

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

KIM-RENEE ROBERTS,

Petitioner,

vs.

Case No. 17-5779

THE KEYES COMPANY,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this matter before Robert L. Kilbride, the assigned Administrative Law Judge of the Division of Administrative Hearings, on February 8, 2018, via video teleconference with sites in Tallahassee and West Palm Beach, Florida.

APPEARANCES

For Petitioner: Jeremy E. Slusher, Esquire
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West Palm Beach, Florida 33401

For Respondent: Bruce D. Friedlander, Esquire
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STATEMENT OF THE ISSUE

Whether Respondent, The Keyes Company, discriminated against Petitioner, Kim-Renée Roberts ("Roberts"), during her employment

with Respondent, in violation of the Florida Civil Rights Act, section 760.10, Florida Statutes (2017), based on her gender.

PRELIMINARY STATEMENT

On March 10, 2017, Roberts filed an Employment Complaint of Discrimination ("Complaint") with the Florida Commission on Human Relations ("FCHR"), alleging that she had been discriminated against based on her gender during her employment with Respondent.

FCHR investigated the Complaint. On August 22, 2017, Michelle Wilson, executive director of FCHR, signed a Determination finding that no reasonable cause existed to believe that an unlawful discriminatory employment practice had occurred.

Taking exception to that Determination, Roberts filed a Petition for Relief ("Petition") on September 26, 2017, which was forwarded to the Division of Administrative Hearings for a formal hearing. The case was assigned to the undersigned, Robert L. Kilbride.

The undersigned conducted a final evidentiary hearing on February 8, 2018, in Tallahassee, Florida. All parties and their counsel appeared by video teleconference from West Palm Beach, Florida.

Roberts' counsel invoked the rule of sequestration at the outset of the final hearing. In response, Respondent objected to Kevin Spina ("Spina") being sequestered. The undersigned

overruled the objection and ordered that all witnesses be sequestered, other than Roberts and Barbara Kozlow ("Kozlow"), the Respondent's corporate representative.

At the hearing, Roberts' counsel made an ore tenus motion in limine to exclude Respondent from arguing that Roberts' job performance was subpar based on the deposition testimony of its designated corporate representative, Kozlow. The undersigned denied the motion.

Roberts testified and also called Alisa Farnsworth ("Farnsworth"), a former administrative assistant with Respondent, and Lisa Ricci ("Ricci"), marketing director of "Interiors by Steven G," the design team for the VistaBlue Project. Petitioner's Exhibits 1 through 29 were entered into evidence by stipulation of the parties. Respondent objected to Petitioner's Exhibit 30, Farnsworth's Affidavit. Petitioner Exhibit 30 was not admitted into evidence.

The deposition transcripts of Kozlow, Spina, and Roberts (Petitioner's Exhibits 31 through 33, respectively) were admitted into evidence.

Respondent presented the testimony of Kozlow, Spina, Kay Grunow ("Grunow"), a current administrative assistant with Respondent; Timothy Harris ("Harris"), former real estate sales associate with Respondent; and Randall Tuller ("Tuller"), an

executive who works for the project developer, Third Palm Capital.

Respondent's Exhibits 1 through 12 and 14 through 20 were entered into evidence by stipulation of the parties. Roberts objected to Respondent's Exhibits 13, 21, and 22. Those exhibits were not admitted into evidence.

The undersigned directed the parties to submit proposed recommended orders within ten days of receipt of the transcript of the final hearing. The deadline was extended by the undersigned based on an unopposed motion filed by Roberts. The one-volume Transcript of the final hearing was filed on February 28, 2018.

Proposed recommended orders were timely filed by the parties, reviewed, and given due consideration by the undersigned in the preparation of this Recommended Order.

References to the Florida Statutes are to the 2016 version, unless otherwise indicated.

FINDINGS OF FACT

The undersigned makes the following findings of facts based on the testimony presented at the hearing, the exhibits, and the record:

1. Roberts is a female and has been a Florida-licensed real estate agent since 1988.

2. Respondent is a real estate brokerage company. Mike Pappas ("Pappas") is Respondent's President and CEO.

3. Kozlow has worked for Respondent for over 28 years and currently serves as its regional sales and branch manager at the branch located in Palm Beach Gardens, Florida.

4. Third Palm Capital is the developer of a real estate project called the VistaBlue Project, a condominium located on the Atlantic Ocean on Singer Island in Palm Beach County, Florida.

5. Keith Spina was the architect for the VistaBlue Project.

6. Spina, Keith's brother, who is a Florida-licensed real estate agent, was contacted to gauge his interest in securing the listing for the VistaBlue Project on behalf of Respondent.

