

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

KATHRYN MOON,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 89-1895
	)	FCHR NO. 88-7405
JIMMY BRYAN TOYOTA, INC.,	)	
	)	
Respondent.	)	
_____	)	

RECOMMENDED ORDER

Pursuant to notice, the above-styled matter was heard before the Division of Administrative Hearings by its duly designated Hearing Officer, Daniel M. Kilbride, on January 19, 1990, in Orlando, Florida. The following appearances were entered:

APPEARANCES

For Petitioner: Jeff Sapper
Qualified Representative
14052 Lake Tilden Boulevard
Winter Garden, Florida

For Respondent: Leo Rock, Jr., Esquire
Gray, Harris and Robinson
Suite 1200 Southeast Bank
201 East Pine Street
Orlando, FL 32801

STATEMENT OF THE ISSUES

Whether Petitioner, a member of a protected class, was demoted from her position as an Assistant Business Manager with the Respondent on February 22, 1988 on the basis of her sex (female), in violation of Section 760.10(1)(a), Florida Statutes (1989)

Whether Petitioner, a member of a protected class, was discharged from her position as automobile salesperson with the Respondent on March 23, 1988 on the basis of her sex (female), in violation of Section 760.10 (1)(a), Florida Statutes (1989).

PRELIMINARY STATEMENT

Petitioner filed a Petition for Relief from a Unlawful Employment Practice with the Florida Commission on Human Relations on March 27, 1989. The matter was referred to the Division of Administrative Hearings for a hearing de novo and the submission of a recommended order to the Commission. At the request of Petitioner, Jeff Sapper moved to be recognized as the representative for Petitioner at the formal hearing. Respondent filed its Answer and Affirmative

Defenses on October 2, 1989. Upon proper notice, a formal hearing was conducted in Orlando, Florida on January 19, 1990. At the hearing, the Hearing Officer made diligent inquiry of the representative, under oath and on the record, as to his capabilities of representing the rights and interests of the Petitioner. Petitioner was present during the inquiry and stated on the record her request for, and acceptance of Jeff Sapper as her non-attorney representative. Based on the inquiry and the request of Petitioner, Jeff Sapper was authorized to appear and represent Petitioner during the course of the formal hearing (Rule 221-6.008, Florida Administrative Code).

At the hearing, Petitioner testified in her own behalf and called as witnesses, Kennette Hughes, Joan Black, Jackson D. Allen, Lynn Allen, Jeff Early, and Laura Moehlenkamp. Petitioner did not offer any exhibits. Respondent called as witnesses, Michael A. Pinto, William A. Nero and Rick D. Compton, and offered four exhibits into evidence. During the course of the hearing, Petitioner sought to elicit testimony relating to the issues of sexual harassment, hostile work environment and disparate treatment in the work place. Respondent objected and moved to strike. The Hearing Officer reserved ruling on the motions. Respondent was permitted to have a continuing objection. On review to the pleadings and the testimony in this matter, Respondent's motion is GRANTED, and all testimony related to those collateral issues have been disregarded as irrelevant and not properly plead. Upon conclusion of the hearing, the parties waived the ten day rule and were provided the opportunity to submit proposed findings of fact, conclusions of law and legal argument within fourteen days of the filing of the transcript. The transcript was filed on February 14, 1990. Petitioner has filed proposed findings which were received on March 14, 1990. Respondent files its proposed findings on February 28, 1990. The parties' proposed findings have been given careful consideration and are addressed in the Appendix attached hereto.

Based upon all of the evidence, the following findings of fact are determined:

FINDINGS OF FACT

1. Kathryn Moon was hired June 17, 1987, in the new car sales department by Respondent Jimmy Bryan Toyota, Inc.
2. Kathryn Moon was promoted to F & I Manager on January 10, 1988, by Respondent.
3. Kathryn Moon was demoted from F & I Manager on February 22, 1988, to new car sales by Respondent.
4. Kathryn Moon was terminated from employment on or about March 23, 1988, by Respondent.
5. The titles Assistant Business Manager, F & I Manager and F & I Closer are synonymous.
6. Kathryn Moon expressed an interest in promotion to F & I Manager several times to Mike Pinto, Respondent's Business Manager, prior to her promotion.
7. Mike Pinto promoted Kathryn Moon to F & I Manager because she had demonstrated good sales performance, consistent with the usual promotion practice of Respondent.

