STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HOLLY MATHIS,

Petitioner,

vs. Case No. 16-1072

O'REILLY AUTO PARTS,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on May 13, 2016, in Panama City, Florida, before Garnett W. Chisenhall, a duly-designated Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner: Robert L. Thirston, II, Esquire
Thirston Law Firm
Post Office Box 19617
Panama City Beach, Florida 32417

For Respondent: Harold W. Wasden, Esquire
Burr Forman LLP
11 North Water Street
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STATEMENT OF THE ISSUE

Whether Petitioner ("Holly Mathis" or "Ms. Mathis"), in contravention of the Florida Civil Rights Act of 1992, sections 760.01 through 760.11 and 509.092, Florida Statutes (2014),[1/]

experienced sexual harassment and/or disparate treatment during her employment at Respondent, O'Reilly Auto Parts ("O'Reilly").

PRELIMINARY STATEMENT

Holly Mathis filed a complaint with the Florida Commission on Human Relations ("the FCHR") on July 14, 2015, alleging that she was subjected to sexual harassment and disparate treatment during her employment with O'Reilly. The FCHR conducted an investigation and ultimately determined on January 19, 2016, that there was reasonable cause to believe that an unlawful employment practice had occurred.

Ms. Mathis filed a Petition for Relief with the FCHR on February 18, 2016, alleging that:

> I am a female who was discriminated against and sexually harassed by my supervisor at my former place of employment, O'Reilly Auto Parts. I worked at O'Reilly from August 2014 until the end of April 2015. I was the only female employed at the Panama City Beach location, and as such, was subject to disparate treatment. Male employees were given preferential treatment, and allowed to use work vehicles for non-work related matters. On April 4, 2015, my supervisor, Mr. Paul Stevenson [sic] approached me and asked me to expose my breasts to him. I refused and was sent home early for the day. On April 9, 2015, Mr. [Yohe], another supervisor, allowed a male employee again to use the work vehicle for a non-work related matter. The next day, though, I had a Gatorade drink in the vehicle and was sent home early again. On April 15, 2015, Paul Stevenson [sic] tried to touch me inappropriately many times, and on April 16, 2015 actually did touch me in

> an inappropriate manner, repeatedly, even though I asked him to stop. Additionally, on that day, while I was attending to my other duties, William [Yohe] had me perform a delivery for a male employee who was sitting around doing nothing. I put in my notice shortly after that incident.

On February 18, 2016, the FCHR referred this matter to DOAH for a formal administrative hearing.

In the Amended Joint Pre-Hearing Stipulation filed on May 11, 2016, Ms. Mathis described her allegations as follows:

> Petitioner was formally employed as a delivery specialist by Respondent, which owns and operates an automotive parts store in Panama City Beach, Florida known as O'Reilly Auto Parts. Petitioner alleges that Respondent unlawfully discriminated and harassed her on the basis of Petitioner's sex, which was female. Specifically, Petitioner alleges that on April 4, 2015, while the Petitioner was on her shift, the Respondent requested that the Petitioner expose her breasts to him in order to allow her [to leave work] early. The Petitioner denied his request, but [she was] allowed to leave work early. Moreover, the Petitioner alleges that there was disparity in the treatment of the Petitioner compared to her male counterpart[s] in disciplinary acts.

The Parties described the stipulated issue of law as follows:

> The parties agree that the Administrative Law Judge should apply the relevant sections of the Florida Civil Rights Act in determining whether "quid pro quo sexual harassment" occurred, based on an evaluation of the facts presented. Petitioner does not allege hostile work environment in this action.

> "Quid pro quo harassment occurs when a work-related benefit is conditioned expressly or impliedly on the granting of a sexual favor." *Tate v. Winn-Dixie Logistics, Inc.*, 2011 WL 7794089 (Cir. Ct. Fla. 2011)(citing *Gupta v. Florida Bd. of Regents*, 212 F.3d 571, 582 (11th Cir. 2000)). The acceptance or rejection of the harassment by the employee must be an expressed or implied condition to receipt of a job benefit or the cause of a job detriment. *Id.* (citing *Hodges v. Gellerstedt*, 833 F. Supp. 898, 901 (M.D. Fla. 1993)

The Parties also stated in the Amended Joint Pre-Hearing Stipulation that "[t]he sole issue of law that must be applied in this matter, after making a [determination] of fact based on the testimony of witnesses and documents presented, is whether quid pro quo sexual harassment occurred, applying the standard of review set forth in the preceding paragraph."

