STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CHRIS MINIARD,

Petitioner,

vs. Case No. 16-1909

NORTH FLORIDA DESIGN GROUP, INC.,

Respondent.
_____/

RECOMMENDED ORDER

A formal hearing was conducted in this case on June 8, 2016, in Jacksonville, Florida, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Daniel Joseph Glary, Esquire
Daniel Glary, P.A.
2468 Atlantic Boulevard
Jacksonville, Florida 32207

For Respondent: Michelle Bedoya Barnett, Esquire
David E. Chauncey, Esquire
Alexander DeGance Barnett, P.A.
1500 Riverside Avenue
Jacksonville, Florida 32204

STATEMENT OF THE ISSUES

Whether Respondent, North Florida Design Group, Inc., d/b/a Granite Transformations of Jacksonville ("North Florida Design"), discriminated against Petitioner, based upon his sex,

by creating a hostile working environment and whether North Florida Design terminated Petitioner's employment in retaliation for complaining that an employee of Respondent was sexually harassing Petitioner, in violation of section 760.10, Florida Statutes (2015).[1/]

PRELIMINARY STATEMENT

On or about June 23, 2015, Petitioner, Christopher Miniard ("Petitioner"), filed with the Florida Commission on Human Relations ("FCHR") an Employment Complaint of Discrimination against North Florida Design. Petitioner alleged that he had been discriminated against pursuant to chapter 760, Florida Statutes, and Title VII of the Federal Civil Rights Act, based upon race, as follows:

> I was hired by North Florida Design Group as a granite fabricator during February of 2015. I performed my job well and I was never counseled or disciplined. My immediate supervisor, Dave, sexually harassed me while I worked there. He frequently indicated that he wanted to engage in sexual acts with me. He touched me inappropriately and he sent texts to my cell phone that included pornographic pictures. I complained about Dave's conduct to Guy Davis, the company's vice-president, but my complaints were ignored and I continued to be sexually harassed by Dave. I then complained to Anthony Davis, the president and owner of the company. In response, I was informed that my employment was being terminated.
>
> I believe that Dave's conduct was repugnant and that his conduct rises to the level of

> inappropriate behavior which constitutes sexual harassment under Florida's law. I believe that the company became liable for Dave's harassment once I made it aware of Dave's conduct and it failed to take any remedial action. I further believe that I was terminated in retaliation for having complained about Dave's conduct, as there was no legitimate business reason for the termination of my employment.
>
> I believe that the company violated Section 760.10(1)(a) of the Florida Civil Rights Act, in that I was discriminated against and discharged because of my sex. I would not have been the target of Dave's conduct, his conduct would not have been tolerated, and my employment would not have been terminated in retaliation for having reported Dave's conduct if I were a woman.

On January 15, 2016, Petitioner filed an Election of Rights form with the FCHR. On the form, Petitioner selected the following option:

> More than 180 days have elapsed since I filed my complaint of discrimination. I wish to withdraw my complaint from the Florida Commission on Human Relations and file a Petition for Relief in order to proceed with an administrative hearing. I understand that a Petition for Relief form must be completed before proceeding to the Division of Administrative Hearings (DOAH). The Florida Commission on Human Relations will mail this form to me.

In a letter dated February 26, 2016, the FCHR issued its Notice of Dismissal, indicating that Petitioner had voluntarily withdrawn his complaint from the FCHR pursuant to Florida Administrative Code Rules 60Y-5.001(8) and 60Y-5.006(9).

On March 28, 2016, Petitioner timely filed a Petition for Relief with the FCHR. On April 4, 2016, the FCHR referred the case to the Division of Administrative Hearings ("DOAH"). The case was scheduled for hearing on June 8, 2016, on which date it was convened and completed.

At the hearing, the parties stipulated that they would jointly employ Respondent's pre-marked exhibits. Petitioner testified on his own behalf and entered Respondent's Composite Exhibit 1 and Respondent's Exhibits 14 and 15 into evidence. Respondent presented the testimony of Guy Davis, operations manager for North Florida Design; Eldon Clark, a fabricator for North Florida Design; David Warner, head fabricator for North Florida Design; Summer Page, office administrator for North Florida Design; and Anthony Davis, owner of North Florida Design and son of Guy Davis. Respondent entered no exhibits into evidence. Petitioner testified in rebuttal.

The one-volume Transcript of the hearing was filed at DOAH on July 5, 2016. Both parties timely filed their Proposed Recommended Orders.[2/]

FINDINGS OF FACT

1. North Florida Design is an employer as that term is defined in section 760.02(7), Florida Statutes. North Florida Design is mainly in the business of fabricating and installing granite countertops and backsplashes. Testimony at the hearing

indicated that North Florida Design also has an affiliated plumbing business.

2. Petitioner, a white male, was hired by North Florida Design in early February 2015, as a trainee fabricator and assigned to work in the company's shop in Green Cove Springs. He was hired by operations manager Guy Davis on the recommendation of Don Pinkston, a longtime employee of North Florida Design. A granite fabricator cuts, polishes, and glues together the pieces of granite countertops. At North Florida Design, the fabricators also cut out sinks and prepared cabinets for installation. At the time of his hiring, Petitioner was qualified for the position.

