STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FRANCES G. DANELLI,

Petitioner,

vs. Case No. 17-6311

FRITO-LAY, INC.,

Respondent.
_____/

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing by video teleconference on March 14 and 15, 2018, at sites in Tallahassee and Lauderdale Lakes, Florida.

APPEARANCES

For Petitioner: Donald R. McCoy, Esquire
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For Respondent: Bonnie Mayfield, Esquire
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STATEMENT OF THE ISSUES

The issues in this case are whether, in violation of the Florida Civil Rights Act, Respondent terminated Petitioner on the basis of her sex or age, or in retaliation for engaging in

protected activity; and whether Respondent subjected Petitioner to a hostile work environment based on her sex or age.

PRELIMINARY STATEMENT

On April 21, 2017, Petitioner Frances G. Danelli filed a Complaint with the Florida Commission on Human Relations ("FCHR"), alleging claims of sex discrimination, age discrimination, retaliation, and harassment. The FCHR investigated Ms. Danelli's claims, and, on October 12, 2017, issued a Determination stating that no reasonable cause existed to believe that an unlawful practice had occurred. Thereafter, Ms. Danelli filed a Petition for Relief, which the FCHR transmitted to the Division of Administrative Hearings ("DOAH") on November 17, 2017.

Initially, this case was set for final hearing on January 19, 2018. At the parties' joint request, the undersigned continued the final hearing to March 14 and 15, 2018. The hearing took place on those days, with both parties present.

Ms. Danelli testified and called five additional witnesses: Sara Oblaczynski, Cesar Caban, Carla Seda, Stanley Gamble, and Carlos Canizares. Petitioner's Exhibits 1 through 7, 9, 19, 20, 22, 34, 36, 46 through 52, and 78 were received in evidence, and Petitioner's Exhibit 67 was received as a proffer. Respondent Frito-Lay, Inc., did not call any witnesses during its case-in-

chief. Respondent's Exhibits 1 through 10, 12 through 14, 17 through 25, 27, 28, 30, and 31 were admitted.

At the close of the final hearing, the parties were given 20 days from the date of the filing of the hearing transcript to file their proposed recommended orders. The transcript was filed on April 24, 2018, and, accordingly, the post-hearing submissions were due by May 14, 2018. Frito-Lay, Inc., filed its Proposed Recommended Order on May 14, 2018, and a First Amended Proposed Order on May 15, 2018. Ms. Danelli untimely filed her Proposed Findings, Conclusions, and Recommended Order on May 15, 2018, and exceeded the page limit. On May 15, 2018, the parties filed a Joint Motion to Withdraw Proposed Recommended Orders and to Allow Late Filing of Amended Versions. On May 16, 2018, Frito-Lay, Inc., filed its May 16, 2018 Proposed Recommended Order, and Ms. Danelli filed her revised Proposed Findings, Conclusions, and Recommended Order. The amended post-hearing submittals have been considered in the preparation of this Recommended Order.

Unless otherwise indicated, citations to the official statute law of the state of Florida refer to Florida Statutes 2018.

FINDINGS OF FACT

1. Respondent Frito-Lay, Inc. ("Frito-Lay"), makes and sells snack foods, including many familiar brands of chips.

Petitioner Frances G. Danelli ("Danelli") is a former employee of Frito-Lay.

2. Frito-Lay initially hired Danelli in or around 1998 as a packer for its West Valley, Utah, plant. When Danelli's husband was transferred to Florida, she took a job for Frito-Lay in Pompano Beach, Florida, and later moved to the company's West Palm Beach Distribution Center as a route sales representative ("RSR"). Danelli worked in Florida as a Frito-Lay RSR for more than 15 years, and her routes eventually included such large stores as Publix, Walmart, Winn-Dixie, and Target.[1/]

3. RSRs sell and deliver Frito-Lay products to retail stores, and these stores, in turn, sell the products to consumers. RSRs are responsible, as well, for presenting the company's products to shoppers in the best way possible to increase sales. So, RSRs not only sell and deliver products to stores, but they also unload the products, stock the shelves, set up displays, and remove unsold items whose sell-by dates have expired. RSRs are paid an hourly wage plus commissions.

4. RSRs are required to compete for sales against other companies' vendors, who (like Frito-Lay's personnel) are trying to place as many of their products as possible onto the shelves of the snack food aisle. Shelf space is essential for growing sales, and competition for product placement can be fierce.

5. There is no dispute that Danelli's performance as an RSR was fine, perhaps even exemplary. Frito-Lay considered her to be a good employee.

6. Danelli went to work early each morning, usually arriving at the warehouse by 4:00 a.m. so that she could get to her first store by 5:00 a.m., which would give her a head start on other vendors. When Danelli got to the warehouse, she would clock in on her handheld computer, which she also used to track the goods she delivered to each store. Upon returning to the warehouse, she had paperwork to complete and print from the handheld computer.

7. In 2013, Frito-Lay started requiring drivers of delivery trucks over a certain size, including RSRs such as Danelli, to comply with U.S. Department of Transportation ("DOT") regulations. As relevant, these regulations require an RSR to take at least a ten-hour break before driving a commercial vehicle, and they prohibit an RSR from driving a commercial vehicle after 14 consecutive hours on duty.

