STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SHIRLEY JACKSON,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 08-2570
	)	
DOLLAR GENERAL CORPORATION,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to Notice, a hearing was held on October 1, 2008, before the Honorable Diane Cleavinger, Administrative Law Judge, Division of Administrative Hearings in Panama City, Florida.

APPEARANCES

For Petitioner: Jean Marie Downing, Esquire
221 Thomas Drive
Panama City Beach, Florida 32408

For Respondent: Alva L. Cross, Esquire
2300 SunTrust Financial Centre
401 East Jackson Street
Tampa, Florida 33602

STATEMENT OF THE ISSUE

Whether Respondent discriminated against Petitioner because of a handicap.

PRELIMINARY STATEMENT

On September 22, 2007, Petitioner, Shirley Jackson, (Petitioner) filed a Charge of Discrimination against

Respondent, Dollar General Corporation (Respondent), with the Florida Commission on Human Relations (FCHR). The Charge alleged that Respondent discriminated against Petitioner based on handicap (vision loss) when Respondent failed to reasonably accommodate her handicap, placed her on family medical leave and then terminated her from employment. On April 17, 2008, the FCHR filed a Notice of Determination: No Cause, which advised Petitioner that she had 35 days from the date of the Notice to request an administrative hearing. On May 22, 2008, Petitioner filed a Petition for Relief alleging the same type of discrimination contained in her earlier Charge. Additionally, the Petition for Relief alleged that Respondent discriminated against Petitioner based on her age. The Petition for Relief was forwarded to the Division of Administrative Hearings. Petitioner later dismissed her claim based on age discrimination and the matter proceeded solely on the issue of discrimination based on handicap.

At the hearing, Petitioner testified in her own behalf and offered the testimony of three witnesses. Respondent offered the testimony of two witnesses. Additionally, both parties offered 17 joint exhibits into evidence, including relevant portions of Petitioner’s deposition.

After the hearing, Petitioner filed a Proposed Recommended Order on November 21, 2008. Respondent filed its Proposed Recommended Order on November 17, 2008.

FINDINGS OF FACT

1. Sometime in July 2002, Petitioner was hired by Respondent as a Store Clerk (now known as a Sales Associate) at Store No. 3727 in Panama City, Florida. On March 1, 2003, Petitioner was promoted to Lead Sales Associate.

2. Sometime around December 2005, Petitioner was diagnosed with absolute glaucoma and cataracts. As a result of her deteriorating eyesight, Petitioner asked the Store's Manager, Michaelene Mellor, to be reassigned to her earlier Sales Associate position. Although there was some conflict in the evidence on whether Petitioner was reassigned as a "store stocker," the better evidence demonstrated that Dollar General did not have a formal position known as a "store stocker." Dollar General did have a position known as a "Sales Associate."

3. The Sales Associate position consisted of a variety of duties. Essential to the position were the following:

a. assist in setting and maintaining planograms and programs;

b. build merchandise displays;

c. operate a cash register;

d. itemize and total a customer's purchase;

e. collect payment from a customer and make change;

f. operate a handheld scanner; and

g. assist with ordering merchandise and maintaining inventory in the store.

4. Planograms are shelving strips that contain shelf tags. They are the method that employees use to place merchandise in the store and on the shelves. They also help in inventory control.

5. Petitioner was reassigned by Ms. Mellor. Her primary duties were to stock the store by using the planograms and shelf tags. Ms. Mellor advised the District Manager about the reassignment. However, she did not inform the District Manager that Petitioner would primarily be limited to stocking the store.

6. Under Ms. Mellor's tenure as Store Manager, Store 3727 was not properly managed. The store was dirty, had incorrect or out-of-date signage, incomplete or nonexistent planograms, merchandise on the floor and blocking the aisles, and a high incidence of inventory loss. Because of these problems, Ms. Mellor was terminated in October 2006. That same month, Thomas Rector became the Store Manager. His goal was to bring the store into compliance with Dollar General's operation policies and to reduce the store's inventory loss.

