STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARLENA SEENAUGHT,

Petitioner,

vs. Case No. 20-2539

MORTON PLANT HOSPITAL, BAYCARE, *AMENDED AS TO PARAGRAPH 107 ONLY

Respondent.
_____________________________________/

*AMENDED RECOMMENDED ORDER

The final hearing in this matter was conducted before Administrative Law Judge Jodi-Ann V. Livingstone of the Division of Administrative Hearings (DOAH), pursuant to sections 120.569 and 120.57(1), Florida Statutes (2019),[1] on August 17 and 19, 2020, by Zoom Conference.

APPEARANCES

For Petitioner: Marlena Jacinta Seenaught, pro se
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Seminole, Florida 33772

For Respondent: Ashley A. Tinsley, Esquire
Kevin D. Johnson, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether Morton Plant Hospital, Baycare (Morton Plant Hospital or Respondent), committed an unlawful employment

[1] All statutory references are to Florida Statutes (2019). Relevant provisions of chapter 760, Florida Statutes, have been unchanged since 2015, prior to any allegedly discriminatory acts.

practice against Marlena Seenaught (Ms. Seenaught or Petitioner), on the basis of her sex and in retaliation for engaging in a protected activity, in violation of the Florida Civil Rights Act (FCRA).

Preliminary Statement

On February 28, 2019, Ms. Seenaught filed an Employment Complaint of Discrimination with the Florida Commission on Human Relations (Commission), alleging that she was the victim of sexual harassment while employed by Respondent. She further alleged that she was terminated by Respondent in retaliation for making a complaint about the sexual harassment. On April 29, 2020, the Commission notified Ms. Seenaught that no reasonable cause existed to believe that Respondent committed an unlawful employment practice.

On June 1, 2020, Ms. Seenaught filed a Petition for Relief with the Commission in which she re-alleged a discriminatory employment practice. The Commission transmitted the Petition for Relief to DOAH to conduct a chapter 120 evidentiary hearing.

At the final hearing, Ms. Seenaught testified on her own behalf and called Anthony O'Donnell and Brian Seenaught as witnesses. Petitioner's Exhibits 1 through 4, 7, 8, 11, 13-C, 13-D, 13-G, 13-O, 14 through 16, and 22 were admitted into evidence. Respondent called Georda Lee Finnegan, Heather Nichole Hayes, Sean Phillip Christensen, Lolita Diaz, and Deborah Pasqua as witnesses. Respondent's Exhibits 3 through 5, 8 through 13, 19, 23, and 24 were admitted into evidence.

At the close of the hearing, the parties were advised of a ten-day timeframe following DOAH's receipt of the hearing transcript to file post-hearing submittals. On September 16, 2020, the court reporter filed a three-

volume Transcript of the final hearing with DOAH. Both parties timely submitted Proposed Recommended Orders, which were duly considered in preparing this Recommended Order.

FINDINGS OF FACT

1. Morton Plant Hospital is a hospital located in Clearwater, Florida. Morton Plant Hospital is part of the greater BayCare Health System.

2. Ms. Seenaught is a woman. She was hired at Morton Plant Hospital as a respiratory therapist in a "pool" position in the respiratory care department on November 13, 2017. Morton Plant Hospital hired Ms. Seenaught right out of school.

3. Ms. Seenaught remained in the respiratory therapist pool position throughout her time at Morton Plant Hospital.

4. By all accounts, Ms. Seenaught was an excellent respiratory therapist. Colleagues described her as a "go-getter" who eagerly sought to learn and grow in her position.

5. Prior to her termination, Ms. Seenaught had never been subject to any discipline by Morton Plant Hospital.

6. At all times relevant to Ms. Seenaught's allegations, Heather Hayes served as her supervisor. Sean Christensen served as her manager, and the manager of all respiratory therapists. Georda Finnegan served as her "charge" respiratory therapist.

7. Charge respiratory therapists are not technically supervisors; however, they serve an important supervisor-like function. The charge respiratory therapist is responsible for organizing and overseeing the daily workflows and evaluating and handling any issues that come up during a shift, in addition to other tasks. Charge respiratory therapists are also the first point of contact for other respiratory therapists if they have problems, complaints, or suggestions.

The Events of September 21, 2018

8. On a Friday evening, September 21, 2018, Ms. Seenaught attended an after-work birthday celebration at a bar with several of her Morton Plant Hospital co-workers. Mr. Bill Kapusta was in attendance.

9. Mr. Kapusta worked at Morton Plant Hospital as a respiratory therapist. He was primarily assigned to the emergency department (ED) and had been with that department for several years. Mr. Kapusta was well liked and respected by the physicians in the ED.