3. Petitioner was hired on a part-time, flexible-hour basis and was paid $10.00 per hour. He began work on February 10, 2015. In addition to learning fabrication in the shop, Petitioner would fill in as an installer helper on an as-needed basis.

4. Petitioner also worked on his own as a "scrapper," i.e., a person who collects and recycles scrap metal. Petitioner testified that he had operated his own business called "Scrappers-R-Us" for several years prior to being hired by North Florida Design. He continued to operate the scrapping business while working part-time for North Florida Design. Petitioner often requested permission to leave work early or

rearrange his schedule to coincide with scrapping opportunities. In most instances, Guy Davis accommodated Petitioner's requests.

5. Petitioner testified that he made from $25,000 to $35,000 per year from his scrapping business.[3/] Petitioner's income tended toward the low end of the range in recent years because of a general decline in the prices for scrap metal. He stated that he saw the job at North Florida Design, not only as a way to supplement his scrapping income, but as a means to learn a real trade.

6. Petitioner's immediate supervisor was the head fabricator, Dave Warner, a ten-year employee of North Florida Design. Guy Davis was the supervisor in charge of the entire shop floor and his son, Anthony Davis, was the owner of the company. The younger Mr. Davis' office was in the North Florida Design showroom, a few miles north of the shop.

7. Mr. Warner and the other employees on the shop floor undertook to train Petitioner in working with the equipment used to cut and polish granite countertops.

8. Mr. Warner testified that Petitioner displayed little aptitude for, or interest in, learning the trade of fabrication, but that he was eager to perform cleanup duties around the shop. Mr. Warner stated that he would be trying to teach Petitioner some aspect of the trade, but Petitioner would "just disappear" to start cleaning. "You would turn around and he'd be gone and

you'd be talking to the wind. It seemed like he only wanted to clean."

9. Guy Davis likewise testified that Petitioner's training did not go well. The skills that the company looks for in a fabricator are usually acquired in three months. North Florida Design has a three month probationary period for new employees to make sure they are catching on to the trade. Mr. Davis stated that Petitioner "kind of avoided" the training and spent most of his time cleaning.

10. Because the other fabricators hated cleanup duty in the shop, Petitioner's preference for that job met with little resistance. If he would rather clean than learn to work with granite, they were happy to indulge him. Mr. Davis stated that Petitioner was good at cleaning. After it became clear that Petitioner would be no help on the fabrication side, it was tacitly acknowledged that his primary duty would be to clean the shop.

11. Guy Davis testified that fabrication is not a physically demanding job, but it is precision work that is very repetitive. On the all-male shop floor, the employees often resorted to ribald humor to break the monotony of the work. Jokes and obscene text messages flew back and forth among the crew. Fabricator, Eldon Clark, testified that the employees traded "shock value" pictures on their cell phones, some

"pornographic," others "absolutely grotesque." There was a general atmosphere of lighthearted, foulmouthed japery that Mr. Davis referred to as "normal shop stuff." Much of the joking was "gay-related," according to Mr. Davis.

12. To all appearances, Petitioner was at home in this shop floor atmosphere from day one. He had no sooner begun work than he gave Mr. Warner a new nickname: "Gay Dave." Mr. Warner is married to a woman with whom he has two children. He stated that he is most definitely not gay. He testified that he didn't really like the nickname but that, in the spirit of the shop floor, he went along with the joke and never told Petitioner to stop using it.

13. Petitioner claimed that his coworkers told him that Mr. Warner was known as "Gay Dave." However, Mr. Warner testified that no one else at the shop called him by that name. Mr. Clark confirmed that no one else in the shop called Mr. Warner "Gay Dave." Mr. Clark opined that Petitioner may have coined the nickname in an effort to fit in at the shop. Guy Davis testified that Petitioner himself would pretend to be gay for comic effect.

14. Petitioner was known throughout the shop for the announcement he made every morning upon his arrival: "It's time to suck the day's dick." Both Mr. Warner and Mr. Clark noted that Petitioner said this "every single day." Petitioner

claimed to have heard the saying from a coworker, but was himself the person known for using it.

15. Petitioner introduced the shop to a routine by the comedian Rodney Carrington offering advice on how to call in sick to work. When the boss says, "You don't sound sick," the response should be, "Well, I'm fucking my sister. Does that sound sick enough for you?" This became a running joke in the shop. When someone missed work or came in late, he was liable to be asked whether he was "fucking his sister."

16. Petitioner testified that in addition to all the sexual joking and texting, there was sexual horseplay of a physical nature instigated by Mr. Warner. There was grabbing and slapping of the crotch and buttocks. Mr. Warner would walk in front of someone, then abruptly stop and bend over. Petitioner testified that he was not the only victim of this behavior, but he was apparently the only person who interpreted it as sexual assault. He testified that he told Mr. Warner to stop and pushed his hand away every time he tried to grab him. Petitioner stated that Mr. Warner's only reaction was to laugh.

