IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA
GENERAL JURISDICTION DIVISION

APRIL TATE,

Plaintiff,

v.

WINN-DIXIE LOGISTICS, INC.

Defendant.
_____/

CASE NO. 09-91943 CA 06

ORDER AND OPINION GRANTING
WINN-DIXIE'S MOTION FOR DIRECTED VERDICT

This matter came on for hearing on the Motion for Directed Verdict of Defendant, Winn-Dixie Logistics, Inc. ("Winn-Dixie"). For the reasons stated herein, the Motion is granted.

I. Introduction

Plaintiff, April Tate ("Plaintiff"), sued her former employer, Winn-Dixie, alleging sexual harassment under the Florida Civil Rights Act, *Fla. Stat.* §§760.10, *et seq.*, and unlawful retaliation under the Florida Whistleblower Act, *Fla. Stat.* §§ 448.101, *et seq.* Specifically, Plaintiff alleged that a Winn-Dixie supervisor sexually harassed her and that Winn-Dixie terminated her employment in retaliation for her objections to Winn-Dixie's failure to investigate and take prompt remedial action to stop the sexual harassment.

Plaintiff offered only one witness at trial, herself. Winn-Dixie moved for directed verdict on both claims at the close of Plaintiff's case. Because Plaintiff did not offer evidence on essential elements of her claims, a directed verdict is warranted.

I. Directed Verdict Standard

"In determining a motion for directed verdict, the evidence, and all reasonable inferences therefrom must be viewed in a light most favorable to the non-moving party." *Woods v. Winn Dixie Stores, Inc.,* 621 So. 2d 710, 711 (Fla. 3d DCA 1993). "Where evidence is conflicting, or will admit of different reasonable inferences, the issue should be submitted to the jury as a question of fact, and not passed upon by the judge as a matter of law." *Levey v. Getelman,* 444 So. 2d 1027, 1028 (Fla. 3d DCA 1984). However, "[a] trial court may direct a verdict...when the evidence and all reasonable inferences fail to prove a plaintiff's case." *Martinolich v. Golden Leaf Management, Inc.*, 786 So. 2d 613, 614 (Fla. 3d DCA 2001).

II. Uncontroverted Facts

Viewing the evidence in a light most favorable to Plaintiff, the facts are as follows.

A. Plaintiff's Employment at Winn-Dixie

Plaintiff was hired in May 2007 as a clerk in the Perishable Department of Winn-Dixie's Distribution Center in Miami, Florida ("Miami DC"). Three months later, Plaintiff became one of three clerks in the Fleet Department of the Miami DC. Plaintiff's personnel file contained several "write-ups," including three resulting from tardiness and one resulting from a no-call no-show.[1] [Ex:10].[2] In addition, Plaintiff received a write-up for a time clock violation. She was late for work, ran inside the Miami DC, clocked-in, and then left the building to park her car in the designated parking area. Plaintiff acknowledged that such conduct violated Winn-Dixie's policies. [Pl:64].[3]

[1] Plaintiff disputed that certain of the write-ups were warranted, but she did not dispute that they were contained within her personnel file.
[2] "Ex" refers to the trial exhibits.
[3] "Pl" refers to Plaintiff's trial testimony.

B. Winn-Dixie's Anti-Harassment Policies

Winn-Dixie promotes a workplace free from harassment by maintaining anti-sexual harassment policies. Pursuant to Winn-Dixie's policies, "Anyone subjected to or witnessing any type of harassment should immediately contact a Manager, Supervisor, Human Resources Manager, or W-Dial[an associate action hotline]." [Ex:23]. Plaintiff received and reviewed the policies. [Pl:44-46]. She also knew that "failing to report inappropriate or offensive conduct" violated the anti-harassment policy. [*Id.*].

C. Plaintiff's Allegations of Sexual Harassment

As many as three Fleet Supervisors were on duty at the Miami DC at any given time during Plaintiff's shifts. While Plaintiff could have spoken with any of them about work-related issues, she preferred to speak with Fleet Supervisor Frederick Stephens ("Stephens"). Plaintiff programmed Stephens' telephone number into her cellular phone and called him late at night while he was off-duty. [Pl:59-62]. She also sent text messages to Stephens while he was off-duty. [*Id.*].