At the outset of the final hearing, the undersigned questioned Ms. Mathis' attorney about the statement in the Amended Joint Pre-Hearing Stipulation that Ms. Mathis was proceeding based on a theory of quid pro quo sexual harassment rather than hostile work environment. The undersigned raised this question because the description of Ms. Mathis' claim in her Petition for Relief seemed to be more closely aligned with one alleging a hostile work environment. Ms. Mathis' attorney responded by characterizing the statement at issue in the Amended Joint Pre-Hearing Stipulation as "an oversight." After hearing Ms. Mathis' testimony, the undersigned is of the opinion

that Ms. Mathis' claim is primarily based on a hostile work environment theory. However, at least one aspect of her case arguably amounts to quid pro quo sexual harassment. Therefore, in the interest of being thorough, the undersigned will evaluate Ms. Mathis' allegations under both theories.

The final hearing was commenced as scheduled on May 13, 2016, and Ms. Mathis' attorney invoked the rule of sequestration.

During the final hearing, Ms. Mathis presented her own testimony and offered an audio recording into evidence. However, the undersigned ultimately ruled that Ms. Mathis' exhibit was inadmissible because at least one participant in the conversation was unaware that it was being recorded. See § 934.03(2)(d), Fla. Stat. (providing that "[i]t is lawful under this section and ss. 934.04-934.09 for a person to intercept a wire, oral, or electronic communication when all of the parties to the communication have given prior consent to such interception."); § 934.06, Fla. Stat. (mandating that "[w]henever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the state, or a political

subdivision thereof, if the disclosure of that information would be in violation of this chapter.").

O'Reilly presented the testimony of three witnesses and offered 31 exhibits. Exhibits No. 1, 2, 2-A-1, 2-A-2, 2-B, 2-C-1, 2-C-2, 2-C-3, 2-C-4, 2-C-5, 2-C-6, 2-E, 2-H-1, 2-H-2, 2-J, 2-L, 3, 4, 5, and 6, were accepted into evidence. However, Respondent's Exhibits 2-D, 2-F, 2-G-1, 2-G-2, 2-G-3, 2-G-4, 2-G-5, 2-G-6, 2-G-7, 2-I, 2-K, and 7, were out-of-court statements that the undersigned could not consider unless it was determined that they supplemented or corroborated other non-hearsay evidence.

The proceedings were recorded, and a one-volume Transcript was filed on May 31, 2016.

O'Reilly filed a timely proposed recommended order on June 10, 2016. Ms. Mathis filed a motion on June 13, 2016, requesting additional time to file a proposed recommended order. Through an Order issued on June 13, 2016, the undersigned granted the aforementioned motion and gave Ms. Mathis until June 17, 2016, to file her proposed recommended order. Ms. Mathis' proposed recommended order was timely filed, and the undersigned considered both proposed recommended orders in the preparation of this Recommended Order.

FINDINGS OF FACT

1. O'Reilly is a retail distributor of automobile parts headquartered in Springfield, Missouri.

2. On approximately August 11, 2014, Ms. Mathis began working at an O'Reilly's store in Panama City Beach, Florida ("store no. 4564"). Her duties included pulling automobile parts from the store's inventory and using an O'Reilly's-owned vehicle to deliver automobile parts to mechanics in the surrounding area.

3. Ms. Mathis was the only female employee at store no. 4564.

4. Upon beginning her employment with O'Reilly, Ms. Mathis received a copy of the O'Reilly Auto Parts Team Member Handbook ("the Handbook") detailing policies, benefits, and the responsibilities of O'Reilly's employees.

5. One portion of the Handbook specifies that O'Reilly's employees "are not discriminated against on the basis of race, religion, color, national origin, sex, sexual orientation, pregnancy, age, military obligation, disability, or other protected class as defined by federal, state or local laws."

6. Another portion of the Handbook addressed harassment and stated that "[a]buse of other team members through ethnic, racist, or sexist slurs or other derogatory or objectionable

conduct is unacceptable behavior and will be subject to progressive discipline."

7. This portion of the Handbook continued by describing sexual harassment as follows:

> Sexual harassment is a specific form of harassment that undermines the integrity of the employment relationship – it will not be tolerated. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:
>
> Submission to such conduct is made, either explicitly or implicitly, a term or condition of an individual's employment.
>
> Submission to or rejection of the conduct is the basis for an employment decision affecting the harassed team member.
>
> The harassment substantially interferes with a team member's work performance or creates an intimidating, hostile, or offensive work environment.

