STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ILEENE C. MCDONALD,

Petitioner,

vs. Case No. 17-3201

BOTTLING GROUP, LLC,

Respondent.
_____/

RECOMMENDED ORDER

A hearing was conducted in this case pursuant to sections 120.569 and 120.57(1), Florida Statutes,[1/] before Cathy M. Sellers, an Administrative Law Judge ("ALJ") of the Division of Administrative Hearings ("DOAH"), by video teleconference on August 28, 2017, at sites in West Palm Beach and Tallahassee, Florida.

APPEARANCES

For Petitioner: Ileene C. McDonald, pro se
1172 The Pointe Drive
West Palm Beach, Florida 33409

For Respondent: Bonnie Mayfield, Esquire
Dykema Gossett, P.L.L.C.
39577 Woodward Avenue, Suite 300
Bloomfield Hills, Michigan 48304

STATEMENT OF THE ISSUES

The issue in this case is whether Respondent engaged in an unlawfully discriminatory employment practice against Petitioner

on the basis of sex, in violation of the Florida Civil Rights Act of 1992 ("FCRA"), section 760.10, Florida Statutes; and, if so, the remedy to which Petitioner is entitled.

PRELIMINARY STATEMENT

In September 2016, Petitioner filed an Employment Charge of Discrimination with the Florida Commission on Human Relations ("FCHR"), alleging that Respondent, Bottling Group, LLC, engaged in unlawful employment discrimination against her on the basis of her sex. On or about April 26, 2017, FCHR issued a "No Reasonable Cause Determination."

On or about May 31, 2017, Petitioner timely filed a Petition for Relief from a Discriminatory Employment Practice ("Petition") with FCHR, alleging that Respondent discriminated against her with respect to the terms, conditions, and privileges of employment on the basis of her sex, in violation of section 760.10(1)(a). Specifically, Petitioner alleged that she had been sexually harassed by male employees of Respondent with whom she worked, causing her to fear for her safety, and that Respondent did not take any action to prevent the harassing conduct, so that she was effectively forced to leave her employment position at Respondent's facility.

FCHR referred the matter to DOAH for assignment of an ALJ to conduct a de novo hearing pursuant to sections 120.569 and 120.57(1). The final hearing initially was set for July 18 and

19, 2017, but pursuant to Respondent's motion, was continued and rescheduled for August 21 and 22, 2017. Thereafter, upon request of the ALJ and by agreement of the parties, the final hearing was continued to August 28 and 29, 2017.

The final hearing was held on August 28, 2017. Petitioner testified on her own behalf, and Petitioner's Exhibit 5[2/] was admitted into evidence without objection. Respondent presented the testimony of Jacer Collins, Armando Velez, and Reggie Tribble. Respondent's Exhibits 1 through 6, 8 through 11, 13, and 14[3/] were admitted without objection. Respondent's Exhibit 12 was admitted into evidence over objection.

The one-volume Transcript was filed with DOAH on September 25, 2017, and the parties were given until October 5, 2017, to file their proposed recommended orders. Respondent timely filed its Proposed Recommended Order on October 4, 2017. Petitioner filed her Proposed Recommended Order on October 6, 2017. Both proposed recommended orders were duly considered in preparing this Recommended Order.

FINDINGS OF FACT

I. The Parties

1. Petitioner, Ileene C. McDonald, is a female, and, thus, is a member of a class protected under the FCRA.

2. At the time of the alleged discriminatory conduct that gave rise to this proceeding, Petitioner was employed by Kelly

Services ("Kelly") as a temporary employee and was assigned to work at Respondent's facility located in Riviera Beach, Florida.

3. Respondent is a limited liability company registered to do business in Florida. It owns and operates a beverage bottling facility in Riviera Beach, Florida. It is owned by PepsiCo, Inc. ("PepsiCo").

4. Respondent is an "employer," as that term is defined in section 760.02(7).[4/]

II. Evidence Adduced at Hearing

5. As noted above, Petitioner was employed by Kelly as a temporary worker.

6. Pursuant to a national contract between Respondent and Kelly, Petitioner began working at Respondent's facility as a temporary worker in early to mid-May 2016.[5/] She was assigned to work in a warehouse, sorting and preparing cardboard sheets for use and reuse in Respondent's processes. Her work hours were from 7:00 a.m. to 4:00 p.m., Monday through Friday.

7. Petitioner credibly testified that as soon as she started working at Respondent's facility, she was constantly subjected to verbal and physical harassment of a sexual nature from one of Respondent's hourly-paid employees, Brandon Owens.

8. The credible evidence establishes that on an essentially daily basis, Owens made suggestive and overt comments of a sexual nature to Petitioner. These included remarks about her "nice

small frame" and, among other things, suggestions that they "spend time together" and engage in acts involving "whipped cream, strawberries, and chocolate sauce." Additionally, on one occasion, Owens grabbed Petitioner's arm and told her "you need a real man."