8. At the time of her promotion to F & I Manager, Mike Pinto told Kathryn Moon that his only concern with her success in the department was making sure that everybody worked well together. Teamwork was essential to closing car sales. She needed to be a "team player" in the F & I Manager position.

9. Mike Pinto selected Kathryn Moon over three male employees vying for the position.

10. Mike Pinto felt that a woman in the position of F & I Manager was helpful in order to calm the customer's anxiety and emotional state at the time of a closing.

11. Training for the F & I position involved learning how to operate the computer, to input a proposal, print forms and to close or store the contract.

12. Training also is involved in how to disclose and sell the products, which included credit life insurance, extended warranties and the like, to the customer.

13. Kathryn Moon received the same or similar training and opportunities as other employees in the same position.

14. Mike Pinto talked with Kathryn Moon on a Monday in early February, 1988, about the dispute that she had had with Bill Nero on the preceding Sunday during the time when she was F & I Manager.

15. Another incident that Mike Pinto recalls occurring during this time was counseling with Kathryn Moon regarding an incident involving Frank Nero, a deal that was not consummated in connection with a tent sale.

16. Mike Pinto caused the termination of a female sales person whom he thought had been insubordinate to Kathryn Moon, but later found out that there was a mutual conflict between Kathryn Moon and the sales person.

17. Mike Pinto did counsel with Kathryn Moon privately more than once in connection with problems reported to him that other sales people were having with Kathryn Moon in her F & I Manager capacity.

18. In mid-February 1988, Mike Pinto decided to demote Kathryn Moon. He talked with General Manager Rick Compton about it because he felt that she was not good in the position. He stated there was too much conflict with her and other managers and some of the sales people. This conflict was disrupting the business of the dealership.

19. After discussing Kathryn Moon's demotion with Rick Compton, Mike Pinto told her the same day to go back on the sales floor because she was not handling the position as well as he wanted due to her conflicts that were occurring with managers and sales personnel.

20. Kathryn Moon was very upset about being demoted.

21. Mike Pinto's decision to demote Kathryn Moon was not gender based.

22. Additional training on the details of the job would not have prevented the problems that led up to Kathryn Moon's demotion.

23. New F & I Managers use their own skills and talents to develop their ability to close deals. The top sales persons are the ones selected to be F & I Managers because of their demonstrated ability to close a deal. The closing ability needed for an effective F & I Manager includes the ability to overcome customer objections and to maintain control so that the deal is closed. The majority of the training is on-the-job.

24. An F & I Manager, to be effective, has to be a teamplayer, one that works well with sales personnel and one that sales people look up to and respect.

25. Kathryn Moon had difficulty getting along with other employees, and it was not limited to just a particular person. She frequently argued with the dealership management and sales employees.

26. Bill Nero was Used Car Manager when he left Jimmy Bryan Toyota in the Fall of 1989. In the Summer of 1987, Bill Nero was Assistant Sales Manager at Respondent's dealership. Bill Nero was demoted from Assistant Sales Manager to T. O. Manager in February 1988.

27. After Kathryn Moon's demotion, Bill Nero asked Kathryn Moon to be on his sales team because she had done an excellent job as a sales person before her promotion. Bill Nero's compensation would be affected by the sales efforts of people on his team.

28. Kathryn Moon took her demotion very hard and had a hard time adjusting back to sales after her demotion.

29. Bill Nero had been demoted just as Kathryn Moon, but he thought they could work together well on his team.

30. Bill Nero decided to terminate Kathryn Moon because of her lack of productivity as she was not generating sales at the level she had prior to being promoted to F & I Manager.

