admitted that she gave all the Gainesville employees a satisfactory rating by default.

145. Further on that issue, Petitioner argued that Respondent acted inconsistently with Florida Administrative Code Rule 60L-35.004, which reads, in pertinent part:

> (3) Career Service employees in probationary status shall have a performance evaluation completed on or before the end of the probationary period . . . . Failure to evaluate the probationary employee on or

> before the end of the probationary period will result in the employee successfully completing the probationary period.
>
> (4) If an employee successfully completes the probationary period within 60 calendar days of the agency designated evaluation date, the probationary period overall rating shall become the employee's overall rating for the annual evaluation period that corresponds with that agency designated evaluation date.

146. The rule does not support Petitioner's pretext claim. Respondent did not fail to evaluate Petitioner prior to the end of her probationary period, thus "successful completion" of her probationary period cannot be "deemed" upon Petitioner pursuant to the rule.

147. Second, Petitioner pointed to Ms. Zeigler's testimony that it "would be absurd" to have fired Petitioner based on the counseling memorandum she delivered to Petitioner regarding failure to comply with the calendaring policy. As discussed previously, Ms. Zeigler's testimony in Petitioner's defense was wholly unreliable. Her testimony did not eclipse the facts that Ms. Zeigler had laid out specifically and clearly the calendaring policy (and the reasons therefore), had followed up with the employees in writing, had verbally addressed the issue with Petitioner at least once prior to issuing the counseling memorandum, and issued the counseling memorandum to document

specific instances of Petitioner's failure to comply, which Ms. Zeigler concluded were unacceptable.

148. Petitioner's evidence on this issue is likewise unpersuasive because whether Respondent followed the exact steps of its disciplinary policy is irrelevant. Petitioner was a career service employee on probationary status who could be terminated for poor work performance.

149. Finally, Petitioner introduced evidence to prove that the underlying reason Petitioner failed to comply with the calendaring policy was connectivity issues beyond her control, that Petitioner diligently addressed the issues with information technology, and that management knew of these problems, failed to address them, and fired her anyway. Petitioner adds to that argument that if management really wanted to know where Petitioner was in the field, they could refer to the sign-in sheet, which Petitioner diligently used.

150. Petitioner's argument, while creative, was unpersuasive. Petitioner's self-serving testimony regarding her connectivity issues lacked credibility and was unsupported by any credible evidence. Even if Petitioner had demonstrated continued connectivity issues which prevented her compliance with the calendaring policy, Petitioner did not produce evidence that Respondent was aware of the issue and failed to address it, or terminated Petitioner despite those complaints.

Conclusion

151. For the reasons set forth herein, Petitioner did not meet her burden to establish a prima facie case of discrimination by retaliation in her termination. Respondent put forth persuasive evidence that Petitioner was terminated from employment as a result of her job performance, and not in retaliation for her participation in a protected activity. Respondent's legitimate non-discriminatory reason was not refuted by Petitioner's efforts to demonstrate pretext.

152. Section 760.10 is designed to eliminate workplace discrimination, but it is "not designed to strip employers of discretion when making legitimate, necessary personnel decisions." See Holland v. Wash. Homes, Inc., 487 F.3d 208, 220 (11th Cir. 2007).

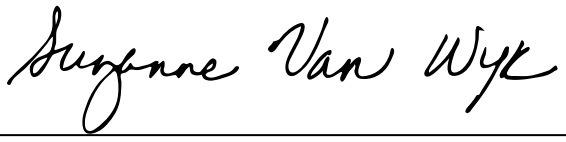
153. For the reasons set forth herein, Petitioner met her burden to establish a prima facie case of discrimination by retaliation in the removal of her worktable by Mr. Keels. Respondent offered no legitimate non-discriminatory reason for the adverse employment action.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations issue a final order finding that Respondent, Florida Department of Elder Affairs, did commit an unlawful employment

practice as to Petitioner, Linda Cattanach, and prohibiting the practice. However, under the specific facts of the case, the undersigned recommends no affirmative relief from the effects of the practice.

DONE AND ENTERED this 5th day of October 2015, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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this 5th day of October, 2015.

ENDNOTES

[1/] The final day of hearing on May 11, 2015, was conducted live in Tallahassee, Florida.

[2/] Except as otherwise noted herein, all references to the Florida Statutes are to the 2013 version in effect when the alleged discriminatory actions against Petitioner took place.

[3/] The final hearing was originally continued to April 20, 2015; however, due to the undersigned's family emergency, the final hearing was continued again to May 11, 2015.

[4/] In her Proposed Recommended Order, Petitioner only addressed her claim of retaliation. However, the record is not clear that Petitioner abandoned her sexual harassment claim. Thus, the

undersigned has included findings and recommendations relevant to this claim.

[5/] Both Petitioner and Respondent offered extensive testimony at the final hearing related to whether Mr. Keels took these same files, knowing that they had been missing and Petitioner had been unable to update them for a random file review. There was no evidence on which to base a finding that Petitioner was terminated based on her record-keeping while employed in the Gainesville office. Thus, the testimony on that issue is irrelevant.

[6/] T.35:15-21.

[7/] In its Proposed Recommended Order, Respondent argued, "[a]s defined by Eleventh Circuit precedent, even when an employee has a Hobson's choice of 'resign or be fired,' a resignation can be voluntary." However, Respondent cited no authority from the 11th Circuit, or for that matter, from any court at all. The undersigned has found 11th Circuit cases which hold that an employee's resignation is voluntary when faced with a choice between resignation and termination for cause or criminal charges. See Santandreau v. Miami Dade Cty., 513 F. App'x. 902 (11th Cir. 2013) (holding that employee's resignation was voluntary when made after he was given a choice to report back to work (after an extended leave of absence), resign, or be terminated, and the employer issued a proposed disciplinary action and offered the employee a chance to respond thereto before final action); Hargray v. City of Hallandale, 57 F.3d 1560 (11th Cir. 1995) (holding employee's resignation was voluntary where the employer gave employee the choice between resignation and submitting to a criminal investigation for grand theft). The cases are inapposite. Here, Petitioner did not have a choice to "stand pat and fight." Hargray at 1568. Petitioner's situation is more akin to the plaintiff in the recent case of Odom v. Citigroup Global Markets, Inc., 62 F. Supp. 1330, 1339 (N.D. Fla. 2014), wherein Odom was given an immediate 'resign or be fired' ultimatum. The court reasoned that where an employee is given a choice between an immediate resignation and immediate termination, the employee does not have a choice at all under Hargray; rather, the employee has been terminated.

[8/] Petitioner cited no case law in support thereof.

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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.