9. These actions by Owens made Petitioner uncomfortable, nervous, and frightened for her personal safety. Petitioner credibly testified that she repeatedly verbally rebuffed Owens' advances and that on the occasion when he grabbed her arm, she hit him and told him if he didn't leave her alone, she was going to hurt him.

10. Petitioner testified, credibly, that some of Respondent's workers observed Owens talking to Petitioner on numerous occasions. Petitioner identified these workers as "Eugene Johnson" and "Willie Tate." She testified, credibly, that she told Johnson and Tate about being harassed and bothered by Owens. She testified that they told her to contact "Reggie," and that she had tried to do so, but was unable to reach him. The evidence does not establish how many times Petitioner attempted to reach him.

11. Although Petitioner thought Johnson was a supervisor at Respondent's facility, the evidence establishes that neither Johnson nor Tate was in a supervisory or management position at Respondent's facility. As such, neither was under any

employment-imposed duty to report Owens' conduct to Respondent's management.

12. The evidence establishes that the "Reggie" whom Petitioner had attempted to contact was Reggie Tribble, a warehouse supervisor for Respondent's first shift at its Riviera Beach facility. Tribble was Petitioner's direct supervisor. However, the credible evidence establishes that Petitioner did not contact Tribble, and that he did not observe, was not informed of, and did not otherwise know about Owens' conduct toward Petitioner.

13. Petitioner testified that another employee, Robert Gary Walker, frequently saw Owens near her at work. She testified:

> He [Walker] noticed that he was constantly over by me. And he asked, 'is he bothering you,' and he was looking at me and he turned his head. I started shaking my head 'yes' and he left. And a little while after that, Gary came back and he said —— 'Gary tried to get me in trouble, but Reggie didn't do anything.' I don't know what was said after they went over that way, but that's what Brandon told me when he came back. I don't know if it was true or not, but that's what Brandon told me.[6/]

14. Petitioner testified that based on this discussion with Walker, she thought he would report Owens' behavior to the appropriate authority at Respondent's facility.

15. The evidence establishes that Walker was a supervisor on Petitioner's shift.[7/]

16. Petitioner also credibly testified that while she worked at Respondent's facility, other male workers who drove forklift trucks often would come around to where she was working to talk to her, and that some had asked for her telephone number and had asked her out on dates. She credibly testified that she consistently rebuffed their advances.

17. On or about the morning of June 17, 2016, as Petitioner arrived at work, Owens drove a semi-trailer truck in front of her, cutting her off as she approached the warehouse in which she worked. This badly frightened her.

18. Petitioner credibly testified that as a result of Owens' action in cutting her off by driving a truck in front of her, she was afraid for her personal safety, and that as result, she left Respondent's facility and did not return.

19. Petitioner's last day of work at Respondent's facility was June 17, 2016.

20. On June 20, 2016, Petitioner reported Owens' behavior to Christie Finnerty, her supervisor at Kelly. This was the first time Petitioner had reported Owens' conduct to Kelly. She also testified that she "may" have verbally reported to Finnerty at that time that a man on a forklift truck came over to talk to her while she was working at Respondent's facility.

21. Finnerty completed a Harassment Complainant Interview ("Harassment Form") memorializing Petitioner's statements

regarding the alleged harassment. Attached to the form were four handwritten pages prepared by Petitioner, describing Owens' conduct toward her. Petitioner signed the form and handwritten pages.

22. On cross-examination, Petitioner acknowledged that she did not report Owens' behavior or that of Respondent's other male employees who had talked to her, asked her out, or asked for her phone number, to Respondent's management.

23. The competent, credible evidence establishes that on one occasion, in response to a question from Walker, she confirmed that Owens was "bothering" her. However, there is no evidence showing that Petitioner specifically told Walker that Owens had made physical and verbal advances of a sexual nature toward her, and there is no evidence showing that Walker was otherwise aware of the sexual nature of Owens' conduct toward Petitioner.

24. Petitioner testified that the incident in which Owens drove a truck in front of her "rattled her nerves a little bit," affected her sleep and appetite, and bothered her "a lot," but that she can "get over it."[8/]

25. On June 21, 2016, Finnerty contacted Respondent's production supervisor, Norman Medina, by electronic mail ("e-mail") to inform Respondent of Petitioner's harassment complaint that was filed with Kelly on June 20, 2016. Attached

to the e-mail were the Harassment Form and a video depicting an individual identified as Brandon Owens.

26. Medina immediately notified Respondent's Riviera Beach plant director, Armando Velez, of Petitioner's harassment complaint. By e-mail sent on June 21, 2016, Velez notified Jacer Collins, Respondent's senior human resources manager for the south and southwest Florida markets, of Petitioner's complaint. Collins was at Respondent's Miami location when she was informed of Petitioner's complaint.

27. On June 22, 2016, Finnerty forwarded to Collins and Velez a copy of the video showing Brandon Owens talking to Petitioner. Also attached to the e-mail was a photograph that appeared to be a still shot of Owens taken from the video.

