STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TRACEY FRANCIS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 09-1337
	)	
WAL-MART,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to proper notice this matter came on for formal hearing before P. Michael Ruff, duly-designated Administrative Law Judge of the Division of Administrative Hearings. The hearing was conducted in Tallahassee, Florida, on October 12, 2009. The appearances were as follows:

APPEARANCES

For Petitioner: Tracy Francis, pro se
284 Water Oak Drive
Tallahassee, Florida 32305

For Respondent: Cornelius D. Boone, Esquire
Littler Mendelson, P.C.
3344 Peachtree Road Northeast, Suite 1500
Atlanta, Georgia 30326

STATEMENT OF THE ISSUES

The issues to be resolved in this proceeding concern whether the Petitioner was subjected to employment discrimination because of her race (African-American) based upon

being subjected to harassment, different terms and conditions of employment and alleged denial of a reasonable accommodation with regard to an alleged disability.

PRELIMINARY STATEMENT

This cause arose upon the filing of a complaint of discrimination on August 6, 2008, by the above-named Petitioner. The Petitioner alleged that she had been harassed, subjected to different terms and conditions of employment and denied a reasonable accommodation with regard to her race and her alleged disability. In due course, an investigation was conducted by the Florida Commission on Human Relations (Commission) which resulted in a determination of No Cause, entered on February 5, 2009. The Petitioner contested that determination and filed a Petition for Relief on March 12, 2009, which was transmitted to the Division of Administrative Hearings for adjudication.

The matter was assigned to the undersigned Administrative Law Judge. After an Initial Order and a Pre-Hearing Order was issued, the discovery process commenced. After allowing a reasonable time for discovery to be accomplished, the matter was scheduled for hearing on July 10, 2009. Thereafter, by a Joint Motion for Continuance, the parties agreed that they needed additional preparation time and the matter was continued. Ultimately, after efforts to accommodate the parties' schedules, the matter was set for hearing for October 12, 2009.

The cause came on for hearing as noticed. The Petitioner presented 14 witnesses. The Respondent presented no direct witnesses, but relied in its presentation upon its cross-examination of the Petitioner's witnesses, many of whom were Company management personnel. The Petitioner offered no exhibits into evidence; the Respondent had its Exhibits 1 through 29 admitted into evidence. Upon conclusion of the proceeding, the parties were given an opportunity to submit proposed recommended orders. Although the Respondent had initially indicated intent to order a transcript, ultimately no transcript was filed. The Proposed Recommended Order from the Respondent was timely filed on November 24, 2009, and has been considered in the rendition of this recommended order.

FINDINGS OF FACT

1. The Petitioner, Tracy Francis, began employment with the Respondent at Wal-Mart store #1077 on or about March 3, 2003. She was employed as a Customer Service Representative at that Wal-Mart store during times pertinent to this claim. During her tenure at Wal-Mart, the Petitioner never held a position that carried managerial responsibilities.

2. The Respondent owns and operates the Wal-Mart store #1077 in Tallahassee, Florida, involved in the facts of this case. A Personnel Manager at that store is not a salaried member of management. As such, personnel managers cannot

discipline hourly associate employees regarding suspected violations of Company policy. An essential function of the Personnel Manager is to read and understand Company policies and procedures and to have a working knowledge of any changes or updates in those policies and procedures. Wal-Mart maintains an Open Door Communications Policy. It contains reporting and investigation procedures that encourage Associates (employees) to report any and all incidents of perceived discrimination. The store also maintains a Dress Code Policy that provides employees with guidance and direction as to workplace appearance expectations.

3. Wal-Mart maintains an Anti-Harassment and Discrimination Policy. It does not tolerate harassment or discrimination against employees. Wal-Mart also has an Accommodation Policy that provides that it will provide employees who have a disability, a reasonable accommodation to enable them to perform the essential functions of their job or to seek new jobs with the Company. The Accommodation Policy provides that an employee can request an accommodation whenever he or she chooses by informing any salaried member of the management staff.

4. Wal-Mart also maintains a "Coaching for Improvement Policy." That policy is designed to inform employees whether they are meeting requirements and expectations of their

position. Pursuant to policy guidelines, there are four levels of disciplinary action: (1) Verbal coaching; (2) Written coaching; (3) Decision-Making Day; and (4) Termination.