7. After Respondent's representatives and Spina participated in meetings with Third Palm Capital, an exclusive listing agreement was reached on September 25, 2015, under which Respondent, through the management of Spina, would serve as the listing agent for the VistaBlue Project.

8. Spina hired Roberts and Harris, another Florida-licensed real estate agent, to work as on-site sales people for the VistaBlue Project. As on-site sales people, it was their primary job to sell condominium units and interact with potential clients who visited VistaBlue's sales gallery.

9. During the relevant time period, Harris was the only male working under Spina with respect to the VistaBlue Project.

10. Spina also hired Farnsworth and Grunow as his administrative assistants for the Project. Despite her title, Farnsworth was also a Florida-licensed real estate agent.

11. Ultimately, Spina's sales team was comprised of Roberts, Harris, Farnsworth, and Grunow. Spina later replaced Harris with Debbie Walker ("Walker") after Harris voluntarily left in February 2016.

12. This sales team operated under Spina's supervision and he was their boss for all intents and purposes.

13. Spina considered himself the "chief" of the sales team he assembled, with the understanding that Kozlow and Pappas were the two higher executives in the chain of command at Respondent.

14. Since Spina was considered the sales team leader, Kozlow deferred to Spina to make daily decisions regarding his team. She generally did not involve herself in his decisions.

15. As the team's boss, Spina had the discretion to hire and fire people on his team.^{1/}

16. Spina developed the team's work schedule and work expectations. There was, however, frequent input from the other team members before he created the work schedule.

17. Most of Spina's sales team began working on the VistaBlue Project in October 2015. Roberts, who was hired as an

independent contractor on October 1, 2015, started work on the sales team in November 2015.

18. Roberts was employed by Respondent as a real estate sales associate pursuant to an Independent Contractor Agreement ("Agreement") that contained details of her employment arrangement and responsibilities. Pet. Ex. 3. The Agreement was signed by her and dated October 1, 2015.^{2/}

19. The Agreement and the meaning of its terms are not in dispute. The document speaks for itself. However, it contained several pertinent provisions paraphrased below:

a. Roberts was not subject to the control of Respondent in the conduct of her business as a real estate sales associate. Pet. Ex. 3, ¶ 2.^{3/}

b. As an independent contractor, she would not be treated as an "employee" with respect to her services for federal taxes or for any other purposes. Pet. Ex. 3, ¶ 1.

c. She was solely responsible for all expenses associated with the conduct of her business. Pet. Ex. 3, ¶ 6d.

d. She had no authority to bind Respondent to any promise or representation, unless expressly authorized to do so by Respondent in writing. Pet. Ex. 3, ¶ 8.

e. She agreed to sell, lease, rent real estate listed with Respondent, and solicit additional listings on behalf of Respondent. Pet. Ex. 3, ¶ 6a.

f. The Agreement could be terminated by either party on one day's notice. Pet. Ex. 3, ¶ 13.

g. She agreed to pay any applicable membership or participation fees imposed by the local Board of Realtors. Pet. Ex. 3, ¶ 6c.

h. She agreed to maintain her own automobile liability insurance at her cost. Pet. Ex. 3, ¶ 6g.

20. As far as on-site responsibilities were concerned, the VistaBlue listing agent, Spina, was responsible for the real estate services required for the successful operation of his sales team and the promotion and sale of the condominium units by Respondent.

21. Regarding compensation, Spina agreed to share some of his commission from the VistaBlue listing with Respondent sales associates, Roberts and Harris. The developer agreed to advance a monthly draw against the commission for the sales associates that worked at the VistaBlue Sales Gallery.

22. On October 1, 2015, prior to the opening of the "on-site" VistaBlue Sales Gallery, Spina's sales team worked full time, five days a week, at Respondent's Legacy Place branch office preparing the ground work to launch the VistaBlue Project.

23. Roberts started working on the VistaBlue team in the beginning of November 2015 and, like the others, first reported to Respondent's Legacy Place branch office.

24. Spina expected all the team members, including Roberts, to attend the Legacy Place branch office from 9:00 a.m. to 5:00 p.m., five days a week during the start-up period.

25. However, at the end of her first day at Respondent's Legacy Place branch office, Roberts informed Spina that she would not be coming back to Respondent's Legacy Place branch office because it was not what she was paid to do. Consequently, for some period, Roberts worked from home and received emails there.^{4/}

26. Roberts's refusal to work at Respondent's Legacy Place branch office during the start-up period did not provide Spina the cohesive "team support" he needed during the early stages of the VistaBlue Project.