28. The video, taken by Petitioner and depicting her vantage point, shows Owens approaching Petitioner in the warehouse where she was working. Owens and Petitioner are the only individuals that appeared in the video. Owens followed Petitioner and stood in close proximity to her as the video was recorded. Parts of the conversation between Petitioner and Owens are unintelligible due to the background noise of the vacuum Petitioner was using. However, Petitioner can be heard telling Owens "I can't stand you," Owens asking why, and Petitioner responding "you know why" and admonishing Owens for grabbing her. Owens responded that he was just playing with Petitioner,

apologized, and said he would not come over to talk to her anymore. The evidence does not definitively establish the date on which the video was taken.

29. PepsiCo has adopted a global equal employment opportunity policy that applies to, and is enforced by, Respondent in the operation of its Riviera Beach facility. Among other things, this policy prohibits discrimination on the basis of sex.

30. Additionally, PepsiCo has adopted a global anti-harassment policy, also applicable to and enforced by Respondent, that prohibits any type of harassment or discrimination based on race, color, religion, sex, sexual orientation, gender identity, age, national origin, disability, veteran status or any other category protected by law. The policy states in pertinent part:

> Sexual Harassment
>
> According to PepsiCo policy, sexual harassment is any verbal, visual or physical conduct of a sexual nature that is unwanted and that a reasonable person, on account of his or her gender, would find offensive.
>
> * * *
>
> Sexual harassment includes unwelcome sexual advances; requests for sexual favors; and other verbal or physical contact of a sexual nature when:
>
> * * *
>
> Such conduct has the purpose or effect of unreasonably interfering with an individual's

work performance or creating an intimidating, hostile or offensive working environment.

Sexual harassment can occur in many different forms. It can be physical, verbal, visual or in a written form. Examples of sexual harassment include but are not limited to: unnecessary and unwelcome touching; unwelcome sexual flirtation; direct or subtle pressure for sexual activity; coercion to date or unwelcome demands for dates; unwelcome or offensive sexual jokes, innuendo, lewd language or obscenities; explicit or degrading remarks about another person or his/her appearance or body; e-mails, posters, graffiti, calendars or other sexually suggestive pictures or objects displayed in the work place; demands for sexual favors accompanied by implied or overt threats concerning pay or other aspects of employment; the taking of or refusal to take any personnel action based on an employee's submission to or refusal to submit to sexual overtures or behavior.

* * *

Reporting Procedure

If you are being subjected to conduct that you believe violates this policy, you should:

Step 1: Tell or notify the offending person that such conduct is not welcome and to stop.

Step 2: In addition to Step 1, immediately report the incident or your complaints to your supervisor. However, if you believe it would be inappropriate to discuss the matter with your supervisor or you are uncomfortable discussing the matter with your supervisor, report the matter to your Human Resources Representative.

You may also contact the PepsiCo Speak Up Line. In the U.S., call 1-866-729-4888 . . . . You may file a complaint via the

> Speak Up Webline by visiting https://speakup.eawebline.com[.]
>
> Step 3: If additional incidents occur, you should immediately report them to the above individuals.
>
> Any reported incident will be investigated by the Company. Complaints and actions taken to resolve complaints of harassment or discrimination will be handled as confidentially as possible. Retaliation against an employee who makes a claim of harassment or discrimination is prohibited.
>
> Violation of this policy, including retaliation against a person who brings a claim and/or who participates in an investigation pursuant to this policy, may result in discipline up to and including termination on the first offense. Further, any manager/supervisor who receives a complaint of harassment, discrimination or retaliation and fails to notify Human Resources will also be subject to disciplinary action, up to and including termination of employment.

31. As soon as Respondent was informed of Petitioner's complaint, it initiated an investigation of the matter. Specifically, on June 23, 2016, Collins interviewed employees, including Johnson and Owens, at the Riviera Beach facility. Owens was not scheduled to work on June 21 or 22, so June 23 was his first day available to be interviewed.

32. Owens denied having spoken to Petitioner and denied all of her allegations regarding his conduct toward her.

33. Respondent suspended Owens from his employment on June 23, 2016. Owens was escorted from Respondent's facility

that day and not allowed to return pending completion of the investigation into Petitioners' complaint.

34. Respondent's investigation confirmed that Owens had engaged in the conduct that Petitioner had alleged. Specifically, the video that Petitioner provided, as well Owens' inconsistent answers to questions Collins asked him based on the information provided by Petitioner in the Harassment Form, established that Owens had engaged in the sexually harassing conduct that Petitioner had alleged in the Harassment Form. This conduct violated Respondent's Global Anti-Harassment Policy.

35. On July 12, 2016, Respondent terminated Owens' employment.[9/]

36. As part of its investigation into Petitioner's complaint, Respondent also attempted to identify the forklift drivers, including a "Hispanic male" driver to which Petitioner had referred in the handwritten pages attached to the Harassment Form. However, due to the non-specific description provided in the Harassment Form, Respondent was unable to identify the forklift drivers, including the "Hispanic male" driver, who Petitioner claimed made unwelcome advances toward her.[10/]

37. It is undisputed that while she was employed at Respondent's Riviera Beach facility, Petitioner did not report to Respondent's management or to her supervisors that forklift drivers had engaged in unwelcome advances toward her.

