STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ARTHUR J. CHRIS-TENSEN,

Petitioner,

vs. Case No. 16-7489

EARTHLINK SHARED SERVICES, LLC,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held on March 21 and 22, 2017, in Tampa, Florida, before Yolonda Y. Green, a duly-designated Administrative Law Judge of the Division of Administrative Hearings ("Division").

APPEARANCES

For Petitioner: Alvin Mark Gomez, Esquire
(Qualified Representative)
Gomez Law Group, PC
Suite 7
2725 Jefferson Street
Carlsbad, California 92008

For Respondent: Alex Drummond, Esquire
Seyfarth Shaw, LLP
Suite 2500
1075 Peachtree Street, Northeast
Atlanta, Georgia 30309

STATEMENT OF THE ISSUE

The issue is whether Petitioner was subjected to a hostile work environment based on his gender in violation of section 760.10(1)(b), Florida Statutes.

PRELIMINARY STATEMENT

On February 4, 2016, Petitioner, Arthur J. Chris-Tensen ("Mr. Tensen" or "Petitioner"), filed a Complaint of Employment Discrimination with the Florida Commission on Human Relations ("Commission"). The complaint alleged that Respondent, EarthLink Shared Services, LLC ("EarthLink" or "Respondent"), violated the Civil Rights Act of 1964 and the Florida Civil Rights Act of 1992 ("FCRA"), as amended, by discriminating against him on the basis of gender (hostile work environment). On November 14, 2016, following its investigation of the allegations in the complaint, the Commission issued a determination of "No Reasonable Cause" to support Petitioner's complaint.

On December 16, 2016, Petitioner filed a Petition for Relief requesting an administrative hearing regarding the Commission's "No Reasonable Cause" determination pursuant to section 760.11(7).

The Commission referred the matter to the Division on December 19, 2016, and on December 20, 2016, this matter was assigned to the undersigned. The undersigned issued a Notice of

Hearing, scheduling the final hearing for February 16 and 17, 2017. The parties filed a Joint Motion for Continuance of Hearing Date on January 11, 2017. The undersigned granted the motion and rescheduled the hearing for March 21 and 22, 2017. On March 21, 2017, the hearing commenced as scheduled and continued until conclusion on March 22, 2017. The parties filed a pre-hearing stipulation wherein they stipulated to certain facts which, to the extent relevant, have been incorporated in the Findings of Fact below.

Petitioner testified on his own behalf and offered the testimony of four witnesses: Stephanie Bouras, former director of sales for Earthlink; James Patrick Dunn, former director of sales (southeast region) for EarthLink; Ashley Stratton Powell, former director of sales (southeast region) for EarthLink; and Chris George Risse, former Channel manager (southeast region) for EarthLink. Petitioner offered Exhibits P-8 through P-19, which were admitted. Petitioner proferred P-6 (Affidavit of Ed Mehdi Benchannof), but the exhibit was not admitted into evidence. Respondent offered the testimony of three witnesses: Sherri Turpin, former vice president of partner programs of EarthLink; Michael Toplisek, former chief revenue officer of EarthLink; and Erin Shmalo, director of talent acquisition of Windstream (formerly EarthLink). Respondent offered Exhibits R-2 through R-8, R-11 through R-21, R-23, and R-25, which were

admitted. The proceeding was recorded by a court reporter and the parties ordered a transcript of the final hearing. The three-volume Transcript was filed on May 1, 2017. Petitioner timely filed a Proposed Recommended Order ("PRO"). Respondent filed its PRO untimely and did not request an extension of time before the applicable deadline.[1/] Petitioner filed an objection to Respondent's PRO for being untimely. However, Petitioner has not shown any prejudice caused by the late filing, and, thus, both PROs have been carefully considered in preparation of this Recommended Order.

All statutory references are to Florida Statutes (2014) when the alleged discriminatory act occurred, unless otherwise indicated.

FINDINGS OF FACT

1. Respondent, EarthLink, is a nationwide telecommunications company that employed more than 15 employees at all times relevant to this matter. EarthLink provided managed network, security, and cloud solutions to individual and multi-location businesses located nationwide, including Florida.

2. EarthLink is an employer as that term is defined by the FCRA, as amended.

3. At all times material to the complaint of discrimination, Petitioner, Mr. Tensen, worked at EarthLink.

Mr. Tensen worked at EarthLink from November 2013 until his position was eliminated on March 20, 2015.

4. Mr. Tensen began his employment at EarthLink as a major Channel manager in 2013 and he was then promoted to senior director of partner development in 2014.

5. Mr. Tensen is a male.

6. Mr. Tensen was an employee of EarthLink as that term is defined by the FCRA. Petitioner is a member of a protected class.

7. Mr. Tensen filed a complaint with the Commission alleging EarthLink, through Ms. Turpin, created a hostile work environment and had bias against men; promoted a woman despite his being qualified for the position; and retaliated against him for complaining about the alleged hostile work environment.

8. The Commission issued a no cause determination and Mr. Tensen filed a Petition for Relief, which is the matter before the undersigned.

9. By way of background, Mr. Tensen applied for a position with EarthLink in or around October 2013 based on encouragement of J.R. Cook, who was then leading the EarthLink Channel ("Channel") organization. At the suggestion of Mr. Cook, Mr. Tensen listed Sherri Turpin as a professional reference. At that time, Ms. Turpin was the vice president of the master agent program, and she ran the Channel in partnership with Mr. Cook.