8. This portion of the Handbook also instructed employees how to report harassment:

> If you feel you have been discriminated against or have observed another team member being discriminated against due to race, color, religion, national origin, disability, sex, age or veteran status, you should immediately report such incidents to your supervisor/manager, local Human Resources representative, the corporate Human Resources Department, or anonymously via the company's T.I.P.S. Hotline at 1-800-473-8470 without fear of reprisal. A prompt, thorough investigation will be made as confidentially as possible. Appropriate action, up to and including

> termination, will be taken to ensure that neither discrimination nor harassment persists . . . .

9. The Handbook instructs an O'Reilly's employee with work-related concerns to bring them to the attention of his or her supervisor. If the work-related concern involves that employee's supervisor, then the Handbook instructs the employee to "speak directly with the next level of supervision."

10. Store no. 4564 had a poster notifying employees that sexual harassment is illegal. The poster stated that:

> If you experience or witness sexual harassment, report it immediately to your supervisor or the Human Resources Department without fear of retaliation. The company will promptly investigate all complaints as confidentially as possible. If the company concludes that sexual harassment did occur, disciplinary action will be taken with the offender(s) up to and including termination.

11. The poster listed two "hotline" phone numbers that O'Reilly's employees could utilize to report sexual harassment.

12. Also, the Handbook states that "[s]moking, eating, and drinking are not allowed in company vehicles, and team members are not permitted to possess food or beverages, including water, within the cab of a store delivery vehicle."

13. As noted above, Ms. Mathis began working for O'Reilly on approximately August 11, 2014. She typically worked from 8:00 a.m. to 5:00 p.m. on Wednesdays, Thursdays, and Fridays.

14. Ms. Mathis' hiring by O'Reilly was probably facilitated by the fact that she had previously worked with the store's general manager (Paul Stephenson) at an Advance Auto Parts store.

15. Ms. Mathis considered Mr. Stephenson to be a "big brother." However, in September of 2014, Mr. Stephenson began directing sexual comments toward Ms. Mathis, and inappropriate conduct by Mr. Stephenson continued through April of 2015.[2/]

16. During Ms. Mathis' employment with O'Reilly, Mr. Stephenson was the highest-ranking employee at the Panama City Beach store. Therefore, Mr. Stephenson had supervisory authority over Ms. Mathis.

17. On April 4, 2015, Ms. Mathis and Mr. Stephenson were working at store no. 4564. When Ms. Mathis asked to leave early so that she could spend time with her newborn, Mr. Stephenson repeatedly asked her to expose her breasts to him.

18. Ms. Mathis refused Mr. Stephenson's requests but was eventually allowed to leave work early. However, Ms. Mathis had been under the impression that she would not be allowed to leave early unless she complied with Mr. Stephenson's request.

19. On approximately April 13, 2015, Ms. Mathis applied for a position at an Autozone store approximately five minutes from store no. 4564. By April 14, 2015, Ms. Mathis had secured

a new position at that Autozone store and submitted a letter of resignation to O'Reilly on April 14, 2015.

20. Mr. Stephenson's inappropriate conduct did not stop after Ms. Mathis submitted her letter of resignation. As discussed in her Petition for Relief, Mr. Stephenson attempted to touch her in an inappropriate manner many times on April 15, 2015, and succeeded in doing so on April 16, 2015. Ms. Mathis reaffirmed that statement during her testimony at the final hearing.

21. The undersigned finds Ms. Mathis' testimony regarding Mr. Stephenson's conduct in April of 2015 to be credible.

22. April 16, 2015, was Ms. Mathis' last day of work at store no. 4564, and she began working for Autozone on April 17, 2015.

23. In addition to Mr. Stephenson's inappropriate conduct, Ms. Mathis asserts that she was subjected to disparate treatment by her direct supervisor, William Yohe.

24. Specifically, Ms. Mathis testified that Mr. Yohe would belittle her by calling her "stupid" in front of co-workers and customers. Male employees did not experience such verbal abuse.

25. In addition, Mr. Yohe allegedly allowed male drivers to decline deliveries without giving Ms. Mathis the same option. When a male driver declined a particular delivery, then Ms. Mathis was required to handle it.