10. The unrefuted credible testimony of Ms. Seenaught established that, while at the bar, Mr. Kapusta grabbed her buttocks without her permission. Despite her effort to dissuade his advances, Mr. Kapusta repeatedly asked her to have sex with him.

11. Ms. Seenaught shared what happened to her with several of her co-workers, including Anthony O'Donnell, who was also present that night.

12. Mr. O'Donnell testified that he saw Mr. Kapusta touch Ms. Seenaught on the back and approach her various times that evening. He also testified that Ms. Seenaught complained to him that Mr. Kapusta was hitting on her, touching her, and generally making her feel uncomfortable.

Reporting the Sexual Harassment

13. The following Thursday (September 27, 2018), Ms. Seenaught reported the sexual harassment incident to her charge respiratory therapist, Georda Finnegan. As Ms. Seenaught's charge respiratory therapist, Ms. Finnegan served as the person Ms. Seenaught directly reported to during her work shift.

14. Ms. Seenaught told Ms. Finnegan that Mr. Kapusta sexually harassed her at the birthday celebration over the weekend. Ms. Finnegan told Ms. Seenaught that since the harassment occurred outside of work, nothing could be done.

15. At all times relevant, Morton Plant Hospital had a sexual harassment policy in place. The policy set forth that Morton Plant Hospital prohibits

harassing, retaliatory, and discriminatory behavior in the workplace, pursuant to its Harassment-Free Workplace Policy. Should harassment occur, the policy explains who should report it and how it should be reported. It states, in pertinent part:

> Team members who believe that they have been harassed and/or discriminated against have a responsibility to report such behavior immediately to Team Resources, the department manager/director, Administration or by calling the Corporate Responsibility Hotline at 1-877-OUR-DUTY.
>
> As well, all known incidents of harassment and/or discrimination must be reported to Team Resources, department manager/director or administration.

16. Team Resources is Morton Plant Hospital's human resources department. Morton Plant Hospital's policies, including the Harassment-Free Workplace Policy and the Hotline information, are readily available and accessible to employees on Morton Plant Hospital's intranet.

17. It is not unusual that Ms. Seenaught would report the sexual harassment she endured to Ms. Finnegan as her charge respiratory therapist. According to Morton Plant Hospital's policy, Respiratory Care Department Expectations, charge respiratory therapists are the first point of contact for other respiratory therapists if they have problems, complaints, or suggestions.

18. However, Ms. Finnegan, as a charge respiratory therapist, is not one of the individuals identified in the Harassment-Free Workplace Policy as someone who alleged harassment should be reported to. According to Morton Plant Hospital's Harassment-Free Workplace Policy, Ms. Seenaught was required to report the incident to a supervisor, administration, or Team Resources.

The Events of October 27, 2018

19. After reporting the sexual harassment incident to Ms. Finnegan, Ms. Seenaught avoided all contact with Mr. Kapusta. This was not difficult to do because they did not work in the same department, and generally did not come in regular contact with each other. Her first direct contact with Mr. Kapusta, after the night at the bar, occurred on October 27, 2018.

20. On that day, Ms. Finnegan assigned Ms. Seenaught to work alongside Mr. Kapusta as part of an ED orientation.

21. Since joining Morton Plant Hospital, Ms. Seenaught had been eager to participate in orientation. Orientation is, essentially, a process in which a respiratory therapist is assigned a preceptor who trains the respiratory therapist in a particular task/department. A respiratory therapist who successfully completes a critical care orientation, which includes ED orientation, receives an increase in pay.

22. Ms. Seenaught began her first day of ED orientation with Mr. Kapusta on October 27, 2018. That morning, when Ms. Seenaught arrived to work, Ms. Finnegan asked her to first report to "the floors"—that is, her regular work—to provide respiratory care, because the department was understaffed and she was needed.

23. Ms. Seenaught stayed on the floors for most of the morning, before heading down to the ED for orientation later that day. She spent the afternoon going back and forth between the floors and the ED.

24. At some point that afternoon, Petitioner voluntarily accompanied Mr. Kapusta and another co-worker to lunch. Ms. Seenaught testified that nothing inappropriate happened at lunch.

25. Towards the end of Ms. Seenaught's shift, at approximately 5:45 or 6:00 p.m., the ED received notice that a code blue patient would be arriving in approximately five minutes. A code blue indicates that the patient is experiencing cardiac arrest or some other condition affecting the patient's ability to breathe. The patient required intubation.

26. This particular patient was the father-in-law of one of the hospital's doctors. As a result, the hospital staff prioritized this patient and "wanted to make sure everything was going to run smoothly."

27. Several employees entered and exited the intubation room, helping to prepare for this emergency procedure. Setting up the room for the intubation took several minutes while the actual intubation took seconds to complete.

