STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

URSULA COSTANTINI,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 06-2461
	)	
WAL-MART STORES EAST, L.P., NO. 5326,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

A hearing was held pursuant to notice, on November 9, 2006, in Ocala, Florida, before the Division of Administrative Hearings by its designated Administrative Law Judge, Barbara J. Staros.

APPEARANCES

For Petitioner: Ursula Costantini, pro se
5108 Southwest Loop
Ocala, Florida 34476

For Respondent: Amy R. Harrison, Esquire
Lindsay A. Connor, Esquire
Ford & Harrison, LLP
225 Water Street, Suite 710
Jacksonville, Florida 32202

STATEMENT OF THE ISSUE

Whether Respondent violated the Florida Civil Rights Act of 1992, as alleged in the Employment Complaint of Discrimination filed by Petitioner on September 26, 2005.

PRELIMINARY STATEMENT

On September 26, 2005, Petitioner, Ursula Costantini, filed an Employment Complaint of Discrimination with the Florida Commission on Human Relations (FCHR) which alleged that Wal-Mart violated Section 760.10, Florida Statutes, by discriminating against her on the basis of age and gender.

The allegations were investigated and on June 15, 2006, FCHR issued an Amended Determination of "no cause" and Amended Notice of Determination: No Cause.

A Petition of Relief was filed by Petitioner on July 10, 2006. The Petition for Relief also alleged retaliation. FCHR transmitted the case to the Division of Administrative Hearings (Division) on or about July 14, 2006. A Notice of Hearing was issued setting the case for formal hearing on September 19, 2006. Respondent filed a Motion for Continuance, which was granted. The hearing was rescheduled for October 13, 2006. Petitioner filed a Motion for Continuance, which was granted. The hearing was rescheduled for November 9, 2006.

At hearing, Petitioner testified on her own behalf and presented the testimony of Lucy Dixon, Jacqueline Case, and John Hayek. Petitioner's Exhibits lettered A through D were admitted into evidence. Respondent presented the testimony of David Achtley, Doris Riofrio, Michelle Perez, Margie Allen, and Myla

Gayle. Respondent offered Exhibits lettered A through H, which were admitted into evidence.

A transcript consisting of one volume was filed on January 9, 2007. The parties timely filed Proposed Recommended Orders which have been considered in the preparation of this Recommended Order. Petitioner also filed a request that certain exhibits already admitted into evidence at the hearing be excluded. Petitioner's request for exclusion of these exhibits is denied.

FINDINGS OF FACT

1. Petitioner, Ursula Costantini, was employed by Wal-Mart Store No. 5326 (hereinafter Wal-Mart) from August 2004 until June 2005. While employed by Wal-Mart, Petitioner held the position of a part-time Accounting Office Associate.

2. David Achtley was store manager of Store 5326 at all times material to this proceeding. Associates who were hired prior to the store's opening performed many tasks including assembling counters, putting up labels, unloading trucks, and stocking shelves. Associates also received training.

3. When the store first started employing associates, employees' work schedules were manually typed on a personal computer. At that time, employees' schedules could be modified fairly easily.

4. Shortly before the store actually opened, employees' work schedules began to be generated using a staffing computer program. In order to generate schedules, the program takes into account sales, customer counts, holidays, and other factors including availability sheets completed by associates. When the store was newly opened, much of this information was based on projections.

5. The store in question opened in 2004. In May 2005, Mr. Achtley began analyzing actual sales data to earlier projections. Mr. Achtley realized that his store was short of its projected sales. As a result, he began re-evaluating staffing needs to reflect actual sales data.

6. All employees complete a Customer Service Scheduling Availability form. Employees are not guaranteed to be assigned the hours they request.

7. Petitioner completed a Customer Service Scheduling Availability Sheet for part-time employment on June 10, 2005, on which she stated that she was available to work Mondays through Thursdays from 11:00 p.m. until 4:00 a.m. Under the words "Store Shifts," "overnight" was circled. She indicated on the form that she was not available to work on Saturdays or Sundays. Petitioner completed another scheduling availability sheet on August 19, 2004, to work as a part-time employee. On this availability form, Petitioner stated her availability to work as

"Open" any day of the week and at "any time," with the exception of being unavailable to work on Sundays.

8. In June 2005, Wal-Mart's home office directed all stores to stop modifying the computer-generated shifts, and mandated that stores must have associates work the computer generated shifts. Some of the shifts changed in part because the store was not making the sales that had been projected. The only flexibility was to allow a modification of one hour for a business or personal need at the beginning or end of a shift.

9. Petitioner had been working a 11:00 p.m. to 4:00 a.m. shift. However, the computer program did not generate a shift with those time frames. The overnight shift was changed to 10:00 p.m. to 7:00 a.m. Petitioner objected to the schedule change.