31. Kathryn Moon's sales of new cars on a monthly basis were:

Jul 1987	- 16
Aug 1987	- 18
Sep 1987	- 13
Oct 1987	- 13
Nov 1987	- 12
Dec 1987	- 25
Jan 1988	- 1 (promoted to F & I)
Feb 1988	- 0 (in F & I until February 23, 1988)
Mar 1988	- 8

32. Kathryn Moon was terminated because of her poor attitude and lackluster performance in late February and March 1988, after her return to the sales floor.

33. Other male and female employees have been terminated for poor attitude and lackluster performance.

34. The company employee handbook states that the general code of conduct for employees requires a positive attitude towards the workplace.

35. General Manager Rick Compton wanted his sales personnel to have a good attitude and be good team players.

36. Kathryn Moon was advised that after she had been back on the sales force for a while there was a possibility that she could advance back into the F & I position. Other employees that had been demoted were promoted again if they performed satisfactorily.

37. There was a decided attitude change in Kathryn Moon after her demotion from the F & I position. She was bitterly disappointed after her demotion. She was not the team player after her demotion that she was before, and her sales performance was poor.

38. High turnover and moving of salespersons between different dealerships is commonplace in the auto industry. More people were terminated at Jimmy Bryan than other dealers in the area. Respondent terminated salespersons if they did not meet the national sales average of ten (10) units per month.

39. Kathryn Moon did not quit after her demotion because she liked selling Toyotas, and Jimmy Bryan was the largest Toyota dealer in the area. She chose not to leave Respondent's employment because that was her best opportunity to make money plus she did not want to travel to a further dealership.

CONCLUSIONS OF LAW

40. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding, and the parties thereto, pursuant to subsection 120.57(1), Florida Statutes and Rule 22T-8.016(1), Florida Administrative Code.

41. The State of Florida, under the legislative scheme contained in Florida Statutes Chapter 760, incorporates and adopts the legal principles and precedents established in the federal anti-discrimination laws specifically set forth under Title VII of the Civil Rights Act of 1964 as amended 42 USC Section 2000e et seq. The Florida law prohibiting unlawful employment practices is found in Section 760.10, Florida Statutes. This section prohibits discharge or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment because of such individual's sex (Sec. 760.10(1)(a)).

42. The Supreme Court established, and later clarified the burden of proof in disparate treatment cases in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). The FCHR has adopted this evidentiary model. Kilpatrick v. Howard Johnson Co., 7 FALR 5468, 5475 (FCHR 1985).

43. McDonnell Douglas places upon the Petitioner the initial burden of proving a prima facie case of discrimination. Judicial authorities have established a three-pronged burden of proof for establishing a prima facie case of discriminatory discharge:

A. The employee is qualified for the position;

B. The employee was subject to an adverse employment decision; and replaced by a person outside the protected class.

C. There is a causal connection between 1 and 2. *Canino v. EEOC*, 707 F.2d 468, 32 FEP Cases 139 (11th Cir. 1983); *Smith v. Georgia*, 684 F.2d 729, 29 FEP Cases 1134 (11th Cir. 1982); *Lee v. Russell County Board of Education*, 684 F.2d 769, 29 FEP Cases 1508 (11th Cir. 1982), appeal after remand, 744 F.2d 768, 36 FEP Cases 22 (11th Cir. 1984).

44. Proving a prima facie case serves to eliminate the most common nondiscriminatory reasons for the Plaintiff's disparate treatment. See, *Teamsters v. U.S.*, 431 U.S. 324, 358 and N. 44 (1977). It is not, however, the equivalent of a factual finding of discrimination. It is simply proof of actions taken by the employer from which discriminatory animus is inferred because experience has proved that in the absence of any other explanation it is more likely than not that those actions were bottomed on impermissible considerations. The presumption is that more often than not people do not act in a totally arbitrary manner, without any underlying reason, in a business setting. *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 576 (1978).

