

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LINDA M. CINNANTE,)
)
 Petitioner,)
)
 vs.) Case No. 08-0715
)
 KMART CORPORATION,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on June 3, 2008, by video teleconference, with the parties appearing in Fort Lauderdale, Florida, before Patricia M. Hart, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, who presided in Tallahassee, Florida.

APPEARANCES

For Petitioner: G. Ware Cornell, Esquire
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For Respondent: David M. DeMaio, Esquire
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STATEMENT OF THE ISSUE

Whether the Respondent committed an unlawful employment practice by discriminating against the Petitioner on the basis

of gender in violation of the Florida Civil Rights Act of 1992, as amended, Section 760.10 et seq., Florida Statutes (2006).¹

PRELIMINARY STATEMENT

In a Petition for Relief dated February 7, 2008, and filed with the Florida Commission on Human Relations ("FCHR"), Linda M. Cinnante alleged that Kmart Corporation ("Kmart") discriminated against her on the basis of her gender, in violation of Section 760.10, Florida Statutes, when it terminated her employment as a Loss Prevention Associate for making a "bad stop" of a person she suspected of shoplifting.² Ms. Cinnante asserted that a male employee of Kmart made a "bad stop" but that he was not terminated from his employment as a Loss Prevention Associate. The FCHR transmitted the matter to the Division of Administrative Hearings for assignment of an administrative law judge. After one continuance, the final hearing was held on June 3, 2008.

At the hearing, Ms. Cinnante testified in her own behalf and presented the testimony of Kevan Allen; Petitioner's Exhibits 2, 7, 11, 14, and 17 were offered and received into evidence. Kmart presented the testimony of Jorge Vega, Lisa Marie Bowman, and David Shane Pearson; Respondent's Exhibits 1, 2, 6 through 8, 16, 17, 20 through 22, and 33 through 36 were offered and received into evidence. Respondent's Exhibit 34 is the transcript of the May 13, 2008, deposition of Linda

Cinnante; Respondent's Exhibit 35 is the transcript of the deposition of Janet Brush, offered in lieu of live testimony; and Respondent's Exhibit 36 is the transcript of the deposition of Ashworth Charles, offered in lieu of live testimony.

The one-volume transcript of the proceeding was filed with the Division of Administrative Hearings on June 13, 2008. The parties timely filed proposed findings of fact and conclusions of law, as well as post-hearing briefs, which have been considered in the preparation of the Recommended Order.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing and on the entire record of this proceeding, the following findings of fact are made:

1. In early February 2006, Ms. Cinnante was hired by Kmart as a Loss Prevention Associate at Kmart Store 7786 in West Palm Beach, Florida. The duties of Kmart Loss Prevention Associates include the prevention of shoplifting and the detention of suspected shoplifters. They also oversee store safety and are expected to clean up any hazard in the store, including picking up clothes hangers from the floor and cleaning up spills. Finally, Loss Prevention Associates are expected to assist with removing outdated items from shelves and cleaning up the employee kitchen.

2. Ms. Cinnante's supervisor was Jorge Vega, the Loss Prevention Manager for Kmart Store 7786. At the times material to this proceeding, Mr. Vega's supervisor was Janet Brush, Kmart's District Loss Prevention Manager, and Ms. Brush's supervisor was Shane Pearson, Kmart's Regional Loss Prevention Manager.³

3. Ms. Cinnante was hired by Ms. Brush on the recommendation of Kmart Store 7786's manager, Lisa Bowman. Mr. Vega had brought Ms. Cinnante's employment application to Ms. Bowman's attention because of her experience in security. Ms. Bowman recommended Ms. Cinnante to Ms. Brush as a good candidate for Loss Prevention Associate, and eventually Loss Prevention Manager in another Kmart store, because of her extensive background and experience in security and because Kmart Store 7786 needed a female Loss Prevention Associates to monitor women's fitting rooms and restrooms.

Training for Loss Prevention Associates.

4. Loss Prevention Associates receive Kmart's loss prevention handbook, computer-based training, and on-the job training before they are certified to detain suspected shoplifters.

5. At the times material to this proceeding, the computer-based training given to Loss Prevention Associates consisted of five computer discs containing various chapters. To ensure that

employees completed each chapter, they were required to pass a test at the end of the chapter in order to proceed to the next chapter. The employees were also required to pass a test upon the completion of the course.