28. As part of her ED orientation, Ms. Seenaught was required to participate in the intubation procedure with Mr. Kapusta as her guide. There were approximately 15 persons in the room during the procedure. This included a physician, who was the person immediately responsible for the intubation.

29. Ms. Seenaught testified that during part of the procedure, Mr. Kapusta stood very close behind her. She alleges that she could feel his breath on her neck and that he "must have been bending down" for this to happen as he was about a foot taller than she is.

30. Ms. Seenaught claims Mr. Kapusta stood behind her for about 30 to 40 seconds.

31. At the onset of the intubation, Ms. Seenaught helped the physician, by passing him necessary equipment. She was not standing in the correct position to allow for her to easily pass the equipment, so the physician became frustrated with her. Mr. Kapusta quickly took over and assisted with the rest of the procedure. Ms. Seenaught could not have assisted with the intubation for more than a few seconds, as the entire procedure took less than one minute.

32. During the procedure, Mr. Kapusta did not say anything inappropriate to Ms. Seenaught or touch her inappropriately.

33. Ms. Seenaught did not report to Ms. Finnegan or anyone else that Mr. Kapusta acted inappropriately during the intubation by standing too closely to her. Also, even though Ms. Seenaught was assigned to continue her ED orientation with Mr. Kapusta the following day, she did not ask Ms.

Finnegan or anyone else to be reassigned. Instead, she finished the ED orientation that evening and went home.

34. After leaving work that day, Ms. Seenaught vented to her co-worker, Krista, through a series of text messages. Ms. Seenaught complained that she was "just feeling disappointed" with how the orientation went. She complained about her interactions with the physician, who she recalled "snatched" something out of her hand. She described the nurses as "rude" and stated that the personnel in the ED "aren't nice to new faces." She made no mention to Krista, who she referred to as her "work mommy," that Mr. Kapusta engaged in any inappropriate behavior that day.

35. The undersigned does not find credible Ms. Seenaught's testimony that Mr. Kapusta sexually harassed her during the intubation on October 27, 2018.

Events of October 28, 2018

36. On October 28, 2018, Ms. Seenaught was scheduled to continue her orientation in the ED from the previous day with Mr. Kapusta. However, as on the previous day, her regular department was significantly understaffed. There were nine respiratory therapists available, but the workload required 11. Ms. Finnegan asked Ms. Seenaught to again start off by working on the floors.

37. To help coordinate the workflow, Ms. Seenaught was assigned a work phone, which she was expected to carry with her at all times. The department assigned work phones, as needed, to coordinate assignments and call respiratory therapists in the event of an emergency and to dole out for emergencies and reassignments. Respiratory therapists also used the work phones to contact other respiratory therapists to see if they needed assistance. Ms. Seenaught was also assigned a workstation on wheels (WOW device).

38. Later that morning, Ms. Finnegan approached Ms. Seenaught and directed her to join Mr. Kapusta in the ED to continue her orientation.

39. Ms. Seenaught refused. Ms. Seenaught walked away from Ms. Finnegan and entered an elevator. Surprised, as she had never had another employee blatantly refuse an assignment, Ms. Finnegan tried to ask Ms. Seenaught why. Ms. Seenuaght allowed the elevator doors to close while Ms. Finnegan was still trying to ask the question. As a result, Ms. Finnegan was given no explanation for why Ms. Seenaught refused to report to the ED.

40. Instead of reporting to the ED, Ms. Seenaught continued to provide patient care on the floors, despite the fact that her charge respiratory therapist had given her a different assignment.

41. Ms. Finnegan repeatedly attempted to contact Ms. Seenaught by calling her on her assigned work phone. Ms. Seenaught did not answer any of the calls.

42. Ms. Seenaught did, however, use her work phone to call Mr. Kapusta to tell him that she would not be joining him in the ED and would remain on the floors. Ms. Seenaught testified that Mr. Kapusta said that he was okay with her not returning to the ED, as it was "dead."

43. Ms. Finnegan, as charge respiratory therapist, had the authority to decide Ms. Seenaught's work assignment for the rest of her shift. Mr. Kapusta had no such authority.

44. Approximately 45 minutes after Ms. Seenaught evaded Ms. Finnegan's question by letting the elevator doors close, Ms. Finnegan found Ms. Seenaught in a patient's room on Witt 5. Ms. Finnegan had been searching for Ms. Seenaught the entire time.

45. Ms. Finnegan told Ms. Seenaught that she had been looking for her and asked why she turned her phone off. Although Ms. Seenaught had just used her phone to call Mr. Kapusta, Ms. Seenaught claimed that her phone had died and that she had not received any calls from Ms. Finnegan during the 45-minute period.