5. Formal disciplinary coachings do not result in loss of pay, benefits, or corporate rank or title. They do not have any ultimate tangible effect on an Associate's employment with the Company. Due to privacy concerns, members of the management team or staff are prohibited from discussing any coaching or disciplinary actions taken against an employee with another employee.

6. On July 10, 2008, while providing the Petitioner with her payroll check, Personnel Manager Lisa Sanderson, who is Caucasian, questioned whether the Petitioner's hair color was in compliance with the Company's Dress Code Policy because the Petitioner's hair color did not appear to be a natural color.

7. In response to that comment about her hair color, the Petitioner requested that Ms. Sanderson review the Company's Dress Code Policy.

8. Ms. Sanderson had initially believed that the policy stated that hair color must be a natural color and the Petitioner's appeared to be an unnatural-appearing platinum blonde color. However, after Ms. Sanderson reviewed the Dress Code Policy she discovered that it required that the Associate's hair must only be "conservative" in style. After reviewing that

policy, Ms. Sanderson wrote an e-mail to the Human Resources Manager, John Williams, who is African-American, detailing the encounter with the Petitioner. Ms. Sanderson acknowledged in the e-mail that she had made a mistake in advising the Petitioner that she was not in compliance with the Dress Code. Ms. Sanderson thereafter met with the Petitioner and apologized to her for making the incorrect statement regarding the Petitioner's hair color.

9. After the e-mail was sent to Mr. Williams by Ms. Sanderson, the Petitioner contacted Mr. Williams and complained about the comment. Mr. Williams thereupon conducted an investigation. He determined that the comment was improper. Therefore, he, along with Store Manager, Demetrius Jones, who is African-American, and Co-Manager Richard Coleman, who is Caucasian, met with Ms. Sanderson and informed her that, as Personnel Manager, she should bring any policy violation she identified to the attention of a member of the management staff. She was informed that it was not proper for her, as an hourly associate employee, to personally address the violation directly with another associate who she felt was in violation of Company policy. Specifically, Ms. Sanderson was informed that she did not have the authority to enforce Company policy, but rather, only authority to interpret that policy.

10. Mr. Williams and Mr. Jones determined that Ms. Sanderson should be verbally counseled concerning the comment made to the Petitioner about hair color. She was verbally counseled for that comment. The Petitioner was not required to change her hair color as a result of the comment or the investigation. The Petitioner also admits that she has no evidence to indicate that the comment made by Ms. Sanderson regarding her hair color was racially motivated.

Alleged Disability and Accomodation Request

11. The Petitioner claimed to have a medical condition stemming from a "slip and fall" accident she suffered in the fall of 2001. This was before she commenced employment with the Respondent. She suffered from that same medical condition throughout her entire employment with Wal-Mart. In the summer of 2007, she was involved in a car accident that aggravated her previous back and neck injury.

12. The Petitioner failed to provide any evidence to detail any physical or mental limitations resulting from her initial slip and fall injury or her subsequent car accident-related injury. She did not show any evidence to indicate that either injury or condition caused any significant or substantial impairment in a major life activity such as walking, sleeping, working, or other major life activities.

13. The Petitioner was aware, during her tenure with Wal-Mart, that in order to request a reasonable accommodation for a purported disability that she was required to complete a Request for Accommodation "packet."

14. In June 2007, more than a year before the Petitioner filed the subject complaint of discrimination with the Commission, she submitted a request for a reasonable accommodation to Wal-Mart. That request was granted by the Respondent. Thus, the Petitioner did not request an accommodation within the one-year statute of limitation prior to filing the subject complaint.

15. During her tenure with the Respondent, the Petitioner satisfactorily performed the essential functions of her job. She admitted that throughout her employment, her performance had been correctly evaluated, and that every performance evaluation she received had rated her performance as satisfactory.

16. Sometime in August 2007, the Petitioner informed Mr. Williams that she was involved in a car accident which was not related to her employment at Wal-Mart. After returning to work following the car accident she met with Mr. Williams to discuss her disciplinary coaching record.

17. During that meeting with Mr. Williams, she complained that she was held accountable and disciplined for absences that were due to her car accident and subsequent surgery.