27. The fact that Roberts did not work at Respondent's Legacy Place branch office on any consistent basis during the start-up period caused hard feelings, dissension, and frustration with Spina and the others who were working at the office.

28. Eventually, in January 2016, the VistaBlue Sales Gallery officially opened on the condominium/project site.^{5/}

29. Under the listing agreement with the developer, there were staffing requirements for the VistaBlue Sales Gallery. The listing agreement required Spina to ensure that two associates and one administrative assistant were on hand every day of the week: 10:00 a.m. to 5:00 p.m., Monday through Saturday; and 12:00 p.m. to 5:00 p.m. on Sunday.

30. Roberts' late arrivals and sporadic attendance continued at the new VistaBlue Sales Gallery once it opened in January 2016. During the course of her employment, Spina discussed with Roberts the issues he had with her. Spina and Roberts disagreed, apparently, on many things, including, operation, sales and marketing decisions, and strategies.^{6/}

31. Spina and Roberts disagreed, for instance, that she should go out and do sales calls before the sales gallery was open, they disagreed on her calling other agents to seek leads and market the property, they disagreed on when she should arrive at the office each day, they disagreed about marketing materials she did not like, and they disagreed about the use of a scale model kept at the site.

32. Harris, the other male sales associate working at the VistaBlue Sales Gallery, testified that Roberts did not arrive at work on time very often.^{7/}

33. According to Harris, Roberts would frequently arrive at the VistaBlue Sales Gallery an hour late. This frustrated Spina when he came to the sales gallery and she was not there.

34. Grunow, a female who also worked in the sales office, testified that when Roberts was late, she heard Spina telling her that he expected her to be there on time and he expected her to be working while they were in the sales gallery. However, she never heard Spina yell at Roberts. Spina just talked loudly.

35. Roberts acknowledged that her late arrivals caused dissatisfaction and frustration by other members of the sales team.

36. It was apparent to the undersigned that Roberts' recurrent late arrivals at the VistaBlue Sales Gallery caused dissension and some frustration by other sales team members.

37. Roberts could not recall if there were any formal rules that she had to follow while working at the sales gallery. According to Roberts, there were no practices or guidelines for how work was done at the sales gallery.

38. Roberts' gender discrimination claim against Respondent is based upon the way Spina treated her, as opposed to other male employees in the office.

39. In general, Roberts claimed that in meetings or in front of other team members, Spina yelled at her, berated her, and belittled her under a variety of different scenarios and circumstances.^{8/}

40. She claimed that Harris was able to keep his draws, but she was not; that Harris could come and go as he pleased, but she could not; that her job was threatened when she spoke up; and if she did not do what Spina told her, her job was in jeopardy. She claims that when she brought up suggestions, she was belittled and berated and told she did not know what she was talking about.^{9/}

41. More specifically, Roberts claim of gender discrimination revolved around several events over the ten months she worked on the VistaBlue listing, as outlined below.

a. She claims that when she brought up the subject of an architectural model for the project at a meeting at the Respondent's Legacy Place branch office, Spina yelled at her and said, "We're not going to do that." "We don't need to have something like that in there."^{10/}

b. She claims that when she asked about having bottled water at the sales gallery with the logo on it, Spina said "we're not going to have that, we're going to have this, this, and this."

c. She claimed that when Spina gave her marketing materials to review, she marked up the materials with her comments. Spina incorporated her ideas on a new sheet, and sent it off to the developer, taking credit for the changes she proposed.

d. She claimed that Harris, a male sales associate, was able to keep his draws after he departed, but she was not.

e. Roberts testified about a meeting at the VistaBlue Sales Gallery with Harris, Spina, and Farnsworth, where she claims that Spina told her and Harris that they needed to make 2,000 phone calls a week. When she questioned this, Spina yelled at her and threatened her job.

42. When encouraged by her attorney to provide any other details or examples of Spina's belittling or discriminatory behavior, she said she was "finished" and provided no more examples.

43. On cross-examination, when Roberts was asked what Spina said when he yelled at her at the VistaBlue Sales Gallery, the only thing she could remember is that he wanted the sales associates to make 2,000 phone calls; she did not recall any other details.

44. On cross-examination, when asked about the meeting at Respondent's Legacy Place branch office where the architectural model was brought up, Roberts said that Harris, Grunow, Farnsworth, and Spina were present. When asked what Spina said to her, Roberts said, "He did not know what that [the scale model] was, what I was referring to, why we needed it, and said we weren't going to have it." She could not recall anything else Spina said to her other than, "it was not going to be done."