26. Also, Mr. Yohe allegedly allowed male drivers to have food and beverages in the O'Reilly-owned delivery vehicles. However, Mr. Yohe sent Ms. Mathis home early on April 10, 2015, for having a Gatorade in a delivery vehicle.

27. With the exception of family and friends, Ms. Mathis told no one (including no one with authority over Mr. Stephenson and Mr. Yohe in O'Reilly's chain-of-command) of the sexual harassment and disparate treatment she experienced at store no. 4564.

28. Ms. Mathis did not report the sexual harassment and disparate treatment to anyone associated with O'Reilly because she was worried that Mr. Stephenson or Mr. Yohe would learn of her complaints and fire her. As a single mother of a newborn, she could ill afford to be out of work.

29. As for the anonymous T.I.P.S. Hotline in the Handbook, Ms. Mathis was concerned that her anonymity could not be maintained because she was the only female employee at store no. 4564.

30. The undersigned finds that Ms. Mathis proved by a preponderance of the evidence that Mr. Stephenson sexually harassed her in April of 2015 as described above.

31. There was no reliable evidence to rebut Ms. Mathis' allegations regarding Mr. Stephenson. For example, another driver at store no. 4564 testified that he never observed any

behavior towards Ms. Mathis that amounted to a violation of O'Reilly's policies. However, that testimony and his written statement were of little use because the other driver worked Mondays and Tuesdays while Ms. Mathis usually worked Wednesday through Friday.

32. Mr. Stephenson did not testify during the final hearing. He did give a written statement to O'Reilly in which he denied any inappropriate conduct of the nature described by Ms. Mathis. However, and as explained in the Conclusions of Law below, Mr. Stephenson's written statement was hearsay, and it did not supplement or corroborate any non-hearsay evidence.

33. In addition, several other O'Reilly's employees submitted written statements explaining that they had never seen any discrimination at their workplace and/or that they were unaware of any discrimination occurring at their workplace. However, those employees did not testify, and their written statements did not supplement or corroborate any non-hearsay evidence.

34. Mr. Yohe gave a written statement in which he noted that no one had complained to him about being sexually harassed. However, and as noted above, Ms. Mathis told no one other than friends and family about her experiences at store no. 4564.

35. While Ms. Mathis proved by a preponderance of the evidence that she was sexually harassed by Mr. Stephenson during

her employment at O'Reilly, she did not prove by a preponderance of the evidence that she was subjected to other types of disparate treatment.

36. Mr. Yohe denied verbally abusing Ms. Mathis, and O'Reilly's witnesses persuasively testified that male and female drivers were treated equally with regard to having prohibited items in O'Reilly-owned delivery vehicles.

37. As for Ms. Mathis' assertion that she was forced to make deliveries that male drivers declined, Mr. Yohe rebutted that assertion by testifying that Ms. Mathis was unable to successfully work the front counter at store no. 4564 because she had yet to accumulate sufficient knowledge of automobile parts. Therefore, if the front counter was short-staffed at certain times, then a male driver would be asked to work the front counter and Ms. Mathis would have to handle all of the deliveries during that time period.

38. The undersigned also finds O'Reilly had reasonable measures in place to prevent and promptly correct any sexually harassing behavior.

39. It is also found that Ms. Mathis failed to take advantage of the preventative or corrective opportunities offered by O'Reilly.

CONCLUSIONS OF LAW

40. DOAH has jurisdiction over the subject matter and the parties in this case pursuant to sections 120.569 and 120.57(1), Florida Statutes (2015).

41. The Florida Civil Rights Act, sections 760.01 through 760.11 and 509.092, Florida Statutes (2014), is patterned after federal law contained in Title VII of the Civil Rights Act of 1964, and Florida Courts have determined that federal discrimination law should be used as guidance when construing its provisions. See FSU v. Sondel, 685 So. 2d 923, n.1 (Fla. 1st DCA 1996); Fla. Dep't of Cmty. Aff. v. Bryant, 586 So. 2d 1205, 1209 (Fla. 1st DCA 1991).

42. Section 760.10(1)(a) provides that it is an unlawful employment practice for an employer 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."

43. The Civil Rights Act does not mention sexual harassment. Nevertheless, courts have recognized that the phrase "terms, conditions, or privileges of employment" evinces an intent to strike at the entire spectrum of disparate treatment of men and women in employment, which includes requiring people to work in a discriminatorily hostile or

abusive environment. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993).