17. Mr. Warner denied any sort of physical contact with Petitioner or any other employee of North Florida Design and stated that he was shocked and dumbfounded when he heard of Petitioner's allegations. Mr. Clark testified that he never saw

Mr. Warner touch Petitioner or any other employee in the manner described by Petitioner.

18. Guy Davis testified that there were closed circuit cameras throughout the shop and that he could see what went on in the entire shop from the monitors in his office. He stated that he never saw Mr. Warner touch Petitioner inappropriately. Mr. Davis conceded that he didn't spend all day every day watching the monitors, but he also pointed out that Mr. Warner had no way of knowing when the monitors were being watched and thus had to assume he was being observed at all times.

19. Mr. Warner testified that one day in February 2015, a couple of weeks after Petitioner started at North Florida Design, he and Petitioner were chatting about some pictures on Mr. Warner's phone. Of particular interest was a series called "Ass of the Day," photos of unclothed female behinds. Petitioner asked Mr. Warner to forward the photos to his phone. Mr. Warner warned Petitioner that forwarding the "Ass of the Day" photo entailed receiving other less appealing text messages, but Petitioner persisted. From that point forward, Mr. Warner included Petitioner on his "forward" list for text messages from the other people in the shop.

20. Petitioner testified, less plausibly, that Mr. Warner started sending these text messages to him unbidden. He speculated that Mr. Warner may have obtained his cell phone

number from the Scrappers-R-Us advertisement on the side of his pickup truck.

21. At the hearing, five photos that Mr. Warner sent to Petitioner were entered into evidence. Two of the photos were sent on February 24, 2015: the aforementioned "Ass of the Day," and a photo of a woman defecating. Petitioner testified that he was not offended by either of these photos, though he thought the defecation photo was "rather immature."

22. On February 25, 2015, Mr. Warner sent two more photos. One showed what appears to be a male's finger being inserted into the rectum of a person whose sex cannot be identified from the angle of the photo. The second photo showed two naked men engaged in anal intercourse.

23. Petitioner testified that he was "not pleased" to see the February 25 photos and that he spoke to Mr. Warner about it. He told Mr. Warner that he did not find it funny and asked him not to send any more such pictures.

24. On the afternoon of February 26, 2015, Mr. Warner sent Petitioner a close-up photo of a man with his penis inserted into his own rectum and the legend, "Go fuck yourself!" Petitioner testified that he interpreted this as Mr. Warner's response to his complaint about the earlier photos.

25. Mr. Warner testified that Petitioner never complained about any image he received and never told him to stop sending

them. Mr. Warner believed that Petitioner took the photos as the jokes they were intended to be, in keeping with the general atmosphere of the North Florida Design shop floor. Mr. Warner's testimony on this point is more credible than Petitioner's.

26. Petitioner testified that he received no more offensive or possibly harassing photos from Mr. Warner after February 26, 2015. Petitioner and Mr. Warner continued to be on friendly terms at work, discussing such things as their use of marijuana and their fondness for firearms.

27. Petitioner testified that this friendliness was something of a ruse on his part, a way to smooth things over with Mr. Warner. Petitioner stated that he did not report Mr. Warner's actions to his superiors because he did not want to make waves in the workplace.

28. On February 26, 2015, about three hours after receiving the last photo from Mr. Warner, Petitioner sent a text message to Mr. Warner reading, "Do you need any wax. my boy just got back in town?" "Wax" is a form of concentrated marijuana smoked in a bong or a vaporizer. Petitioner was offering to connect Mr. Warner with his own drug dealer. Mr. Warner declined the offer in a return text, citing lack of funds until payday.

29. Petitioner testified that his offer of a marijuana source was the offshoot of his conversations with Mr. Warner

about using the drug. Petitioner stated that he never offered his connection to anyone else at work. Petitioner testified that he received no cut from his dealer's sales. He was merely reaching out to Mr. Warner as a friend and offering to do him a favor.

30. On March 4, 2015, at 3:44 p.m., Petitioner texted Mr. Warner, "Whant [sic] to chill for hump day at my house after work?" To Petitioner, "chilling" signified having drinks, smoking pot, and watching television together. Petitioner testified that this was a general invitation to the North Florida Design shop crew, not to Mr. Warner alone. At 4:13 p.m., Mr. Warner responded, "Nah, I've been tired as shit. I'm thinking about going home and taking a nap."

31. On the morning of March 10, 2015, Mr. Warner texted Petitioner a picture of a gun he was trying to sell with the caption, "16" midlength, all magpul furniture case and cleaning kit for $750.00 obo." That evening, Petitioner sent Mr. Warner a photo of his "Scrappers-R-Us" pickup truck loaded with scrap metal with the caption, "Rack city," meaning he had an extraordinarily good day scrapping. Petitioner testified that his only purpose in sending this text was to share news of his good fortune with his friend.