7. At the time Mr. Rector took over Store 3727, the store had 4 positions and 7 employees allotted to it. The positions were Store Manager, Assistant Store Manager, Lead Sales Associate and Sales Associate. Each store was allotted a specific number of labor hours, excluding the hours worked by the manager, to cover the hours the store is open for business. Because Store 3727 had only 7 employees, only two or three employees worked during any given shift. With so few employees to cover each shift, it was essential that all employees be able to perform all the duties of the position that they filled. In this case, it was essential that Petitioner be able to read a scanner, run the cash register, make change, read a planogram, read a shelf tag, locate merchandise and stock merchandise.

8. For the next several months, Mr. Rector observed that Petitioner could not clock herself in or out of work. More importantly, he observed that Petitioner had difficulties in stocking merchandise in the proper place. He observed that other employees had to sometimes help Petitioner with stocking. Improperly stocked items caused inventory control problems, increased the labor hours used by the store because time was required to correctly place store items and could result in lost revenue due to improper pricing. He also observed that she had trouble reading the scanner, the planograms and shelf tags.

9. Based on his observations, Mr. Rector concluded that Petitioner could not fulfill the duties of a Sales Associate. He contacted the District Manager, Joe Peebles, and advised him that Petitioner could not perform the duties of a Sales Associate.

10. On June 6, 2007, Mr. Peebles met with Petitioner. He read her the list of duties that a Sales Associate must perform and asked her if she felt she could perform those duties. Those duties are outlined above. Petitioner admitted she had difficulty with reading a planogram and operating a cash register.

11. Likewise at the hearing, Petitioner admitted and demonstrated that she could not accurately read a planogram or shelf tag. She admitted she could not build a merchandise display, could not operate a cash register and could not make change for a customer. The evidence was clear that Petitioner could not perform the essential functions of a Sales Associate.

12. Eventually, Petitioner was placed on leave and was told that, if her vision did not improve, she would be terminated. At no time did Petitioner ask for or identify any reasonable accommodation that could be made by Respondent to enable her to perform her duties as a Sales Associate and the evidence did not reveal that any such accommodations existed or were available. Ultimately, Petitioner was terminated because

she could not perform the duties of a Sales Associate. The evidence did not demonstrate that her termination was discriminatory or the reasons given for her termination were pretextual. Finally, the evidence did not demonstrate that Petitioner's vision impairment could be reasonably accommodated. Given these facts, Petitioner's Petition for Relief should be dismissed.

CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. § 120.57(1), Fla. Stat.

14. It is an unlawful employment practice for an employer to discharge or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's age, race, gender or handicap. § 760.10(1)(a), Fla. Stat.

15. In cases of discrimination, Petitioner has the burden of proving by a preponderance of the evidence that Respondent committed an unlawful employment practice. Fla. Dep't of Community Affairs v. Bryant, 586 So. 2d 1205, 1209 (Fla. 1st DCA 1991).

16. The provisions of Chapter 760, Florida Statutes, are analogous to those of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. Cases interpreting Title VII are, therefore, applicable to Chapter 760, Florida Statutes. See

School Bd. v. Hargis, 400 So. 2d 103, 108 and n. 2 (Fla. 1st DCA 1981); Harper v. Blockbuster Entertainment Corp., 139 F.3d 1285, 1387 (11th Cir. 1998) ("No Florida court has interpreted the Florida Statue to impose substantive liability where Title VII does not."), cert. denied, 525 U.S. 1000, 119 S. Ct. 509, 142 L. Ed.2d 422 (1998); Bryant, 586 So. 2d at 1209; see also Scelta v. Delicatessen Support Servs., 146 F. Supp. 2d 1255, 1261 and n. 5 (M.D. Fla. 2001). See Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 143 (2000); Chapman v. Al Transp., 229 F.3d 1012, 1024-25 (11th Cir. 2000) (en banc).