10. Mr. Cook asked Ms. Turpin to interview Mr. Tensen for a Channel manager position, a junior position in the Channel organization. Mr. Tensen was more than qualified for and perhaps, over-qualified for the position. Ms. Turpin interviewed Mr. Tensen by phone and then, participated in the decision to hire him. EarthLink hired Mr. Tensen as a senior Channel manager for the southeast region, and he reported to James Dunn (southeast regional director).

EarthLink Organizational Structure

11. EarthLink had a model for the Channel team that was based on a sell-through model, where the goal is to motivate partners and brokers to sell EarthLink's products to their customers. The Channel team leverages relationships with consultants or partners, pitching EarthLink's services to them, and differentiating EarthLink's services to the consumer.

12. The Channel team is comprised of Channel managers, who report directly to regional directors. Channel managers are tasked with the primary responsibility of working directly with partners to manage sales of EarthLink's products and services. At the time Mr. Tensen was hired, the regional directors were Mr. Dunn, Randy Landers, and Paul Keefe, all males. They reported to Ms. Turpin who, in turn, reported to Mr. Cook.

13. A separate group of employees, known as partner development directors or PDDs, work with the Channel managers to

focus on the largest partners, identified as "master agents." Master agents have ties to national or regional carriers. The PDDs offer additional support to Channel managers to facilitate sales with partners. The PDDs are in an overlay role, meaning their primary task is to assist the direct contributors (Channel managers and regional directors) in making their quota.

14. In 2013 through 2014, EarthLink experienced difficulties with retaining some accounts after the initial sale, a problem commonly known as "churn." Mike Toplisek, the then executive vice president and chief revenue officer, decided that EarthLink should create an organization dedicated to the retention of existing customers and he selected Ms. Turpin to develop, implement, and lead the organization. In the new churn organization, Ms. Turpin worked with, among others, Ashley Powell.

15. After Ms. Turpin left the Channel team in January 2014, Mr. Tensen was promoted to a PDD position in the Channel team, reporting directly to Mr. Cook. PDDs have responsibilities for overseeing relationships with three to seven master agents, and they are charged with business development, hosting marketing events, and developing collaboration and alignment between the consultant and Channel managers. In essence, the PDD role is a marketing role in a triangular relationship between the Channel managers, the master agents, and the PDD.

16. In early 2014, Mr. Cook informed Mr. Toplisek of his intention of leaving the Company, prompting a need to find a new Channel chief. Mr. Toplisek interviewed two or three internal candidates, including Petitioner and Ms. Turpin. In the meantime, Mr. Toplisek appointed Ms. Turpin as the interim Channel chief based on Mr. Cook's recommendation.

17. Ms. Turpin worked in telecommunications her entire career. In fact, Ms. Turpin worked for XO Communications for 17 years before working at EarthLink. At XO, she was responsible for a direct sales course and she ran a Channel as a sales executive. Similar to the Channel at EarthLink, she also worked on a sell-through-model. Ms. Turpin testified that she had approximately seven to eight years of experience working in the Channel when she applied for the Channel chief position. EarthLink's then CEO recruited Ms. Turpin away from her position to work with Mr. Cook, who was the Channel chief at that time. Ms. Turpin and Mr. Cook created the national master agent program at EarthLink.

18. Ultimately, Mr. Toplisek selected Ms. Turpin based on her prior experience running the Channel with Mr. Cook and Mr. Cook supported Mr. Toplisek's decision.

19. Mr. Tensen disagreed with the decision to hire Ms. Turpin as Channel chief because he believed that he should have been selected. He believed that he had the necessary

qualifications and experience and that Ms. Turpin was lacking in experience as purportedly indicated in Ms. Turpin's 360 assessment review.

20. Ms. Turpin did have negative comments on her 360 assessment review. However, those comments were a small fraction of the overall assessment. In the 360 assessment review, she was described as an extreme asset to EarthLink with the ability to problem-solve, build relationships, and motivate her team for success. Ms. Turpin's rating in each category of assessment and overall rating was "fully productive." Ms. Shmalo (Earthlink's former human resources partner) testified that Ms. Turpin's rating was positive. The preponderance of evidence presented at the hearing establishes that Ms. Turpin had the necessary qualifications and experience to be the Channel chief. Mr. Cook and Mr. Toplisek agreed that Ms. Turpin was the best candidate for the position.

21. Mr. Cook believed that Mr. Tensen might be disappointed in not being selected to lead the Channel and he suggested that Mr. Toplisek ensure that Mr. Tensen did not feel slighted and was made to feel important. Accordingly, Mr. Toplisek reached out to Petitioner and invited him to have confidential discussions from time to time so that Mr. Toplisek could get his perspective on the Channel, employee morale, and messaging. Mr. Toplisek credibly testified that he never claimed he was forced to select

Ms. Turpin over Mr. Tensen as the Channel chief, nor did he promise that Petitioner would replace Ms. Turpin in the future.

22. The undersigned is not in a position to second-guess EarthLink's decision to promote Ms. Turpin, who was qualified for the position, to replace Mr. Cook as the Channel chief absent evidence that the decision was based on a discriminatory practice. The fact that Mr. Tensen met the qualification for the position did not give him the exclusive right to being hired for the position.