Additionally, in the handwritten pages attached to the Harassment Form, Petitioner acknowledged that the "Hispanic male" forklift driver had approached her only once and that at the time, she "didn't think it was something to report."

38. The credible evidence establishes that once Respondent concluded its investigation, verified Petitioner's allegations regarding Owens' conduct, and terminated Owens, Respondent contacted Finnerty at Kelly Services to let her know that Petitioner was welcome to return to her temporary position at Respondent's facility. Petitioner declined to do so.

III. Findings of Ultimate Fact

39. As discussed in greater detail below, the credible, persuasive evidence establishes that while she was employed at Respondent's Riviera Beach facility, Petitioner suffered severe, pervasive harassment as a result of Owens' frequent verbal and physical advances of a sexual nature toward her.

40. However, the competent, persuasive evidence does not establish that Respondent received, during Petitioner's employment at Respondent's facility, either constructive or actual notice of the sexual nature of Owens' conduct toward Petitioner. The evidence shows that Petitioner indicated, by nodding her head in response to a question from Walker, that Owens was "bothering" her. However, there is no competent, credible evidence in the record showing that Petitioner

specifically informed Walker of the sexual nature of Owens' conduct toward her, or that Walker otherwise had knowledge of such conduct. Thus, at most, the evidence shows only that Walker was informed that Owens was "bothering" Petitioner. Further, there is no competent evidence establishing that any other supervisors or managers of Respondent's Riviera Beach facility were aware, or should have been aware, of the sexual nature of Owens' conduct toward Petitioner.

41. The evidence shows that Respondent only received notice of Owens' sexual conduct toward Petitioner when she complained to Kelly after she had left her employment with Respondent, and Kelly then forwarded that complaint to Respondent.

42. The credible, persuasive evidence further establishes that as soon as Respondent received notice of Owens' conduct, it immediately initiated an investigation and interviewed persons identified by Petitioner as witnesses, including Johnson and Owens.

43. As a result of Respondent's investigation, Owens was suspended from employment on the day he was interviewed, and was terminated from employment once Respondent completed its investigation——approximately 21 days after Respondent received notice of Owens' harassing behavior toward Petitioner.

44. Additionally, the evidence shows that Respondent diligently attempted to identify and investigate the forklift

drivers who were mentioned in the Harassment Form and accompanying pages, but due to the non-specific description provided therein, were unable to do so.[11/]

45. Finally, the credible, persuasive evidence establishes that once Owens was discharged, Respondent contacted Kelly to let them know that Owens was no longer employed at the Riviera Beach facility, and that Petitioner was welcome to return to her previous position. Notwithstanding that Owens no longer worked there, Petitioner refused to return.

CONCLUSIONS OF LAW

46. DOAH has jurisdiction over the parties to, and subject matter of, this proceeding. §§ 120.569, 120.57(1), Fla. Stat.

47. The FCRA is codified at sections 760.01 through 760.11, Florida Statutes.

48. Section 760.10(1)(a) makes it an unlawful employment practice to: "discharge or 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, pregnancy, national origin, age, handicap, or marital status."

49. As discussed above, Respondent is an "employer" as that term is defined in section 760.02(7).[12/]

50. In cases involving claims of unlawful employment discrimination, the burden of proof is on the complainant——here, Petitioner——to establish, by a preponderance, or "greater weight," of the evidence, the occurrence of the alleged unlawful discrimination. EEOC v. Joe's Stone Crabs, Inc., 296 F.3d 1265, 1273 (11th Cir. 2002); St. Louis v. Fla. Int'l Univ., 60 So. 3d 455, 458-59 (Fla. 3d DCA 2011).

51. The FCRA is modeled after Title VII of the Civil Rights Act of 1964, the principle federal anti-discrimination statute. Accordingly, case law interpreting Title VII is applicable to proceedings under the FCRA. Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17, 21 (Fla. 3d DCA 2009); Brand v. Fla. Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994)(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).

52. Discrimination can be established through direct or circumstantial evidence. U.S. Postal Serv. Bd. of Gov.'s v. Aikens, 460 U.S. 711, 714 (1983); Schoenfeld v. Babbitt, 168 F.3d 1257, 1266 (11th Cir. 1999). Direct evidence of discrimination is evidence that, if believed, establishes the existence of discriminatory intent behind an employment decision without resort to inference or presumption. Wilson v. B/E Aero., Inc.,

376 F.3d 1079, 1086 (11th Cir. 2004); Maynard v. Bd. of Regents, 342 F.3d 1281, 1289 (11th Cir. 2003).

Sexual Harassment

53. Neither Title VII nor the FCRA expressly mention sexual harassment. However, courts have recognized that the phrase "terms, conditions, or privileges of employment" evinces an intent to strike at the entire spectrum of disparate treatment of men and women in employment, which includes requiring people to work in a discriminatorily hostile or abusive environment. Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993).