Mr. Williams investigated her complaint regarding the discipline and discovered that the Petitioner was coached for unexcused absences she incurred while away from the store recovering from surgery. As a result of his investigation, Mr. Williams requested that the Petitioner complete a Leave of Absence "packet" to cover the past and future absences related to her surgery. He subsequently approved her request for the leave of absence.

18. Despite the fact that Mr. Williams had approved the Petitioner's leave of absence related to surgery, the co-manager, Reginald Brooks, who is African-American, did not file the required documents with the Personnel office. This resulted in the Petitioner still being held accountable and coached for continued absences. The Petitioner brought this to the attention of Mr. Williams and he conducted a follow-up investigation and learned that the leave of absence documentation had never been properly filed. He, therefore, completed an additional leave of absence packet and provided the Petitioner with an intermittent leave of absence for an entire year. An “intermittent leave of absence” was given to the Petitioner to provide her with the flexibility to schedule her work shifts to accommodate her recovery from surgery and any related medical treatment. After providing the Petitioner with an intermittent leave of absence, Mr. Williams and Mr. Jones

removed every disciplinary coaching record or notation contained in the Petitioner's personnel file.

19. The Respondent maintains a Dress Code Policy and a Dress Code Chart that provides employees with guidance regarding expectations for their attire while on work duty. The Dress Code Chart is posted in the Associate's Lounge.

20. Under the policy, employees are required to wear workpants that range in color from beige to dark brown. On one occasion, Assistant Manager Paula Barfield, who is Caucasian, spoke with the Petitioner regarding the color of her workpants. Ms. Barfield believed that the workpants, which were of a rust color, violated the Dress Code Policy. There is no evidence to show that Ms. Barfield's conversation with the Petitioner regarding the color of the Petitioner's workpants had any relationship to the Petitioner's race.

21. The Petitioner reported Ms. Barfield's comments to Mr. Coleman. Mr. Coleman reviewed the Petitioner's work place attire and informed her that her workpants were appropriate. He therefore allowed the Petitioner to remain at work and she was not coached or disciplined in any way about the matter.

22. On another occasion, on April 10, 2009, Ms. Sanderson believed that the Petitioner's workpants violated the Dress Code Policy. She therefore asked Assistant Manager Marie Williams, who is African-American, and Customer Service Manager Corlin

Hudson, who is also African-American, to speak to the Petitioner regarding the color of her workpants. These two staff members reviewed the Petitioner's attire and determined that the pants violated the Company's Dress Code Policy and so informed the Petitioner.

23. The Petitioner thereupon reported Ms. Williams and Ms. Hudson's comments to Mr. Coleman. Mr. Coleman reviewed the Petitioner's workplace attire and informed her that her workpants were appropriate. He allowed her to remain at the store and she was not coached or disciplined in any way.

24. The Petitioner admits that each time she complained about an incident regarding her compliance with the Company's Dress Code Policy, that Mr. Coleman remedied the problem. The Petitioner was never required to change her work attire due to non-compliance with the Dress Code Policy. She was never required to change her hair color or style. She never received a disciplinary coaching, nor was she ever sent home as a result of her workplace attire or her hair color or styling. In summary, during the entire course of her period of employment with Wal-Mart, as relevant to this case, she never suffered an adverse employment action.

CONCLUSIONS OF LAW

25. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2009).

26. Section 760.10, Florida Statutes (2009), provides that "it is unlawful employment practice for an employer . . . 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 of employment, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status."

27. The Petitioner maintains that she was discriminated against, in essence, through imposition of harassment and a hostile work environment because she is African-American. She also claims she was discriminated against when the Respondent failed to accommodate her purported disability. Because of the substantial similarities between the relevant provisions of Chapter 760, Florida Statutes, and the Americans with Disabilities Act (ADA), federal decisions interpreting and applying the ADA have been held to be instructive in cases arising under Section 760.10, Florida Statutes (2009). Chanda v. Englehard/ICC, 234 F.3d 1219, 1221 (11th Cir. 2000). The Petitioner's disability discrimination claim is based on events occurring prior to January 1, 2009. Therefore, the Amendments

Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008), effective January 1, 2009, does not apply to the instant case. Fikes v. WalMart Inc., 322 Fed. Appx. 882, 883 (11th Cir. 2009).