32. On March 20, 2015, at 4:07 p.m., Petitioner texted Mr. Warner as follows: "U off? want to come chill?" Two

minutes later, Mr. Warner responded with, "Damn nigga I would but I've been home for an hour as [sic] already." Both Petitioner and Mr. Warner are white, but for reasons neither could articulate at the hearing, habitually addressed each other as "nigga" or "nigger."

33. On March 24, 2015, at 7:23 a.m., Mr. Warner texted Petitioner, "Are you fucking your sister?" This was a reference to the Rodney Carrington comedy routine. Petitioner recalled that this text was occasioned by his being late for work that day. He testified that he did not find this text offensive or harassing. To the contrary, he would ask Mr. Warner if he was "fucking his sister" in the same joking manner. Petitioner stated that "it was a back and forth thing. It was not a one-sided thing."

34. On April 13, 2015, at 9:11 a.m., Mr. Warner texted Petitioner a photo of old appliances and a lawn mower with the caption, "I love you." Mr. Warner testified that the photo was of some scrap metal he had salvaged from an old trailer and that he had arranged for Petitioner to come pick it up. He stated that the "I love you" was his joking way of expressing gratitude for Petitioner's taking the junk off his hands. Mr. Warner testified that nothing romantic or sexual was intended by the statement.

35. On April 22, 2015, at 1:46 p.m., Mr. Warner texted Petitioner, "There's a couple hundred lbs of cast iron in the dumpster . . . ." Petitioner was not at work that day, and Mr. Warner was alerting him to the opportunity to pick up some scrap metal that the shop was discarding. Petitioner drove in to the shop.

36. While he was at the dumpster behind the shop, Petitioner could hear the whiz of a pellet fired from a pellet gun. He testified that the pellet passed over his head. A pellet gun was kept at the shop, and employees would take turns shooting it during breaks from work.

37. On the same day, at 2:14 p.m., Mr. Warner texted Petitioner, "Next time he won't miss you nigger." Two minutes later, Petitioner responded, "That's fuck up nigger."

38. Petitioner testified that he felt threatened by being shot at but did not say anything to a supervisor or call the police because he was afraid of Mr. Warner's reaction.

39. Mr. Warner testified that the text was a joke. He stated that he did not know who shot the pellet gun in Petitioner's direction. It is not plausible that Mr. Warner knew to send the text to Petitioner but did not know who fired the pellet gun. It is more likely that Mr. Warner knew who fired the gun but did not wish to incriminate the culprit.[4/]

40. Petitioner testified that from this point forward he carried a concealed Glock pistol to work and tried to limit his conversations with Mr. Warner. He could not stay away from him altogether because Mr. Warner was his supervisor, but Petitioner stated he did as much cleaning as possible because doing so made it easier to avoid Mr. Warner.

41. On the morning of April 23, 2015, the day after the dumpster incident, Mr. Warner texted Petitioner, "Land lord didn't pay the light bill, no power, have a nice day . . . ." By this text, Mr. Warner was letting Petitioner know there was no power at the shop and he did not need to report for work that day.

42. On April 27, 2015, at 2:29 p.m., Mr. Warner texted Petitioner a photo of a power ballast that he had asked Petitioner to pick up at Home Depot on his way in to the shop. This was the last text sent between Mr. Warner and Petitioner.

43. On May 2, 2015, Petitioner held a party at his home to which he invited all the employees of North Florida Design, including Mr. Warner. Mr. Warner did not attend the party. Though he was invited on several occasions, Mr. Warner never went to Petitioner's home. Mr. Warner never invited Petitioner to his home.

44. On May 13, 2015, roughly at the end of his 90-day probationary period, Petitioner had a conversation with

Mr. Warner about the progress of his training and his general job performance. Mr. Warner testified Petitioner seemed upset, perhaps about having been denied time off on the previous day. Petitioner approached Mr. Warner in a somewhat threatening manner, moving closer and closer and raising his voice louder and louder as their conversation progressed. Mr. Warner testified that he told Petitioner he was not doing too well on the fabricating side but that he was very good at cleaning.

45. Petitioner testified that Mr. Warner told him that he was untrainable, that his performance was horrible, and that he didn't know why Petitioner even bothered to come in to work.

46. Unsatisfied and upset by the conversation with Mr. Warner, Petitioner next went to the office of Guy Davis.[5/] Mr. Davis testified that Petitioner barged in as he was speaking with someone else and "started getting in my face." Mr. Davis asked Petitioner to sit down and talk rationally.

47. Summer Page, North Florida Design's office administrator, shared the office with Mr. Davis and confirmed his account of Petitioner's abrupt entrance and of the ensuing conversation.

48. Petitioner sat down and began asking questions about his job performance. Mr. Davis testified that he was "up front" with Petitioner, telling him that he tended to default to cleaning the shop as opposed to doing the fabrication job for

which he had been hired. Petitioner's job performance was not "up to snuff" and he "needed to pick it up" in the fabrication part of his job.

49. At this point, Petitioner raised, for the first time with anyone at North Florida Design, the subject of sexual harassment. He told Mr. Davis that the other men in the shop, and especially Mr. Warner, kidded him in a sexual manner. Mr. Davis testified that Petitioner said nothing about being touched or having been shot at with the pellet gun. Petitioner said nothing about a "hostile" work environment or feeling threatened. Mr. Davis testified that this meeting was the first time that Petitioner had ever complained to him about anything in the shop.