54. Petitioner alleges that based on her gender, she was subjected to unwelcome sexual advances from male employees at Respondent's Riviera Beach facility. In particular, Petitioner alleges that she was subjected to sexual comments and harassing and physically intimidating conduct by Owens, a male employee at Respondent's facility.[13/]

55. Petitioner may seek to prove unlawful sexual harassment under two theories. Under the first theory, Petitioner must prove that the harassment culminated in a "tangible employment action" taken against her by superiors acting under color of their authority. In such situations, the injury is an employment action which could not have been inflicted without the "agency" relation. Alternatively, under a "hostile work environment" theory, Petitioner must prove that she suffered "severe or

pervasive conduct" which affected the terms and conditions of her employment. Under the hostile work environment theory, it is unnecessary to show a tangible employment action. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (U.S. 1986).

56. Here, Petitioner does not allege that Respondent took any tangible adverse employment action taken against her. Therefore, Petitioner is pursuing a hostile workplace environment claim in this proceeding.

Hostile Work Environment

57. "Hostile work environment" sexual harassment occurs when the conduct of an employer or an employer's agent, such as a co-worker, "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive environment." Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311, 1315 (11th Cir. 1989).

58. Here, Petitioner does not allege that the hostile work environment was created by sexual harassment from her supervisors, for which the employer might be vicariously liable. Rather, Petitioner alleges and has presented evidence showing that the harassment she suffered was perpetrated by co-workers—— specifically, by Owens, an employee of Respondent.

59. A party claiming a hostile work environment based on sexual harassment by co-workers must prove five elements. These

elements are: 1) the employee belongs to a protected group; 2) the employee has been subjected to unwelcome sexual harassment, such as sexual advances, or other conduct of a sexual nature; 3) the harassment was based on the sex of the employee; 4) the harassment was sufficiently severe or pervasive to alter the terms and conditions of Petitioner's employment and create a discriminatorily abusive working environment; and 5) there is a basis for holding the employer liable. Watson v. Blue Circle, Inc., 324 F.3d 1252, 1257 (11th Cir. 2003); Miller v. Kenworth, Inc., 277 F.3d 1269, 1275 (11th Cir. 2002); Breda v. Wolf Camera & Video, 222 F.3d 886 (11th Cir. 2000); Maldonado v. Publix Supermarkets, 939 So. 2d 293-94 (Fla. 4th DCA 2006); Speedway SuperAmerica, LLC v. Dupont, 933 So. 2d 75, 80 (Fla. 5th DCA 2006).

60. An employee may prevail on a hostile environment claim only if "the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Harris, 510 U.S. at 21. See Rojas v. Fla., 285 F.3d 1339, 1344 (11th Cir. 2002). In evaluating the workplace, the conduct that occurred must be considered as a whole under all of the circumstances. Reeves v. C.H. Robinson Worldwide, Inc., 525 F.3d 1139, 1146 (11th Cir. 2008)(courts should consider the severity of all circumstances

taken together); Olson v. Lowes's Home Ctrs., Inc., 130 Fed. Appx. 380 (11th Cir. 2005)(courts should examine conduct in context and determine severity and pervasiveness under the totality of the circumstances).

61. Turning to this case, Petitioner is a woman and, thus, belongs to a protected group. Additionally, the evidence clearly demonstrates that Petitioner was subjected to unwelcome, harassing physical and verbal advances of a sexual nature by Respondent's employee, Owens. Sexual behavior directed at women gives rise to the legal inference that the harassment is based on their sex. Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486, 1522 (M.D. Fla. 1991); see Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982). Accordingly, the first three elements of a "hostile work environment" are met.

62. The next question is whether the harassment was so severe or pervasive that it altered the interpersonal climate of the workplace, creating an objectively abusive and hostile atmosphere. Gupta v. Fla. Bd. of Regents, 212 F.3d 571, 582 (11th Cir. 2000).

63. To be actionable, a sexually objectionable environment must be both objectively and subjectively offensive. Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment is not actionable under the FCRA or Title VII. Likewise, if the victim does not subjectively

perceive the environment to be hostile or abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no violation. Harris, 510 U.S. at 21-22; Bryant v. Jones, 575 F.3d 1281, 1297 (11th. Cir. 2009).

64. Case law establishes a non-exclusive list of factors to be considered when determining whether discrimination in a work environment is "severe or pervasive." These include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or is a mere offensive utterance; and whether or not the discriminatory conduct interferes with the employee's ability to do his or her job. Allen v. Tyson Foods, Inc., 121 F.3d 642, 647 (11th Cir. 1997).

65. The "severity or pervasiveness" factor contains both a subjective and an objective component. To be actionable as "severe or pervasive," the harassment must result in both an environment that a reasonable person would find hostile or abusive and an environment that the victim herself subjectively perceives to be abusive. Miller, 277 F.3d at 1276.