Plaintiff testified that Stephens sexually harassed her. Specifically, she testified that during the two-year period of her employment in the Fleet Department, Stephens massaged her shoulders "once or twice," once stated, "You make my dick hard," and once stated, "I want to eat your pussy." [Pl:8]. On one occasion he sent a picture of his penis to Plaintiff's cellular phone. [Pl:14; Ex:1]. Plaintiff summarized the conduct as follows:

Q. Did he make any other comments?
A. No, just those.
Q. You mentioned that he massaged your shoulders. How often would he do that?
A. He only did that like once, once or twice.
Q. Did he ever touch you physically?
A. Not other than that.
Q. Did he make any other advances towards you?

A. No. Only verbally and the massaging and then the picture. That is it.

[Pl:11].

Q. He never grabbed your breasts or anything like that, did he?
A. No.
Q. He never grabbed you or physically forced himself on you or anything like that, right?
A. No.
Q. So it was flirting and massaging your shoulders one, maybe two times?
A. Yes.

[Pl:64].

D. Plaintiff's Failure to Report Stephens' Conduct

Plaintiff testified that she never specifically reported Stephens for sexual harassment. [Pl:17-18]. Rather, she told a Winn-Dixie supervisor, Andres Hernandez ("Hernandez"), that Stephens was being "inappropriate" and "making it hard for her."[4] This was the extent of Plaintiff's comments to any supervisor concerning Stephens. Plaintiff offered no evidence that either Hernandez or Stephens was involved in her termination.

E. Plaintiff's Written Reports of "Important" Employment Issues

Plaintiff testified that she reported "important" employment issues to Winn-Dixie in writing. She did not, however, report Stephens' alleged conduct in writing or otherwise.

For instance, in July 2008, Winn-Dixie security reported that Plaintiff refused to allow an inspection of her bags, a violation of Winn-Dixie policy. In response, Plaintiff drafted a petition

[4] Plaintiff testified:

Q. Did you ever tell Mr. Hernandez, Mr. Andy Hernandez, that you were being sexually harassed by Mr. Stephens?
A. Not in those exact words.
Q. What did you tell him?
A. I let him know that Fred was being inappropriate.
Q. Did you tell him how?
A. Yes. I said Fred is being inappropriate in the things that he is saying. So I know he is trying to make it hard for me.

[Pl:17-18].

declaring her innocence, obtained signatures from security personnel on her behalf, and sent an email concerning the incident to Patrick Carraro ("Carraro"), Manager of the Miami DC, demanding an investigation. [Ex:138, 140].

In February 2009, Plaintiff requested to be promoted to Fleet Supervisor. After Winn-Dixie offered the promotion to another candidate, she called Robert Scott ("Scott"), Human Resources Manger at Winn-Dixie's headquarters in Jacksonville, Florida, to express her disappointment. She also complained to Carraro that she was not promoted to Fleet Supervisor. She requested and obtained a meeting with Carraro and Hernandez where she handed out a letter detailing her qualifications. [Ex:142]. In response, Winn-Dixie provided Plaintiff additional training so that she might be eligible for a supervisory position in the future.

During the course of her employment, Plaintiff also sent several emails to Carraro and others concerning work-related issues she deemed important. [Ex:29, 30].

In contrast, Plaintiff did not report Stephens' conduct to Carraro or Scott in writing or otherwise. Nor did she report Stephens' conduct via the W-Dial action line even though she was familiar with it. Plaintiff also testified that that she did not share with Winn-Dixie the picture of Stephens's penis until after she filed the lawsuit. Her reasoning was that she did not want to get Stephens fired.[5]

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[5] Plaintiff testified:

A. I wasn't trying to get anybody fired...I did not want to see him fired.
Q. You could have also reported on the 800 number anonymously, true? You didn't even have to give your name.
A. It still would have got him fired.
Q. So you are saying you were absolutely disgusted at Fred Stephens for this harassment against you, but you did not want to get him fired?
A. No, I didn't want him to lose his job.