23. Petitioner failed to establish that the decision to select Ms. Turpin as the Channel chief was based on bias against males or any other discriminatory practice.

Ms. Turpin's Actions

24. In May 2014, shortly after assuming the position of Channel chief, Ms. Turpin initiated a meeting with all her new Channel employees in Dallas, Texas. The two purposes of the meeting were to better understand the Channel organization that Mr. Cook had assembled in Ms. Turpin's absence and to transition Ms. Turpin's churn duties to other members of the churn organization. Ms. Turpin allowed some members of the churn team, including Ms. Powell, to sit in on the meetings with the Channel team.

25. Ms. Powell did not have prior experience in Channel sales, but she was interested in learning about it. Ms. Powell

testified that Ms. Turpin took her to the meeting to meet the new team and to get an idea about the Channel. Ms. Powell claimed that Ms. Turpin had informed her that she would have a position in the Channel sales team.

26. At the Dallas meeting, Ms. Turpin conducted a review of all of the regions, Channel managers, and master agents. In the meeting, each of the regional directors, including Mr. Dunn, presented on their respective teams and Channel managers.

27. During Mr. Dunn's presentation, Ms. Turpin raised concerns about one of his Channel managers, Andrew Butts. Ms. Turpin criticized Mr. Butts based on his production, practices, and/or work habits.

28. Mr. Dunn noted that in the year 2013, Mr. Butts received an award for the top five percent performance in the company. Mr. Tensen testified that Mr. Butts was the highest achiever for multiple years. Although Mr. Butts had good past performance, Ms. Turpin was concerned about his performance at that time.[2/]

29. Mr. Dunn believed that it was inappropriate to speak about Channel managers in the manner Ms. Turpin used. Mr. Dunn asked Ms. Turpin to refrain from degrading Andrew Butts. Although Mr. Dunn maintained that he raised his concerns in a calm manner, several witnesses, including Ms. Powell and Ms. Bouras, contradicted that assessment. For example,

Ms. Powell said that Mr. Dunn was "very emotional" and that he "raised his voice" when he expressed his concerns. Stephanie Bouras recalled that Mr. Dunn's voice was "[e]levated" and that "[h]e was frustrated and angry." Ms. Turpin recalled that Mr. Dunn stood up, screamed, and yelled, and that he refused to follow her direction to manage Mr. Butts' performance. Mr. Dunn conceded that after he challenged Ms. Turpin, "the room got quiet, as quiet as it could get." Further, Mr. Dunn noted that several people approached him after his comments and counseled him to apologize to Ms. Turpin. Mr. Dunn did not apologize for his actions.

30. Mr. Tensen claimed Ms. Turpin targeted Mr. Butts because he was male. To the contrary, however, Ms. Bouras and Ms. Turpin credibly testified that the discussion about Mr. Butts was not because of his gender.

31. Following Mr. Dunn's outburst, Ms. Turpin consulted Mark Hopkins, the vice president of human resources, to seek guidance. Based on the guidance from Mr. Hopkins, she ultimately spoke with two prior supervisors who described separate incidents in which Mr. Dunn "exploded" or "lost his cool" at an off-site meeting.

32. Based on the conduct she observed during the Dallas meeting and the events relayed to her by Mr. Dunn's prior

supervisors, Ms. Turpin decided to terminate his employment for insubordination.

33. Mr. Dunn claimed that he was told his position was eliminated and he received a severance package. Ms. Turpin played no role in deciding whether Mr. Dunn should be offered a severance package in exchange for a release. Likewise, Ms. Shmalo had no involvement in Mr. Dunn's separation and has no knowledge of whether he was offered a package in exchange for a release. According to Ms. Shmalo, generally an employee who is separated for cause, i.e., insubordination, is not eligible for a severance package. However, any individual offered a severance package, even if for business reasons, would be classified as having their position eliminated.

34. Although Petitioner claimed that Ms. Turpin said, "Sometimes you have to throw one of the boys under the bus" after the Dallas meeting, that alleged statement is inconsistent with the statement Petitioner provided in an email to Ms. Turpin and Mr. Toplisek which noted, in part, "Sherri, thank you for creating an environment where we could all have our own breakthrough moments. Best off site I've ever attended!" This email makes no reference to Ms. Turpin making references to throwing "a boy under the bus," nor does the email make any reference to discrimination, bias, or harassment.

35. Based on the description of Mr. Dunn's actions at the meeting as related by Ms. Bouras, Ms. Powell, and Ms. Turpin, the preponderance of the evidence supports that Mr. Dunn was terminated for insubordination, rather than his position being eliminated. Mr. Tensen failed to produce evidence to support a finding that Mr. Dunn was terminated because he was male.

36. Following Mr. Dunn's termination, Ms. Turpin interviewed four candidates to replace him: Petitioner, Ms. Powell, Rob Olson, and an external candidate. Despite Ms. Powell's claims, Ms. Turpin did not discuss or offer a director position to Ms. Powell before the Dallas meeting or prior to Mr. Dunn's termination. Ms. Turpin first gave Mr. Tensen the opportunity to replace Mr. Dunn, but he deferred to Ms. Turpin's judgment about his optimal role. Ms. Turpin ultimately selected Ms. Powell for the role.

37. Shortly after Ms. Turpin became the Channel chief, she further restructured the partner development organization, promoting Mr. Tensen to senior partner development director, with the remaining PDDs reporting directly to him. Petitioner received a raise of more than $20,000 per year in total compensation.