46. Ms. Finnegan again told Ms. Seenaught that she should go to the ED to resume her orientation. And again, Ms. Seenaught refused without

offering any explanation. Ms. Finnegan asked her if something happened during orientation and Ms. Seenaught said "no." Ms. Seenaught told Ms. Finnegan that she wanted to remain on the floors. When Ms. Finnegan continued to direct Ms. Seenaught to return to the ED, Ms. Seenaught told her she was going to cancel her orientation, and that she was going to talk to Mr. Christensen.

47. Ms. Seenaught was aware that Ms. Finnegan was the authority on whether or not she could continue to work the floors or return to the ED. Ms. Seenaught testified that Ms. Finnegan "would have the last say-so unless Sean or Heather were present."

48. After announcing she was going to cancel her orientation, Ms. Seenaught began to cry and asked Ms. Finnegan if she could remain on the floors instead of returning to the ED. Ms. Finnegan denied Ms. Seenaught's request but offered her a break to compose herself, after which she needed to report to the ED. Ms. Seenaught declined the offer; she told Ms. Finnegan that she was leaving. She said she was calling her mother to pick her up and would be contacting Mr. Christensen.

49. Ms. Seenaught exited the building, leaving her assigned phone and WOW device unattended on Witt 5. She sent a message via Facebook Messenger to her co-worker, Lolita Diaz, asking Ms. Diaz to retrieve the phone and WOW device from Witt 5 and return them to the department.

50. Per Morton Plant Hospital's Respiratory Department Expectations policy, a respiratory therapist is required to complete a detailed report for the next shift if the charge respiratory therapist approves a respiratory therapist's request to leave early. This detailed report serves to inform the respiratory therapist taking over on the next shift about any patient care or other issues occuring during the prior shift.

51. Prior to leaving the hospital, Ms. Seenaught also contacted Mr. Christensen by email to inform him that she was leaving. As Mr. Christensen was not on duty that day, he did not immediately receive

Ms. Seenaught's email and did not realize she emailed him until the next day.

52. Although Ms. Finnegan claims she did not know that Ms. Seenaught left the hospital with no intention of returning that day, the undersigned does not find her testimony on this point credible.

53. Ms. Seenaught refused to follow Ms. Finnegan's work assignment, announced she was leaving (even though her shift was not over), calling her mother to pick her up, and telling Mr. Christensen. Regardless, Ms. Finnegan did not give Ms. Seenaught permission to leave early, as Ms. Seenaught admits.

54. Even more importantly, Ms. Seenaught never told Ms. Finnegan that anything happened during her shift that day, that she endured any sexual harassment the day before, or that she felt uncomfortable with her orientation placement with Mr. Kapusta.

55. Ms. Finnegan believed that Ms. Seenaught refused to go to the ED and ultimately left work because she was frustrated about not getting the full 12 hours of ED orientation on Saturday and Sunday that she was initially scheduled for.

56. This is supported by the totality of the credible evidence in the record. Ms. Seenaught was frustrated that her orientation had already been pushed back three times and she was upset about having to go back and forth between the floors and the ED. Although in her hearing testimony, she claimed that she was uncomfortable being assigned to work with Mr. Kapusta for ED orientation, this claim is contradicted by her actions and not supported by evidence.

57. As she did the evening before, Ms. Seenaught turned to her co-worker and "work mommy," Krista, to vent about the day's events. In text messages sent after she left work, Ms. Seenaught wrote the following to Krista:

> Oh Krista. I think I'm having not a bad day but a bad month. We are staffed with 9 people for the

> weekend and I've been doing floor treatments while trying to orient yesterday so I didn't even bother going to the ER today. They had since May to schedule me appropriately and I'm always getting screwed over or at least that's how I feel I'm not finishing my orientation which I'm sure they'll be pissed about. I'm over management. They hired so many new people telling me that's the true reason I got pushed back 3 times and out of the 8 or 9 new people there's not even enough people on our weekend and we are losing Tanya soon I normally don't get upset too easily but as of late I think everything has been bothering me.
>
> * * *
>
> Well I left work and sure I will get written up and Georda made a big deal about me trying to help the floor and unit people and told me go back to the ER even though she asked me to help this morning and said she will have to tell Sean so I told her go ahead and tell Sean because I'm trying to help everyone they need the help I don't see what I did wrong and she got all ballistic so I'm turning off my phone.

58. Ms. Seenaught made it clear that she was unhappy with how her orientation was playing out. She was frustrated at having to split her time between orientation and working on the floors.

59. Ms. Seenaught did not include a single reference to Mr. Kapusta in her complaints to her "work mommy" about all that went wrong at work. She said nothing about Mr. Kapusta or any discomfort she had working with him in the ED orientation.