[Pl:55].

F. Winn-Dixie's Reduction in Force

In recent years, Winn-Dixie has struggled financially and has conducted several reductions in its workforce. In 2005 the company initiated the process of reorganization through bankruptcy proceedings. In October 2009, Winn-Dixie decided to reduce two of the three Fleet Clerks in the Miami DC. The Fleet Clerks were Plaintiff, Jorge Altamirano ("Altamirano"), and Laura Ramirez ("Ramirez"). Winn-Dixie advised each of the Fleet Clerks that it would apply a Merit Rating System ("MRS") to determine which one of the three would remain employed. The criteria for the MRS were length of service and performance. Plaintiff offered no evidence at trial that Stephens played any role in the MRS.

Winn-Dixie claimed that Plaintiff had the lowest MRS score of the three Fleet Clerks based on her short length of service and the several write-ups contained in her personnel file. Ramirez, a 30-year Winn-Dixie employee, earned 22 points. Altamirano earned 13 points. Plaintiff earned only 9 points. Pursuant to the MRS, Winn-Dixie determined that Ramirez would keep her job, and Plaintiff and Altamirano would be laid off. On October 28, 2009, Plaintiff sent an email to the Fleet Department, including Stephens, stating, "I enjoyed the time I spent here working with you as a team and you all will be truly missed." [Ex: 27]. Winn-Dixie terminated Plaintiff's employment on October 29, 2009. Plaintiff testified that she did not know who was involved in the decision to terminate her, and she offered no evidence that her termination was based on unlawful retaliation.

III. Discussion

A. Sexual Harassment Under Florida Civil Rights Act ("FCRA")

The FCRA prohibits sexual harassment in the work place. *See Fla. Stat.* §§760.10, *et seq*. 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 Industries, Inc. v. Ellerth,* 524 U.S. 742, 751 (1998).[6]

1. Quid Pro Quo Sexual Harassment

Quid pro quo harassment occurs when a work-related benefit is conditioned expressly or impliedly on the granting of a sexual favor. *Gupta v. Florida Bd. of Regents*, 212 F. 3d 571, 582 (11th Cir. 2000). Plaintiff did not plead a claim of quid pro quo sexual harassment nor was any evidence presented at trial to support such a claim. Stephens did not demand sexual favors as a *quid pro quo* for job benefits. Moreover, Plaintiff presented no evidence that Stephens was involved in her termination. *See Hodges v. Gellerstedt*, 833 F. Supp. 898, 901 (M.D. Fla. 1993) ("Th[is] element is crucial to alleging a quid pro quo claim...The acceptance or rejection of the harassment by the employee must be an expressed or implied condition to receipt of a job benefit or the cause of a job detriment."). The Court, therefore, analyzes Plaintiff's claim as hostile environment sexual harassment.

2. Hostile Environment Sexual Harassment

To establish a hostile environment sexual harassment claim under the FCRA based on harassment by a supervisor, a plaintiff must show:

> (1) that he or she belongs to a protected group; (2) that the employee has been subject to unwelcome sexual harassment, such

[6] Because the FCRA is patterned after Title VII of the Civil Rights Act of 1964, as amended, federal case law is controlling. *See Russell v. KSL Hotel Corp.,* 887 So. 2d 372, 377 (Fla. 3d DCA 2004).

> as sexual advances, requests for sexual favors, and other conduct of a sexual nature; (3) that the harassment must have been based on the sex of the employee; (4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and (5) a basis for holding the employer liable.

Mendoza v. Borden, Inc., 195 F.3d 1238, 1245 (11th Cir. 1999). Plaintiff has failed to present evidence to support findings in her favor on the second (unwelcome), fourth (severe and pervasive) and fifth (employer liability) elements of her case.

a. Unwelcome

For conduct to be unlawful sexual harassment, it must be unwelcome. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986). In determining whether conduct is unwelcome, the court may consider "whether, as well as the manner in which, the plaintiff registered her complaint." *Balletti v. Sun-Sentinel Co.*, 909 F. Supp. 1539, 1547-1548 (S.D. Fla. 1995).