8. Frito-Lay programmed its employees' handheld computers so that an employee subject to the DOT regulations would receive a conspicuous warning if he or she attempted to clock in to work less than ten hours after last going off duty. As Danelli testified at hearing, if the computer told her to wait, she

would go to the warehouse, pick up some product, fix her truck, and then sign in when the handheld said she could go.

9. Evidently, however, to get the warning, an employee needed to log on as a "regulated" employee; if, by mistake, a "regulated" employee logged on as "non-regulated," she would not get the warning.

10. Danelli found it difficult to comply with the DOT regulations, which led to Frito-Lay's imposing discipline against her in accordance with the company's Corrective Action Process set forth in its Sales National RSR Handbook, which governed Petitioner's employment.

11. The handbook prescribes a process of progressive discipline that begins with "coaching," which is a form of pre-discipline. As the name suggests, a "coaching" is, essentially, a nondisciplinary intervention whose purpose is to correct an issue before the employee's conduct warrants stronger measures.

12. If coaching is ineffective, the Corrective Action Process calls for increasingly severe steps of discipline. The steps of discipline consist of a Step 1 Written Reminder, a Step 2 Written Warning, a Step 3 Final Written Warning, and a Step 4 Termination. The particular discipline to be imposed depends upon the severity of the infraction and the step of discipline, if any, the employee happens to be on when the infraction is committed.

13. Steps of discipline remain "active" for six to nine months, depending on the step. If the employee does not commit any further disciplinary infractions during the active period, the step "falls off." If the employee commits another disciplinary infraction within the "active" period, however, he or she moves to the next disciplinary step in the Corrective Action Process.

14. On June 5, 2014, after having previously been coached to maintain compliance with the DOT regulations, Danelli received a Step 1 Written Reminder for four violations of the 10-hour rule. She did not appeal this discipline.

15. On July 25, 2014, Danelli received a Step 2 Written Warning for a new violation of the 10-hour rule. Once again, Danelli did not appeal the discipline.

16. On October 7, 2014, Danelli was given another coaching, during which she was informed that (i) an investigation into her DOT hours was in process, and (ii) the company was concerned that she might be getting assistance on her route from her husband in violation of the RSR Performance Standards.

17. On January 27, 2015, Danelli received a Step 3 Final Written Warning for violating the 14-hour rule. She did not appeal this discipline.

18. Under the Corrective Action Process, a Step 3 Final Written Warning remains "active" for nine months and is the final step prior to a Step 4 Termination. On May 2, 2015, Danelli committed another DOT violation. Because she was already on a Step 3 Final Written Warning, she was suspended pending further investigation.

19. Danelli maintains that this violation, and others, resulted from her making a simple mistake with the handheld computer, namely failing to log on as a "regulated" employee, which cost her the electronic warning she otherwise would have received. She points out, too, that in this instance, the violation was minor, merely clocking in ten minutes early. These arguments are not wholly without merit, and if Frito-Lay had fired Danelli for a single, ten-minute violation of the DOT regulations, the undersigned would question the company's motivation. But that is not what happened. Danelli did not just violate the ten-hour rule once or twice, but many times, after multiple warnings, and in the face of increasingly serious disciplinary steps.

20. Further, Frito-Lay did not terminate Danelli's employment over this latest violation of the ten-hour rule, even though it would have been justified in doing so within the parameters of the Corrective Action Process. Instead, the company placed Danelli on a Last Chance Agreement.

21. Last Chance Agreements are not specifically provided for in the Corrective Action Process but are used, at the company's discretion, as a safety valve to avoid the occasional unfortunate termination that might result from strict adherence to rigid rules. In this regard, the agreement given to Danelli, dated May 15, 2015, stated as follows:

> We strongly considered [terminating your employment]. However, due to the unique facts and circumstances involved here, as well as your 15 years of service with the Company, the Company is willing to issue this Last Chance Warning. This step is over and above our normal progressive disciplinary process, and is being issued on a one-time, non-precedent setting basis. . . . [A]ny subsequent violations by you may result in discipline up to and including immediate termination. More specifically, any future violations [of the DOT regulations] will result in your immediate termination.

As Danelli put it, the Last Change Agreement was a "sign of grace" from Frito-Lay. By its terms, it was intended to be "active and in effect for a period of 12 months."

22. The undersigned pauses here to let the Last Chance Agreement sink in, because the fact that Frito-Lay did not fire Danelli in May 2015 when——for objective, easy-to-prove reasons, after a by-the-book application of progressive discipline——it clearly could have, is compelling evidence that the company was not harboring discriminatory animus against Danelli. After all, if Frito-Lay had wanted Danelli gone because of her age or her

gender, why in the world would the company not have jumped at this golden opportunity, which Danelli had given it, to fire her with practically no exposure to liability for unlawful discrimination? The irony is that by showing mercy, Frito-Lay set in motion the chain of events that led to this proceeding.