38. Ms. Turpin also advocated for Petitioner to be eligible to receive stock options. Ms. Turpin succeeded in obtaining stock options for Petitioner, an extremely valuable

benefit. In arguing for extra money and stock options for Mr. Tensen, Ms. Turpin referred to him as her "right hand guy" and noted he would be vital for the growth of the business and the plans for the Channel.

39. Around the same time, Ms. Turpin received approval to add a new PDD to her team. She selected Michael Brennan for the position, resulting in a promotion and increase in compensation. Ms. Turpin had promoted Mr. Brennan on other occasions and advocated for several increases in compensation during her tenure at EarthLink.

40. In addition to the promotion and raises, during the time Mr. Tensen reported to Ms. Turpin, she provided him with a positive performance review, and she described him as an "amazing employee." Though she noted some areas where Petitioner could improve, she largely praised his contributions to EarthLink. The review notes a "billed revenue" number of $36,062,382, which was 109.15 percent of the stated goal. The billed revenue number in this review reflected all revenue across all customers in the Channel, regardless of whether Mr. Tensen drove or impacted the sales. The 109-percent figure was largely driven by churn, reflecting that customers were not leaving the EarthLink as rapidly.

41. In addition to Mr. Brennan and Mr. Tensen, Ms. Turpin had a good working relationship with Travis O'Keefe, who consistently met his quotas.

42. There was some evidence offered at hearing that Ms. Turpin had a "girl's club." Although Mr. Risse testified there was a "women's team" in management, he admitted that all of the leaders in the Channel organization, except Ms. Powell and Ms. Turpin, were men. Further, he based his belief in part on Jim Dunn's termination and the mistaken belief that Ms. Powell was selected to replace Mr. Dunn without consideration of external candidates. In fact, the evidence shows Mr. Dunn was terminated for insubordination and four candidates (two males, including Mr. Tensen, an external candidate, and Ms. Powell) were interviewed for the position. The undersigned notes that Mr. Risse did not make any complaints of discriminatory behavior regarding Ms. Turpin's actions.

Reduction in Force

43. In early 2015, EarthLink had a relatively new CEO who shifted EarthLink's prior strategy and focused on providing the greatest value to shareholders. Around that time, the teams were also not consistently meeting their quotas. The strategy focused on maximizing profits, which, based on the EarthLink's core business, necessitated a greater emphasis on cost reduction. Specifically, EarthLink focused on reducing

operational expenses. Based on the nature of the business, the biggest operational expense was employees. As such, EarthLink would undergo a reduction-in-force ("RIF").

44. To satisfy this directive, Mr. Toplisek directed his direct reports, including Ms. Turpin, to reduce cost while keeping revenue flow as high as possible. Upon receiving this directive from Mr. Toplisek, Ms. Turpin considered several options to comply with his directive. Ultimately, Ms. Turpin decided to eliminate Mr. Tensen's position. Because this was a position (the only such position) she had created, Ms. Turpin believed she could absorb majority of the work being performed by Mr. Tensen without significantly increasing the burden on the rest of the Channel team.

45. Ms. Turpin notified Mr. Toplisek of her decision and explained the basis for her selection. Mr. Toplisek supported her decision.

46. On March 9, 2015, Ms. Turpin (and a human resources representative) notified Mr. Tensen by phone that his position was eliminated. Because Mr. Tensen's position was eliminated as part of the RIF, he was given a severance package. Ms. Turpin testified that elimination of Mr. Tensen's position was unrelated to his job performance. Ms. Turpin settled on eliminating Petitioner's role because she believed it had the least amount of impact on sales, as he was in an overlay role

and, moreover, one step removed from the PDDs who worked directly with the Channel managers. After Mr. Tensen's position was eliminated, Ms. Turpin absorbed his responsibilities. No one replaced Mr. Tensen as the position was never refilled.

47. Although Petitioner was the only employee eliminated in the Channel organization, several other employees were also downsized during the RIF. Ms. Shmalo testified that she notified 21 employees in March 2015 that their positions were being eliminated, including both male and female employees. Moreover, in March 2015, EarthLink eliminated the positions of 40 to 50 employees in Toplisek's sales organization.

48. The preponderance of the evidence supports that the decision to eliminate Mr. Tensen's position was based on the directive to reduce operation expenses by a RIF and not related to his gender or retaliation.

Use of Profanity/Hostile Work Environment

49. Mr. Tensen asserts that Ms. Turpin terminated him because she had a bias against men and that she would use profanity against and "verbally castrate" men.

50. Several witnesses testified at hearing that Ms. Turpin used profanity. Ms. Turpin admitted that she used profanity but it was not in a derogatory or offensive manner. She also stated that no one complained to her that they were offended by the use of profanity.

51. Mr. Toplisek testified that EarthLink employees (men and women) used profanity. He considered the term "bitch(es)" as an endearing term and it was used by Ms. Turpin and others at EarthLink. The term was used for men and women. Ms. Turpin testified that it was an acronym[3/] and that she "never referred to a person directly as a bitch." While, this is contradicted by the testimony of Stephanie Bouras, who testified that Ms. Turpin used the term "bitch" as addressed directly to a person, Ms. Bouras noted that the term "bitches" was directed toward men and women, rather than only to men. Ms. Powell also testified that Ms. Turpin called everyone "bitches."