6. In the on-the-job training, Loss Prevention Associates completed three "stops" or detentions of suspected shoplifters. For the first "stop," the new Loss Prevention Associate observed other Loss Prevention personnel as they completed the steps culminating in the detention of a suspected shoplifter; for the second "stop," the new Loss Prevention Associate participated in completing the steps culminating in the detention of a suspected shoplifter; and for the third "stop," the new Loss Prevention Associate was supervised while completing the steps culminating in the detention of a suspected shoplifter.

Kmart policy and procedure for detaining suspected shoplifters.

7. Loss Prevention Associates are expected to master the "Six Required Steps to Make a Detention" ("Six Steps") contained in Kmart's loss prevention handbook. Training in the Six Steps constituted a substantial part of both the computer-based training and the on-the-job training. The Six Steps are as follows:⁴

In order to initiate detention of a suspected shoplifter, the following elements for each of the six steps must be met:

Step 1: Observe suspect approach the merchandise. **The suspect must be observed approaching the merchandise in question.** It is important to know that the suspect did not have the merchandise in question prior to being observed by Loss Prevention personnel.

Step 2: Observe suspect select merchandise. **The suspect must be observed selecting the merchandise in question.** It is important that we positively know that the merchandise in question is Kmart merchandise. In some cases, customers bring items into the store to compare size, color, technical data, etc.

Step 3: Observe suspect's concealment. **The suspect must be observed concealing the merchandise in question.** Loss Prevention personnel must know where the suspect has concealed the merchandise. Personal observation of the concealment is necessary.

Step 4: Maintain continuous surveillance. **From the point of concealment, until the suspect exits the store there must be uninterrupted observations of the suspect.** It is important to know that the suspect has not put back, dumped, moved the merchandise to a different concealment location, passed to someone else or paid for the merchandise between the observed concealment and being stopped exiting the store.

Step 5: Failure to pay. **The suspect must be allowed every opportunity to change their mind and pay for the merchandise.** They must pass by the cash register area or go through the cash register lanes without declaring the concealed merchandise.

Step 6: The stop. **Suspect may only be stopped in the vestibule or outside the store. No detentions for shoplifting can be conducted within the store.** Caution should be used for stops within the vestibule if there are pay phones or these is merchandise

offered for sale in the vestibule, as shoplifters can claim to have entered the vestibule to use the phone or pick up additional merchandise.

* * *

Caution! Individuals may attempt to "set you up."

Example: You come across a man by the sunglasses display. He has a pair of sunglasses in his hand complete with price tag. He slides the sunglasses in his pocket and quickly leaves the store. You stop him for shoplifting but find out the sunglasses were his. He had a receipt and was just comparing them to other sunglasses on the rack. Although it appeared that intent was demonstrated, you have failed to fulfill the first of the six steps. You did not see the subject prior to the theft (i.e., approach the merchandise) so you are not really sure whether the subject even took the sunglasses off the rack or if the sunglasses are Kmart merchandise. If you act, you have exposed yourself and Kmart to a potential lawsuit due to your failure to adhere to the six required steps.

8. The first three of the Six Steps are considered the most important because they must be followed in order to confirm that a crime is being committed. A Loss Prevention Associate cannot be certain that a theft has taken place if the Loss Prevention Associate has not observed the suspected shoplifter approach the merchandise, select the merchandise, and conceal the merchandise.

9. Loss Prevention personnel are required to follow the Six Steps in making detentions for shoplifting in order to

protect against lawsuits for wrongful detention. As is explained in Kmart's loss prevention handbook, in order to avoid lawsuits, Kmart must be able to show that, among other things, "[t]he six elements required to make a detention were met."

10. Loss Prevention Associates are made aware that termination of employment is the consequence of a Loss Prevention Associate's failure to follow the Six Steps prior to detaining a suspected shoplifter. Very rarely and depending on the circumstances, an exception to termination may be made when a Loss Prevention Associate makes a detention after failing to complete the requirement in step 4 to keep the suspected shoplifter under continuous surveillance. This exception to termination is made under circumstances when, because of the layout of the store or other factors, there are very brief lapses in the surveillance of the suspected shoplifter.

Ms. Cinnante's termination.

11. Ms. Cinnante successfully completed the computer-based training and the on-the-job training and was certified to detain suspected shoplifters as a Kmart Loss Prevention Associate. She received extensive training in the Six Steps that must be followed by Loss Prevention personnel before a suspected shoplifter can be detained; she knew that the purpose of the Six Steps was to avoid lawsuits against Kmart; and she knew that termination was the penalty for failing to follow the Six Steps.