45. Once the Plaintiff has succeeded in proving all the elements necessary to establish a prima facie case, the employer must then articulate some legitimate, nondiscriminatory reason for the challenged employment decision. The employer is required only "to produce admissible evidence which would allow the trier of fact to conclude that the employment decision had not been motivated by discriminatory animus." *Texas Department of Community Affairs v. Burdine*, at 257. The employer "need not persuade the court that it was actually motivated by the proffered reasons . . . it is sufficient if the [employer's] evidence raises a genuine issue of fact as to whether it discriminated against the Plaintiff." *Id.* at 254-255. This burden is characterized as "exceedingly light." *Perryman v. Johnson Products Co., Inc.*, 698 F.2d 1138 (11th Cir. 1983).

46. Once the employer articulates a legitimate reason for the action taken, the evidentiary burden shifts back to the Petitioner who must prove that the reason offered by the employer for its decision is not the true reason, but is merely a pretext. The employer need not prove that it was actually motivated by the articulated nondiscriminatory reasons or that the replacement was more qualified than the Petitioner. *Texas Department of Community Affairs v. Burdine*, at 257-8.

47. In *Burdine*, the Supreme Court emphasized that the ultimate burden of persuading the trier of fact that the Respondent intentionally discriminated against the Petitioner remains at all times with the Petitioner. *Texas Department of Community Affairs v. Burdine*, at 253. The Court recently confirmed this principle in *Price Waterhouse v. Hopkins*, 109 S.Ct. 1775 (1989).

48. In *Price Waterhouse v. Hopkins*, the Court examined the parties' respective burdens of persuasion where the Plaintiff has proven with direct evidence that the employer's actions were motivated by discriminatory animus. A plurality of the Court held that in such a case, the employer must prove by a preponderance of the evidence that it would have made the same decision even if discriminatory animus had not been a motivating part of its decision.

49. The Court cautions, however, that the holding does not alter the *Burdine* burden of proof allocation. The employer only bears the burden of persuasion after the Plaintiff has proven discriminatory motivation. In a concurring opinion, Justice O'Connor explained that the application of this rule is limited to mixed-motive cases, that is, where the employer has created substantial uncertainty as to causation by knowingly giving substantial weight to an impermissible criterion.

50.. In the case sub judice, the Petitioner has satisfied the first element of establishing that she were qualified for the position. The Petitioner has also established that she was subjected to an adverse employment decision by her demotion and subsequent termination from employment. However, the Plaintiff has completely failed in establishing or proving by credible, persuasive evidence that there is a causal connection between her qualification for the position and her ultimate discharge from employment. The Plaintiff did not provide at the formal hearings through testimony or exhibits any direct evidence sufficient in itself to sustain her burden of proof. The mere sequence of events whereby termination followed her demotion does not prove a charge of unlawful sex discrimination; nor absent more circumstantial evidence, do such circumstances establish an irrefutable presumption of retaliatory design or discriminatory purpose. See: Price Waterhouse v. Hopkins, 109 S.Ct. 1775 (1989).

51. At best the sequence of events require the Respondent to come forward and "articulate" a valid, nondiscriminatory reason for the resulting termination of employment. The Company has done so.

52. The Respondent established by a preponderance of the testimony and business records that the Petitioner had been terminated from employment due to her violation of a major work rule. The evidence presented by the Company and elicited from witnesses at the formal hearing on this matter establish that the Petitioner was bitterly disappointed when she returned to the sales floor in February. This disappointment was reflected in her work performance which deteriorated to a level where it caused constant conflict among the employees she worked with and was reflected in poor sales performance where for management terminated her employment. The basis for the decision was based on a nondiscriminatory reason. In addition, Respondent has articulated a valid, nondiscriminatory reason as the basis for its decision to demote Petitioner in February, 1988. While she was in the F & I position, her aggressive, outspoken personality created conflicts with other dealership employees which was disruptive to the dealership function. Respondent could properly consider this when making employment decisions. Hale v. Cuyahoga County Welfare Dept., ___F.2d___, 51 FEP 1264 (6th Cir. 1989). Petitioner has failed to produce any evidence to demonstrate that the Respondent's articulated reasons were "pretextual".

RECOMMENDATION

Based on the foregoing findings of fact and conclusions of law, it is

RECOMMENDED that a Final Order be issued which DENIES the Petition for Relief.