<u>Ms. Seenaught's Termination</u>

60. On October 29, 2018, Mr. Christensen sent a text message to Ms. Seenaught to inform her that she was being removed from the schedule pending an investigation into the events that occurred on October 28, 2018.

61. In response, Ms. Seenaught again turned to Krista. She told her about being removed from the schedule and expressed how hurt she was by it.

Ms. Seenaught told Krista that she wanted to do orientation at a later time when she did not "have to be back and forth between floors and orientation."

62. During this conversation on October 29, 2018, Ms. Seenaught mentioned to Krista, for the first time, that Mr. Kapusta grabbed her buttocks and asked her to have sex while they were at a bar for a party in September. Ms. Seenaught told Krista that although Mr. Kapusta was not behaving unprofessionally during the orientation, she did not feel that he was properly orienting her, that he seemed uncomfortable, and that it felt "awkward."

63. On October 29, 2018, Ms. Hayes, Mr. Christensen, and Ms. Seenaught met to discuss Ms. Seenaught leaving work early without Ms. Finnegan's permission on October 28, 2018.

64. During the meeting, Ms. Seenaught explained that she expressed to Ms. Finnegan that she wanted to cancel her orientation and remain on the floors. She left the hospital when Ms. Finnegan denied her request to stay on the floors. She also expressed that she felt uncomfortable working with Mr. Kapusta and revealed to Mr. Christensen that Mr. Kapusta had sexually harassed her at a bar the previous month. Mr. Christensen had not heard of this until that moment.

65. Mr. Christensen asked Ms. Seenaught if Mr. Kapusta had ever done anything at work to make her feel uncomfortable. Ms. Seenaught said no.

66. Following the meeting, Mr. Christensen and Ms. Hayes contacted Team Member Relations Coordinator Anjanette Dickey to discuss Ms. Seenaught's actions on October 28, 2018, and the allegations regarding Mr. Kapusta.

67. On November 1, 2018, Mr. Christensen, Ms. Hayes, and Ms. Dickey met with Ms. Seenaught and provided her with a termination form that set forth the following:

> On Sunday 10/28/2018. You left work unauthorized before completing your shift without handing your

> phone off or appropriately notifying leadership, which is in violation of policy MPH_130. You left your phone and your WOW on Witt 5, and did not return it to the appropriate area.
>
> When discussed with you, you stated you texted your co-workers you were leaving, but, you did not ask or advise leadership that you wanted to leave, because you were not happy with your assignment. Already being short staffed during this day your actions resulted in patient abandonment and goes against the BayCare Code of Conduct- Doing the Right Thing.
>
> You were hired on an as needed basis (Pool) by BayCare on 11/13/2017. Per BayCare Policy 212 Pool/PRN you are not subject to the progressive discipline process. BayCare does not believe it would be beneficial for either party to continue your employment based on the event that occurred.

68. Ms. Seenaught told Ms. Finnegan that she intended to leave work. She did not ask for permission to leave early, nor did she receive permission to do so. The reasons stated in the termination form were well-founded.

69. Ms. Seenaught testified that she believed Ms. Finnegan had the authority to cancel her orientation or not. But Ms. Seenaught certainly had no authority to dictate her assignment to Ms. Finnegan. Ms. Seenaught refused her assignment and abandoned her post without permission to do so.

70. Ms. Seenaught could have made a request to a higher authority to cancel her orientation, or, in the alterative, request permission from a higher authority to leave work for the day. She initiated such a procedure when she contacted Mr. Christensen by email, but did not await an answer or authorization from him to cancel her orientation or leave work early. Nor did she submit a similar request to her other supervisor, Ms. Hayes.

71. Ms. Seenaught repeatedly testified that Ms. Finnegan had a responsibility to escalate her desire to cancel her orientation. While there

may have been other options for Ms. Seenaught to explore canceling or restructuring her orientation, such as asking Ms. Finnegan to check with supervisors, in the meantime, Ms. Seenaught was responsible for doing her job and following the assignment she was given. Indeed, whether Ms. Seenaught was in orientation or not, Ms. Seenaught did not have permission to leave; and even if she did, she did not follow the proper protocols for leaving early (which included returning your phone and WOW device and giving a detailed report).

72. As a pool employee, Ms. Seenaught was not entitled to Morton Plant Hospital's progressive discipline or appeal processes. Ms. Seenaught sought to appeal her termination. Deborah Pasqua mistakenly told her, at first, that she could do so, because Ms. Pasqua did not realize that Ms. Seenaught was a pool employee. When Ms. Pasqua determined Ms. Seenaught was a pool employee, she informed Ms. Seenaught that she was not entitled to the appeal process, but that she could submit a written statement for inclusion in her personnel file.