23. In or around November of 2015, Danelli underwent surgery, which required her to take some time off of work. For several years before this leave, Danelli's route had consisted of a Super Walmart and two Publix stores. When she returned, the Super Walmart had been assigned to another RSR, and to make up for its loss, Danelli's supervisor, Stanley Gamble, put a third Publix grocery on Danelli's route, i.e., Publix #1049 located in Tequesta, Florida.

24. Danelli was acquainted with one of the managers at the Tequesta Publix, a Mr. Morgan. On her first day back, Danelli and Mr. Gamble went to that store, where Mr. Morgan told Mr. Gamble that he was "glad Frances is here." Mr. Morgan had complained to Mr. Gamble about the previous RSR, who left the store "all messed up," according to Mr. Gamble. Danelli also met Sarah Oblaczynski, the store's "backdoor receiver," which is the Publix employee who checks in merchandise.

25. On her new route, Danelli usually went to the Tequesta store first, early in the morning. She soon ran into a vendor named Tony who worked for Snyder's of Hanover ("Snyder's"), a

snack food company that competes with Frito-Lay. From the start, Tony was nasty to Danelli and aggressive, telling her that "there is no space" for two vendors. Tony was possessive about shelf space within the store, as well as the parking space close to the store's loading dock. Danelli thought, because of Tony's behavior, that he might be using drugs.

26. On Tuesday, April 6, 2016, Petitioner had an argument with Tony over the shelf space that the store manager previously had awarded to her for the display of Frito-Lay products. Tony asserted that he had been promised the same space and said to Danelli, "You're going to take that stuff out of the shelf." Danelli told him, "No, Morgan said that's still my space." At this, Tony began cursing and pushed Danelli's cart into her, yelling, "That fucking Morgan!" Danelli later spoke to Mr. Morgan, who assured Danelli that the shelf space in question was hers and said he would leave a note to that effect for Ms. Oblaczynski.

27. There is a dispute as to when Danelli reported the forgoing incident to Frito-Lay. She claims that, before the end of the day on April 6, she told Mr. Gamble, her supervisor, all about the matter, in detail, and requested that someone be assigned to accompany her on her route the next day because Tony planned on taking her shelf space. According to Danelli, Mr. Gamble just laughed and said he did not have anybody to help

her. Mr. Gamble testified, to the contrary, that Danelli had neither reported the April 6, 2016, incident to him nor asked for any assistance. (Danelli admits that she did not report the incident to Mr. Canizares, sales zone director, or to Human Resources ("HR")).

28. Without written documentation regarding this alleged discussion, it is hard to say what, if anything, Danelli reported on April 6, 2016. It is likely that Danelli did complain to Mr. Gamble about Tony on some occasion(s), and might well have done so on April 6. What is unlikely, however, is that Danelli notified Mr. Gamble that she felt she was being *sexually harassed* by Tony. Tony's boorish and bullying behavior, to the extent directed at Danelli, seems to have been directed to her qua competitor, not as a woman. At the very least, the incident is ambiguous in this regard, and one could reasonably conclude, upon hearing about it, that Tony was simply a jerk who resorted to juvenile antics in attempting to gain the upper hand against a rival vendor. The undersigned finds that if Danelli did speak to Mr. Gamble about Tony on April 6, he—not unreasonably—did not view the incident as one involving sexual harassment.

29. As far as Mr. Gamble's declining to provide Danelli with an escort, assuming she requested one, his response is reasonable if (as found) Mr. Gamble was not clearly on notice

that Danelli believed she was being sexually harassed. Danelli, after all, was by this time an experienced and successful RSR who undoubtedly had encountered other difficult vendors during her career. Indeed, as things stood on April 6, a person could reasonably conclude that Danelli in fact had the situation under control, inasmuch as Mr. Morgan had clearly taken Danelli's side and intervened on her behalf. What could a Frito-Lay "bodyguard" reasonably be expected to accomplish, which would justify the risk of escalating the tension between Tony and Danelli into a hostile confrontation?

30. During the evening of April 6, 2016, Danelli talked to her husband about the problem at Publix #1049, and they decided that he would accompany her to the store the next morning before reporting to his own work, to assist if Tony caused a scene.

31. On April 7, 2016, Danelli's husband drove to Publix #1049 in his own vehicle. Although no longer an employee of the company, Danelli's husband entered the store wearing a Frito-Lay hat, and he stayed in the snack aisle while Danelli went to the back to bring the order in.

32. Ms. Oblaczynski, the receiver, presented Tony with a note from Mr. Morgan stating that Danelli's products and sales items were assigned to aisle one. In response, Tony started swearing about Mr. Morgan and the denial of shelf space, made a hand gesture indicative of a man pleasing himself, and told

Ms. Oblaczynski that "they can take a fly[ing] F'n leap." Tony had made this particular hand gesture about Mr. Morgan on a number of previous occasions, in front of both men and women.