44. "This includes both unwelcome, sex-based conduct that alters a term or condition of employment (i.e., hostile work environment) and coercing an employee's 'resignation' based on sex (constructive discharge)." Jones v. United States Petroleum Corp., 20 F. Supp. 2d 1379, 1382 (S.D. Ga 1998).

45. Petitioner has the burden of proving by a preponderance of the evidence that O'Reilly committed an unlawful employment practice. Fla. Dep't of Transp. v. J.W.C., 396 So. 2d 778 (Fla. 1st DCA 1981).

46. As found above, Ms. Mathis failed to prove her allegations of disparate treatment by a preponderance of the evidence.

47. However, Ms. Mathis proved by a preponderance of the evidence that Mr. Stephenson sexually harassed her in the manner that she described during the final hearing.

48. There was no reliable evidence to rebut Ms. Mathis' testimony on this point. Mr. Stephenson did not testify during the final hearing, and his written statement denying Ms. Mathis' allegations was hearsay. See generally Lyles v. State, 412 So. 2d 458, 459 (Fla. 2d DCA 1982)(explaining why hearsay is unreliable by stating that "[h]earsay testimony is generally inadmissible for several reasons. First, the declarant is not

testifying under oath. Second, the declarant is not in court for the trier of fact to observe his or her demeanor. Third, and of prime importance, the declarant is not subject to cross-examination in order to test the truth of the statement.") (overruled on other grounds by Deparvine v. State, 995 So. 2d 351 (Fla. 2008)).

49. Moreover, Mr. Stephenson's written statement did not supplement or corroborate any non-hearsay evidence. As a result, the undersigned cannot base any findings of fact on Mr. Stephenson's written statement. See § 120.57(1)(c) (providing that "[h]earsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.").

50. Therefore, the analysis must turn to whether O'Reilly will be held responsible for Mr. Stephenson's sexual harassment of Ms. Mathis.

51. "The relief granted under Title VII is against the employer, not individual employees whose actions would constitute a violation of the Act." Smith v. Lomax, 45 F.3d 402, 403-04 n.4 (11th Cir. 1995)(quoting Busby v. City of Orlando, 931 F.2d 764, 772 (11th Cir. 1991)).

52. Pursuant to Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 753 (1998), and Faragher v. City of Boca Raton,

524 U.S. 775, 790, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998), the labels "quid pro quo" and "hostile environment" are relevant only to the extent that they illustrate the distinction between cases involving carried out threats by a supervisor and those involving offensive conduct in general, in order to assist in resolving a "threshold question whether a plaintiff can prove discrimination." Ellerth, 524 U.S. at 743.

53. Cases involving claims that an employer is liable for sexual harassment should be separated into two groups: (1) harassment which culminates in a "tangible employment action," such as discharge, demotion or undesirable reassignment; and (2) harassment in which no adverse "tangible employment action" is taken but which is sufficient to constructively alter an employee's working conditions. Ellerth, 524 U.S. at 761-63; Faragher, 524 U.S. at 807.

54. With regard to the first type of claim, if the employee suffered an adverse and tangible employment action as a result of the supervisor's harassment, then the employer is automatically held vicariously liable. Faragher v. City of Boca Raton, 524 U.S. 775, 790, 807 (1998).

55. "A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different

responsibilities, or a decision causing a significant change in benefits." Ellerth, 524 U.S. at 761.

56. Constructive discharge can qualify as a tangible employment action. Hipp v. Liberty Nat'l Life Ins. Co., 252 F.3d 1208, 1230 (11th Cir. 2001)(noting that "[w]e have long recognized that constructive discharge can qualify as an adverse employment decision under the [Age Discrimination in Employment Act]."). See also United States Petroleum Corp., 20 F. Supp. 2d at 1383 (noting that both plaintiffs resigned from USAP before complaining of Brown's behavior and that a normal voluntary resignation is not a tangible employment action. "However, if the employer made working conditions so intolerable that the employee was 'forced' to resign, courts can recognize that a constructive discharge occurred, and that is a tangible employment action.").

57. However, it is very difficult to establish a constructive discharge claim. In order to do so, a plaintiff must demonstrate that his or her working conditions were so intolerable that a reasonable person would have been compelled to resign. Hipp, 252 F.3d at 1231. See also Hill v. Winn-Dixie, 934 F.2d 1518, 1527 (11th Cir. 1991)(stating that there must be "a high degree of deterioration in working conditions, approaching the level of intolerable.").