73. Ms. Pasqua also offered Ms. Seenaught the opportunity to meet with Director Michelle Maher regarding her concerns. Ms. Seenaught asked to bring a representative with her to the meeting with Director Maher. Morton Plant Hospital's Appeal Policy explicitly states that "[a] team member is not permitted to be represented by a third party (e.g. legal counsel, relative, friend, etc.) during the appeal process." When Ms. Seenaught was told that she would not be able to be accompanied by a representative, she declined the meeting, but still submitted her written statement.

<u>Ultimate Findings of Fact</u>

74. Mr. Kapusta sexually harassed Ms. Seenaught on one occasion at an after-work social gathering at a bar. Ms. Seenaught reported the incident to Ms. Finnegan. Ms. Finnegan did not to escalate the complaint because the incident occurred outside of the workplace. Ms. Seenaught's testimony that

Mr. Kapusta breathed on her neck during an intubation procedure, thereby sexually harassing her again, is not credible.

75. Ms. Seenaught failed to prove that she was subjected to a hostile work environment based on an isolated incident at a single after-work social gathering at a bar.

76. Ms. Seenaught failed to prove that Mr. Kapusta sexually harassed her at work, that she was subjected to a hostile work environment, or that she was terminated because she complained about the harassment.

77. Accordingly, Ms. Seenaught failed to meet her burden of proving that Morton Plant Hospital committed an unlawful employment action against her in violation of the FCRA.

CONCLUSIONS OF LAW

78. DOAH has jurisdiction over the parties and the subject matter of this cause pursuant to sections 120.569, 120.57(1), and 760.11(7), Florida Statutes. *See also* Fla. Admin. Code R. 60Y-4.016.

79. Ms. Seenaught initiated this proceeding, alleging that Respondent subjected her to sexual harassment in violation of the FCRA. She also alleged that she was retaliated against for complaining about the sexual harassment. The analysis herein rests on whether Respondent should be held responsible for Mr. Kapusta's sexual harassment of Ms. Seenaught and whether Respondent terminated Ms. Seenaught for reporting the harassment.

80. Section 760.11(7) permits a party for whom the Commission determines that there is no reasonable cause to believe that a violation of the FCRA has occurred to request an administrative hearing before DOAH. Following an administrative hearing, if the Administrative Law Judge (ALJ) finds that a discriminatory act has occurred, the ALJ "shall issue an appropriate recommended order to the commission prohibiting the practice and recommending affirmative relief from the effects of the practice, including back pay." § 760.11(7), Fla. Stat.

81. The burden of proof in an administrative proceeding, absent a statutory directive to the contrary, is on the party asserting the affirmative of the issue. *Dep't of Transp. v. J.W.C. Co.*, 396 So. 2d 778 (Fla. 1st DCA 1981); *see also Dep't of Banking & Fin., Div. of Sec. & Investor Prot. v. Osborne Stern & Co.*, 670 So. 2d 932, 935 (Fla. 1996).

82. Respondent is an "employer" within the meaning of the FCRA. § 760.02(7), Fla. Stat.

83. The FCRA is patterned after Title VII of the Civil Rights Act of 1964, as amended. Accordingly, Florida courts hold that federal decisions construing Title VII are applicable when considering claims under the FCRA. *Harper v. Blockbuster Entm't Corp.*, 139 F.3d 1385, 1387 (11th Cir. 1998); *Valenzuela v. GlobeGround N. Am., LLC*, 18 So. 3d 17, 21 (Fla. 3d DCA 2009); and *Fla. State Univ. v. Sondel*, 685 So. 2d 923, 925 n.1 (Fla. 1st DCA 1996).

84. The FCRA prohibits discrimination in the workplace. *See* §§ 760.10 and 760.11, Fla. Stat. Section 760.10(1)(a) states 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.

85. The FCRA does not mention sexual harassment. Nevertheless, 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, 21 (1993).

Hostile Work Environment

86. There are two types of sexual harassment cases: (1) quid pro quo cases, which are "based on threats which are carried out" or fulfilled; and (2) hostile environment cases, which are based on "bothersome attentions or sexual remarks that are sufficiently severe or pervasive to create a hostile work environment." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 751 (1998). In the instant case, Ms. Seenaught alleges she was subjected to a hostile work environment.