50. Petitioner testified that Mr. Davis told him that he knew about Mr. Warner's propensity for sexual horseplay, and that Petitioner needed to go back to the shop floor and "work it out" with Mr. Warner. This testimony is not credible.

51. As soon as Petitioner left his office, Mr. Davis began investigating his allegations. North Florida Design is a small company without a separate human relations department. Mr. Davis conducted his investigation based on anti-harassment and discrimination training he had received during 24 years as a pilot for Delta Airlines and seven years as a pilot in the United States Air Force. This was the first time in the 12 year

history of North Florida Design that an employee had made a claim of harassment or discrimination.

52. Mr. Davis spoke separately with each man on the shop floor. He took Mr. Warner aside and spoke with him at length. The men uniformly denied that any sort of sexual harassment was occurring in connection with Petitioner or anyone else. Mr. Warner denied ever touching Petitioner, but did admit to sending texts. The men generally told Mr. Davis that Petitioner was a part of the joking that occurs on the shop floor.

53. Mr. Davis told the men to "knock it off" as far as involving Petitioner in their verbal sparring. He was not going to have anyone feel harassed or offended on the shop floor. Whatever else the men did, they were not to direct any of their humor at Petitioner. Mr. Warner assured him there would be no more texting to Petitioner.

54. Mr. Davis did not know about the "Gay Dave" nickname until after he laid down the law to the shop staff. This indication of Petitioner's wholehearted participation in the shop floor merriment, coupled with the men's adamant denial that Petitioner was treated any differently than anyone else on the floor as regards to the trading of jokes and insults, led Mr. Davis reasonably to conclude that Petitioner's allegation of sexual harassment was unfounded. All he discovered in his

investigation was banter back and forth on the shop floor that was, in fact, often started by Petitioner.

55. Mr. Davis met with Petitioner again a few days later. They discussed the results of Mr. Davis' investigation, but Petitioner was more interested in negotiating a reduction in work days. He wanted to work only on Mondays and Fridays in order to spend more time on his scrapping business. Petitioner also stated that he wished to do nothing but clean while on the job at North Florida Design. Mr. Davis readily agreed to this proposal.

56. Petitioner's next scheduled day to work under the new arrangement was May 22, 2015. He failed to show up. Petitioner was needed to work outside the shop with the plumbers on May 26 and 27, 2015, and he worked both days. However, on his next scheduled morning to work in the shop, May 29, 2015, he again failed to show up for work.

57. Petitioner testified that he did not show up to work in the shop because his conversation with Mr. Davis convinced him that the situation had not changed. He did not feel safe after being shot at.

58. On the afternoon of May 29, 2015, Petitioner appeared at the shop to pick up his paycheck. He spoke briefly with Mr. Davis. Mr. Davis testified, "I told him since I don't know

when he's going to come to work, I'll call him when I need him." Mr. Davis never saw or spoke to Petitioner again.

59. Ms. Page, the office administrator, was present when Petitioner came in for his paycheck. Petitioner appeared agitated and gave some indication that he intended to drive over to the North Florida Design showroom to speak with Anthony Davis. Ms. Page phoned Anthony Davis to let him know to expect Petitioner's arrival.

60. Anthony Davis testified that he could tell Petitioner was "fired up" when he entered his office. Petitioner sat down and inquired whether Mr. Davis was aware of the situation at the shop. Mr. Davis had discussed the matter with his father and was confident that the elder Mr. Davis had done his due diligence. He had also learned from the elder Mr. Davis and Ms. Page that Petitioner had stopped showing up for work and was in the process of being dropped from the company's payroll.

61. Petitioner told Mr. Davis that he was being sexually harassed and asked what Mr. Davis was going to do for him. Mr. Davis testified that this statement confirmed his suspicion that Petitioner was attempting some sort of shakedown. Mr. Davis asked what he meant by "doing something for him." Petitioner replied that he did not want to work in the shop anymore. He wanted to be an installer.

62. Mr. Davis told Petitioner that it was his understanding that Petitioner had quit his job by not showing up for work, but that in any event Petitioner was not capable of performing installation work and that he would not be sending Petitioner into the homes of his customers. Petitioner again asked Mr. Davis what he was going to do for him. Mr. Davis replied, "I'm not going to do shit for you.[6/]"

63. Mr. Davis testified that at that point, Petitioner exploded and said he was going to sue him for a million dollars. Mr. Davis told Petitioner to get the hell out of his office. Mr. Davis testified that he repeated several times his understanding that Petitioner had quit his job. He never told Petitioner that he was fired.

64. Petitioner testified that he never went back to work for North Florida Design after his conversation with Anthony Davis because it was an unsafe working environment.

65. Petitioner testified that since leaving North Florida Design, he has lived entirely on income from his scrapping business. He has not sought other employment, nor did he apply for unemployment compensation.