In *Weinsheimer v. Rockwell International Corp.,* 754 F. Supp. 1559, 1564 (M.D. Fla. 1990), *aff'd,* 949 F.2d 1162 (11th Cir. 1991), the court found that conduct was not "unwelcome" where plaintiff did not report offensive behavior until months after it happened and, even then, only in the course of casual conversation with supervisor. Similarly, in *Vermett v. Hough,* 627 F. Supp. 587, 598–99 (W.D. Mich. 1986), the court found that the conduct was not "unwelcome" where the plaintiff did not report the incident for three months.

In the instant case, the alleged conduct was not unwelcome. Plaintiff did not report Stephens' alleged conduct to a supervisor; she admittedly wanted Stephens to remain employed by Winn-Dixie; she did not request a transfer for herself or Stephens but rather wanted to remain employed alongside him as a fellow Fleet Supervisor; she programmed Stephens' cellular phone number in her phone; and she sent Stephens text messages and regularly called him late at night while he was off-duty even though other supervisors were on duty. These actions are

inconsistent with those of an employee who subjectively perceives her work environment to be abusive or desires to convey to her supervisor that his behavior is unwelcome. *See, e.g., Balletti* at 1548.

b. Severe or Pervasive

Sexual harassment is actionable only when it is alters the terms or conditions of employment. *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1246 (11th Cir. 1999). The plaintiff must establish that her work environment was both objectively and subjectively offensive, considering all of the circumstances, including the social context of the particular behavior. *Oncale v. Sundower Offshore Services, Inc.*, 523 U.S. 75, 81 (1998). That is, the plaintiff must "subjectively perceive"[7] the sexual harassment as sufficiently severe or pervasive to alter the terms or conditions of employment, and her subjective perception must be objectively reasonable. *Id.*

The Supreme Court has identified four factors to consider in determining whether harassing conduct is objectively severe or pervasive to alter an employee's terms or conditions of employment: (1) "the frequency of the conduct; (2) the severity of the conduct; (3) whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and (4) whether the conduct unreasonably interferes with the employee's work performance." *Mendoza* at 1246, *citing Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993). An examination of the *Harris* factors demonstrates that Plaintiff did not endure conduct that was so severe or pervasive that it altered the terms and conditions of her employment.

Plaintiff presented evidence of three categories of harassing conduct over a two-year time period: (1) one or two instances where Stephens massaged Plaintiff's shoulders; (2) two

[7] Given that the Stephens' conduct was not unwelcome, it must be concluded that Plaintiff did not subjectively perceive it to be severe or pervasive.

instances where Stephens made inappropriate comments; and (3) one instance where Stephens sent a picture of his penis to Plaintiff's cellular phone. An analysis of these factors follows.

i. *Frequency of Conduct*

The conduct was not frequent. The four to five instances occurred over a 26-month time period and therefore were too infrequent to alter the terms or conditions of Plaintiff's employment. *See Mendoza* at 1249 (finding five instances of inappropriate conduct over an eleven-month time period too infrequent to alter the terms and conditions of employment); *Dar Dar v. Associated Outdoor Club, Inc.*, 248 Fed. Appx. 82, 85 (11th Cir. 2007) (finding "two sexually inappropriate comments and two incidents of intentional buttocks touching over the course of 22 months" insufficient to create hostile work environment).

ii. *Physically Threatening or Humiliating*

Plaintiff presented no evidence that Stephens' conduct was "physically threatening or humiliating." Stephens' comments and picture message cannot be considered physically threatening as such conduct involved no touching. Although shoulder massages do involve touching, not all touching is physically threatening. Here, Plaintiff did not testify that she felt physically threatened by Stephens massages. Rather, she admitted that Stephens never grabbed her or physically forced himself onto her.