33. Mr. Danelli left to go to work once Danelli's product was placed, and she left to go to the next store on her route.

34. When Danelli returned to the warehouse, she went to Mr. Gamble's office and told him about the April 7, 2016, incident. According to Danelli, Mr. Gamble laughed in response. Danelli asked Mr. Gamble if the company would conduct an investigation, and he said yes. She recalls that every day thereafter, she asked Mr. Gamble if he had heard anything because she thought "we [Frito-Lay] were investigating" and that HR was on top of it.

35. Danelli admits, however, that she "intentionally" did not tell Mr. Gamble that her husband had accompanied her to Publix #1049 to assist her in the store that morning. She did not report this detail because she knew it was "bad." In conflict with Danelli's account, Mr. Gamble testified that Danelli did not report that Tony made a sexual gesture in front of her or used coarse or profane language in her presence on April 7, 2016.

36. The undersigned finds that Mr. Gamble most likely did not laugh at Danelli or otherwise treat her dismissively upon hearing her report of the incident. If Mr. Gamble had believed

the matter were so trivial or amusing, he would not likely have agreed to investigate. The undersigned finds, further, that however Danelli described the incident, she did not make it clear to Mr. Gamble that she perceived Tony's behavior as a form of sexual harassment. Danelli did not make a formal written complaint to that effect at the time, and the situation at Publix #1049 was, at the very least, ambiguous. More likely than not, Mr. Gamble viewed the troublesome vendor from Snyder's as an unwelcome business problem to be dealt with, not as a perpetrator of unlawful, gender-based discrimination.

37. To elaborate, putting Tony's "sexual gesture" to one side momentarily, the rest of his conduct, even the cursing, while certainly objectionable, is not suggestive of sexual harassment; it is just bad behavior. Tony's temper tantrums and outbursts no doubt upset Danelli and others, but that does not turn them into gender discrimination. Further, Danelli seems to have handled the situation well until she resorted to self-help on April 7, 2016. The responsible Publix employees were already aware of the problem, and in due course, they complained to Snyder's, which unsurprisingly removed Tony from that store. Meantime, had Danelli felt physically threatened or afraid as a result of Tony's more aggressive antics, she (or Publix) could have called the police; this, indeed, would have been a safer and more reasonable alternative to bringing along her husband or

another civilian for protection, which as mentioned above posed the risk of provoking a fight, given Tony's volatility.

38. Ultimately, it is Tony's "sexual gesture" that provides a colorable basis for Danelli's sexual harassment complaint. But even this gives little grounds for a claim of discrimination, without more context than is present here. To be sure, the "jerk off gesture" or "air jerk" is obscene, and one would not expect to see it in polite company or in the workplace. Yet, although it clearly mimics a sexual practice, the air jerk is generally not understood as being a literal reference to masturbation. That is, the gesture is not typically used to convey a present intention to engage in masturbation or as an invitation to perform the act on the gesturer. Rather, the jerk off gesture usually signifies annoyance, disgust, disinterest, or disbelief. As with its cousin, the "finger" (or bird) gesture, the sexual connotations of the air jerk are (usually) subliminal.

39. Here, there is no allegation or evidence that Tony's jerk off gesture was undertaken in pursuit of sexual gratification or was intended or perceived as a sexual advance on Danelli (or someone else)——or even as being overtly sexual in nature. (Obviously, if the evidence showed that, under the circumstances, Tony was, e.g., inviting Danelli to participate in sexual activity, this would be a different case. The

undersigned is not suggesting, just to be clear, that the air jerk gesture is inconsistent with or could never amount to sexual harassment, but only that it is not unequivocally a sign of such harassment, given its commonly understood meanings.) To the contrary, it is clear from the surrounding circumstances that Tony made the gesture to indicate that he regarded Mr. Morgan's note as pointless and annoying. It was roughly the equivalent of giving them the bird, albeit arguably less contemptuous than that. For these reasons, the undersigned finds it unlikely that, assuming Danelli described the gesture (which is in dispute), Mr. Gamble thought Danelli was complaining about sexual harassment, as opposed to a very difficult vendor.

40. On April 13, 2016, Mr. Gamble visited Publix #1049 and spoke to Ms. Oblaczynski about the situation. During this conversation, Ms. Oblaczynski stated that the "Frito-Lay people" did nothing wrong. She further specified that "the person [Danelli] had with her did nothing wrong."

41. After speaking with Ms. Oblaczynski, Mr. Gamble met with Danelli while she was servicing her second account. Right off the bat, Mr. Gamble asked Danelli who was with her at Publix #1049 on April 7, 2016. She eventually admitted that her husband was with her in the store that day. Aware of the

seriousness of her offense and the active Last Chance Agreement, Danelli asked Mr. Gamble, several times, if she would be fired.

42. That same day, Mr. Gamble called Carlos Canizares to tell him what he had learned. Mr. Canizares instructed Mr. Gamble to stay with Danelli while she finished servicing her accounts and then to obtain a written statement from her about the incident.

43. Later on April 13, 2016, Danelli provided a written statement in which she confirmed that her husband had been working with her at Publix #1049 the previous week. Danelli has since described this statement as a "full written account of the harassment [and] rude sexual gestures." Danelli knew, of course, that HR would review her statement, and yet she said nothing therein about having complained to Mr. Gamble or any supervisor about harassment generally or Tony in particular; about Tony's use of course or improper language; or about having requested an escort to help keep Tony in line.