66. Here, Petitioner proved that she was frequently subjected to unwelcome verbal and physical sexual advances by Owens during the term of her employment at Respondent's Riviera Beach facility. According to her credible, unrebutted testimony, Owens very frequently came over to where she worked to talk to her; often suggested that he and Petitioner engage in sex acts,

including acts involving whipped cream, strawberries, and chocolate; and physically accosted her. Petitioner credibly testified that she constantly rebuffed Owens' advances, but that he continued to harass her. Finally, one day Owens drove a truck in front of Petitioner, cutting her off as she walked to the warehouse where she worked. This badly frightened her, and out of fear for her personal safety, she left Respondent's facility that day and did not return.

67. This evidence establishes that Petitioner suffered frequent and severe verbal and physical harassment of a sexual nature by Owens. Petitioner herself perceived Owens' conduct as hostile and abusive. Additionally, a reasonable person similarly would find such conduct sufficiently harassing to create an abusive and hostile workplace.

68. Further, the evidence establishes that Owens' conduct—— particularly in grabbing Petitioner's arm and driving a semi trailer-truck in front of her——badly frightened her, thus interfering with her ability to perform her job, to the point that she felt compelled to leave her position at Respondent's facility in order to protect her personal safety.

69. It is likewise concluded that Owens' conduct was so severely intimidating that it would interfere with a reasonable employee's ability to perform her job.

70. In sum, Petitioner presented evidence that, considered in context and as a whole, shows that Owens' conduct was sufficiently severe and pervasive that Petitioner's work environment was permeated with discriminatory intimidation and insult that altered the conditions of her employment and created an abusive working environment. Accordingly, it is determined that the fourth element of a "hostile work environment" is met.

71. An employer may be held liable for sexual harassment by a co-worker of the victim when the employer knew or should have known of the co-worker's harassing behavior and failed to take prompt and appropriate remedial action. Watson, 324 F.3d at 1259; Breda, 222 F.3d at 889.

72. A complainant may show that the employer had knowledge of the harassment either by demonstrating that the harassment was so pervasive that constructive knowledge may be inferred, or by proving that Respondent had actual knowledge of the harassing conduct. Huddleston v. Roger Dean Chevrolet, Inc., 845 F.2d 900, 904 (11th Cir. 1988).

73. Here, the evidence does not support an inference that Respondent was on constructive notice of Owens' harassment of Petitioner. However, Petitioner argues that Respondent had actual notice of Owens' harassment through its employee, Walker, who was a supervisor on Petitioner's shift.

74. An employer is deemed to have actual notice of alleged harassment when the employer has a policy designating how reports of such allegations are to be made, and the employee follows that procedure. "With such a policy, the employer itself answered the question of when it would be deemed to have notice of the harassment sufficient to obligate it or its agents to take prompt and appropriate remedial measures." Breda, 222 F.3d at 889 (11th Cir. 2000); Coates v. Sundor Brands, Inc., 164 F.3d 1361 (11th Cir. 1999).

75. As discussed above, Respondent has adopted and distributed to its employees a Global Anti-Harassment Policy which includes a Reporting Procedure. The Reporting Procedure requires an employee claiming to be the victim of harassment to tell the offending person that such conduct is unwelcome and to stop, and to immediately report the conduct to his or her supervisor.

76. The credible evidence establishes that Petitioner repeatedly told Owens to stop his harassing conduct and to leave her alone. However, the evidence shows that Petitioner did not report the specific sexual nature of Owens' conduct toward her to a supervisor or manager at Respondent's Riviera Beach facility.

77. In Jones v. Allstate Insurance Company, 2017 U.S. App. LEXIS 17207 (11th Cir. 2017), the court concluded that vague, non-specific descriptions made by a complainant that a co-worker

made "unwanted remarks" and used "profanity" were insufficient to place the employer on notice that the co-worker had engaged in harassing conduct of a sexual nature toward the complainant for purposes of showing the existence of a hostile work environment.

78. Similarly, in Nurse "BE" v. Columbia Palms West Hospital, L.P., 490 F.3d 1302, 1309-1310 (11th Cir. 2007), the court concluded that a complainant's report that a co-worker made multiple late-night "harassing" phone calls asking her out for drinks or dinner was not sufficiently specific regarding the sexual nature of the conduct to place the employer on notice for purposes of showing the existence of a hostile work environment.

79. Here, although the credible, competent evidence shows that Petitioner indicated that Owens was "bothering" her, there is no evidence showing that Petitioner specifically informed Walker of the sexual nature of Owens' conduct toward her, or that Walker otherwise had knowledge of Owens' sexual conduct toward Petitioner. As noted above, the evidence shows only that Petitioner informed Walker that Owens was "bothering" her. The evidence does not show that Walker——and, thus, Respondent——knew or should have known about the sexual nature of Owens' conduct toward Petitioner. See Miller, 277 F.3d at 1278 (actual notice to employer is established by proof that supervisors or managers knew of the harassment).

80. Furthermore, the evidence establishes that even if Respondent had notice that Owens had engaged in sexually harassing conduct directed at Petitioner, Respondent took remedial action as soon as it was informed of the nature of Owens' conduct through Petitioner's complaint filed with Kelly.