Moreover, Plaintiff did not testify that she felt humiliated or embarrassed by Stephens' conduct. She presented no evidence that such conduct occurred in front of others or even during work hours. *Compare Hall v. Gus Const. Co*, 842 F. 2d 1010, 1018 (8th Cir. 1988) (sexual harassment established with evidence that, *inter alia,* female employees were held down so that other employees could touch their breasts and legs) *with Long v. Eastfield College,* 88 F. 3d 300,

309 (5th Cir. 1996) (holding sexually-oriented joke is the kind of non-threatening utterance that cannot alone support hostile-environment claim).

iii. *Unreasonably Interfered with Work Performance*

Plaintiff presented no evidence that the cumulative effect of Stephens' conduct unreasonably interfered with her job performance. To the contrary, she testified that she excelled at Winn-Dixie. According to Plaintiff, her work ethic and performance qualified her to become a Fleet Supervisor. In vying for a supervisor position, Plaintiff requested and took on additional responsibilities and training.

iv. *Severity of the Conduct*

Finally, the conduct was not severe. While perhaps annoying or inappropriate, Stephens' conduct is less severe than that found non-actionable by other courts. *See, e.g., Lockett v. Choice Hotels Int'l, Inc.*, 2009 WL 468298, *3 (11th Cir. 2009) (alleged harasser talked about sexual positions and made obscene comments); *Mendoza v. Borden*, 195 F.3d 1238, 1239 (11th Cir. 1999) (alleged harasser told plaintiff "I'm getting fired up"; rubbed his hips against plaintiff's while touching her shoulder and smiling; made sniffing sounds while looking at plaintiff); *Gupta v. Fla. Bd. of Regents,* 212 F.3d at 584-85 (supervisor touched employee's jewelry and often asked her to lunch; touched her knee and raised her dress hem while asking about the material; said she looked beautiful while staring at her; called her home two or three nights per week and asked about her boyfriend; and suggested he wanted to spend the night); *Shepherd v. Comptroller of Pub. Accounts,* 168 F.3d 871, 874 (5th Cir. 1999) (harassing conduct occurred for approximately two years and included instances in which harasser rubbed plaintiff's arm, asked her to sit on his lap, and tried to stare down her blouse); *Weiss v. Coca-Cola Bottling Co.,* 990 F.2d 333, 334-35 (7th Cir. 1993) (supervisor asked about plaintiff's personal life, complimented

her looks, asked for dates, called her a dumb blonde, repeatedly put his hands on her shoulders, placed "I love you" signs in her work area, and attempted to kiss her on three occasions); *Willets v. Interstate Hotels, LLC,* 204 F. Supp. 2d 1334, 1337 (M.D. Fla. 2002) (supervisor tried to hug plaintiff 20 times, rubbed her head and shoulders, frequently indicated love for her, and once grabbed her buttocks, kissed her neck, and placed a hand on her inner thigh); *Fromm-Vane v. Lawnwood Med. Ctr., Inc.,* 995 F. Supp. 1471, 1474 (S.D. Fla. 1997) (supervisor's reference to size of employee's husband's penis, women's breasts, and sexual exploits with his girlfriend and discussions regarding his visits to "whorehouses").

While Plaintiff may have found Stephens' picture distasteful, courts have found similar behavior not sufficiently severe to support a hostile work environment claim. *See, e.g., Valenti v. Triangle Circuits of Pittsburgh, Inc.*, 419 F. Supp. 2d 701 (W.D. Pa. 2005) (single incident in which vice president showed employee a picture of a naked woman on a motorcycle was not sufficiently severe or pervasive to alter the conditions of employee's employment, and thus did not create hostile work environment); *Arnold v. GI Joe's, Inc.*, 2004 WL 2026431 (Or. 2004) (finding no hostile work environment where supervisor showed plaintiff a magazine that contained a picture of a woman holding her hands over the nipples of her breasts, directed foul language at plaintiff, and used offensive language in the workplace); *Babcock v. Frank*, 783 F. Supp. 800 (S.D.N.Y. 1992) (finding that pinning a picture of a half-naked woman to the wall of employee's office may have been offensive, but was insufficient to establish hostile working environment).