44. On the instructions of the company's HR department, Mr. Gamble conducted an investigation into the "rude sexual gesture" about which Danelli had complained. Specifically, he called Mr. Morgan, the Publix manager, and asked him about the incident. Mr. Gamble also requested that he be allowed to review any videotapes and documents concerning the incident. Mr. Morgan informed Mr. Gamble that Publix was investigating the

matter. Mr. Gamble's request to allow Frito-Lay access to Publix videotapes and documents was, however, turned down.

45. Tony's boorish behavior aside, the fact remained that Danelli, without prior approval, had allowed a non-employee to perform work or services for Frito-Lay at one of the stores on her route, which the RSR Performance Standards specifically prohibit without express authorization. RSRs who are found to have permitted non-employees to accompany them on their routes are either discharged or issued multiple steps of discipline, as Danelli knew. Because Danelli violated this rule while on an active Last Chance Agreement, Frito-Lay decided to terminate her employment.

46. On April 26, 2016, Mr. Canizares met with Danelli to inform her that she was fired. Danelli timely appealed her termination pursuant to the company's Complaint and Appeal Procedure, electing to have her appeal decided by a neutral, third-party arbitrator. The arbitration hearing took place in January 2017. Three months later, the arbitrator ruled that Danelli's termination had been proper and carried out in accordance with Frito-Lay's employment policies.

47. Danelli does not presently deny that she violated the DOT regulations and the company policy forbidding the use of non-employees as helpers while on duty, nor does she dispute that Frito-Lay had sufficient grounds for imposing the

disciplinary steps leading to the Last Chance Agreement. Indeed, she does not contend that it would have been wrongful for Frito-Lay to have fired her in May 2015 instead of offering the Last Chance Agreement. Her position boils down to the argument that because Frito-Lay could have exercised leniency and not fired her for bringing her husband to work at Publix #1049 (which is probably true[2/]), its failure to do so can only be attributable to gender or age discrimination. Put another way, Danelli claims that but for her being a woman in her 50s, Frito-Lay would have given her another "last chance." This is a heavy lift.

48. As circumstantial evidence of discrimination, Danelli points to the company's treatment of another RSR, a younger man named Ryan McCreath. Like Danelli, Mr. McCreath was caught with a non-employee assisting him on his route. Unlike Danelli, however, Mr. McCreath was not on any active steps of discipline at the time of the incident, much less a Last Chance Agreement. Although Mr. McCreath's disciplinary record was not unblemished, Frito-Lay did not terminate his employment for this violation of the RSR Performance Standards. Instead, he received *three steps* of discipline and was issued a Final Written Warning.

49. Mr. McCreath's situation is distinguishable because he was not under a Last Chance Agreement at the time of the violation. Moreover, it is not as though Mr. McCreath got off

scot-free. He received a serious punishment. Danelli could not have received a comparable punishment for the same offense because she was already beyond Step 3; her record, unlike his, did not have room for the imposition of *three steps* of discipline at once.

50. The McCreath incident does not give rise to a reasonable inference that Frito-Lay unlawfully discriminated against Danelli when it terminated her employment for committing a "three-step violation" while on an active Last Chance Agreement. There is simply no reason to suppose that if Danelli, like Mr. McCreath, had not had any active steps of discipline when she violated the rule against having non-employees provide on-the-job assistance, Frito-Lay would have terminated her employment for the April 7, 2016, infraction; or that if Mr. McCreath, like Danelli, had been on a Last Chance Agreement when he violated the rule, Frito-Lay would have issued him a Final Written Warning in lieu of termination.

Ultimate Factual Determinations

51. There is no persuasive evidence that any of Frito-Lay's decisions concerning, or actions affecting, Danelli, directly or indirectly, were motivated in any way by age- or gender-based discriminatory animus. Indeed, there is no competent, persuasive evidence in the record, direct or

circumstantial, upon which a finding of unlawful age or gender discrimination could be made.

52. There is no persuasive evidence that Frito-Lay took any retaliatory action against Danelli for having opposed or sought redress for an unlawful employment practice.

53. There is no persuasive evidence that Frito-Lay committed or permitted sexual harassment of Danelli or otherwise exposed her to a hostile work environment.

54. Ultimately, therefore, it is determined that Frito-Lay did not discriminate unlawfully against Danelli on any basis.

CONCLUSIONS OF LAW

55. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes.

56. As stated in City of Hollywood v. Hogan, 986 So. 2d 634, 641 (Fla. 4th DCA 2008):

> The Florida Civil Rights Act of 1992 (FCRA) prohibits age discrimination in the workplace. See § 760.10(1)(a), Fla. Stat. (2007). It follows federal law, which prohibits age discrimination through the Age Discrimination in Employment Act (ADEA). 29 U.S.C. § 623. Federal case law interpreting Title VII and the ADEA applies to cases arising under the FCRA. Brown Distrib. Co. of W. Palm Beach v. Marcell, 890 So. 2d 1227, 1230 n.1 (Fla. 4th DCA 2005).