66. Petitioner offered no evidence to corroborate his story of sexual harassment in the workplace. There was no credible evidence that Mr. Warner ever touched him in a sexual

manner or made any proposition to Petitioner that could be regarded as anything other than a joke.

67. Even in the absence of overt, physical sexual activity, a workplace such as the shop floor of North Florida Design, filled with constant sexual innuendo, obscene text messages, and bawdy jokes, might in some cases be considered a hostile and victimizing work environment. However, the evidence in this case established that Petitioner swam freely and happily in these muddy waters.

68. As often as not, Petitioner was the instigator of the activities of which he now complains. He gave Mr. Warner the "Gay Dave" nickname. He introduced the shop to the Rodney Carrington incest joke. He started each morning with the loud proclamation, "It's time to suck the day's dick." These were not the actions of a victim. Even if one were to grant that Petitioner was merely keeping up a front, he kept it up so well that no one in the shop could possibly have guessed that he found all this badinage deeply offensive and sexually harassing.

69. Petitioner's testimony that he felt afraid of Mr. Warner and sought to avoid him is belied by the facts that he continued to invite Mr. Warner to his home and to send him friendly text messages through most of his short career at North Florida Design. Even after someone allegedly fired a pellet gun at him and Mr. Warner sent him a possibly threatening text about

not missing the next time, Petitioner invited Mr. Warner to a party at his house.

70. Petitioner did not raise the issue of sexual harassment with anyone at North Florida Design until after he received a poor job review. Guy Davis investigated the charges and satisfied himself that they were baseless.

71. Even after Petitioner made his accusations against Mr. Warner, North Florida Design was willing to keep Petitioner as a part-time, Monday and Friday employee performing cleanup work. Petitioner declined to show up for work and was dropped from the payroll. Guy Davis' statement to the effect of "we'll call you when we need you" could be read as a constructive dismissal, but this statement was made only after Petitioner failed to show up for work on multiple occasions. Consistent with a voluntary separation, Petitioner did not apply for unemployment compensation. The greater weight of the evidence is that Petitioner was not terminated but abandoned his position.

72. Petitioner offered no credible evidence that North Florida Design discriminated against him because of his sex or that he was subjected to a hostile workplace due to his sex in violation of section 760.10.

73. Petitioner offered no credible evidence that the ending of his employment at North Florida Design, whether by

employer termination or by voluntarily abandonment of his position, was in retaliation for any complaint of discriminatory employment practices that he made while an employee of North Florida Design.

CONCLUSIONS OF LAW

74. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

75. The Florida Civil Rights Act of 1992 (the "Florida Civil Rights Act" or the "Act"), chapter 760, prohibits discrimination in the workplace.

76. Section 760.10 states the following, in relevant 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.

77. North Florida Design is an "employer" as defined in section 760.02(7) which provides the following:

> (7) "Employer" means any person employing 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such a person.

78. Florida courts have determined that federal case law applies to claims arising under the Florida's Civil Rights Act, and as such, the United States Supreme Court's model for employment discrimination cases set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), applies to claims arising under section 760.10, absent direct evidence of discrimination.[7/] See Harper v. Blockbuster Entm't Corp., 139 F.3d 1385, 1387 (11th Cir. 1998); Paraohao v. Bankers Club, Inc., 225 F. Supp. 2d 1353, 1361 (S.D. Fla. 2002); Fla. State Univ. v. Sondel, 685 So. 2d 923, 925 n.1 (Fla. 1st DCA 1996); Fla. Dep't of Cmty. Aff. v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991).

79. Under the McDonnell analysis, in employment discrimination cases, Petitioner has the burden of establishing, by a preponderance of evidence, a prima facie case of unlawful discrimination. If the prima facie case is established, the burden shifts to the employer to rebut this preliminary showing by producing evidence that the adverse action was taken for some legitimate, non-discriminatory reason. If the employer rebuts the prima facie case, the burden shifts back to Petitioner to show by a preponderance of evidence that the employer's offered reasons for its adverse employment decision were pretextual. See Texas Dep't of Cmty. Aff. v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981).

80. In order to prove a prima facie case of unlawful employment discrimination under chapter 760, Petitioner must establish that: (1) he is a member of the protected group; (2) he was subject to adverse employment action; (3) North Florida Design treated similarly situated employees outside of his protected classifications more favorably; and (4) Petitioner was qualified to do the job and/or was performing his job at a level that met the employer's legitimate expectations. See, e.g., Jiles v. United Parcel Serv., Inc., 360 Fed. Appx. 61, 64 (11th Cir. 2010); Burke-Fowler v. Orange Cnty, 447 F.3d 1319, 1323 (11th Cir. 2006); Knight v. Baptist Hosp. of Miami, Inc., 330 F.3d 1313, 1316 (11th Cir. 2003); Williams v. Vitro Servs. Corp., 144 F.3d 1438, 1441 (11th Cir. 1998); McKenzie v. EAP Mgmt. Corp., 40 F. Supp. 2d 1369, 1374-75 (S.D. Fla. 1999).