17. In Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), and McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the United States Supreme Court set for the requirements for proving a prima facie case of discrimination, which can vary depending on the type of discrimination case. Under McDonnell, a Plaintiff has the initial burden of establishing by a preponderance of the evidence a prima facie case of unlawful discrimination. If the Plaintiff establishes a prima facie case, then the Respondent must go forward and articulate a legitimate nondiscriminatory reason for the action taken by the Respondent. Once the Respondent has articulated a legitimate nondiscriminatory reason, the Plaintiff then must establish by a preponderance of the evidence that the reason given is not true or merely pretextual.

McDonnell Douglas Corp. v. Green, 411 U.S. at 802 n. 13; Schwartz v. State of Florida, 494 F. Supp. 574, 583 (N.D. Fla. 1980). McDonnell Douglas Corp. v. Green provides:

> [t]hat a Title VII plaintiff carries the initial burden of showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were "based on a discriminatory criterion illegal under the (Civil Rights Act of 1964.)" Teamsters v. United States, 431 U.S. 324, 358 (1977).

See also Furnco Construction Corp. v. Waters, 438 U.S. 567, 576 (1977).

18. In St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S. Ct. 2742, 2747 (1993), the Court held that once the employer succeeds in carrying his burden of producing a nondiscriminatory reason for the challenged action, the employee must show that the employer's reason is pretextual. The final and ultimate burden of persuading the trier of fact, by a preponderance of the evidence, remains at all times with the employee. St. Mary's Honor Center v. Hicks, 113 S. Ct. at 2747.

19. The employee's ultimate burden of persuasion may be satisfied by direct evidence showing that a discriminatory reason, more likely than not, motivated the decision involved, or by indirect evidence showing that the proffered reasons of the employer are not worthy of belief. Department of Corrections v. Chandler, 528 So. 2d 1183, 1186 (Fla. 1st DCA 1991). In Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000), the U.S. Supreme Court resolved a conflict among the circuits about the standard for establishing pretext fueled by the Court's earlier decision in St. Mary's Honor Center v. Hicks, 509 U.S.

133 (1993), and made it clear that "pre-text plus" was not the standard to be used. Reeves established the pretextual standard as a permissive, case-by-case approach in "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false and . . . permit the trier of fact to conclude that the employer unlawfully discriminated." Id. at 148. Justice O'Connor's opinion for a unanimous court carefully explained why evidence of pretext with the prima facie case may be sufficient to find discrimination:

> In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. . . Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely explanation, especially since the employer is in the best position to put forth the actual reasons for the decision . . .

Reeves, 530 U.S. at 147. See also Dep't of Corrections v. Chandler, 582 So. 2d 1186 (Fla. 1st DCA. 1991) and Chapman, 229 F.3d at 1024.

20. On the other hand, "[a] plaintiff is not allowed to recast an employer's proffered nondiscriminatory reason or substitute [his] business judgment for that of the employer." Chapman, 229 F.3d at 1030. Rather, "an employee must meet that reason head on and rebut it, and the employee cannot succeed by simply quarreling with the wisdom of that reason." Id.

21. In this case, Petitioner established that she is a member of a protected class since her vision impairment and blindness qualifies as a handicap. However, Petitioner failed

to prove a prima facie case of discrimination based on handicap. None of the evidence shows any basis to conclude that Petitioner was terminated because of her handicap. The evidence was clear, and Petitioner admitted, that she could not perform the duties of a Sales Associate. Petitioner did not ask for any reasonable accommodation of her handicap. Finally, the evidence did not demonstrate that a reasonable accommodation of Petitioner's handicap existed or was available. Having failed to establish a prima facie case, Petitioner's Petition for Relief should be dismissed.

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.

DONE AND ENTERED this 9th day of January, 2009, in Tallahassee, Leon County, Florida.

DIANE CLEAVINGER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 9th day of January, 2009.

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.