45. Regarding hiring and firing for the VistaBlue Project, if Spina was unhappy with someone, Spina needed to speak to the developer, discuss it with him, and ask him what he could do or not do to change it.

46. When asked if he had the authority to get rid of people if they were doing something he did not want them to do, Spina said, "If the developer allowed me to, yes."

47. Roberts' claim that Spina yelled at her and belittled her on multiple occasions, however, was contradicted by Harris, Grunow, Farnsworth, Ricci, and Spina himself.

48. Harris testified that when he attended sales meetings with Roberts (the frequent situs of Spina's alleged yelling or belittling behavior), the meetings were very open, conversations flowed freely, ideas were shared, and everyone at the meetings had the opportunity to express themselves.^{11/}

49. Significantly, when asked directly about whether Spina yelled at Roberts during these meetings, Harris responded emphatically that he had "absolutely" never heard Spina yelling at Roberts, or anyone else, for any reason.

50. Grunow testified that although Roberts and Spina would let each other know if either one was not happy with how things were handled at the sales gallery, she never heard Spina yell.

51. Farnsworth testified that she overheard several disputes discussed between Spina and Roberts regarding the operations of the sales gallery, the layout of the offices, the project scale model, the project renderings, the sales brochures, and the business cards. When these "differences of opinion," as she put it, were discussed, Spina would tell Roberts his decision and what he expected her to do.^{12/}

52. It is also significant that when Farnsworth was pressed for details during on-site questioning by the developer's agent,

Tuller, she was not able or willing to characterize Spina's behavior towards Roberts as verbally "abusive." Nor did she ever suggest to Tuller that Roberts needed protection or suggest that Tuller should do something directly to intervene in the ongoing dispute.

53. Spina testified that in his discussions with Roberts, she had the opportunity to express her opinion about the sales gallery operations, but since he was the listing agent, the team leader, and the one hired to run the sales gallery for the developer, his decisions had to be honored and ultimately followed. They discussed many things, and they disagreed on many things, but he never yelled at her.

54. Ricci, the marketing/advertising director of Interiors by Steven G, the interior decorator for the VistaBlue Project, was called by Roberts. She testified about her attendance and observations of the interactions between Spina and Roberts at several design meetings related to the condominium units. These meetings were held at the VistaBlue Sales Gallery.

55. Ricci testified that at the meetings, Roberts was very out-spoken about her style and design preferences. Based on Roberts' input and very active involvement at the meetings, Ricci mistakenly concluded that Roberts was the head of sales or the sales director.

56. Although Spina did not seem to be interested in what she had to say and may have cut her off, Ricci testified that Spina did not raise his voice at Roberts, and she did not witness any belittling behavior by Spina towards Roberts.

57. When questioned directly by the undersigned at the hearing, Ricci testified that Roberts never mentioned to her that Spina's conduct or words were in the nature of sexual harassment.

58. Likewise, Ricci never noticed anything of a sexual nature in any comments by Spina to Roberts. She never observed Spina yelling at Roberts.

59. Tuller, the real estate developer's executive assigned to the VistaBlue Project, was responsible for all aspects of the VistaBlue Project. He testified that based upon his personal observations of Spina's interactions with the salesforce at the sales gallery, he found Spina to be very personable and professional.

60. Tuller testified about a meeting with Roberts at a Marriott Hotel on August 4, 2016. During that meeting, Roberts complained that there were harsh and dysfunctional working conditions at the sales gallery. She complained that Spina was loud, raised his voice, and was short with the staff. Tuller responded to Roberts that, that was "news to him," and contrary to what he had personally observed.

61. When Tuller asked Roberts bluntly if Spina's conduct included any sexual or other forms of harassment, Roberts quickly remarked, "No, no, not that, not that. It's just hard to be there."^{13/}

62. On August 4, 2016, shortly after her hotel meeting with Tuller, Roberts attempted to call Kozlow but was unable to reach her.^{14/}

63. Roberts sent Kozlow a text message that same day and wrote "I'm not sure if I should be speaking with you or with Mike There are some very serious issues at VistaBlue that I need to discuss and get some direction." They agreed to talk the following day.

64. Later that same day, Kozlow sent an email back to Roberts, and copied Spina and Pappas, president of Respondent. She told Roberts that she had the utmost confidence in Spina and his management of VistaBlue and that she was sure that Spina could resolve any issues.

65. On August 5, 2016, Roberts replied to Kozlow's email and wrote, "The reason I reached out to you is that the issue is with Kevin. I will make another attempt to resolve it with him. However, if there is no resolution I will reach out to you again. At a meeting I had with Kevin two weeks ago, he suggested that I speak to Randal [Tuller] but I wanted to handle this internally first."