DONE AND ENTERED this 19th day of March, 1990, in Tallahassee, Leon County, Florida.

DANIEL M. KILBRIDE
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904)488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of March, 1990.

APPENDIX

The following constitutes my specific rulings, in accordance with section 120.59, Florida Statutes, on findings of fact submitted by the parties.

Proposed Findings of Fact Submitted by Petitioner:

Accepted: Paragraphs 2 (in substance), 12.
Rejected as against the greater weight of the
evidence or irrelevant : Paragraphs 1, 3-11.

Proposed Findings of Fact Submitted by Respondent:

Accepted: Paragraphs 1,2,3,4,5,6,7,8,9,10,11,12,13 (in
substance), 14 (in substance), 15 (in substance), 16,
17,18,19,20,22,23,25 (in substance), 26-33 (in
substance), 34, 35-36 (in substance), 37, 38, 43 (in
substance), 44,45,46,47,48,49,50,51,52,53,54-57 (in
substance), 58 (in substance), 59-69 (in substance),
70,71,72-84 (in substance), 85,93,116,117,122,138.
Rejected as irrelevant, subsumed or repetitive: 21,
24, 39-42, 86-92, 94-115, 118-121 (irrelevant),
123-137, 139-162.

COPIES FURNISHED:

Jeff Sapper, Representative
14052 Lake Tilden Boulevard
Winter Garden, FL 32787

Kathryn L. Moon
6460 Yellowstone Street
Orlando, FL 32807

Leo P. Rock, Jr., Esquire
Gray, Harris and Robinson, P.A.
Post Office Box 3068
Orlando, FL 32802

Dana Baird
General Counsel
Florida Human Relations
Commission
325 John Knox Road
Building F, Suite 240
Tallahassee, FL 32399-1925

Margaret Jones, Clerk
Florida Human Relations
Commission
325 John Knox Road
Building F, Suite 240
Tallahassee, FL 32399-1925

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AGENCY REMAND

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STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

KATHRYN MOON,

Petitioner,

EEOC CASE NO. 15D881979

v.

FCHR CASE NO. 88-7405

JIMMY BRYAN TOYOTA, INC.,

DOAH CASE NO. 89-1895

Respondent.

FCHR ORDER NO. 90-025

_____/

ORDER REMANDING PETITION FOR
RELIEF FROM AN UNLAWFUL
EMPLOYMENT PRACTICE

I. Panel of Commissioners

The following three Commissioners participated in the disposition of this matter.

Commissioner Learna G. Ramsey,
Chairperson;
Commissioner Elena Flom; and
Commissioner Ralph P. Mangione.

II. Appearances

For Petitioner Kathryn Moon: No appearance.

For Respondent Jimmy Bryan Toyota, Inc.: Leo P. Rock, Jr., Esquire, Gray, Harris and Robinson, Suite 1200 Southeast Bank, 201 East Pine Street, Orlando, Florida 32801.

III. Preliminary Matters

Kathryn Moon, Petitioner herein, filed a complaint of discrimination with this Commission pursuant to the Human Rights Act of 1977, as amended, Sections

760.01-760.10, Florida Statutes (1989), alleging that Jimmy Bryan Toyota, Inc., Respondent herein, unlawfully discriminated against Petitioner on the basis of sex.

In accordance with the Commission's rules the allegations of discrimination set forth in the complaint of discrimination were investigated and a report of the investigation was submitted to the Executive Director.

On February 22, 1989, the Executive Director issued his Determination finding reasonable cause to believe that an unlawful employment practice occurred. Petitioner then filed a Petition for Relief from an Unlawful Employment Practice on March 27, 1989. The petition was referred to the Division of Administrative Hearings (DOAH) for the conduct of a formal proceeding pursuant to Rule 22T-8.016(1). The formal proceeding was held on January 19, 1990.

During the course of the formal hearing, Respondent objected to Petitioner's introduction of testimony relating to sexual harassment and a hostile work environment. The hearing officer reserved ruling on the motion and Respondent maintained an ongoing objection and motion to strike all testimony relating to sexual harassment and hostile working environment. The objection was raised regarding testimony of Petitioner's witnesses as well as Petitioner's testimony. The hearing officer's recommended order granted Respondent's motion to strike all testimony regarding sexual harassment, hostile work environment and disparate treatment.