52. According to Ms. Shmalo, if an employee was uncomfortable with the use of profanity, that individual would be instructed to notify his or her direct supervisor that they felt uncomfortable with the language. Ms. Shmalo also stated that harassment or discrimination is based on conduct involving an individual in a protected class.

53. At all times material to this matter, EarthLink had a policy which prohibits discrimination based on any protected categories, including sex.

54. EarthLink has policies which express its commitment to a workplace free from discrimination. The EarthLink handbook provides, "[w]e respect the individual and our business success depends on employees being able to express their ideas and doing

their jobs without fear of harassment or unlawful treatment." Accordingly, EarthLink requires all employees to be given equal opportunity in "every aspect of employment, including recruitment, hiring, training, promotions, transfers, compensation, benefits, discipline, terminations, and all other privileges, terms and conditions of employment." Discrimination or harassment on the basis of gender or any other protected characteristic is prohibited. EarthLink provides employees with detailed instructions for reporting any violation of EarthLink's equal employment and anti-harassment policies, and retaliation against employees who complain about harassment or discrimination is also prohibited.

55. Mr. Tensen claimed that he complained of Ms. Turpin fostering a hostile work environment in a letter to then CEO, Mr. Eazor. Ms. Shmalo had no knowledge of the letter and thus, was not aware of any complaints regarding Ms. Turpin maintaining a hostile work environment.

56. Ms. Shmalo did receive complaints regarding Ms. Turpin from employees working in the Channel. Ms. Powell and Mr. Brennan complained about Ms. Turpin's leadership style and communication practices. However, they did not complain of discrimination, harassment, a hostile work environment, or bias in favor of women (also known as the girl's club).

57. Mr. Tensen spoke to Ms. Shmalo after his position was eliminated, but he did not complain to her that he believed his separation was based on discrimination against him because he was male or due to bias against males.

58. Mr. Tensen's exit interview questionnaire complained of dissatisfaction with Ms. Turpin's leadership and management style but did not mention any complaints of discrimination or bias against males.

59. EarthLink's Anti-Harassment Policy provides that an employee who is subject to or a witness of harassment must report it to any manager or member of management. Mr. Tensen never complained that he felt uncomfortable with the use of profanity. He never complained that he felt discriminated against. He also never complained to anyone at EarthLink that he believed there was a bias against men before his position elimination. Moreover, he had confidential meetings with Mr. Toplisek and he never mentioned discrimination or a hostile work environment to him before he was terminated.

60. On March 12, 2015, three days after his position elimination, Mr. Tensen spoke with Mr. Toplisek in a phone conversation. During the call, Mr. Tensen expressed that he believed Ms. Turpin terminated him because he sent an email to Mr. Eazor. Mr. Tensen did not state that be believed he was

terminated because he is male, or as a result of discrimination or harassment.

61. Mr. Tensen followed up on the conversation with Mr. Toplisek by email later that same day. Although he was critical of Ms. Turpin, he did not mention that he believed he was terminated based on discrimination, harassment, or because he is male.

62. Mr. Tensen alleged that Ms. Turpin retaliated against him after he sent the letter to Mr. Eazor complaining about Ms. Turpin. Ms. Powell testified that before Mr. Tensen was terminated, Ms. Turpin was aware of the letter Mr. Tensen sent to Mr. Eazor and instructed her not to talk with Mr. Tensen because of that "letter." Ms. Turpin denies this. Ms. Powell's testimony, which is largely uncorroborated, is found to be not credible on whether Ms. Turpin knew about the letter before Mr. Tensen was terminated.

63. The evidence supports the finding that Ms. Turpin did not learn of the letter until after Mr. Tensen's position was eliminated. Mr. Tensen sent two emails regarding Ms. Turpin's leadership and management style. Mr. Tensen sent the first email to Mr. Eazor on February 2, 2015, where he outlined his concerns about Ms. Turpin, including that she created and sustains a hostile work environment. On March 12, 2015, a second email was sent to Mr. Toplisek (three days after

Mr. Tensen was terminated). Similar to the first letter, Mr. Tensen complained about Ms. Turpin and it also mentioned the first letter to Mr. Eazor.

64. On March 12, 2015, Mr. Toplisek forward Mr. Tensen's second email (mentioning the letter to Mr. Eazor) to Mark Hopkins in human resources. Mr. Hopkins discussed Mr. Tensen's email with Ms. Turpin. Mr. Hopkins agreed with Mr. Toplisek that he should cease communication with Mr. Tensen.

65. Ms. Turpin and Mr. Toplisek credibly testified that they did not learn of the letter to Mr. Eazor until after Mr. Tensen was terminated.

66. Mr. Tensen failed to provide evidence to demonstrate that he complained of discrimination or a hostile work environment before he was terminated from EarthLink.

67. It is undisputed that Petitioner received a positive performance review for 2014 and exceeded his quota for that year by more than nine percent. He was recognized for his ability to drive results. He was successful in motivating his team to focus on driving sales. He was recognized as very efficient and effective when it came to putting customers first. He was characterized as a key to the success of his department.

68. However, the credible evidence supports that Mr. Tensen's position being eliminated had nothing to do with his work performance; rather, it was due to the company-wide

RIF. Petitioner offered no credible evidence that EarthLink's elimination of his position was in retaliation for any complaint of discriminatory employment practices or due to gender bias against males.