81. To absolve an employer of liability, the remedial action must be taken promptly and must be appropriate. Kilgore v. Thompson & Brock Mgmt., 93 F.3d 752, 754 (11th Cir. 1996). When an employer undertakes remedial action within a short period of time after receiving notice of the harassing conduct, the action is considered prompt. Id. See Watson, 324 F.3d at 1261. Additionally, the remedial action is considered appropriate when it is reasonably calculated to prevent the conduct from recurring. Kilgore, 93 F.3d at 754.

82. Here, once Respondent received Petitioner's complaint, it immediately investigated Owens' conduct and, as a result of that investigation, terminated his employment. Respondent's remedial action was both prompt and specifically calculated to prevent Owens' sexually harassing conduct from recurring.

83. Because Petitioner did not show a basis for holding Respondent liable for Owens' sexually harassing conduct, it is concluded that Petitioner failed to prove sexual harassment on the basis of a hostile work environment, in violation of section 760.10.

Constructive Discharge

84. In her Petition for Relief and in the evidence presented at the final hearing, Petitioner claims that due to Owens' behavior——particularly, his actions in grabbing her by the arm and driving a truck in front of her——she feared for her personal safety to the extent that she felt compelled to resign from her temporary position at Respondent's Riviera Beach facility. This contention can be interpreted as a constructive discharge claim.[14/]

85. To prevail on a constructive discharge claim, Petitioner must show that "the abusive working environment became so intolerable that her resignation qualified as a fitting response." Pa. State Police v. Suders, 542 U.S. 129, 133 (2004).

86. Petitioner's subjective perceptions do not control; rather, the test is an objective one. Doe v. DeKalb Cnty. Sch. Dist., 145 F.3d 1441, 1450 (11th Cir. 1998). "To successfully claim constructive discharge, a plaintiff must demonstrate that working conditions were 'so intolerable that a reasonable person in [his or her] position would have been compelled to resign.'" Hipp v. Liberty Nat'l Life Ins. Co., 252 F.3d 1208, 1231 (11th Cir. Fla. 2001)(citing Poole v. Country Club, 129 F.3d 551, 553 (11th Cir. 1997); Thomas v. Dillard Dep't Stores, Inc., 116 F.3d 1432, 1433-34 (11th Cir. 1997)); Wardwell v. Sch. Bd. of Palm Beach Cnty., 786 F.2d 1554, 1557 (11th Cir. 1986).

87. To prove constructive discharge, the sexual harassment must be even more severe or pervasive than the minimum required to prove a hostile work environment claim. Landgraf v. USI Film Prods., 968 F.2d 427, 430 (5th Cir. 1992), aff'd, 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994). See also Steele v. Offshore Shipbuilding, Inc., 867 F.2d at 1316.

88. Here, Petitioner contends that she was effectively forced to resign from her temporary position at Respondent's facility because she feared for her safety.

89. As discussed above, Petitioner did prove that Owens' conduct, considered as a whole and in context, was sufficiently severe and pervasive that Petitioner's work environment was permeated with discriminatory intimidation and insult which altered the conditions of her employment and created an abusive working environment. Additionally, it is likely that under those circumstances, a reasonable employee would fear for his or her personal safety, to the point that he or she would have felt compelled to resign.

90. However, constructive discharge typically is not found where the employer does not have adequate knowledge of the situation or sufficient time to remedy it. Kilgore, 93 F.3d at 754 (11th Cir. 1996)(constructive discharge not found where plaintiffs did not allow enough time for employer to correct situation); Jones v. USA Petroleum Corp., 20 F. Supp. 2d 1379,

1383 (S.D. Ga. 1998)(employer not given sufficient time to remedy hostile work environment when not provided notice).

91. As discussed above, here Respondent did not know of Owens' conduct toward Petitioner until after she had resigned her position. Thus, Respondent was not afforded sufficient time to correct the situation before Petitioner resigned.

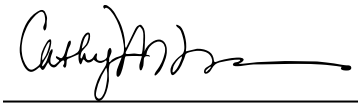
92. Further, once Respondent was informed of Owens' conduct, Respondent immediately investigated the matter and took prompt and appropriate action to terminate Owens' employment—— thereby correcting the situation that led to Petitioner's resignation.

93. Additionally, the evidence establishes that once Owens was terminated, Respondent contacted Kelly and offered Petitioner the opportunity to return to her position, but that Petitioner refused. Thus, under any circumstances, it is concluded that Petitioner was not constructively discharged from her position at Respondent's Riviera Beach facility. See Overstreet v. Calvert Cnty. Health Dep't, 187 F. Supp. 2d 567, 574 (D. Md. 2002) (constructive discharge claim not supported when cured by reinstatement to previous employment position).

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 the Petition for Relief.

DONE AND ENTERED this 17th day of November, 2017, in Tallahassee, Leon County, Florida.



CATHY M. SELLERS
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 17th day of November, 2017.

ENDNOTES

[1/] Unless otherwise stated, all statutory references are to the 2016 version of Florida Statutes, which was in effect at the time of the alleged discriminatory actions.

[2/] Petitioner's Exhibit 5 consists of a photograph of a frame of a video-recording. Respondent's Exhibit 14 consists of the entire video-recording.