81. Petitioner has failed to prove a prima facie case of unlawful employment discrimination.

82. The Findings of Fact here are not sufficient to establish a prima facie case of discrimination against Petitioner based on his sex. No evidence supports an inference that Petitioner was discriminated based upon his sex. Petitioner offered no evidence to establish that any similarly situated employee was treated differently by North Florida Design.[8/] Likewise, Petitioner did not provide sufficient evidence that he suffered an adverse employment action. The

greater weight of evidence was that Petitioner simply stopped showing up for work.

83. Even if Petitioner had provided sufficient evidence that there was an adverse employment action, North Florida Design presented plentiful evidence of legitimate, non-discriminatory reasons for Petitioner's termination, including failing to show up to work and failing to seriously train for the position he was hired to fill. The fact that his employer showed the forbearance to keep him on as a shop cleaner does not change the fact the Petitioner completely failed to learn the job of fabrication.

84. Petitioner has also advanced a hostile environment sexual harassment claim. Under federal case law and section 760.10, Petitioner can establish a hostile work environment claim by showing that: (1) he is a member of a protected group; (2) that he was the subject of unwelcome sexual harassment; (3) that the harassment occurred because of his sex; and (4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of his employment. Natson v. Eckerd Corp., Inc., 885 So. 2d 945, 947 (Fla. 4th DCA 2004). "Additionally, 'the employee must show that the employer knew or should have known of the harassment and failed to take remedial action.'" Id., citing Castleberry v. Edward M Chadbourne, Inc., 810 So. 2d 1028, 1029-30 (Fla. 1st DCA 2002).

85. It is also well established that "[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee." Faragher v. City of Boca Raton, 524 U.S. 775, 807; 118 S.Ct. 2275; 141 L.Ed.2d 662 (1998).

86. The incidents described by Petitioner were not sufficiently severe or so pervasive as to alter the terms and conditions of his employment. Petitioner's testimony as to the behavior of Mr. Warner was not credible enough to be believed in the absence of any corroborating evidence. There was no credible evidence that Mr. Warner touched Petitioner. As to the general sexual and scatological joking that pervaded the shop floor, Petitioner failed to establish that this conduct was not welcomed. In fact, the evidence shows that the alleged harassing conduct was welcomed and very often initiated by Petitioner himself. This conduct included Petitioner's giving a disparaging nickname to his alleged harasser.

87. Having failed to sufficiently establish the severe or pervasive element or unwelcomed conduct element of a hostile working environment claim, Petitioner has not established a prima facie case of hostile working environment.

88. Even if Petitioner had provided sufficient evidence that there was an adverse employment action, Petitioner did not

avail himself of North Florida Design's remedial action following the complaint and investigation. Petitioner failed to report any alleged sexual harassment to management prior to his meeting with Guy Davis on or about May 14, 2015. Before that meeting, North Florida Design was not aware of any alleged sexual harassment. There was no evidence to establish that North Florida Design should have known of any alleged sexual harassment prior to that meeting. North Florida Design investigated the allegations and instituted remedial measures of which Petitioner failed to take advantage.

89. Finally, as to Petitioner's retaliation claim, the court in Blizzard v. Appliance Direct, Inc., 16 So. 3d 922, 926 (Fla. 5th DCA 2009), described the elements of such a claim as follows:

> To establish a prima facie case of retaliation under section 760.10(7), a plaintiff must demonstrate: (1) that he or she engaged in statutorily protected activity; (2) that he or she suffered adverse employment action and (3) that the adverse employment action was causally related to the protected activity. See Harper v. Blockbuster Entm't Corp., 139 F.3d 1385, 1388 (11th Cir.), cert. denied 525 U.S. 1000, 119 S.Ct. 509, 142 L.Ed.2d 422 (1998). Once the plaintiff makes a prima facie showing, the burden shifts and the defendant must articulate a legitimate, nondiscriminatory reason for the adverse employment action. Wells v. Colorado Dep't of Transp., 325 F.3d 1205, 1212 (10th Cir. 2003). The plaintiff must then respond by demonstrating that defendant's asserted

> reasons for the adverse action are pretextual. Id.

90. Petitioner failed to prove that any employment action by North Florida Design was causally related to his claims of sexual harassment or sex discrimination. The facts were somewhat ambiguous as to whether Petitioner quit his job or was dismissed after failing to show up for work on multiple occasions, though the greater weight of the evidence was that Petitioner abandoned his position. Petitioner presented insufficient credible evidence that his claims of harassment or discrimination played any role in the end of his employment. Subsequent to his making harassment allegations to Guy Davis, Petitioner was accommodated with the Monday and Friday cleaning schedule that he requested. Mr. Davis also took steps to ensure that Petitioner would no longer be subjected to any joking on the shop floor.

91. Guy Davis' subsequent statement that he would call Petitioner when he needed him could be construed as a constructive dismissal, but this statement was related to Petitioner's failure to show up for work, not to Petitioner's harassment allegations. North Florida Design dropped Petitioner from the payroll after he failed to show up for work at least twice.