12. On August 1, 2006, Ms. Cinnante was working as a Loss Prevention Associate in Kmart Store 7786. As she was leaving Mr. Vega's office, she observed a man walking away from the display of toothpaste and turning into the aisle in which toothbrushes were displayed. Ms. Cinnante happened to follow the man as he walked down the aisle containing the toothpaste, and, after the man turned into the other aisle, she proceeded to the main aisle and walked to the garden department, where she spoke briefly with another employee. Out of the corner of her eye, she observed the man holding a toothbrush and toothpaste in his left hand and then removing a toothbrush from the shelf display and comparing the one in his left hand with the one he had removed from the shelf. Ms. Cinnante watched as the man put the toothbrush in his right hand back on the shelf. She also observed him move the toothbrush and toothpaste he was holding in his left hand into his right hand and put the toothbrush and toothpaste in his right pants pocket.

13. Ms. Cinnante observed the man while he shopped in the jewelry and shoe departments. While the man was in the shoe department, Mr. Vega came up to Ms. Cinnante and asked her what was "going on." Ms. Cinnante told Mr. Vega that the man had a toothbrush and toothpaste in his right pocket. Mr. Vega walked behind the man, returned to Ms. Cinnante, and told her that the man also had a bottle of shampoo in his left pocket. Mr. Vega

told Ms. Cinnante to "stay on" the man, and he left to meet with Ms. Brush, who was visiting his office that day.

14. Ms. Cinnante observed the man pull the shampoo bottle from his pocket and put it on the bench in the shoe department. The man then sat down on the bench and tried on a pair of shoes. He removed the shoes and put his own shoes back on, and then he walked away, leaving the shampoo bottle on the bench.

15. As the man approached a cashier, Ms. Cinnante tried to contact Mr. Vega, but he did not respond. The man paid for some items and left the store. Meanwhile, Ms. Cinnante had tried several times to reach Mr. Vega on the telephone, but he did not respond. When the man left the store, Ms. Cinnante followed him, walked around him to meet him face-to-face, pulled out her badge, identified herself as a loss prevention officer for the store, and detained him. The man did not speak English but, through another Kmart employee who spoke Spanish, the man told Ms. Cinnante that the toothbrush and toothpaste were his and were not Kmart merchandise.

16. As Ms. Cinnante was escorting the man to Mr. Vega's office, Mr. Vega came around a corner and met them. Mr. Vega spoke to the man in Spanish, examined the toothbrush and toothpaste, and determined that they were not Kmart merchandise.

17. Ms. Cinnante realized at that time that she had not followed all of the Six Steps and had made a "bad stop." She

felt very bad about the incident, and she and Mr. Vega apologized to the man, who accepted the apologies and left the store.

18. Mr. Vega told Ms. Cinnante that she would lose her job over the incident and that there "was no way around" the problem. Mr. Vega returned to his office and told Ms. Brush, who was still working in Mr. Vega's office, about the incident. Ms. Brush asked that Mr. Vega call Ms. Cinnante into the office.

19. Ms. Brush discussed the incident with Ms. Cinnante and immediately prepared a statement detailing the circumstances of the incident as related by Mr. Vega and Ms. Cinnante. Ms. Brush concluded that Ms. Cinnante had failed to follow the Six Steps in detaining the man because Ms. Cinnante failed to see the man approach and select the toothpaste and toothbrush and that the value of the items in question was not over \$5.00. Ms. Brush recommended that Ms. Cinnante be terminated, and she sent her report, dated August 1, 2006, to Kmart's Regional Office by facsimile transmittal and by electronic mail.

20. Mr. Pearson, Kmart's Regional Loss Prevention Manager, responded to Ms. Brush's report and recommendation by electronic mail on August 2, 2008. He directed Ms. Brush to terminate Ms. Cinnante for violation of company policy. Ms. Bowman terminated Ms. Cinnante on August 3, 2006.

July 14, 2006, detention of suspected shoplifter by Ashworth Charles.

21. On July 14, 2006, Mr. Vega, Ms. Cinnante, and Ashworth Charles, a Loss Prevention Associate employed at Kmart Store 7786, were in Mr. Vega's office when they observed on the video monitor a man remove a 20" LCD television from the shelf in the Electronics Department and place it in his cart. Mr. Vega, Ms. Cinnante, and Mr. Charles hurriedly left Mr. Vega's office and proceeded to place the man under surveillance. Mr. Vega, Ms. Cinnante, and Mr. Charles worked together as a team, with each of them taking up separate positions in order to keep the man under continuous surveillance.