87. Where harassment is perpetrated by a co-worker, as opposed to a supervisor or manager, in order to establish a case of hostile work environment sexual harassment, Ms. Seenaught must show that: (1) she is a member of protected group; (2) she was subjected to unwelcome sexual harassment, such as sexual advances, requests for sexual favors, and other conduct of a sexual nature; (3) harassment was based on her sex; (4) harassment was sufficiently severe or pervasive to alter the terms and conditions of her employment and create a discriminatorily abusive working environment; and (5) that Morton Plant Hospital knew or should have known about the harassment and took insufficient remedial action, and as such, should be held liable. *Maldonado v. Publix Supermarkets*, 939 So. 2d 290, 293-94 (Fla. 4th DCA 2006).

88. Elements (1), (2), and (3) have been met. Ms. Seenaught is a woman and is, therefore, a member of a protected group. It has also been established that Ms. Seenaught was subjected to unwelcomed sexual harassment by Mr. Kapusta when he repeatedly asked her for sex and grabbed her buttocks during one after-work party at a bar. The sexual harassment she complained about was based on her sex.

89. However, consistent with the findings of fact and credibility determinations above, Ms. Seenaught failed to prove by the greater weight of the evidence that she was sexually harassed in the workplace—the harassment occurred during a non-work related birthday celebration at a bar.

Although Ms. Seenaught testified that Mr. Kapusta sexually harassed her at work, during an emergent intubation procedure, with 15 other employees present, by breathing on her neck, the undersigned did not find this part of her testimony credible. The sum of the persuasive evidence showed that the sole incident of sexual harassment against Ms. Seenaught by Mr. Kapusta occurred outside of work.

90. Even if both alleged incidents were accepted as factual, the two incidents would not rise to the level of severe and pervasive harassment that would alter the terms and conditions of her employment with Morton Plant Hospital. "[A] sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so." *Faragher v. Boca Raton*, 524 U.S. 775, 787 (1998).

91. Generally, courts consider four factors to determine, from an objective standpoint, whether the alleged conduct is sufficiently severe and pervasive to alter the terms and conditions of employment. These factors are: (1) the frequency of the conduct; (2) severity of the conduct; (3) whether the conduct was physically threatening or humiliating; and (4) whether the conduct unreasonably interfered with the employee's job performance.

92. Ms. Seenaught was sexually harassed on one occasion at a birthday party in a bar, not at work. Mr. Kapusta's conduct was absolutely inappropriate. During the alleged second incident, Ms. Seenaught testified that Mr. Kapusta did not touch her or make any inappropriate comments. Except for their interactions during the prematurely terminated orientation, Ms. Seenaught testified that she did not have any meaningful contact with Mr. Kapusta at work. She rarely had occasion to even run into him. The orientation on October 28, 2018, was her first time working with him after the bar incident.

93. Ms. Seenaught told Krista, Ms. Finnegan, and Mr. Christensen, all at separate times and under different circumstances, that Mr. Kapusta did not engage in any inappropriate behavior at work.

94. Ms. Seenaught did not endure conduct that was sufficiently severe and pervasive to support an action for hostile work environment; Ms. Seenaught's allegations amounted to two incidents, neither being so severe as to have interfered with a reasonable person's job performance. And, she only proved one of these allegations—the incident that was not at the workplace and that was not shown to have any carryover effect on the workplace.

95. Ms. Seenaught did not establish her hostile work environment claim.

Retaliation

96. Ms. Seenaught also failed to prove the claim of retaliation. Section 760.10(7) provides, in relevant part:

> It is an unlawful employment practice for an employer, an employment agency, a joint labor-management committee, or a labor organization to discriminate against any person because that person has opposed any practice which is an unlawful employment practice under this section, or because that person has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section.

97. Petitioner did not introduce any direct or statistical evidence that proves Respondent fired her in retaliation for Petitioner's complaint to Ms. Finnegan about Mr. Kapusta's sexual harassment at the bar. Absent any direct or statistical evidence of retaliation, Ms. Seenaught must prove her allegation of retaliation by circumstantial evidence. Circumstantial evidence of retaliation is subject to the burden-shifting analysis established in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973).

98. Under the *McDonnell Douglas* analysis, Ms. Seenaught has the initial burden of establishing, by a preponderance of the evidence, a prima facie case

of unlawful retaliation. *See Burlington N. & Santa Fe Ry Co. v. White*, 548 U.S. 53 (2006).

99. In order to prove a prima facie case of unlawful employment retaliation, Ms. Seenaught must establish that: (1) she engaged in a protected activity; (2) she suffered an adverse employment action; and (3) there was a causal relationship between the two events. *Pennington v. City of Huntsville*, 261 F.3d 1262, 1266 (11th Cir. 2001). To establish this causal relationship, Ms. Seenaught must prove "that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer." *Univ. of Tex. S.W. Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013). This standard has also been called "but-for causation." *Frazier-White v. Gee*, 818 F.3d 1249, 1258 (11th Cir. 2016).