28. The Petitioner established no direct evidence of discrimination. Therefore, in order to establish a prima facie case of discrimination, she must establish an inference of discrimination under the burden-shifting provisions set forth in McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973).

29. The Petitioner must establish that: (1) she is a member of a protected class; (2) she was subjected to an adverse employment action; (3) similarly-situated employees outside of her protected category or class were treated more favorably by the Respondent; and (4) she was qualified for the job. Holifield v. Reno, 115 F.3d 1555, 1561-62 (11th Cir. 1997).

30. If the Petitioner established a prima facie case, then the Respondent would be required to provide a legitimate, non-discriminatory reason for the relevant, adverse employment action. Smith v. Horner, 839 F.2d 1530, 1536-37 (11th Cir. 1988). If a legitimate, non-discriminatory reason for the employment action at issue is shown by the Respondent employer, then the Petitioner must come forward with evidence to show that such a reason is really a pretext for what amounts to intentional discrimination.

31. The Petitioner did not establish a prima facie case of race or disability discrimination because she failed to show that she was subjected to an adverse employment action. "An adverse employment action is an ultimate employment decision, such as discharge or failure to hire, or other conduct that 'alters the employee's compensation, terms, conditions, or privileges of employment, deprives him or her of employment opportunities, or adversely affects his or her status as an employee.'" Gupta v. Florida Board of Regents, 212 F.3d 571, 587 (11th Cir. 2000) (citing Robinson v. City of Pittsburgh, 120 F.3d 1286, 1300 (3rd. Cir. 1997)); Davis v. Town of Lake Park, 245 F.3d 1232, 1238 (11th Cir. 2001) (holding that "the employee's subjective view of the significance of the employer's action is not controlling; rather, the employment action must be materially adverse to a reasonable person under the circumstances."). In the instant situation, the Petitioner must show that she suffered a significant change in employment status. She failed to adduce any evidence which persuasively shows that.

32. The Petitioner failed to establish that she suffered an adverse employment action during the one year statute of limitations period prior to filing her complaint with the Commission. Indeed, she admitted that from the time she was hired until she filed the subject complaint, that she never

suffered a tangible loss of any kind. To the contrary, all of her performance appraisals were positive, and she received a pay increase each year of her employment with the Respondent. More particularly, with regard to the above-found facts, as to each potential situation involving any suggestion that the Petitioner had violated Company policy, no disciplinary action was imposed and her personnel record was even cleansed of any reference to it, in the manner found above.

33. The Petitioner has failed to establish that she suffered an adverse employment action, which is fatal to both her race and disability discrimination claims. See Davis, supra. at 1238. Because the Petitioner failed to provide direct evidence of any discriminatory intent and because she has not established her prima facie discrimination claim, as to disability or race, through presumption, her claims must fail as a matter of law.

Racial Discrimination Based Upon Harassment

34. Moreover, in order to establish a claim based upon racially-related harassment, the Petitioner is required to show that: (1) she belongs to a protected group; (2) she was subjected to unwelcome harassment; (3) the harassment was based upon a protected classification (her race); (4) the harassment was sufficiently severe or pervasive as to alter the terms and conditions of her employment and create a hostile working

environment; and (5) there is a basis for holding the Respondent liable. Alexander v. Opelika City Schools, 2009 U.S. App. LEXIS 24686 (11th Cir. 2009).

35. In order to determine whether alleged "harassing" conduct is sufficiently "severe or pervasive," courts will evaluate: (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 job performance. Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1275 (11th Cir. 2002). The Petitioner failed to establish several essential elements of the racial harassment claim and it is without merit.

36. Her claim is based upon the following allegations: (1) that Ms. Sanderson "harassed" the Petitioner when she questioned whether her hair color was in compliance with the Company's Dress Code Policy; and (2) that she was "harassed" when various members of management, including African-American managers, questioned whether her clothing was in compliance with the Company Dress Code Policy. The preponderant, persuasive evidence demonstrates that Ms. Sanderson's comment and or the comments made by the store's management personnel regarding the Petitioner's workplace attire and appearance were not based upon her race. The comments were not frequent or severe enough to

create any semblance of an abusive work environment. Moreover, the Petitioner readily admitted in hearing in her testimony, that Ms. Sanderson's comment regarding her hair color was not racially-motivated.