66. On August 5, 2016, Kozlow was copied on Spina's email to Roberts wherein he attempted to arrange a meeting with her that day. Later Kozlow wrote to Roberts and commented "Hopefully you and Kevin can resolve any issues. He is the lead and we will not be making any changes that he doesn't agree with."

67. At the time of this text and email exchange between Roberts and Kozlow, Spina had worked for Respondent in Kozlow's branch office for more than seven years.

68. Kozlow found Spina to be very friendly and respectful of others. She had not received any other complaints about Spina's conduct.^{15/}

69. Kozlow testified that while she was exchanging the text messages with Roberts from Wisconsin, she did not know what the issues were at VistaBlue and that Roberts never told her what the nature of the issues were with Spina. Further, despite the opportunity and exchange of communications, Roberts never told her that Spina was discriminating against her on the basis of her gender or sex.

70. Kozlow also testified about Respondent's policy against gender discrimination. She was aware of the policy when she received Roberts August 4 and 5, 2016, text messages and emails.

71. The policy is published in Respondent's Policy Manual. The policy was in effect when she first started working for Respondent in 1990. Pet. Ex. 8. If she became aware that any

associate or employee of Respondent was discriminating on the basis of gender or another protected class, she had a duty to report it to Pappas, the president and owner of the company.

72. Once reported, there would be an investigation, and if the allegations were found to be true, there would be corrective action.

73. After the meeting between Tuller and Roberts at the Marriott Hotel, Tuller called Spina and arranged a meeting with him to discuss Roberts' complaints.

74. At the meeting, Tuller testified that Spina admitted he was frustrated with Roberts because she was hard to work with, she would not listen to him, she would not do what he asked her to do, she did not show up on time, and she was not professional. Tuller asked Spina to try to find a solution that would work for everyone.

75. Spina testified that, subsequently, he talked again with Tuller and told Tuller that he needed to terminate Roberts from the sales gallery.

76. When Tuller told Spina that there had been too many changes with marketing and that the owner of the project would not support such a change, Spina informed Tuller the only other option was for Spina to leave. Spina offered to pay for a manager to take his place.

77. Tuller was amenable to this option, and subsequently, Spina and Tuller interviewed several managers to take his place. However, in the end, Tuller did not agree on a replacement for Spina.

78. When Tuller asked Spina to stay, Spina told Tuller that he could not and that he was leaving the VistaBlue Project.

79. Spina testified that the reason he consulted with Tuller about Roberts was because he felt that he did not have the authority to terminate somebody without consulting with the developer.

80. As a result of Spina's decision to withdraw from the VistaBlue listing, the listing was terminated, and the draws against commission that the developer paid were reconciled against the commission that was due to Keyes on termination. At the termination of the listing agreement, the draws that were paid exceeded the commission that was due to Respondent by \$6,000.

81. Roberts admits that as a result of the termination of the VistaBlue listing, her position at the VistaBlue Sales Gallery came to an end.

82. Spina did not tell her she was fired or terminated. She simply was not able to continue her position because of the loss of the listing by Spina and Keyes. She interviewed with the new broker for VistaBlue but was not hired.

83. Although Roberts complained that she did not receive all of her draws, Roberts admitted that when she had previously wanted to take a listing for a different condominium unit outside of the VistaBlue Project, she had agreed to forego her draw.

84. Spina further explained to her the reason she did not receive the August 2016 draw was that the draws that she had been paid exceeded the commission that was due to her upon the termination of the listing agreement. Although she was not happy, she agreed with that because that had been her agreement.

CONCLUSIONS OF LAW

85. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding pursuant to sections 120.569, 120.57(1), and 760.11(7), Florida Statutes (2017).

86. Roberts is suing Respondent under the Florida Civil Rights Act of 1992 ("FCRA"), section 760.01 through 760.11.

87. The gravamen of Roberts' charge is gender discrimination and the existence of a hostile work environment caused by the conduct and statements of Spina. Her claim is founded on section 760.10(1)(a), which provides:

(1) It is an unlawful employment practice for an employer:

(a) To discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions,

or privileges of employment, because of such individual's race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status.

88. The FCRA is modeled after Title VII of the Federal Civil Rights Act. When a Florida statute is adopted or modeled after an act of Congress, the Florida Legislature adopts the construction placed on that statute by the federal courts, so long as that construction is not inharmonious with the spirit and policy of Florida's general legislation on the subject. Green v. Burger King Corp., 728 So. 2d 369, 370-71 (Fla. 3d DCA 1999); and Russell v. KSL Hotel Corp., 887 So. 2d 372 (Fla. 3d DCA 2004).