58. Even if a petitioner can establish that his or her working conditions were so intolerable that a reasonable person would have been compelled to resign, a constructive discharge will generally not be found if the employer was not given a sufficient amount of time to remedy the situation. See United States Petroleum Corp., 20 F. Supp. 2d at 1383 (noting that "constructive discharge will generally not be found if the employer is not given sufficient time to remedy the situation.")

59. Courts have recognized that it can be exceedingly awkward for a victim of sexual harassment to utilize remedies offered by an employer. However, it is well-established that this burden furthers a compelling public interest. See generally Barrett v. Applied Radiant Energy Corp., 240 F.3d 262, 267 (4th Cir. 2001)(explaining that "[r]eporting the harasser benefits the victim by allowing the company to halt future harassment. It benefits others who might be harassed by the same individual, and it benefits the company by alerting it to the disruptive and unlawful misconduct of an employee. Thus, the reporting requirement serves the 'primary objective' of Title VII which 'is not to provide redress but to avoid harm.' Faragher, 524 U.S. at 806. By advancing a speculative 'fear of retaliation' excuse for remaining silent, Barrett's argument would undermine the primary objective of Title VII and could result in more, not less, sexual harassment going undetected.

Furthermore, Title VII expressly prohibits any retaliation against Barrett for reporting Ramsey's harassment. 42 U.S.C. § 2000e-3(a). It is for this reason that the courts have refused to recognize a nebulous 'fear of retaliation' as a basis for remaining silent.").

60. Ms. Mathis' assertions regarding Mr. Stephenson's behavior are similar to the allegations made by the plaintiffs in United States Petroleum Corp., supra. Plaintiffs Kathy Jones and Kristi Wilson had worked in a gas station owned by USA Petroleum and filed separate sexual harassment suits against USA Petroleum because of the alleged actions of Richard Brown, the station manager where the plaintiffs had worked. Id. at 1381.

61. Both plaintiffs resigned from USA Petroleum before complaining of Mr. Brown's alleged conduct. However, the Court held that the plaintiffs' constructive discharge claims were undermined by their failure to give USA Petroleum an opportunity to remedy the situation:

> Wilson relies largely on generalized claims that Brown used profanity in her presence; berated her for failure to complete her nightly duties around the station; and occasionally rubbed against her while the two were in the cashier's booth each morning. Wilson dep. at 49-56, 65-70. As for specific incidents, she alleges that Brown once tried to open the restroom door while she was using the facilities, coyly asking "Do you need any help in there?" Wilson dep. at 46-47. Additionally, she maintains that Brown once asked her to drop

her pants so he could feel her undergarments. Id. at 53.

Jones likewise relies upon generalized claims that Brown used profanity, though she also testified that he made sexually suggestive comments (i.e., he asked her the color of her pubic hair, jokingly propositioned her, etc.) and sometimes rubbed up against her while they were together in the cashier's booth. Jones dep. at 85-88, 97-100. Jones also alleges that Brown forcibly kissed her in the bathroom of the station, causing her to become ill and faint later that day. Id. at 100-108.

As alleged, Brown's conduct towards both Wilson and Jones is boorish and offensive. The Court recognizes that a factual issue may exist as to whether plaintiffs' working conditions were intolerable. Perhaps such is for a jury to decide. Compare Hill, 934 F.2d at 1527 (affirming j.n.o.v. for harassing behavior occurring over a few weeks) with Morgan v. Ford, 6 F.3d 750, 756 (11th Cir. 1993) (reversing summary judgment on a constructive discharge claim because whether working conditions are intolerable is a question of material fact).

Nevertheless, neither plaintiff was constructively discharged because they failed to give USAP notice of Brown's behavior by utilizing USAP's internal grievance procedure, or otherwise notify USAP. They thus deprived USAP of a chance to remedy the situation. Tate Aff. P 9. It is undisputed that USAP's established grievance procedure directed victims of supervisor harassment to call USAP's personnel manager, yet Wilson and Jones chose to disregard it. The prohibition against Brown's alleged behavior is spelled out on USAP's anti-harassment form. Both plaintiffs read and signed the form just prior to encountering Brown. Still, they failed to complain about it until several

months after their resignation. Tate Aff. P 7. By depriving USAP of a reasonable opportunity to remedy the situation, plaintiffs neutralized their constructive discharge claim.