22. Mr. Vega and Ms. Cinnante separated and took up positions inside the store where they could keep the suspected shoplifter under continuous surveillance, and Mr. Charles exited the store through the garden shop entrance and took up a position outside the store, in front of the glass doors leading from the main part of the store. Mr. Charles stood against a column with his back to the doors. Mr. Vega communicated with Mr. Charles by cell phone and kept him advised of the suspected shoplifter's movements.

23. Kmart stores have two sets of glass doors leading from the store to the outside. The first set of doors leads to the

vestibule, which is an area that contains pay telephones and vending machines, none of which are owned or operated by Kmart. The second set of doors leads to the parking lot.

24. The suspected shoplifter was observed by Ms. Cinnante or Mr. Vega or both pushing the cart containing the television past the cashiers' stations and past all points at which he could have paid for the television. The suspected shoplifter sat on a bench near the doors into the vestibule for a few minutes, constantly looking around the store, and then he went through the inner glass doors into the vestibule of the store. Mr. Vega saw the suspected shoplifter hesitate in the vestibule, and then he saw the outside glass doors begin to open. He used his cell phone to direct Mr. Charles to detain the suspected shoplifter. Ms. Cinnante was not near Mr. Vega when he directed Mr. Charles to make the detention.

25. Mr. Charles made the detention while the suspected shoplifter was in the vestibule but was in the process of pushing the cart through the doors leading to the outside of the store and the parking lot. The suspected shoplifter was escorted to Mr. Vega's office, where he identified himself as Kevan Allen. Mr. Allen stated that he was waiting for his mother to meet him and pay for the television. Mr. Vega decided to call the police, and Mr. Allen was arrested. He subsequently pled guilty to retail theft and was sentenced.

26. Mr. Vega did not report Mr. Charles for making a "bad stop" because he did not consider the detention of Mr. Allen to be improper. The detention was a team effort involving Mr. Vega, Ms. Cinnante, and Mr. Charles, and all of the Six Steps were followed by the team. The detention while Mr. Allen was still in the vestibule was specifically permitted in Step 6, even though such stops are to be made with caution.

Treatment of Loss Prevention Associates who failed to follow the Six Steps.

27. Two Loss Prevention Associates working in the Kmart Store 7786 had been terminated for failing to follow the Six Steps prior to Ms. Cinnante's termination. Both terminated employees were male.

28. One Loss Prevention Associate working in Kmart Store 7786 was sent to re-training after detaining several suspected shoplifters without having had them under continuous surveillance. On that occasion, continuous surveillance of the suspected shoplifters was not possible given the circumstances, and Ms. Brush recommended that the Loss Prevention Associate not be terminated.

29. In 2002, Mr. Charles made what he considered a questionable "stop" even though he followed all of the Six Steps. At the time, he was working in a store other than Kmart Store 7786. Mr. Charles stopped a man who had tried on several

pairs of shoes in the shoe department based on his belief that the man had switched his shoes for Kmart shoes. After he stopped the man outside the store, Mr. Charles asked about the shoes. The man offered an explanation, but Mr. Charles still thought that the shoes could have been Kmart merchandise; he was not certain, however, and he let the man go.

30. Mr. Charles reported the incident to the store Loss Prevention Manager, who reported the incident to Ms. Brush. The decision was made to terminate Mr. Charles's certification to detain suspected shoplifters, and he was required to complete all of the training required of a new Loss Prevention Associate and to become re-certified to make detentions.

Summary.

31. Ms. Cinnante failed to present any persuasive direct evidence that Kmart intended to discriminate against her on the basis of her gender. There was no persuasive evidence that Mr. Vega displayed any discriminatory animus toward Ms. Cinnante because she was a woman. Mr. Vega's statement to Ms. Cinnante that he needed to hire a woman Loss Prevention Associate to monitor the women's fitting rooms and restrooms cannot reasonably support the inference that he hired Ms. Cinnante only because she was a woman. To the contrary, there is persuasive evidence that Mr. Vega and Ms. Bowman were impressed by Ms. Cinnante's background and experience in security and

believed she would be a good Loss Prevention Associate and could eventually move up to Loss Prevention Manager.

32. In addition, Ms. Cinnante failed to present evidence to establish that Mr. Vega treated Ms. Cinnante differently than he treated male Loss Prevention Associates by requiring her to perform tasks not related to store security. Rather, there is persuasive evidence showing that all Loss Prevention personnel in Kmart Store 7786, not just Ms. Cinnante, were required to clean the employee kitchen and do other, non-security-related jobs around the store.