Other courts have found "several" sexually explicit pictures insufficient to establish a hostile work environment. *See Hernandez v. Gutierrez*, 656 F. Supp. 2d 101, 106, n. 6 (D.D.C. 2009) (no hostile work environment where alleged harasser "frequently touched his private parts

in front of her, told her his marriage was not the same as it used to be, talked to her about humans and animals having sex, and showed her sexually explicit pictures"); *Kelleher v. Bank of the West*, 2008 WL 3853367 (Or. 2008) (finding no hostile work environment where alleged harasser drew pictures of a penis on a co-worker, called co-worker a "ho," "slut," and "whore," and discussed how plaintiff's "butt" looked).

Similarly, in *NAACP v. Florida Dept. of Corrections*, 2002 WL 34420335, *24, n. 114 (M.D. Fla. 2002), the court observed:

> Fields has failed to produce evidence sufficient to establish a hostile work environment claim. She has cited only a handful of examples of offensive behavior spread out over several years, including finding the letters "KKK" on a calendar, finding a picture of a penis in a time sheet book, and finding pictures of a naked woman drawn on the visor of a Department vehicle. Fields has not testified that she was subjected to frequent racial slurs, racist jokes, or similar harassment. The few examples Fields cites, even when considered together with her other allegations, are not sufficient to rise to the level of creating an objectively abusive working environment based on race...As the Court has previously noted, Fields has not preserved any claim for a hostile work environment based upon gender. Even if she had, however, Fields' two examples of finding sexually explicit drawings is not sufficient to rise to the level of establishing an objectively hostile work environment based upon gender.

Comparing Plaintiff's allegations to conduct deemed insufficient by other courts, this Court concludes that they are not objectively severe or pervasive to alter the terms or conditions of employment as a matter of law. Accordingly, a directed verdict is warranted on the sexual harassment claim.

c. Winn-Dixie's Affirmative Defense

Even assuming that the alleged conduct was sufficiently severe or pervasive to alter the terms or conditions of employment, there is no basis for liability against Winn-Dixie. An employer is not liable for a supervisor's sexual harassment where the employer has procedures in place to prevent and promptly correct sexually harassing behavior and the plaintiff unreasonably

fails to take advantage of the employer's preventive or corrective opportunities. *In Frederick v. Sprint/United Management Co.,* 246 F. 3d 1305, 1311 (11th Cir. 2001), the court explained:

> [W]hen a supervisor engages in harassment which results in an adverse "tangible employment action" against the employee, the employer is automatically held vicariously liable for the harassment. In contrast, when the supervisor's harassment involves no adverse "tangible employment action," an employer can avoid vicarious liability for the supervisor's conduct by raising and proving the affirmative defense described in the *Faragher* and *Ellerth* cases.

Id. (citing Burlington Indus. v. Ellerth, 524 U.S. 742, 761-63 (1998), and *Faragher v. City of Boca Raton,* 524 U.S. 775, 790 (1998)).

Plaintiff has put forth no evidence that Stephens had anything to do with her termination, nor has she identified any harassment which culminated in any other tangible employment action, such as demotion or undesirable reassignment. Thus, Winn-Dixie is not liable for Stephens' actions if it establishes its *Faragher/Ellerth* affirmative defense: (a) that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior and (b) that Plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. *See id.*

Winn-Dixie established its *Faragher/Ellerth* affirmative defense during Plaintiff's case in chief. Plaintiff admitted on cross-examination that Winn-Dixie had an anti-harassment policy which set forth reasonable complaint procedures, including several mechanisms within which to report offending conduct. Pursuant to Winn-Dixie's policies, "Anyone subjected to or witnessing any type of harassment should immediately contact a Manager, Supervisor, Human Resources Manager, or W-Dial." [Ex:10]. Plaintiff received and reviewed the policies and knew that she could remain anonymous and any alleged harassment would be thoroughly investigated. Plaintiff also knew that "failing to report inappropriate or offensive conduct" violated Winn-

Dixie's policies. However, Plaintiff failed to avail herself of Winn-Dixie's policies. She did not report Stephens' conduct to a Winn-Dixie manager, supervisor, human resources manager, or through the W-Dial hotline because she did not want Winn-Dixie to terminate his employment. Accordingly, Winn-Dixie is not liable for hostile work environment harassment because Plaintiff failed to take advantage of the preventive and corrective opportunities available to her.