[3/] See note 2, supra. Respondent was granted permission to late-file Respondent's Exhibit 14, which presented a complete version of the video-recording from which Petitioner's Exhibit 5 was derived.

[4/] "Employer" is defined 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.

[5/] There is conflicting evidence as to whether Petitioner started working at Respondent's facility on May 8 or on May 18, 2016. In any event, this apparent conflict is neither determinative of, nor relevant to, the outcome of this proceeding.

[6/] Petitioner's testimony that Owens told her that Walker had told Tribble about his (Owens') conduct is hearsay and, therefore, is not competent substantial evidence that can constitute the sole basis for findings that Walker informed Tribble that Owens was harassing Petitioner. As discussed herein, there is no other evidence showing that Tribble knew that Owens had harassed Petitioner.

[7/] Walker did not testify at the final hearing in this proceeding because he was on medical leave and therefore unavailable to testify. Respondent's Exhibit 12, an affidavit of Robert Gary Walker executed on August 14, 2017, was admitted into evidence. In the affidavit, Walker stated: "I neither saw nor reported to anyone anything involving Ileene McDonald and/or Brandon Owens. I am completely unaware of any complaint Ileene McDonald had or may have had while employed at this location." This affidavit is hearsay and is the sole evidence for the point that Walker was "completely unaware of any complaint" that Petitioner had about Owens. Accordingly, it has not been afforded any weight in this proceeding. As discussed herein, the evidence establishes that Walker was aware that Owens was "bothering" Petitioner, but was not specifically informed of the sexual nature of Owens' conduct.

[8/] In the Harassment Form, Petitioner indicated that she was not experiencing any personal issues outside of the workplace.

[9/] Owens had not worked at Respondent's Riviera Beach facility since June 23, 2016, the date on which he had been suspended pending the outcome of the investigation into Petitioner's complaint.

[10/] See note 13, infra. The evidence establishes that Respondent employed many male forklift drivers, including those of Hispanic ethnicity, at its Riviera Beach facility during the period in which Petitioner was employed at the facility, so that Respondent was unable to specifically identify and inquire about the conduct of any specific individuals that may have had interactions with Petitioner.

[11/] Further, on one of the handwritten pages attached to the Harassment Form, the "Hispanic" forklift driver's interaction with Petitioner was described as "just the one time" and "she didn't think it was something to report." This one-time interaction that Petitioner did not, at the time, perceive as harassment cannot, as a matter of law, form the basis of a sexual harassment hostile work environment claim. See Harris v. Forklift Sys., Inc., 510 U.S. 17, 20-21 (1993); Bryant v. Jones, 575 F.3d 1281, 1297 (11th Cir. 2009)(conduct must result in an environment that both the victim subjectively perceives as, and a reasonable person would find, hostile or abusive).

[12/] The evidence establishes that Respondent shared or co-determined the essential terms and conditions of Petitioner's employment at the Riviera Beach facility such that Respondent was a joint employer of Petitioner for purposes of this discrimination proceeding. See Virgo v. Riviera Beach Assocs., 30 F.3d 1350, 1360 (11th Cir. 1994).

[13/] The evidence shows that Respondent attempted to identify and investigate the forklift drivers, but were unable to do so, due to the non-specific description provided by Petitioner in the Harassment Form and accompanying pages. Due to the dearth of information provided in the Harassment Form and accompanying pages, Respondent cannot be deemed to have been provided notice sufficient to enable it to take prompt and appropriate action to address the conduct, so it cannot be held liable for these employees' actions under a hostile work environment theory. See Nurse "BE" v. Columbia Palms West Hosp., 490 F.3d 1302, 1309-11 (11th Cir. 2007)(vague references to negative treatment and annoyance are insufficient, as a matter of law, to place employers on notice of sexual harassment). Accordingly, this Recommended Order does not specifically address allegations in the Petition for Relief regarding any "forklift drivers," but instead considers only whether Owens' conduct gives rise to liability on the part of Respondent for unlawful discrimination on the basis of sex, in violation of section 760.10.

[14/] The "Determination: No Reasonable Cause" issued by the FCHR on April 26, 2017, addressed both sexual harassment and constructive discharge, concluding that there was no reasonable basis for determining that either had occurred.

COPIES FURNISHED:

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

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

Ileene Mcdonald
1172 The Pointe Drive
West Palm Beach, Florida 33409
(eServed)

Raymond Alan Cowley, Esquire
Dykema Cox Smith
1400 North McColl Road, Suite 204
McAllen, Texas 78501
(eServed)

Bill Howard, Esquire
Bottling Group, LLC
MD 3A-442
7701 Legacy Drive
Plano, Texas 75024
(eServed)

Bonnie Mayfield, Member
Dykema Gossett PLLC
39577 Woodward Avenue, Suite 300
Bloomfield Hills, Michigan 48304
(eServed)

Rea K. Ferandez, Esquire
Dykema Cox Smith
112 East Pecan Street, Suite 1800
San Antonio, Texas 78205
(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.