33. Most importantly, however, Ms. Cinnante has not presented any evidence that the persons making the decision to terminate her employment had any discriminatory animus toward her whatsoever. Mr. Vega reported the incident to Ms. Brush, who had recommended that Ms. Cinnante be hired as a Loss Prevention Associate, and Ms. Brush recommended that Ms. Cinnante be terminated. Mr. Pearson, Kmart's Regional Loss Prevention Manager, made the final decision to terminate Ms. Cinnante. Although the evidence establishes that Mr. Vega reported Ms. Cinnante's improper detention to Ms. Brush on August 1, 2006, there is no evidence that Mr. Vega failed to report any other improper detention by a Loss Prevention Associate.

34. The evidence presented by Ms. Cinnante is not sufficient to establish that Kmart treated male Loss Prevention Associates differently than she was treated under similar circumstances. Ms. Cinnante does not claim that she followed all of the Six Steps required for the detention of a suspected shoplifter or that the August 1, 2006, detention was proper. She contends, rather, that Mr. Charles was treated differently because he was not terminated for making what she categorized as an improper detention on July 14, 2006. The evidence is not sufficient to establish that any of the Six Steps were not followed when Mr. Charles detained Mr. Allen, and Ms. Cinnante has failed, therefore, to establish that the detention of Mr. Allen was improper. The circumstances of Ms. Cinnante's August 1, 2006, detention and of Mr. Charles's July 14, 2006, detention were, therefore, not similar.

35. Ms. Cinnante also failed to present persuasive evidence to establish that the circumstances of the 2002 incident in which Mr. Charles released a suspected shoplifter after stopping him for questioning were similar to those of the August 1, 2006, improper detention leading to Ms. Cinnante's termination.

CONCLUSIONS OF LAW

36. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of

the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2007).

37. Section 760.10, Florida Statutes, part of the Florida Civil Rights Act of 1992, as amended, provides in pertinent part:

(1) It is an unlawful employment practice for an employer:

(a) To discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges or employment, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.

38. Florida courts routinely rely on decisions of the federal courts construing Title VII of the Civil Rights Act of 1964, codified at Title 42, Section 2000e et seq., United States Code, ("Title VII"), when construing the Florida Civil Rights Act, "because the Florida act was patterned after Title VII." Harper v. Blockbuster Entertainment Corp., 139 F.3d 1385, 1387 (11th Cir. 1998), citing, inter alia, Ranger Insurance Co. v. Bal Harbor Club, Inc., 549 So. 2d 1005, 1009 (Fla. 1989), and Florida State University v. Sondel, 685 So. 2d 923, 925, n. 1 (Fla. 1st DCA 1996).

39. Ms. Cinnante has the burden of proving by a preponderance of the evidence that she was the victim of employment discrimination, and she can establish discrimination

either through direct evidence of discrimination or through circumstantial evidence, which is evaluated within the framework of the burden-shifting analysis first articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973). See Logan v. Denny's Inc., 259 F.3d 558, 566-67 (11th Cir. 2001).

40. As observed by the court in Bass v. Board of County Comm'rs, Orange County, Florida, 256 F.3d 1095, 1105 (11th Cir. 2001):

Direct evidence of discrimination is "evidence which, if believed, would prove the existence of a fact [in issue] without inference or presumption." . . . "Only the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of [gender] constitute direct evidence of discrimination." . . . "For statements of discriminatory intent to constitute direct evidence of discrimination, they must be made by a person involved in the challenged decision." . . . "Remarks by non-decision makers or remarks unrelated to the decision-making process itself are not direct evidence of discrimination."

(Citations omitted).

41. Based on the findings of fact herein, Ms. Cinnante has presented no persuasive direct evidence that she was discriminated against because of her gender. Mr. Pearson ordered her termination based on Ms. Brush's recommendation, and Ms. Cinnante presented no evidence that either Mr. Pearson or Ms. Brush had ever displayed any discriminatory animus toward her. Furthermore, based on the findings of fact herein,

Ms. Cinnante has presented no persuasive evidence that Mr. Vega ever exhibited any discriminatory animus toward her.

42. In the absence of direct evidence of discrimination, Ms. Cinnante must rely on the presumption set forth in McDonnell Douglas to establish a prima facie case of discrimination on the basis of gender by showing that (1) she is a member of a protected class; (2) she was qualified to do the job; (3) she suffered an adverse employment action; and (4) she was treated differently than similarly situated Kmart Loss Prevention Associates outside the protected class. See Haas v. Kelly Servs. Inc., 409 F.3d 1030, 1035 (8th Cir. 2005); Chapman v. AI Transp., 229 F.3d 1012, 1024 (11th Cir. 2000).