57. Section 760.10(1)(a), Florida Statutes, provides that it is an unlawful employment practice for an employer:

> 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.

58. In McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-803 (1973), the U.S. Supreme Court articulated a scheme for analyzing employment discrimination claims where, as here, the complainant relies upon circumstantial evidence of discriminatory intent. Pursuant to this analysis, the complainant has the initial burden of establishing by a preponderance of the evidence a prima facie case of unlawful discrimination. Failure to establish a prima facie case of discrimination ends the inquiry. If, however, the complainant succeeds in making a prima facie case, then the burden shifts to the accused employer to articulate a legitimate, nondiscriminatory reason for its complained-of conduct. If the employer carries this burden, then the complainant must establish that the proffered reason was not the true reason but merely a pretext for discrimination. Id.; St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506-07 (1993).

59. Under the foregoing framework, Danelli bears the burden of establishing her prima facie case by a preponderance of the evidence and must show, among other elements, that: (i) she was subjected to an adverse employment action; and (ii) similarly-situated employees outside of her protected class (i.e., younger and/or male) were treated differently. Schrock v. Publix Super Mkts, Inc., 653 F. App'x 662, 663 (11th Cir. 2016); see, e.g., Holland v. Gee, 677 F.3d 1047, 1055 (11th Cir. 2012)(Title VII); Chapman v. AI Transp., 229 F.3d 1012, 1024 (11th Cir. 2000)(ADEA).

60. In this matter, the evidence does not establish a prima facie case of discrimination based on sex or age. To begin with, Danelli failed to identify any other similarly-situated employees outside of her protected class who were treated more favorably. Danelli points to Mr. McCreath as a similarly-situated, younger, male employee who was treated better than she was. Specifically, she argues that Mr. McCreath was given a Final Written Warning for his violation of the policy prohibiting non-employees from working with Frito-Lay employees on their routes, whereas she was fired for the same violation.

61. "When comparing similarly-situated individuals to raise an inference of discriminatory motivation, these individuals must be similarly situated in all relevant

respects." Jackson v. BellSouth Telecom., 374 F.3d 1250, 1273 (11th Cir. 2004)(emphasis added). In determining whether employees are similarly situated, courts require that the proposed comparator and the plaintiff be "nearly identical." In this regard, it is necessary to consider whether they: (i) "answered to the same supervisor"; (ii) "worked under the same standards of conduct"; (iii) had different disciplinary records, see Jones v. Alabama Power Co., 282 F. App'x 780, 784 (11th Cir. 2008)(factoring in the proposed comparator's lack of a disciplinary record in holding that the plaintiff and the comparator were not similarly situated); and (iv) "engaged in 'the same conduct without such differentiating or mitigating circumstances that would distinguish . . . the employee's conduct or the employer's treatment of the employee.'" Sanguinetti v. United Parcel Serv., Inc., 114 F. Supp. 2d 1313, 1317 (S.D. Fla. 2000)(citing Mitchell v. Toledo Hosp., 964 F.2d 577, 583 (6th Cir. 1992); Jones v. Gerwens, 874 F.2d 1534, 1541 (11th Cir. 1989)(finding that "disciplinary measures undertaken by different supervisors may not be comparable for purposes of Title VII analysis"); Dep't of Child. & Fams. v. Shapiro, 68 So. 3d 298, 305 (Fla. 4th DCA 2011)(quoting Maniccia v. Brown, 171 F.3d 1364, 1368 (11th Cir. 1999)).

62. As found above, Mr. McCreath's disciplinary record differed materially from Danelli's in that she was on a Last

Chance Agreement and he had no active discipline. Differences in the plaintiff's and a comparator's overall record may render them not "similarly situated" for purposes of establishing a prima facie case. See, e.g., Knight v. Baptist Hosp. of Miami, Inc., 330 F.3d 1313, 1316-19 (11th Cir. 2003)(finding that the employee and comparator who committed the same act were not similarly situated because the comparator's overall record was better); Cooper v. S. Co., 390 F.3d 695, 741 (11th Cir. 2004)(holding that a plaintiff's prior placement in a disciplinary program rendered employees not placed in the program invalid comparators). Mr. McCreath's different disciplinary record at the time of his discipline establishes that he was not similarly situated to Danelli.

63. Danelli's failure to make out a prima facie case of discrimination ended the inquiry. Because the burden never shifted to Frito-Lay to articulate a legitimate, nondiscriminatory reason for its conduct, it was not necessary to make any findings of fact in this regard. Nevertheless, Frito-Lay gave such a reason for its decision to discharge Danelli, namely that she violated the RSR Performance Standards while on an active Last Chance Agreement. The undersigned found this explanation to be well-founded in fact and not pretextual.

64. In addition to the age and gender discrimination claims, Danelli asserts that Frito-Lay terminated her employment

in retaliation for her complaint regarding a third-party competitor's (Tony's) purported harassment. Particularly, in her Complaint, Danelli claims that she "would not have been fired but for . . . [her] harassment complaints."