89. Further, Federal case law interpretations of Title VII are applied to cases arising under FCRA. Fla. State Univ. v. Sondel, 685 So. 2d 923 (Fla. 1st DCA 1996) ("The Florida Civil Rights Act of 1992 . . . was patterned after Title VII of the Civil Rights Acts of 1964 and . . . the Age Discrimination in Employment Act. Federal case law interpreting Title VII and the ADEA is applicable to cases arising under the Florida Act.").^{16/} See also Fla. Dep't of Cmty. Aff. v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991).

I. Employee vs. Independent Contractor - Applicable Law and Conclusions

90. The protections afforded by Title VII extend to the traditional employment relationship, and not to independent contractors. Smith-Johnson v. Thrivent Fin. for Lutherans,

2005 U.S. Dist. LEXIS 36715 (M.D. Fla. 2005); and Zink v. Allstate Ins. Co., 2003 U.S. Dist. LEXIS 27996 (S.D. Fla. 2003). See, e.g., Cobb v. Sun Papers, Inc., 673 F.2d 337 (11th Cir. 1982).

91. Said differently, for a successful claim under Title VII, a claimant must be an "employee" within the meaning of the statute to be entitled to its protections. If a claimant is working as an independent contractor, there is no viable claim under Title VII. Murray v. Principal Fin. Grp. Inc., 613 F.3d 943 (9th Cir. 2010).

92. In Murray, the Court noted that "We, along with virtually every other circuit to consider similar issues, have held that insurance agents are independent contractors and not employees for the purpose of various federal employment statutes, including . . . Title VII." Id. at 944-45.

93. Under the line of cases mentioned above, it is reasonable to conclude that independent contractors are not covered under the protections or definitions outlined in FCRA.

94. Even more specific to this particular case is a line of state and federal cases recognizing that real estate agents are considered to be independent contractors in a variety of statutory applications. Edwards v. Caulfield, 560 So. 2d 364 (Fla. 1st DCA 1990). See also Fla. Indus. Comm'n v. Schoenberg, 117 So. 2d 538 (Fla. 3d DCA 1960) (Workers' Compensation Law);

In re Moriarty, 27 B.R. 73 (M.D. Fla. 1983); and In re Hanick, 164 B.R. 165 (M.D. Fla. 1994) (Bankruptcy exemptions).

95. The degree of control over the worker is the principal test used by most courts to assess whether the worker is an independent contractor or employee. See, e.g., Baya's Bar & Grill v. Alcorn, 40 So. 2d 468 (Fla. 1949). Of course, the terms of the Agreement used by Roberts and Respondent carries considerable weight as well.

96. Quoting here from Edwards, nothing in Roberts' case suggests that she was "subject to any more control than that which exists in the typical real estate agent/broker relationship, a relationship which is recognized by statutory and case law as involving independent contractor status." Edwards, 560 So. 2d at 374.

97. The expectation that a worker be present at a work location during a particular time of the day does not, by itself, transform an independent contractor into an employee. Edwards, 560 So. 2d at 372.^{17/}

98. On balance, the greater weight of the evidence in this case reveals (1) that the identifying marks of an independent contractor were present and (2) an independent contractor relationship was maintained between Roberts and Respondent.

99. Under the more compelling and persuasive facts, the undersigned concludes that Roberts was an independent contractor

for Respondent and, as such, was not covered by the protections afforded under the FCRA.

100. For this reason alone, Roberts' claim is legally and factually unavailing, and should be dismissed.

II. Hostile Workplace Environment Claim - Applicable Law and Conclusions

101. In order to establish that a hostile work environment existed, violating section 760.10(1)(a), it was Roberts' obligation to prove by a preponderance of the evidence that:

- (1) She belongs to a protected group;
- (2) She was subjected to unwelcome harassment;
- (3) The harassment was based on her gender;
- (4) The harassment was severe enough to affect a term, condition, or privilege of employment and to create a discriminatorily abusive working environment; and
- (5) The employer knew or should have known of the harassment and failed to intervene.

Russell, 887 So. 2d at 372, 377-378.

102. In determining whether harassment is sufficiently severe and pervasive, the courts consider both a subjective and objective component. Maldonado v. Publix Supermarkets, 939 So. 2d 290, 294 (Fla. 4th DCA 2006). See also Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1276 (11th Cir. 2002). "[T]o be actionable, this behavior must result in both an environment 'that a reasonable person would find hostile or abusive' and an

environment that the victim 'subjectively perceives . . . to be abusive.'" Id. (quoting Harris v. Forklift Sys. Inc., 510 U.S. 17, 21-22, 114 S. Ct. 367, 370-71 (1993)). See also Grogan v. Heritage NH, LLC, 126 So. 3d 262 (Fla. 3d DCA 2010).