IV. Findings of Fact

The hearing officer's finding of fact relate mostly to Petitioner's performance evaluation. The findings of fact failed to include any findings regarding: (1) alleged disparate treatment of Petitioner in respect to training in her new position; (2) alleged hostile work environment towards female employees; and (3) an alleged atmosphere of sexual harassment towards Petitioner and others. The hearing officer's findings of fact are therefore incomplete.

V. Conclusions of Law

The hearing officer granted Respondent's motion to strike testimony regarding sexual harassment, hostile work environment and disparate treatment. He gave no legal support for granting such a motion. Based upon his findings of fact, the hearing officer concluded that Respondent articulated a valid, nondiscriminatory reason as the basis for its decision to demote Petitioner. The hearing officer also concluded that Petitioner failed to prove a causal connection between her qualification for the position and her discharge. The hearing Officer recommends that the petition be dismissed. Upon consideration, we find that the hearing officer's granting of Respondent's motion to strike certain testimony was contrary to the law and therefore erroneous.

Under a McDonnell Douglas analysis, Petitioner has the burden of rebutting Respondent's articulation of a nondiscriminatory reason for its actions by proving that the proffered reason was not the true reason for Respondent's actions. This can be accomplished through indirect evidence that shows disparate treatment. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). In *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097 (8th Cir. 1988), the court reversed a lower court ruling that excluded several categories of evidence that tended to show a climate of racial and age bias at the employer's facility. The court held that such evidence was admissible and the cumulative

effect of excluding the evidence was sufficiently prejudicial to justify reversal, even if each evidentiary ruling, in isolation, would not have justified reversal. The court reasoned that such background evidence may, in discrimination cases, be critical for an assessment of whether an employer was more likely than not to have acted from an unlawful motive.

More recently, the principles enumerated in *Estes* were applied to a sex discrimination case in *Hawkins v. Hennepin Technical Center* 900 F.2d 153 (8th Cir. 1990), where the court reversed a lower court ruling that excluded several categories of evidence that tended to show a climate of sexual harassment. The court held that even though sexual harassment was not formally charged, a former employee should be permitted to introduce additional evidence as to specifics of such harassment to attempt to show an atmosphere of condoned sexual harassment in the work place, thereby increasing the likelihood of proving discrimination. The court reasoned that an employer's past discriminatory policy and practice may well illustrate that the employer's asserted reasons for disparate treatment are a pretext for intentional discrimination.

VI. Remand

In consideration of the hearing officer granting Respondent's motion to strike testimony relating to sexual harassment, etc., and the absence of any factual findings regarding such testimony, we conclude that all testimony presented regarding sexual harassment, hostile work environment and disparate treatment should be considered by the hearing officer in recommending the final disposition of this case.

Accordingly, the Petition for Relief from an Unlawful Employment practice is hereby REMANDED to the Division of Administrative Hearings for reconsideration consistent with this opinion.

It is so ORDERED:

Dated this 27th day of July 1990.

FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

BY: _____
Commissioner Elena Flom; and
Commissioner Ralph P. Mangione.

Commissioner Learna G. Ramsey, Chairperson, dissenting. I would adopt the hearing officer's recommendation of dismissal.

FILED this 27th day of July, 1990 in Tallahassee, Florida.

Margaret A. Jones
Clerk of the Commission

ENDNOTE

1/ Unless otherwise indicated, all statutory references are to Florida Statutes (1989), and all rule references are to Florida Administrative Code.