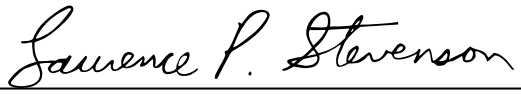
92. Even if Petitioner had demonstrated that there clearly was an adverse employment action, North Florida Design presented sufficient evidence of legitimate, non-discriminatory reasons for Petitioner's termination. Petitioner repeatedly failed to show up for work. He showed no interest in learning the rudiments of the job for which he had been hired. He demanded that Anthony Davis send him out as an installer, a job for which he was entirely unqualified. Petitioner also failed to remain on the job long enough to see whether the remedial actions ordered by Guy Davis would end his alleged harassment. Even if North Florida Design did terminate Petitioner's employment, the termination was not in retaliation for Petitioner's allegations of discrimination and harassment.

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 North Florida Design Group, Inc., did not commit any unlawful employment practices and dismissing the Petition for Relief filed in this case.

DONE AND ENTERED this 4th day of August,2016, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 4th day of August, 2016.

ENDNOTES

[1/] Citations shall be to Florida Statutes (2015) unless otherwise specified. Section 760.10 has been unchanged since 1992, save for a 2015 amendment adding pregnancy to the list of classifications protected from discriminatory employment practices. Ch. 2015-68, §6, Laws of Fla.

[2/] Respondent's Proposed Recommended Order was stamped as received by DOAH on Friday, July 15, 2016, at 4:55 p.m. Petitioner's Proposed Recommended Order was submitted on July 15, 2016, but not in time to be stamped as received until Monday, July 18, 2016 at 8:00 a.m. Respondent has not objected and the undersigned has treated Petitioner's Proposed Recommended Order as timely filed.

[3/] Petitioner freely admitted that "Scrappers-R-Us" is not registered with the Division of Corporations and that he pays no taxes on the (largely cash) proceeds of the business. This admission has no direct bearing on the issues raised by Petitioner, but does carry some negative implication as regards to his character and honesty.

[4/] The record does not establish whether the person shooting the pellet gun was aiming to hit Petitioner and missed or, as seems

more likely given the joking atmosphere of the shop floor, purposely shot over his head to give him a scare and provide a laugh for the group.

[5/] The record is unclear whether this meeting occurred on the same day as Petitioner's discussion with Mr. Warner, or on the next day, May 14, 2015.

[6/] Mr. Davis testified that he told Petitioner, "I'm not going to do anything for you." In the context of the conversation, Petitioner's version is more plausible than Mr. Davis' sanitized self-quotation.

[7/] "Direct evidence is 'evidence, which if believed, proves existence of fact in issue without inference or presumption.'" Rollins v. TechSouth, Inc., 833 F.2d 1525, 1528 n.6 (11th Cir. 1987) (quoting Black's Law Dictionary 413 (5th ed. 1979)). In Carter v. City of Miami, 870 F.2d 578, 582 (11th Cir. 1989), the court stated:

> This Court has held that not every comment concerning a person's age presents direct evidence of discrimination. [Young v. Gen. Foods Corp. 840 F.2d 825, 829 (11th Cir. 1988)]. The Young Court made clear that remarks merely referring to characteristics associated with increasing age, or facially neutral comments from which a plaintiff has inferred discriminatory intent, are not directly probative of discrimination. Id. Rather, courts have found only the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of age, to constitute direct evidence of discrimination.

Petitioner offered no evidence that would satisfy the stringent standard of direct evidence of discrimination.

[8/] As to the question of disparate treatment, the applicable standard was set forth in Maniccia v. Brown, 171 F.3d 1364, 1368-1369 (11th Cir. 1999):

> "In determining whether employees are similarly situated for purposes of establishing a prima facie case, it is necessary to consider whether the employees

> are involved in or accused of the same or similar conduct and are disciplined in different ways." Jones v. Bessemer Carraway Med. Ctr., 137 F.3d 1306, 1311 (11th Cir.), opinion modified by 151 F.3d 1321 (1998) (quoting Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997)). "The most important factors in the disciplinary context are the nature of the offenses committed and the nature of the punishments imposed." Id. (internal quotations and citations omitted). We require that the quantity and quality of the comparator's misconduct be nearly identical to prevent courts from second-guessing employers' reasonable decisions and confusing apples with oranges. See Dartmouth Review v. Dartmouth College, 889 F.2d 13, 19 (1st Cir.1989) ("Exact correlation is neither likely nor necessary, but the cases must be fair congeners. In other words, apples should be compared to apples."). (Emphasis added.)

The Eleventh Circuit has questioned the "nearly identical" standard enunciated in Maniccia, but has in recent years reaffirmed its adherence to it. See, e.g., Brown v. Jacobs Eng'g, Inc., 572 Fed. Appx. 750, 751 (11th Cir. 2014); Escarra v. Regions Bank, 353 Fed. Appx. 401, 404 (11th Cir. 2009); Burke-Fowler, 447 F.3d at 1323 n.2.

In any event, Petitioner in the instant case failed to provide any evidence at all to establish disparate treatment.

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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.