103. In analyzing the objective prong of severity, courts also study the following: (1) the frequency of the conduct; (2) the severity of the conduct; (3) whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and (4) whether the conduct unreasonably interferes with the employee's job performance. Id. at 264.

104. Behavior by a supervisor that causes "mere discomfort" in the workplace, therefore, does not alter the conditions of employment so as to create a hostile work environment. McElroy v. Am. Family Ins., 630 Fed. Appx. 847 (10th Cir. 2015).

105. Conversely, harassment need not be of a sexual nature to constitute a hostile work environment. "Rather, any harassment or disparate treatment of an employee that would not occur but for the gender of the employee may, if there is a pattern or pervasiveness in the conduct, constitute 'hostile work environment' at [sic] sexual harassment." See Russell, 887 So. 2d at 372, 377-378.

106. In this case, while the undersign concludes that the conduct/statements by Spina were more than isolated, they were not severe, physically threatening or humiliating, nor

did they unreasonably interfere with Roberts' job performance.
See Russell, 887 So. 2d at 372, 377-378.

107. The frequency of Spina's conduct, as it were, is also far outweighed by the absence of the other factors, resulting in a firm conclusion by the undersigned that Spina's comments to Roberts were neither severe and pervasive, nor harassing, as those terms are defined.

108. More succinctly put, it was clear to the members of the sales team who testified, and the undersigned, that Spina and Roberts had an ongoing personality conflict, and simply could not agree on many aspects of the business. This, however, does not constitute actionable discrimination due to her gender.

109. Furthermore, Petitioner has failed to prove by the preponderance of the evidence that Spina's behavior was objectively harassing in nature.

110. The conduct, statements, and actions of Spina were frequently driven by disagreements between Spina and Roberts regarding how the office should be run. Those disputes and discussions, while heated or intense in some instances, simply did not rise to the level of being objectively severe and pervasive enough to create a hostile work environment.

111. A reasonably objective person may have concluded that Spina was rude, abrasive, and uncivil at times. However, this level of conduct by a supervisor does not constitute actionable

harassment. Speedway SuperAmerica, LLC v. Dupont, 933 So. 2d 75 (Fla. 5th DCA 2006) ("First, and perhaps most important, federal courts require that the conduct/harassment be more than merely insulting or rude and boorish behavior. These statutes were not intended to be "general civility codes.").^{18/}

112. The U.S. Supreme Court has addressed conduct which is not actionable and does not support a hostile work environment claim involving a supervisor. In Farragher v. City of Boca Raton, 524 U.S. 775, 788 (1998), the Court commented:

"These standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a "general civility code. Properly applied, they will filter out complaints attacking the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing. We have made it clear that conduct must be extreme to amount to a change in the terms and conditions of employment and the Courts of Appeals have heeded this view."

III. Disparate Treatment Claim - Applicable Law and Conclusions

113. To establish a prima facie case for disparate treatment in a gender discrimination case, the plaintiff must show that: (1) she is a member of a protected class; (2) she was subjected to an adverse employment action; (3) her employer treated similarly situated employees outside of her protected class more favorably than she was treated; and (4) she was

qualified to do the job. EEOC v. Joe's Stone Crab, Inc., 220 F.3d 1263, 1286 (11th Cir. 2000).

114. If the plaintiff satisfies these elements, then the defendant must show a legitimate, non-discriminatory reason for its employment action. Id.

115. If it does so, then the plaintiff must prove that the reason provided by the defendant is a pretext for unlawful discrimination. Burke-Fowler v. Orange Cnty., Fla., 447 F.3d 1319 (11th Cir. 2006).

116. Direct evidence is evidence that, if believed, would prove the existence of discriminatory intent, without resorting to inferences or presumptions, and must in some way relate to the adverse action against the complainant. Greene v. Sch. Bd. of Broward Cnty., 2014 U.S. Dist. LEXIS 111664, at *13-14 (S.D. Fla. 2014).

117. Generally, only the most blatant or direct remarks, whose intent could mean nothing other than to discriminate, constitute direct evidence of discrimination. Id. at 26.

118. In this case, there was no persuasive or direct evidence of gender discrimination offered by Roberts. More specifically, there was no evidence in the form of blatant or direct verbal statements, emails, memos, or documents offered to show that Respondent intended to discriminate against Roberts because of her gender.