COPIES FURNISHED:

Kathryn Moon, Petitioner
Leo P. Rock, Jr., Respondent
Daniel M. Kilbride, DOAH Hearing Officer
Patricia Buttarro, Student Intern

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SUPPLEMENTAL RECOMMENDED ORDER

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

KATHRYN MOON,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 89-1895
	)	FCHR NO. 88-7405
JIMMY BRYAN TOYOTA, INC.,	)	
	)	
Respondent.	)	
_____	)	

SUPPLEMENTAL RECOMMENDED ORDER

Pursuant to the remand of the Florida Commission on Human Relations, the entire record of above-styled matter was reviewed before the Division of Administrative Hearings by its duly designated Hearing Officer, Daniel M. Kilbride. The following appearances were entered:

APPEARANCES

For Petitioner: Jeff Sapper, Qualified Representative
14052 Lake Tilden Boulevard
Winter Garden, Florida 32787

For Respondent: Leo Rock, Jr., Esquire
Gray, Harris and Robinson
Suite 1200 Southeast Bank
201 East Pine Street
Orlando, Florida 32801

SUPPLEMENTAL STATEMENT OF THE ISSUES

Whether Petitioner received disparate treatment in respect to training upon being promoted to the position of Assistant Business Manager.

Whether Petitioner, a member of a protected class, had been sexually harassed while employed by Respondent from the summer of 1987 to March 23, 1988.

Whether Respondent fostered or maintained a hostile work environment at Petitioner's place of employment.

PRELIMINARY STATEMENT

Following a formal hearing, the undersigned Hearing Officer submitted a Recommended Order for consideration by the Florida Commission on Human Relations. Following consideration by the Commission, this matter was remanded to the hearing officer to reconsider testimony already presented and not reopen the record for the taking of additional testimony, but to include findings regarding: (1) alleged disparate treatment of Petitioner in respect to training in her new position; (2) alleged hostile work environment towards female employees; and (3) an alleged atmosphere of sexual harassment towards Petitioner and others. The hearing officer has made a complete review of the record, considered testimony previously excluded and made the additional findings of fact as set forth below. In view of the fact that no new additional evidence was presented, no additional submittal of the parties was considered in the rendering of this order. The numbering of paragraphs relates back to the Recommended Order, dated March 19, 1990.

Based upon all of the evidence, the following supplemental findings of fact are determined:

SUPPLEMENTAL FINDINGS OF FACT

12(a). Interpersonal relations and attitude training were not part of the skills training provided by Respondent to employees in the Assistant Business Manager's position. Personnel were expected to have developed such skills prior to their promotion to that position.

12(b). Petitioner brought the attitude and interpersonal skills which she had developed in sales with her to the new position.

12(c). In her position in sales, Petitioner was aggressive, outspoken, and forthright in dealing with her peers and with management. In spite of unfair, rude or obnoxious behavior toward her by other sales persons or her T.O., Petitioner took steps to insure that she met or exceeded her sales quota each month prior to her promotion.

12(d). These attributes, which were beneficial for her in an aggressive and competitive sales environment, were counterproductive in the Assistant Business Manager's position. Team work, with sales personnel and management, and a reassuring and persuasive personality were essential for success. Instead, Petitioner was in constant conflict with management and sales personnel over the closing of "deals."

13(a). Mike Pinto, the Business Manager, spent the same or greater time providing on the job training with Petitioner as with other similarly situated male employees.

13(b). When the Business Manager was not available for consultation with Petitioner, in January, 1988, due to a tent sale, other Assistant Business

Managers, knowledgeable in the position, were available to answer Petitioner's questions.

13(c). Petitioner testified that her peers refused to allow her to sit in and observe their transactions with a client, as she requested. Standing alone, this conduct is insufficient to demonstrate disparate treatment in the training as an Assistant Business Manager.

* * *

40. The work environment between peers in sales at the Respondent's dealership was uncivil, rude, manipulative, hostile and highly competitive. It was common practice for sales personnel to harass and demean each other in an effort to be the "outstanding salesperson" for the month.

41. Although sales personnel were ostensibly assigned to "teams", each salesperson was in direct competition with their team member. In order to retain their position at Respondent's dealership, a person in sales was expected to sell a minimum of ten units per month or their job was in jeopardy. Prior sales performance had minimum impact in retaining their position with the company.