100. Failure to establish a prima facie case of retaliation ends the analysis. If Ms. Seenaught establishes a prima facie case, she would create a presumption of retaliation. At that point, the burden shift would to the employer to articulate a legitimate, non-discriminatory reason for taking the adverse action. *Blizzard v. Appliance Direct, Inc.*, 16 So. 3d 922, 926 (Fla. 5th DCA 2009). The reason for the employer's decision should be clear, reasonably specific, and worthy of credence. *Dep't of Corr. v. Chandler*, 582 So. 2d 1183, 1186 (Fla. 1st DCA 1991). The employer has the burden of production, not persuasion, to demonstrate to the trier of fact that the decision was non-discriminatory. *Id.* This burden of production is "exceedingly light." *Holifield v. Reno*, 115 F.3d 1555, 1564 (11th Cir. 1997). The employer only needs to produce evidence of a reason for its decision. It is not required to persuade the trier of fact that its decision was actually motivated by the reason given. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (U.S. 1993).

101. If the employer meets its burden, the presumption of discrimination disappears. The burden would then shift back to Ms. Seenaught to prove that the employer's proffered reason was not the true reason but merely a

"pretext" for discrimination. *Combs v. Plantation Patterns*, 106 F.3d 1519, 1538 (11th Cir. 1997); *Valenzuela*, 18 So. 3d at 25.

102. In order to satisfy this final step of the process, Ms. Seenaught would have to show "directly that a discriminatory reason more likely than not motivated the decision, or indirectly by showing that the proffered reason for the ... decision is not worthy of belief." *Chandler*, 582 So. 2d at 1186 (citing *Tex. Dep't of Cmty. Aff. v. Burdine*, 450 U.S. 248, 252-56 (1981)). The proffered explanation would be unworthy of belief if Ms. Seenaught demonstrates "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence." *Combs*, 106 F.3d at 1538; *see also Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000). Ms. Seenaught would have to prove that the reasons articulated were false *and* that discrimination was the real reason for the action. *City of Miami v. Hervis*, 65 So. 3d 1110, 1117 (Fla. 3d DCA 2011)(citing *St. Mary's Honor Ctr.*, 509 U.S. at 515)("[A] reason cannot be proved to be 'a pretext *for discrimination*' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason.").

103. Despite the shifting burdens of proof, the ultimate burden of persuading the trier of fact that Respondent retaliated against Petitioner remains at all times with Petitioner. *See Burdine*, 450 U.S. at 253; *Valenzuela*, 18 So. 3d at 22.

104. Ms. Seenaught established that she suffered an adverse employment action when she was terminated by Respondent, and that she engaged in a protected activity when she reported her sexual harassment to Ms. Finnegan and Mr. Christensen.

105. To prove the third element, Ms. Seenaught was required to prove a causal connection between the protected activity and the adverse employment decision. This causal link element is construed broadly, and may be established by a demonstration that the employer was aware of the

protected conduct and that the protected activity and the adverse action were not "completely unrelated." *Williams v. Ala. Dep't of Indus. Rels.*, 684 Fed. Appx. 888, 894 (11th Cir. 2017). Petitioner satisfies this third element if (1) Respondent was aware of her protected expression or activity; and (2) there was a close temporal proximity between this awareness and the adverse action. *Id.* at 894. "A close temporal proximity between the protected expression and an adverse action is sufficient circumstantial evidence of a causal connection for purposes of a prima facie case." *Higdon v. Jackson*, 393 F.3d 1211, 1220 (11th Cir. 2004). Here, although the persons responsible for Ms. Seenaught's termination were not aware of the alleged sexual harassment until the October 29, 2018 meeting, after the disciplinary process was already underway, Ms. Seenaught was terminated only a few days later.

106. Since Petitioner established a prima facie case of retaliation, Respondent must articulate a legitimate, nondiscriminatory, and non-retaliatory reason for the adverse action.

107. The sum of the persuasive, credible testimony at the hearing demonstrated that Ms. Seenaught was terminated because she left work without permission on October 28, 2018, and failed to return her phone and WOW device.

108. Respondent provided convincing, legitimate, nondiscriminatory, and non-retaliatory reasons for firing Petitioner and Petitioner did not show the reasons provided were not worthy of belief.

<u>Conclusion</u>

109. Ms. Seenaught failed to establish that she was subjected to a hostile work environment, or that she was retaliated against for engaging in a protected activity. Accordingly, Ms. Seenaught's Petition for Relief must be dismissed.

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 Ms. Seenaught's Petition for Relief.

DONE AND ENTERED this 19th day of October, 2020, in Tallahassee, Leon County, Florida.

JODI-ANN V. LIVINGSTONE
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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.