43. If Ms. Cinnante satisfies her burden of proving a prima facie case of discrimination on the basis of gender, the burden of producing evidence then shifts to Kmart to produce evidence articulating "a legitimate, non-discriminatory reason" for terminating Ms. Cinnante. Id. If Kmart establishes a legitimate, non-discriminatory reason for terminating Ms. Cinnante, Ms. Cinnante must produce evidence to prove that the non-discriminatory reason offered by Kmart is pretextual. Jones v. School Dist. of Philadelphia, 198 F.3d 403, 410 (3d Cir. 1999).

44. Based on the findings of fact herein, there is no dispute that Ms. Cinnante is a member of a class of persons

protected by Section 760.10, Florida Statutes; that she was qualified to work as a Loss Prevention Associate for Kmart; and that she was terminated from this position. The first three elements of a prima facie case of employment discrimination have, therefore, been satisfied.

45. Nonetheless, Ms. Cinnante has failed to meet her burden of establishing a prima facie case of discrimination on the basis of gender because she has failed to make a persuasive showing that she was treated differently by Kmart than other Loss Prevention Associates outside her protected class were treated under similar circumstances. In a case such as this, involving discipline for misconduct or violations of workplace policies, Ms. Cinnante must establish that similarly situated male employees were treated more favorably than she was when the male employees engaged in substantially the same type of conduct: "'The most important factors in the disciplinary context are the nature of the offenses committed and the nature of the punishments imposed.' . . . In order to satisfy the similar offenses prong, the comparator's misconduct must be nearly identical to the plaintiff's in order 'to prevent courts from second-guessing employers' reasonable decisions and confusing apples with oranges.'" Silvera v. Orange County Sch. Bd., 244 F.3d 1253, 1259 (11th Cir. 2001).

46. Based on the findings of fact herein, Ms. Cinnante has failed to produce sufficient evidence to satisfy the fourth prong of a prima facie case of gender discrimination under the McDonnell Douglas analysis. The evidence establishes that it was Kmart's policy to terminate Loss Prevention Associates who failed to follow the Six Steps, except for the rare circumstance when a Loss Prevention Associate was unable to keep a suspected shoplifter under continuous surveillance. In addition, and more specifically, Ms. Cinnante failed to present any evidence establishing that Kmart failed to terminate any Loss Prevention Associate, either male or female, who did not follow the critical first three of the Six Steps, the conduct for which she was terminated.

47. Ms. Cinnante has also failed to establish that Mr. Charles committed any misconduct with respect to the July 14, 2006, detention of Mr. Allen or to establish that Mr. Charles's decision in 2002 to let a shoplifter go was based on circumstances even remotely similar to those in which Ms. Cinnante made the improper detention on August 1, 2006, for which she was terminated.

48. Because Ms. Cinnante has failed to establish a prima facie case of discrimination on the basis of gender, it is not necessary to consider whether Kmart produced persuasive evidence of a legitimate, non-discriminatory reason for terminating

Ms. Cinnante. Nonetheless, it is concluded that the evidence presented by Kmart is sufficient to establish that its policy requiring termination of Loss Prevention Associates who fail to follow the Six Steps when detaining a suspected shoplifter is based on the legitimate business reason of avoiding lawsuits by persons improperly detained. Ms. Cinnante failed to present any evidence that this reason is unworthy of belief or a pretext for discrimination on the basis of gender.

49. For these reasons, Ms. Cinnante has failed to prove by a preponderance of the evidence that Kmart committed an unlawful employment practice prohibited by Section 760.10, Florida Statutes.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations enter a final order dismissing the Petition for Relief from an Unlawful Employment Practice filed by Linda M. Cinnante on February 7, 2008.

DONE AND ENTERED this 31st day of July, 2008, in
Tallahassee, Leon County, Florida.



PATRICIA M. HART
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of July, 2008.

ENDNOTES

^{1/} All citations to the Florida Statutes herein are to the 2006 edition unless otherwise indicated.

^{2/} A "bad stop" in the context of this Recommended Order is the common term used by Kmart employees to describe the improper detention of a suspected shoplifter.

^{3/} Kmart also refers to its Loss Prevention Managers as Loss Prevention Coaches.

^{4/} The format of the following quotation has been changed somewhat to accommodate the format of this text.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.