

constructively discharged when her manager removed her from the work schedule.

Logue characterizes her October 2010 text message to her manager as a joke. *See* Invt'g. Rep., Ex. E. In her complaint to the Commission, Logue alleges that other male, heterosexual Starbucks employees who engaged in sexual banter were not disciplined, discharged or removed from the work schedule. Compl. ¶ III.D. Logue identified a specific male, heterosexual coworker as being similarly situated to her but more favorably treated. *Id.*

In follow up interviews with Commission staff, Logue explained that the identified coworker told “that’s what she said” jokes. 1/17/11 Interview. Logue also mentioned other, unspecified “dark humor” but could not identify a specific instance in which another coworker, in jest or otherwise, offered to exchange a sexual favor for a change in work conditions. *See id.* Neither could any of the three Starbucks coworkers interviewed by Commission staff, including the coworker identified by Logue in her complaint (who also represented to Commission staff that he is Logue’s personal friend). *See, e.g.,* 12/5/11 Interviews. Moreover, Logue’s manager indicated in an interview with Commission staff that when he took the promotion and became aware of baristas telling “that’s what she said” jokes, he had his supervisees sign agreements to no longer engage in that behavior.

Starbucks has an anti-harassment policy that defines sexual harassment to include, *inter alia*, “[o]ffering employment benefits in exchange for sexual favors.” Invt’g. Rep., Ex. A. This policy states that an employee found to have engaged in sexual harassment “may be subject to corrective action up to and including termination of employment.” *Id.* An investigation file provided by Starbucks indicates that Logue’s manager terminated her for violating the anti-harassment policy. *See id.* at Ex. D.

Discussion

The Human Rights Ordinance prohibits an employer, *inter alia*, from discriminating against any individual in discharge or discipline “on the basis of unlawful discrimination.” County Code, § 42-35(b)(1). The Human Rights Ordinance defines “unlawful discrimination” to include discrimination the basis of both gender and sexual orientation. *See id.* at § 42-31.

The parties agree that the expressed reason for Logue’s discharge was a text message that she sent to her manager. Compl. ¶ III.C; Resp. ¶ III.C. Therefore, if Logue could prevail on her claim that this decision was actually made because she is a woman and a homosexual, she would have to be able to establish the familiar elements of a *prima facie* case of employment discrimination: (1) that she is a member of a protected class (or classes); (2) that she met Starbucks’s legitimate performance expectations; (3) that she suffered an adverse employment action; and (4) Starbucks treated similarly situated employees outside of her protected class more favorably. *See Vakharia v. Swedish Covenant Hosp.*, 190 F.3d 799, 806 (7th Cir. 1999). For the purpose of rendering this decision, the Commission presumes that Logue can establish the first and third elements of a *prima facie* case, but the Commission’s investigation finds a fatal lack of substantial evidence with respect to the remaining elements. The Commission’s investigation does not find sufficient evidence to proceed with respect to whether Logue met her employer’s legitimate performance expectations or that her treatment raises a causal inference between

Starbucks's employment decision and Logue's membership in a protected class or classes.

Starbucks's anti-harassment policy is commendably clear. It prohibits a wide range of harassing behavior, including the exchange of sexual favors and unwelcome sexual jokes. The policy also puts Starbucks employees on notice that violations of the policy can result in termination. In light of this clear warning, a Starbucks employee who nonetheless chooses to engage in workplace sexual banter, does so at his or her peril. Such an employee takes the risk that what he or she may consider a harmless sexual joke is heard by another employee as an unwanted sexual advance and, as here, leads to discipline under the policy.

But even conduct in violation of a clear employment policy can form the basis of a discrimination claim when there is evidence showing that the employer was unduly selective in its enforcement. There is not even a scintilla of evidence that this is a plausible description of the case at hand. Sophomoric "that's what she said" jokes, though indisputably in poor taste, are not the same thing as a sexual proposition, and need not be treated as such by an employer with an anti-harassment policy. No matter how bawdy the workplace, every witness interviewed by the Commission staff, including the Complainant and her friend, agreed that no other Starbucks employee – man, woman, heterosexual or homosexual – had offered a sexual favor in exchange for a work accommodation without being disciplined for it. The only employee who had made such an offer was Logue, and she was effectively terminated for it. That she also happens to be a woman and a homosexual does not in and of itself make Starbucks enforcement of its anti-harassment policy at Store #2249 unlawfully discriminatory.

Conclusion

For the foregoing reasons, the Commission orders that complaint 2011E013 be DISMISSED for LACK OF SUBSTANTIAL EVIDENCE of a violation of the Human Rights Ordinance. In accordance with CCHR Pro. R. 480.100(A), either party may file a request for reconsideration with the Commission within 30 days of this order.

October 18, 2013

By delegation:



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Human Rights