42. When a new customer came on to Respondent's lot, each salesperson had to be alert and position themselves so that they could be the first person to approach the customer. If that customer did purchase a vehicle, then the salesperson who "worked the deal" would be entitled to the commission. Therefore, aggressive sales people would devise various methods whereby they could be the first on the scene to approach a customer.

43. It was common practice for male salespersons to lure female sales associates away from the lot during busy times. This was done by having them go out for sandwiches at lunch or to pick up their dry cleaning or do other errands. Male salespersons were not expected to run such errands during their working hours.

44. During the period June 17, 1987 through January 10, 1988, when she was promoted, Petitioner steadfastly refused to participate in the subterfuge and no adverse employment decision was made against her. Therefore, the unfair labor practices employed by one salesperson against another at Respondent's dealership cannot be said to be gender based.

45. The work environment fostered by management at Respondent's dealership toward its employees in sales and the Business Managers positions was uncivil, hostile, manipulative, arbitrary, capricious, secretive and unprofessional. However, from the evidence adduced at hearing, such conduct was not gender based.

46. Due to the hostile work environment fostered by management, there was massive turnover in the sales and the Assistant Business Managers positions by both male and female employees. Terminations, both voluntary and involuntary, promotions, demotions, and lateral transfers took place at an astonishing pace. The evidence was insufficient to show that it was gender based.

47. There was insufficient evidence to support a finding of hostile work environment based on gender.

48. There was insufficient evidence to support a finding of sexual harassment directed to Petitioner.

SUPPLEMENTAL CONCLUSIONS OF LAW

8. In the instant case, the essential questions are whether the Petitioner has demonstrated, by a preponderance of the evidence, that the true reason for her demotion and eventual firing was intentional sex discrimination, and/or whether Petitioner was subject to harassment based on her gender or whether Petitioner was subject to a hostile work environment fostered by Respondent towards female employees.

9. Although the testimony showed that the work environment fostered by Respondent was hostile and sales and entry level management personnel were subjected to constant harassment and threats to maintain sales quotas of face demotion or dismissal, the evidence was insufficient to show that such conduct created a pervasive hostile work environment that was gender based. As the Eleventh Circuit Court of Appeal stated in *Nix v. WLCY Radio*, 738 F.2d 1183, reh.denied 747 F.2d 710 (11th Cir. 1984), as follows:

Title VII is not a shield against harsh treatment in the work place [citation omitted] nor does the statute require the employer to have good cause for his decisions. The employer may fire an employee based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason [citations omitted]. While an employer's judgment or course of action may seem poor or erroneous to outsiders, the relevant question is simply whether the given reason was a pretext for illegal discrimination. The employers stated legitimate reason . . . does not have to be a reason the judge or jurors would act on or approve. [citations omitted].

That is certainly the situation in this case. Respondent's reasons for demotions and firing of its employees both male and female, sales and management, certainly appears to have been arbitrary and capricious. However, the proof was insufficient to prove that its action was for a discriminatory reason. See also: *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742 (1993).

RECOMMENDATION

Based on the foregoing findings of fact and conclusions of law, it is RECOMMENDED that a Final Order be issued which DENIES the Petition for Relief.

DONE and ENTERED this 13th day of July, 1994, in Tallahassee, Florida.

DANIEL M. KILBRIDE
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904)488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of July, 1994.

COPIES FURNISHED:

Jeff Sapper
Qualified Representative
14052 Lake Tilden Boulevard
Winter Garden, Florida 32787

Leo Rock, Jr., Esquire
Gray, Harris and Robinson
Suite 1200 Southeast Bank
201 East Pine Street
Orlando, Florida 32801

Kathryn L. Moon
6460 Yellowstone Street
Orlando, Florida 32807

Sharon Moultry, Clerk
Florida Human Relations
Commission
325 John Knox Road
Building F, Suite 240
Tallahassee, Florida 32399-1925

Dana Baird
General Counsel
Florida Human Relations
Commission
325 John Knox Road
Building F, Suite 240
Tallahassee, Florida 32399-1925

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to the Recommended Order. All agencies allow each party at least 10 days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should consult with the agency that will issue the final order in this case concerning their rules on the deadline for filing

exceptions to this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.