119. When direct evidence of discrimination does not exist, the employee may attempt to establish a prima facie case by way of circumstantial evidence through the burden-shifting legal framework articulated by the United States Supreme Court in McDonnell Douglas Corporation v. Green, 411 U.S. 792, 802-805 (1973).

120. However, failure to establish a prima facie case of discrimination by either direct or circumstantial evidence ends the inquiry. See Kidd v. Mando Am. Corp., 731 F.3d 1196, 1202 (11th Cir. 2013).

121. In this case, Roberts failed to prove a prima facie case of discrimination because she failed to prove two of the elements: (1) that she was subject to any adverse employment action because of her gender,^{19/} and (2) that Respondent treated similarly situated employees outside of her protected class more favorably than she was treated.

122. In conclusion, Roberts worked in the capacity of an independent contractor, and was not protected by the provisions of the FCRA. Additionally, Roberts did not prove by a preponderance of the evidence that a hostile work environment existed or that there was disparate treatment against her due to her gender or sex.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations dismiss the Petition for Relief and find in Respondent's favor.

DONE AND ENTERED this 6th day of April, 2018, in Tallahassee, Leon County, Florida.



ROBERT L. KILBRIDE
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Filed with the Clerk of the
Division of Administrative Hearings
this 6th day of April, 2018.

ENDNOTES

- ^{1/} However, the evidence showed that Spina sought input from the developer in some instances.
- ^{2/} Spina had an identical Independent Contractor Agreement with Respondent dated January 23, 2009. Resp. Ex. 1.
- ^{3/} The Agreement did not outline or set any specific hours or days she was contractually required to be in the office or at her desk.
- ^{4/} Her first day at work was the only day Roberts worked at the Legacy Place branch office.

5/ Roberts had been working out of the VistaBlue Sales Gallery beginning in approximately mid-December 2015.

6/ While Roberts was licensed and had considerable experience in the real estate field, Spina was the boss and ultimately responsible for the project's success. As a result, his decisions regarding operational and sales and marketing decisions necessarily prevailed.

7/ Harris is no longer employed by Respondent, or Spina's sales team.

8/ The exact frequency or number of times this occurred was not clear.

9/ Ultimately, the credible and more persuasive weight of the evidence did not support her perception of these events or claims.

10/ As this case aptly demonstrates, "yelling" can be a relative term. For instance, some people consider it to be "yelling" when people speak loudly or raise their voices. Petitioner called it yelling. Spina called it speaking in a loud voice. Regardless, no details were provided regarding the volume, pitch, intensity, tone, or whether any aggressive facial expressions or body language accompanied the yelling. Regardless, the undersigned is unable to draw any helpful conclusions about whether Spina's "yelling" was in the nature of harassment. There simply was not a sufficient description to draw a conclusion or ascribe a discriminatory animus, one way or the other.

11/ Harris impressed the undersigned as truthful, unbiased, and straightforward.

12/ She did not mention during her testimony that Spina yelled at her or Roberts, but characterized his manner of talking to them as "not appropriate." No other details were provided or solicited from Farnsworth.

13/ The undersigned found Tuller to be straightforward as a witness, unbiased, and credible.

14/ Kozlow was vacationing in a remote area of Wisconsin and responded to her call by text message and wrote that she would return her call the following day.

15/ There are more than 100 sales associates and administrative assistants in Kozlow's office.

16/ The interplay between Federal Title VII law and Florida's FCRA prompted the undersigned to ask the parties to brief several legal issues. In particular, what bearing Roberts' Agreement had on her claims, as well as the substantive law applicable to an alleged hostile work environment created by a supervisor. The undersigned is appreciative that both counsel competently briefed these legal issues and included them in their proposed recommended orders.

17/ In addition to the clear and unambiguous terms of the Agreement, Roberts herself followed a course of conduct and attendance timetable which was more akin to an independent contractor schedule, than an employee. For example, she insisted on coming in when she wanted, worked from home on frequent occasions, and conducted her marketing and sales strategies as she felt best. While the undersigned finds no fault in these practices, it supports a finding that Roberts understood that she was an independent contractor and not a traditional employee of Respondent. Roberts conducted her actions and controlled her work day independently as she saw fit.

18/ Spina even admitted to Roberts and Farnsworth that his wife and others called him an "asshole." Nevertheless, this unflattering description of an individual does not set the gage by which workplace discrimination is measured.

19/ Neither Respondent nor Spina fired or terminated Roberts. Instead, Spina relinquished the listing resulting in Roberts reapplying with the new broker. She was not re-hired.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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