B. Florida Whistleblower Act ("FWA")

The FWA states:

> An employer may not take any retaliatory personnel action against an employee because the employee has complained, objected to, or refused to participate in, any activity, policy, or practice of the employer which is in violation of a law, rule, or regulation.

Fla. Stat. § 448.101.

To show that the conduct was "of the employer," the employee must prove that she "objected to or refused to participate in (i) an illegal activity, policy, or practice of an employer, (ii) illegal activity of anyone acting within the legitimate scope of their employment, or (iii) illegal activity of an employee that has been ratified by the employer." *Pinder v. Bahamasair Holdings, LTD, Inc.*, 661 F. Supp. 2d 1348, 1357-58 (S.D. Fla. 2009) (*citing Sussan v. Nova Univ.,* 723 So. 2d 933, 934 (Fla. 4th DCA 1999)).

Plaintiff alleged that Winn-Dixie terminated her employment in retaliation for her objections to Winn-Dixie's "failure to investigate and take prompt action to stop the supervisor's sexual harassment..." (Complaint ¶ 5). Yet, during cross-examination, Plaintiff admitted that she never objected to Winn-Dixie about its alleged failure to investigate and take prompt remedial action. [Pl:22]. Plaintiff's failure to prove an activity, policy, or practice of Winn-Dixie to which she objected warrants a directed verdict on the FWA claim.

Moreover, as discussed above, no actionable sexual harassment existed for Winn-Dixie to investigate. *See Odum v. Gov't Employees Ins. Co.,* 2009 U.S. LEXIS 59397, at *9 (M.D. Fla. July 13, 2009) ("activity protected by the Act must be an actual violation of a law, rule, or regulation; a suspected violation is not sufficient to trigger the Act's protection."). Absent an underlying violation of a law, rule or regulation, the FWA does not apply.

Finally, Plaintiff has presented no evidence of causation. Even if Plaintiff had engaged in protected activity, she offered no evidence that her employment was terminated because of it. Winn-Dixie articulated a non-retaliatory reason for terminating Plaintiff's employment--it reduced its force in the Fleet Department from three Fleet Clerks to one through the MRS. Plaintiff offered no proof that Stephens participated in the MRS or was otherwise involved in her termination. Nor did she offer evidence that Hernandez, the supervisor to whom Plaintiff allegedly made off-handed remarks concerning Stephens, was involved in her termination. Rather, Plaintiff testified that she did not know who was involved in the decision to terminate her, and she offered no other evidence on this issue. In sum, Plaintiff offered no evidence that her termination was a pretext for retaliation.

In the final analysis, Plaintiff's whistleblower claim was based entirely on unsupported allegations and questioning of Winn-Dixie's wisdom in managing its workforce. This type of non-evidence is insufficient to submit the case to a jury. *See Damon v. Fleming Supermarkets of Florida, Inc.*, 196 F. 3d 1354, 1361 (11th Cir.), *cert. denied*, 529 U.S. 1109 (2000) ("We have repeatedly and emphatically held that a defendant may terminate an employee for a good or a bad reason without violating federal law. We are not in the business of adjudging whether employment decisions are prudent or fair. Instead, our sole concern is whether unlawful discriminatory animus motivates a challenged employment decision.").

IV. Conclusion

For the foregoing reasons, the Court hereby enters a directed verdict on all claims in Winn-Dixie's favor.

DONE AND ORDERED at Miami, Miami-Dade County, Florida, this ___ day of November, 2011.

Conformed Copy
NOV 28 2011

Circuit Judge, Miami-Dade County
David C. Miller
Circuit Court Judge

Copies furnished to:

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Lawrence McGuinness, Esq.

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