10. Doris Riofrio was the operations co-manager of store 5326. Ms. Riofrio supervised Margie Allen, the assistant who was directly over the accounting office. Petitioner contacted Ms. Riofrio to discuss this schedule change. At the time, Mr. Achtley was out of town. However, he phoned Petitioner from an airport when he received a voice-mail message to discuss the schedule change. Mr. Achtley informed Petitioner, that he could no longer modify work schedules as in the past. He explained that he had a position available for her in the cash office from

10:00 p.m. to 7:00 a.m., but that he could no longer offer her a position with an 11:00 p.m. to 4:00 a.m. schedule.

11. Petitioner met with Mr. Achtley and Michele Perez, the personnel coordinator for store 5326. Mr. Achtley again explained that there was no shift from 11:00 p.m. to 4:00 a.m. Petitioner refused to work the 11:00 p.m. to 7:00 a.m. shift.

12. Mr. Achtley also offered to look at other positions in the store that were available that might have a shorter schedule, but she did not accept that offer either. She did not want to work anywhere in the store except the cash office during the hours she had been working.

13. During this meeting, Petitioner did not express that she was being discriminated against because of her age or gender.

14. At the conclusion of the meeting, an Exit Interview form was filled out and signed by Mr. Achtley and Ms. Perez. On the form, Mr. Achtley checked "yes" that he would recommend her for re-hire. The following was written in the comment section: "Refused new job offer, refused to alter availability, available shifts not acceptable to her, good associate, very dependable, would rehire." Petitioner refused to sign the form.

15. Respondent did not hire anyone to replace Petitioner in the accounting office following Petitioner's leaving employment with Respondent. Associates who worked the overnight

shift after she left worked the computer-generated shift, not the 11:00 p.m. to 4:00 a.m. shift previously worked by Petitioner.

16. Petitioner presented testimony from former co-workers about personality conflicts within the accounting office, in particular with Myla Gayle, who was the lead associate in the cash office at the time Petitioner was employed there. However, those witnesses acknowledged that the conflicts were not related to age or gender.

17. One of the co-workers who testified on behalf of Petitioner is a 62-year-old male. He continues to work for Respondent. He believes that he was discriminated against on the basis of age when applying for a particular position which was filled by a younger person. However, that person's qualifications or wages are not in evidence.

18. There is no competent evidence that Wal-Mart used age or gender as a criterion in its determining its associates' work schedules, including Petitioner's.

19. Petitioner did not engage in any protected activity prior to her termination from employment at Wal-Mart.

CONCLUSIONS OF LAW

20. The Division of Administrative Hearings has jurisdiction over the parties and subject matter in this case. §§ 120.569 and 120.57, Fla. Stat.

21. Section 760.10(1), Florida Statutes, states that it is an unlawful employment practice for an employer to discharge or otherwise discriminate against an individual on the basis of age or sex (gender).

Age Discrimination

22. In order to make out a prima facie case of age discrimination under the federal Age Discrimination in Employment Act (ADEA), the complainant must show that she was a member of a protected age group, that she was qualified for the job, that she was rejected, and that she lost the position to a younger person. Benson v. Tocco, Inc., 113 F.3d 1203, 1207 (11th Cir. 1997), citing McDonnell Douglass Corp. v. Green, 411 U.S. 792 (1973) (the 11th Circuit has adopted a variation of the McDonnell Douglass Corp. v. Green test in ADEA violation claims.).[1/]

23. However, in cases alleging age discrimination under Section 760.10(1)(a), Florida Statutes, FCHR has concluded that unlike cases brought under ADEA, the age of 40 has no significance. FCHR has determined that to demonstrate the last element of a prima facie case of age discrimination under Florida law, it is sufficient for Petitioner to show that she was treated less favorably than similarly-situated individuals of a "different" age as opposed to a "younger" age. See Linda

Marchinko v. The Wittemann Co., Inc., FCHR Order No. 06-005 (January 6, 2006), and numerous cases cited therein.

24. Petitioner has not met her burden of proving a prima facie case of age discrimination under either federal or Florida law. As to the first element of establishing a prima facie case, she is, and was at the time of her employment with Respondent, a member of a protected age group for purposes of ADEA. As to the second element, while the minimum qualifications for the job are not clear from the record, there is nothing to indicate that she was not qualified for the job and she was not fired because of poor job performance. Accordingly, she met the minimum requirements for the job satisfying the second element of establishing a prima facie case.

25. As to the next element of establishing a prima facie case, Petitioner was subject to an adverse employment decision in that she was not kept on the job. There is no competent evidence that anyone was hired to replace Petitioner, much less a person of a "different" age group. Thus, this element of establishing a prima facie case is not satisfied.

26. Assuming that Petitioner had established a prima facie case, when the charging party, i.e., Petitioner, is able to make out a prima facie case, the burden to go forward shifts to the employer to articulate a legitimate, non-discriminatory

explanation for the adverse employment action. Walker v. Prudential Property and Casualty Insurance Company, 286 F.3d 1270 (11th Cir. 2002); Department of Corrections v. Chandler, 582 So. 2d 1183 (Fla. 1st DCA 1991) (court discusses shifting burdens of proof in discrimination cases). The employer has the burden of production, not persuasion, and need only persuade the finder of fact that the decision was non-discriminatory. Department of Corrections v. Chandler, supra; Alexander v. Fulton County, GA, 207 F.3d 1303 (11th Cir. 2000).