Both Jones and Wilson claim that, while they read and signed the sexual harassment form, they did not truly have notice of it because the policy was not given to them or posted in the station. Wilson doc. # 51; Jones doc. # 74. However, neither plaintiff claims to have ever asked for a copy of the form. Additionally, several documents bearing both USAP's phone number and address and the regional manager's phone number were posted in the station. Jones dep. at 247, 249-254. Rather than using this information to contact someone at USAP, plaintiffs chose to ignore it and instead quit and sue.

Given the pivotal importance notice plays in supervisor sexual harassment cases, see Ellerth, 118 S. Ct. at 2270, this Court concludes that the instant plaintiffs neutralized their constructive discharge claims by not notifying their employer of their problems with Brown. To hold otherwise would allow a constructive-discharge claiming employee to procedurally bypass her employer's grievance procedure and deprive it of the Ellerth/Faragher affirmative defense. That would simply moot the employer's preventive and corrective efforts, and gut Ellerth/Faragher's goal of encouraging sensible grievance procedures.

This conclusion is reinforced by pre-Ellerth/Faragher constructive discharge precedent. The employees in Kilgore neutralized their constructive discharge claims by complaining to management but then failing to give it a reasonable chance to remedy the situation (they failed to return to work following their complaints). 93 F.3d at 754; accord Garner, 807 F.2d at 1539 (denying constructive discharge claim

> where employee, who quit just one day after complaining of an adverse reassignment which she felt was in retaliation for an EEOC claim, failed to give the employer sufficient time to address the matter).
>
> Under both Kilgore and Garner, an employee must act reasonably and give the employer an opportunity, after utilizing a grievance procedure, to correct the discriminatory situation. Here neither plaintiff even began the remedial process since neither notified USAP's personnel manager in accordance with USAP's grievance procedure. Thus, USAP never had an opportunity to correct the situation.

Id. at 1383-84.

62. Ms. Mathis does not specifically allege that she suffered a tangible employment action by being constructively discharged. However, even if it were to be assumed that she had made that specific allegation, her sexual harassment claim must suffer the same fate as those made by the plaintiffs in United States Petroleum Corp., supra. While the undersigned found that Ms. Mathis' proved her allegations regarding the sexual harassment by Mr. Stephenson by a preponderance of the evidence, the case law demonstrates that Ms. Mathis cannot prevail on her tangible employment claim because O'Reilly did not have an opportunity to correct the situation. In other words, O'Reilly cannot be held vicariously liable for Mr. Stephenson's actions because Ms. Mathis did not utilize the reporting procedures O'Reilly made available to her.

63. An employer can also be liable for a supervisor's harassing conduct even if there was no adverse tangible employment action. In order to sustain this second type of sexual harassment claim, the conduct in question must be sufficient to constructively alter an employee's working conditions.

64. However, if no tangible employment action occurred, then the employer can avoid liability if it can demonstrate that: (a) it exercised reasonable care to prevent and promptly correct any sexually harassing behavior; and (b) the plaintiff unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer. Ellerth, 118 S. Ct. at 2270.

65. The unchallenged, documentary evidence in the instant case demonstrates that O'Reilly had appropriate measures in place to prevent and promptly correct any sexually harassing behavior. However, Ms. Mathis failed to take advantage of the preventative or corrective opportunities offered by O'Reilly.

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 Holly Mathis' claim for relief.

DONE AND ENTERED this 13th day of July, 2016, in Tallahassee, Leon County, Florida.

Garnett Chisenhall

G. W. CHISENHALL
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of July, 2016.

ENDNOTES

[1/] All statutory references will be to the 2015 version of the Florida Statutes unless indicated otherwise.

[2/] Ms. Mathis' testimony did not give a detailed description of the inappropriate conduct that occurred prior to April of 2015. However, that lack of detail is largely irrelevant because any inappropriate conduct committed by Mr. Stephenson prior to April of 2015 was not mentioned in Ms. Mathis' Petition for Relief or in the Amended Joint Pre-Hearing Stipulation. As a result, the undersigned will not consider any inappropriate conduct committed by Mr. Stephenson prior to April of 2015 in evaluating whether an unlawful employment practice occurred. See generally State Farm Fire & Cas. Co. v. Tippett, 864 So. 2d 31, 33 (Fla. 4th DCA 2003)(noting that "[i]n determining whether a duty to defend exists, the trial court is confined to the allegations in the complaint. The trial court is restricted to the allegations set forth in the complaint, regardless of what the insured or others say actually happened.")(internal citations omitted).

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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.