65. Under the Florida Civil Rights Act's ("FCRA") opposition clause, Frito-Lay is prohibited from retaliating against Danelli because she has opposed an unlawful employment practice. § 760.10(7), Fla. Stat. Meanwhile, under the FCRA's participation clause, Frito-Lay is prohibited from retaliating against an employee because he or she "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [the FCRA]." Id.

66. As a preliminary matter, Danelli never "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" prior to her termination from employment. Accordingly, Danelli cannot establish her retaliation claim under the FCRA's participation clause.

67. To establish her prima facie case of retaliation under the FCRA's opposition clause, Danelli must demonstrate that: (i) she engaged in statutorily protected activity; (ii) she suffered a materially adverse action; and (iii) a causal relationship existed between her protected activity and the adverse action. Goldsmith v. Bagby Elevator Co., Inc., 513 F.3d 1261, 1277 (11th Cir. 2008). If Danelli establishes a

prima facie case, the burden shifts to Frito-Lay to rebut the presumption by articulating a legitimate non-retaliatory reason for the materially adverse action. Id. Danelli then must demonstrate that the articulated reason is a pretext to mask an improper motive. Id. In other words, Danelli must show that her alleged protected activity was a "but for" cause of her termination. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338 (2013).

68. The first element of Danelli's prima facie case of retaliation requires her to show that she engaged in statutorily protected activity. For this, Danelli must prove that she had a "good faith, reasonable belief that . . . [Respondent] was engaged in unlawful employment practices." Little v. United Techs., Carrier Transicold Div., 103 F.3d 956, 960 (11th Cir. 1997). In order to constitute protected activity, Danelli must, at the very least, have communicated her belief that illegal discrimination was occurring. Marcelin v. Eckerd Corp. of Fla., Inc., No. 8:04-CV-491-T-17MAP, 2006 U.S. Dist. LEXIS 18097, *27-*28 (M.D. Fla. Apr. 10, 2006)(citing Webb v. R & B Holding Co., 992 F. Supp. 1382, 1389 (S.D. Fla. 1998)). "It is not enough for [Petitioner] . . . to complain about a certain policy or certain behavior of coworkers and rely on the employer to infer that discrimination [or harassment] has occurred." Webb, 992 F. Supp. at 1389.

69. Although Danelli complained about Tony, her complaints were not grounded on her sex or any other protected characteristic. This is because Tony's utterances and gesture, as both Danelli and Ms. Oblaczynski testified, were about Mr. Morgan and the denial of shelf space. None of this clearly and unambiguously related to Danelli's sex or any other protected characteristic, and Danelli never told Frito-Lay, unequivocally, that she believed it did. Frito-Lay was not required to draw an inference of unlawful sexual harassment from such circumstances.

70. It is well-established that laws prohibiting retaliation do not set forth "a general civility code for the American workplace" and do not protect employees from being mistreated in the workplace. See Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998). Here, the evidence demonstrates that Tony——although rude and boorish——took action against Danelli because he wanted her shelf space, not because of her sex or any other protected characteristic. Thus, Danelli's general complaints about Tony and his mistreatment of her cannot serve as the basis of a retaliation claim.

71. Even if they could, Danelli still needed to prove that she would not have been terminated "but for" her complaint. See Trask v. Sec'y, Dep't of Vets' Aff., 822 F.3d 1179, 1194 (11th Cir. 2016). Danelli was unable to do this because she

undisputedly violated the RSR Performance Standards one day after she supposedly complained about the alleged harassment. Specifically, on April 7, 2016, Petitioner had her husband——a non-employee——assist her with her work on her route. Petitioner's flagrant act of misconduct severed any causal chain that might have existed between any alleged protected activity and her termination. See Fleming v. Boeing Co., 120 F.3d 242, 248 (11th Cir. 1997)(the employee's failure to meet performance standards broke the causal chain established by the employee who filed complaints of sexual harassment shortly before her application for employment was rejected). Because Danelli failed to prove the required causation between these two events, her retaliation claim was not established.

72. Finally, Danelli asserts a claim of sexual harassment, alleging that Tony harassed her while she was working. Generally, sexual harassment comes in two forms: (i) harassment that does not result in a tangible employment action (traditionally referred to as "hostile work environment" harassment), and (ii) harassment that does result in a tangible employment action (traditionally referred to as "quid pro quo" harassment). See Gen. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 760-63 (1998). This case involves an alleged hostile work environment.

73. To establish a claim of a hostile work environment, Danelli must prove that "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 v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993).

74. When, as here, the alleged harassment is committed by coworkers, non-supervisory employees, or third parties, the petitioner must demonstrate that the respondent "knew, or reasonably should have known, of the harassment and failed to take prompt remedial actions." See Allen v. Tyson Foods, Inc., 121 F.3d 642, 646-47 (11th Cir. 1997)(citing Faragher v. City of Boca Raton, 111 F.3d 1530, 1535, 1538 (11th Cir. 1997)). The remedial action must be reasonably calculated to prevent the misconduct from recurring. Kilgore v. Thompson & Brock Mgmt., Inc., 93 F.3d 752, 753-54 (11th Cir. 1996).