69. While Petitioner was employed with EarthLink, he never complained about discrimination or a hostile work environment.

CONCLUSIONS OF LAW

70. Pursuant to sections 120.569 and 120.57(1), Florida Statutes (2016), the Division has jurisdiction over the subject matter and parties to this proceeding.

71. Section 760.10(1)(a) makes it unlawful for an employer to take adverse action against an individual because of that employee's race or sex.

72. The FCRA defines "employer" as "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 person." § 760.02(7), Fla. Stat.

73. Based on the evidence presented, EarthLink meets the definition of employer.

74. Petitioner filed a complaint alleging Respondent discriminated against him on the basis of his sex (male) and retaliated against him for engaging in a protected employment activity.

75. Section 760.11(1) provides, in pertinent part, that "[a]ny person aggrieved by a violation of ss. 760.01-760.10 may file a complaint with the [Commission] within 365 days of the alleged violation." Petitioner timely filed his complaint.

76. Section 760.11(7) provides that upon a determination by the Commission that there is no reasonable cause to believe that a violation of the FCRA has occurred, "[t]he aggrieved person may request an administrative hearing under ss. 120.569 and 120.57, but any such request must be made within 35 days of the date of determination of reasonable cause." Following the Commission's determination of no cause, Petitioner timely filed his Petition for Relief from Unlawful Employment Practices and Request for Administrative Hearing resulting in this hearing.

77. Chapter 760, Part I, is patterned after Title VII of the Civil Rights Act of 1964, as amended. When "a Florida statute is modeled after a federal law on the same subject, the Florida statute will take on the same constructions as placed on its federal prototype." Brand v. Fla. Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994); see also Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17 (Fla. 3d DCA 2009); Fla. State Univ. v. Sondel, 685 So. 2d 923 (Fla. 1st DCA 1996); Fla. Dep't of Cmty. Aff. v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991).

78. Petitioner has the burden of proving by a preponderance of the evidence that Respondent committed an

unlawful employment practice. See St. Louis v. Fla. Int'l Univ., 60 So. 3d 455 (Fla. 3d DCA 2011); Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981).

Discrimination-Sex

79. Employees may prove discrimination by direct, statistical, or circumstantial evidence. Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d at 22.

80. Direct evidence is evidence that, if believed, would prove the existence of discriminatory intent without resort to inference or presumption. Denney v. City of Albany, 247 F.3d 1172, 1182 (11th Cir. 2001); Holifield v. Reno, 115 F.3d 1555, 1561 (11th Cir. 1997). It is well established that "'only the most blatant remarks, whose intent could be nothing other than to discriminate . . .' will constitute direct evidence of discrimination." Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d 1354, 1358-59 (11th Cir. 1999)(citations omitted).

81. Petitioner argues that he presented direct evidence of discrimination on the basis of sex as indicated by testimony of Ms. Powell and Mr. Risse. Their testimony was insufficient to prove direct evidence of bias. However, Ms. Bouras, Mr. Dunn, and Mr. Toplisek testified that Ms. Turpin did not treat men differently and more importantly, they did not observe any

instances of Ms. Turpin treating Petitioner differently because he was male. Petitioner failed to prove that there was direct evidence of discrimination on the basis of sex.

82. Petitioner presented no statistical evidence of discrimination by Respondent in its personnel decisions affecting Petitioner.

83. In the absence of any credible direct or statistical evidence of discriminatory intent, Petitioner must rely on circumstantial evidence. In McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973), and as refined in Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), and St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993), the United States Supreme Court established the procedure for determining whether employment discrimination has occurred when employees rely upon circumstantial evidence of discriminatory intent.

84. Under McDonnell Douglas, Petitioner has the initial burden of establishing a prima facie case of unlawful discrimination.

85. To establish a prima facie case of gender discrimination, Petitioner must demonstrate by a preponderance of the evidence that: 1) he is a member of a protected class; 2) he was qualified for the position; 3) he was subjected to an adverse employment action; and 4) his employer treated

similarly-situated employees outside of his protected class more favorably than she was treated. Burke-Fowler v. Orange Cnty., 447 F.3d 1319, 1323 (11th Cir. 2006).

86. The first, second, and third elements of the prima facie case have been met by Petitioner. Petitioner is a male, he was qualified for the position, and he was terminated from his position at EarthLink due to the RIF.

87. Petitioner did not, however, prove the fourth element, that other similarly-situated employees were treated more favorably than him.

88. An adequate comparator for Petitioner must be "'similarly-situated' in all relevant respects." Valenzuela v. GlobeGround N. Am., 18 So. 3d at 23 (internal citations omitted); Johnson v. Great Expressions Dental Ctrs. of Fla., 132 So. 3d 1174 (Fla. 3d DCA 2014). The Johnson court explained the exacting nature of the similarly-situated comparator, as follows:

> Similarly situated employees must have reported to the same supervisor as the plaintiff, must have been subject to the same standards governing performance evaluation and discipline, and must have engaged in conduct similar to plaintiff's, without such differentiating conduct that would distinguish their conduct of the appropriate discipline for it.

Id. at 1176.