27. Even if Petitioner established a prima facie case of age discrimination, Respondent has adequately articulated a legitimate, non-discriminatory explanation for its employment decision regarding Petitioner. Petitioner was not willing to adjust to the schedule change and did not want to accept any other position with Respondent. As such, Respondent has asserted a legitimate, non-discriminatory reason for not continuing to employ Petitioner. The decision of Respondent regarding Petitioner was based upon legitimate means and was not based upon Petitioner's age.

28. Petitioner failed to present sufficient evidence to contradict the evidence presented by Respondent that she was not retained by Wal-Mart because she was not willing to work a new hourly schedule or change positions.

29. Once the employer articulates a legitimate non-discriminatory explanation for its actions, the burden shifts back to the charging party to show that the explanation given by the employer was a pretext for intentional discrimination. "Would the proffered evidence allow a reasonable factfinder to conclude that the articulated reason for the decision was not the real one?" Walker v. Prudential, supra. "The employee must satisfy this burden by showing directly that a discriminatory reason more likely than not motivated the decision, or indirectly by showing that the proffered reason for the employment decision is not worthy of belief." Department of Corrections v. Chandler, 582 So. 2d 1183 at 1186; Alexander v. Fulton County, GA, supra. Petitioner has not met this burden.

30. Courts have found only the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of age, to constitute direct evidence of age discrimination. See, e.g., Barnes v. Southwest Forest Industries, 814 F.2d 607 at 610 (11th Cir. 1987) (remark by personnel manager to terminated security guard that in order to transfer, "you would have to take another physical examination at your age, I don't believe you could pass it" was not considered direct evidence of age discrimination by the court); Williams v. General Motors Corp., 656 F.2d 120 at 130 (5th Cir. Unit B 1981) cert. denied, 455 U.S. 943 (1982) (scrap of paper on which was written

"Too old--Lay Off" would constitute direct evidence of discriminatory intent).

31. Other than Petitioner's assertions that Respondent discriminated against her, Petitioner presented no evidence establishing that Respondent's reasons were pretextual. Petitioner's speculation and personal belief concerning the motives of Respondent are not sufficient to establish intentional discrimination. See Lizaro v. Denny's, Inc., 270 F. 3d 94, 104 (2d Cir. 2001) (plaintiffs have done little more than to cite to their mistreatment and ask the court to conclude it must have been related to their race. This is not sufficient.").

Gender Discrimination

32. To establish a prima facie case of gender discrimination, Petitioner must demonstrate similar elements to those previously discussed regarding age discrimination: that she is a member of a protected class; that she is qualified to do her job; and that her employer treated similarly-situated employees outside of her protected class more favorably than it treated her. See, McDonnell, supra.

33. Petitioner is a female and a member of a protected class. As Mr. Achtley acknowledged on her exit interview form that he would rehire her, she was presumably qualified to do her job. As to the third prong of the analysis, however, there is

no competent evidence that Respondent treated men more favorably than Petitioner in the application of its computer-generated work schedule after June 2005, or in any other aspect of her employment.

Retaliation

34. To establish a prima facie case of retaliation, Petitioner must show that she engaged in protected activity, that she suffered adverse employment action, and that there is some causal relation between the protected activity and the adverse employment action. Casiano v. Gonzales, 2006 U.S. Dist. Lexis 3593 (N.D. Fla. 2006): Jeronimus v. Polk County Opportunity Council, Inc., 2005 U.S. App. Lexis 17016 (11th Cir. 2005). There is no evidence that Petitioner engaged in protected activity (i.e., complained about unlawful discriminatory treatment) when she spoke to any of her superiors, to support a charge of retaliation.

35. In summary, Petitioner has failed to carry her burden of proof that Respondent engaged in discrimination based on age, gender, or retaliation in its actions regarding her employment.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law set forth herein, it is

RECOMMENDED:

That the Florida Commission on Human Relations enter a final order dismissing the Petition for Relief.

DONE AND ENTERED this 28th day of February, 2007, in Tallahassee, Leon County, Florida.

BARBARA J. STAROS
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of February, 2007.

ENDNOTE

[1/] FCHR and Florida courts have determined that federal discrimination law should be used as guidance when construing provisions of Section 760.10, Florida Statutes. See Brand v. Florida Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994).

COPIES FURNISHED:

Ursula Costantini
5108 Southwest Loop
Ocala, Florida 34476

Amy R. Harrison, Esquire
Lindsay A. Conner, Esquire
Ford & Harrison, LLP
225 Water Street, Suite 710
Jacksonville, Florida 32202

Cecil Howard, General Counsel
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

Denise Crawford, Agency Clerk
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

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.