75. Danelli failed to establish her hostile work environment claim. Foremost, she has not shown that Tony's purportedly harassing behavior was based on her sex. The evidence establishes, rather, that Tony's conduct was based on his desire to acquire Danelli's shelf space, or was responding to Mr. Morgan's denial of Tony's demands regarding shelf space. See Smart v. City of Miami Beach, Fla., 933 F. Supp. 2d 1366, 1376 (S.D. Fla. 2013)("As an initial matter, a plaintiff's claim

of sexual harassment may not be supported with evidence of non-sexual, non-gender-based harassment.").

76. The fact that Tony made a sexual gesture——the air jerk——in front of Danelli did not turn the situation into an actionable hostile work environment. See Reeves v. CH Robinson Worldwide, Inc., 594 F.3d 789, 808 (11th Cir. 2010)(noting that words containing sexual content or invoking sexual connotations do not automatically serve as evidence of sex-based discrimination). "[N]ot all sexually offensive conduct rises to the level of a . . . violation." Mendoza v. Borden, Inc., 195 F.3d. 1238, 1268 (11th Cir. 1999).

77. The law is clear: "innocuous statements or conduct, or boorish ones, unrelated to a protected ground" are not actionable. Cotton v. Cracker Barrel Old Country Store, Inc., 434 F.3d 1227, 1234 (11th Cir. 2006); see also Williams v. Ala. Pub. Health Dep't., 159 F. App'x 120, 121 (11th Cir. 2005)(affirming the district court's dismissal of a hostile work environment claim where the plaintiff "alleged that her coworkers' conduct was annoying and unprofessional but failed to allege that it was attributable to her membership in a protected category"). Because Danelli failed to proffer any persuasive evidence showing that Tony's conduct was based on her sex, such conduct cannot form the basis of a hostile work environment claim.

78. Similarly, Danelli has not shown that she was subjected to harassing behavior because of her age. There is no persuasive evidence indicating that any of Tony's behavior was taken because of Danelli's age. Moreover, the evidence shows that Tony behaved the same way in front of others, without regard to their ages.

79. Along with failing to show that the alleged harassment was based on her sex or age, Danelli failed to prove that the harassment was sufficiently severe or pervasive to alter a "term, condition, or privilege" of employment and create an abusive working environment. Danelli primarily takes issue with the incidents that transpired on April 6 and 7, 2016, plus some additional rude comments by Tony about Mr. Morgan and the denial of shelf space. Such harassment is not objectively severe enough to alter her employment terms and conditions. See Muggleton v. Univar USA, Inc., 249 F. App'x 160, 163 (11th Cir. 2007)(noting that one incident with a few comments was not sufficiently "severe" to constitute actionable age-based harassment); see also Willets v. Interstate Hotels, LLC, 204 F. Supp. 2d 1334, 1337 (M.D. Fla. 2002)(supervisor hugged plaintiff three times a year, rubbed her head and shoulders, frequently indicated his love for her, grabbed her buttocks, kissed her, and placed his hand on her inner thigh——not severe enough for actionable harassment).

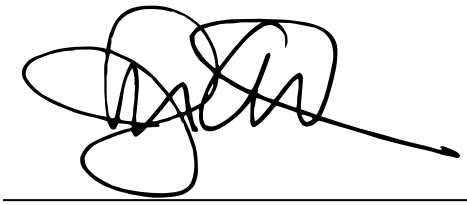
80. Nor was the purported harassment "pervasive." Publix #1049 was not added to Danelli's route until November 2015. Thus, all of her interactions with Tony took place between November 2015 and April 2016. A few isolated incidents during a five-month period do not amount to pervasive harassment. See Johnson v. Rice, 237 F. Supp. 2d 1330 (M.D. Fla. 2002)(harasser's conduct held not to be objectively pervasive where he made sexual comments and jokes over a period of six months).

81. In sum, Danelli's hostile work environment claim fails because she did not prove by the greater weight of the evidence that: (i) Tony's alleged harassment was based on her sex, age, or any protected characteristic; and (ii) the harassment was severe or pervasive enough to alter a "term, condition, or privilege" of employment and create an abusive working environment.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations enter a final order finding Frito-Lay not liable for gender or age discrimination, retaliation, or creating a hostile work environment.

DONE AND ENTERED this 11th day of July, 2018, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of July, 2018.

ENDNOTES

[1/] For five years during this 15-year period, but not at the times relevant to this proceeding, Danelli's husband held a part-time job with Frito-Lay as a merchandiser.

[2/] The undersigned does not much doubt that if it had wanted to, Frito-Lay could have found a way to spare Danelli's job without setting a bad precedent. It might have found, for example, that the situation with Tony was a mitigating circumstance, which, while not a justification for bringing along a non-employee to work with her, provided a somewhat sympathetic explanation for Danelli's infraction. Danelli's argument, however, presupposes, without support, that an employee with an active Last Change Agreement is practically *entitled* to such mercy.

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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.