89. Petitioner has failed to prove by a preponderance of the evidence that Respondent treated similarly-situated employees outside his protected class more favorably than him. Petitioner's only evidence that Ms. Turpin treated women more favorably was that she created a "girl's club" and surrounded herself with women. However, this is not evidence of a similarly situated comparator. Furthermore, Ms. Bouras was the only non-biased witness who testified regarding the alleged girl's club, and stated that "there were girls hanging out together" but stopped short of stating there were girls working together or that there was a girl's club. Thus, this argument is rejected.

90. Petitioner failed to produce evidence that Respondent treated female employees more favorably than Petitioner. At the time of his position elimination, Petitioner was the only employee that served as a senior director of partner development. Ms. Powell and Ms. Bouras were females working in the Channel under Ms. Turpin, whereas Petitioner was the only senior director. Further, Ms. Powell testified that she was placed on a performance for plan and had travel restrictions. The evidence presented at hearing failed to demonstrate that any of the female employees met the similarly-situated employee test and failed to demonstrate that any female received favorable treatment on the basis of gender. Therefore, Petitioner failed

to prove a prima facie case of unlawful discrimination based on his sex (male) under the McDonnell Douglas standard.

Legitimate Non-Discriminatory Reason

91. If Petitioner had met his burden of demonstrating a prima facie case of unlawful discrimination, the burden would 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 would then shift 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)).

92. Respondent's proffered legitimate nondiscriminatory reason for terminating Petitioner was the RIF. Given the CEO's directive to provide greater value to EarthLink shareholders, it was necessary for EarthLink to reduce operating costs and expenses and employee reduction was the most obvious place to make reductions. The decision to eliminate Mr. Tensen's position was not related to his gender. Rather, his position elimination was a result of the RIF.

93. Thus, Respondent met its burden to produce evidence of a legitimate, nondiscriminatory reason for eliminating Petitioner's position.

Pre-text for Discrimination

94. To meet the requirements of the pretext step, Petitioner must produce sufficient evidence for a reasonable fact finder to conclude that the employer's legitimate, nondiscriminatory reason was "a pretext for discrimination." Laincy v. Chatham Cnty. Bd. of Assessors, 520 F. App'x. 780, 781 (11th Cir. 2013) (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.

95. It is clear from the evidence presented that EarthLink provided a legitimate, nondiscriminatory reason for its employment action involving elimination of Mr. Tensen's position. Therefore, Petitioner did not prove by a preponderance of the evidence that EarthLink's grounds for the position elimination were pretextual.

Retaliation

96. As a preliminary matter, the undersigned finds that Petitioner abandoned any retaliation claim against Respondent in this matter. While Petitioner alleged in his initial complaint of discrimination that Respondent retaliated against him, Petitioner never alleged a retaliation claim in his Petition. Further, in the Joint Pre-hearing Stipulation submitted by the parties on March 16, 2017, Petitioner did not identify retaliation as an issue which remained to be tried at the hearing.

97. In paragraph 5(h) of the Order of Pre-hearing Instructions, the undersigned directed the parties to "provide a concise statement of those issues of law which remain for determination by the undersigned." The undersigned also indicated that "the failure to identify issues of fact or law remaining to be litigated may constitute a waiver and elimination of those issues." See Palm Beach Polo Holdings, Inc. v. Broward Marine, Inc., 174 So. 3d 1037 (Fla. 4th DCA 2015). Petitioner did not include retaliation as an issue of law which remained for determination in the joint pre-hearing stipulation. At the hearing, the undersigned asked whether the issues identified in the joint pre-hearing stipulation were the only issues to be tried at the hearing; Petitioner still did not

raise retaliation as an issue. Accordingly, the undersigned finds that Petitioner abandoned any retaliation claim in this case.

98. Even if Petitioner had not abandoned his claim for retaliation, Petitioner failed to present evidence to support a claim for retaliation.

99. A claim of retaliation involves section 760.10(7), which provides that: "It is an unlawful employment practice for an employer, . . . 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."

100. "Section 760.10(7), Florida Statutes, is virtually identical to its Federal Title VII counterpart, 42 U.S.C. § 2000e-3(a). The FCRA is patterned after Title VII; federal case law on Title VII applies to FCRA claims." Hinton v. Supervision Int'l, Inc., 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)).

101. In construing 42 U.S.C. § 2000e-3(a), the Eleventh Circuit has held that: [t]he 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. (citations omitted). Muhammed v. Audio Visual Servs. Group, 380 Fed. Appx. 864, 872 (11th Cir. 2010). 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, at 925-926 (Fla. 5th DCA 2009).

102. 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).

103. Petitioner did not introduce any direct or statistical evidence that proves Respondent retaliated against him as a result of Petitioner's opposition to acts of discrimination. Absent any direct or statistical evidence, Petitioner must prove his allegations of retaliation by circumstantial evidence. Circumstantial evidence of retaliation is subject to the burden-shifting analysis established in McDonnell Douglas.

104. To establish a prima facie case of retaliation under the opposition clause under McDonnell Douglas, Petitioner must demonstrate by a preponderance of the evidence "(1) that [he] engaged in statutorily protected expression; (2) that [he] suffered an adverse employment action; and (3) there is some causal relationship between the two events." (citations omitted). Holifield v. Reno, 115 F.3d at 1566; see also Muhammed v. Audio Visual Servs. Group, 380 Fed. Appx. at 872; Tipton v. Canadian Imperial Bank, 872 F.2d 1491 (11th Cir. 1989).

a. Statutorily-Protected Activity

105. 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 [he] had a subjective good-faith belief 'that [his] employer was

engaged in unlawful employment practices'; and (2) that [his] belief, even if mistaken, was objectively reasonable in light of the record." Id. (emphasis added).

106. 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 coworkers' 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).

107. Here, Petitioner argued that on February 2, 2015, he submitted a written complaint of discrimination to Respondent's CEO. While he used what he termed the "buzz word" of hostile

environment, his statement referenced complaints regarding men and women. He did not specifically state any complaints of discrimination directed to one gender (males). Further, Petitioner sent his email to an email address that appeared to be for feedback to lodge his complaints, instead of complaining to Mr. Toplisek (Ms. Turpin's direct supervisor) with whom he had regular conversations or to a member of human resources. Thus, Petitioner failed to establish a subjective good-faith belief for his reports of discrimination based on sex or hostile environment.

108. Therefore, Petitioner failed to prove by a preponderance of the evidence that he engaged in a statutorily-protected activity when he reported complaints of hostile work environment to Respondent's CEO.

b. Adverse Employment Action

109. Clearly, Petitioner suffered an adverse employment action when his position was eliminated on March 9, 2015.

110. Thus, Petitioner could satisfy his burden to establish that he met the second element of the prima facie case for retaliation.

c. Causal Connection

111. To prove the third element, Petitioner must demonstrate a causal connection between the protected activity and the adverse employment decision. This causal link element

is construed broadly, and may be established by a demonstration that the employer was aware of the protected conduct and that the protected activity and the adverse action were not "wholly unrelated." Farley v. Nationwide Mut. Ins., 197 F.3d 1322, 1337 (11th Circ. 1999)(internal citations omitted); Olmstead v. Taco Bell Corp., 141 F.3d 1457, 1460 (11th Cir. 1998). Moreover, for purposes of demonstrating a prima facie case, close temporal proximity may be sufficient to show that the protected activity and adverse action were not wholly unrelated. Gupta v. Fla. Bd. of Regents, 212 F.3d 571, 590 (11th Cir. 2000).

112. At the hearing, Petitioner discussed incidents that occurred during his employment that he did not like and felt were discriminatory. However, Petitioner failed to establish that he complained about discrimination during his employment. Petitioner's vague statements of hostile work environment and displeasure with men and women were not sufficient to establish that he sufficiently complained of discrimination on the basis of gender. No evidence was produced by Petitioner that he expressly complained about gender discrimination. Courts have consistently required that an employee's complaints must clearly put an employer on notice of a violation of the law. See Johnson v. Fla. Dep't of Elder Aff., No. 4: 09-CV- 306/RS/WCS, 2010 U.S. Dist. LEXIS 42784, at 6 (N.D. Fla. Mar 20, 2010). Further, the courts recognize a "common sense" requirement that

"[a] decision maker cannot have been motivated to retaliate by something unknown to [her]." Brungart v. BellSouth Telecomms., Inc., 231 F.3d 791, 799 (11th Cir. 2000).

113. The record is clear that Petitioner received the employee handbook with the grievance procedures for EarthLink. Since Petitioner never put EarthLink on notice that he was opposing gender discrimination or that he was making a formal complaint, Petitioner failed to produce evidence of any protected activity, and as a result, he failed to show a causal connection related to Petitioner's position elimination.

114. Therefore, Petitioner would not be able to prove by preponderance of the evidence that Respondent retaliated against him for engaging in protected complaints of unlawful employment discrimination.

Conclusion

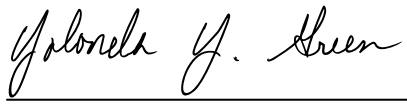
115. Based on the foregoing, Petitioner did not prove his Charge of Discrimination. The undersigned therefore concludes that Respondent did not violate the Florida Civil Rights Act of 1992, and is not liable to Petitioner for discrimination in employment based on sex or retaliation.

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 dismissing Petitioner's

discrimination complaint and Petition for Relief consistent with the Findings of Fact and Conclusions of Law of this Recommended Order.

DONE AND ENTERED this 1st day of June, 2017, in Tallahassee, Leon County, Florida.



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

Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of June, 2017.

ENDNOTES

[1/] Florida Administrative Code Rule 28-106.104(3) states "Any document received by the office of the agency clerk before 5:00 p.m. shall be filed as of that day but any document received after 5:00 p.m. shall be filed as of 8:00 a.m. on the next regular business day."

[2/] Based on the evidence presented at hearing, Mr. Butts did not attended the meeting.

[3/] The acronym B.I.T.C.H.E.S. represented: Babes or (Boys) In Total Control of Herself (or Himself).

COPIES FURNISHED:

Tammy S. Barton, Agency Clerk
Florida Commission on Human Relations
Room 110
4075 Esplanade Way
Tallahassee, Florida 32399
(eServed)

Alex Drummond, Esquire
Seyfarth Shaw, LLP
Suite 2500
1075 Peachtree Street, Northeast
Atlanta, Georgia 30309
(eServed)

Soloman Laguerre, Esquire
Seyfarth Shaw, LLP
Suite 2500
1075 Peachtree Street, Northeast
Atlanta, Georgia 30309
(eServed)

Alvin Mark Gomez, Esquire
Gomez Law Group, PC
Suite 7
2725 Jefferson Street
Carlsbad, California 92008
(eServed)

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

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.