37. The Petitioner's complaint of discrimination is really premised on comments that are nothing more than the "ordinary trials and tribulations of the workplace," which, as a matter of law, will not support a harassment claim. See Burlington Northern and Sante Fe Railway Co. v. White, 548 U.S. 53 (2006). The conduct of which the Petitioner complains is not racially-related and is not severe or pervasive enough as to alter the terms and conditions of the Petitioner's job. Therefore, the harassment claim has not been established.

38. Even if the Petitioner had established such a prima facie harassment claim, the Respondent may still avoid liability by showing: (1) that it "exercised reasonable care to prevent and correct any harassing behavior;" and (2) that Petitioner "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998).

39. Based upon its establishment of an Anti-Harassment Policy and its Open Door Policy requiring Associates to report any perceived act of harassment, as well as the fact that the

Petitioner was aware of these policies, it cannot be disputed that the Respondent exercised reasonable care to prevent and correct any harassing behavior.

40. Indeed, as Petitioner admits, every time she made a complaint regarding imagined harassment, the Respondent promptly responded and corrected any behavior which might possibly be deemed to be harassing.

The Disability Claim

41. In order to establish a prima facie case of disability discrimination the Petitioner must demonstrate: (1) that she has a qualified disability; (2) that she is qualified for the job at issue; and (3) that she was subjected to unlawful discrimination because of her disability. See D'Angelo v. Conagra Foods, 422 F.3d 1220, 1226 (11th Cir. 2005).

42. "It is insufficient for individuals attempting to prove disability status . . . to merely submit evidence of a medical diagnosis of impairment. Instead, the ADA requires those claiming the Act's protection . . . to prove a disability by offering evidence that the extent of the limitation [caused by their impairment] in terms of their own experience . . . is substantial." Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 567 (1999). An impairment must be of a considerable nature or to a large degree, and its impact must also be permanent or long term. Toyota Motor Manuf., Kentucky, Inc. v. Williams, 534 U.S.

184, 196-98 (2002) (The terms "major life activities" and "substantial limitation" must be "interpreted strictly to create a demanding standard for qualifying as disabled. . . "). In order to determine if a petitioner's ailments substantially limit his or her activities, courts look to federal regulations which define the term "substantially limits" to mean:

> "[u]nable to perform a major life activity that the average person in the general population can perform" or "[s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a major life activity as compared to the condition, manner or duration under which the average person in the general population can perform the same major life activity."

Hilburn v. Maruta Elecs. N. Am. Inc., 181 F.3d 1220, 1227 (11th Cir. 1999) (citing 29 C.F.R. § 1630.2(j)(1)(i),(ii)). In evaluating the existence of a disability, the Eleventh Circuit has further directed courts to look at "(1) the nature and the severity of the impairment; (2) the duration or expected duration of the impairment; and (3) the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment." Id. at n.13 (citing 29 C.F.R. § 1630.2(j)(2). The Petitioner in this case simply did not adduce any persuasive evidence under the above standards, to establish that she has any impairment, that it is a significant

impairment and that it significantly limits or impairs any major life activity such as working, ambulating, etc.

43. The Petitioner, in fact, offered little more than a vague, general description of her purported disability. She failed to provide any evidence or explanation as to how this purported condition limits any major life activities. Moreover, on May 13, 2008, the Petitioner provided the Respondent with medical documentation that showed that she was released to go back to work at the Respondent's store location at issue, in the position of Customer Service Representative, with no medically-related restrictions.

44. The Petitioner therefore failed to establish that she was disabled as a matter of law, thus failing to establish the prima facie case for disability and disability discrimination. Thus, to the extent she has made a claim for alleged failure to accommodate her disability, the claim becomes untenable. See Albright v. Columbia County Board of Educ., 135 Fed. Appx. 344, 346 (11th Cir. 2005) (holding that, to establish an actionable failure to accommodate claim, it must be demonstrated that the employee is disabled within the meaning of the ADA).

45. The above facts show that as a result of her car accident, in June 2007, more than one year before the Petitioner filed the complaint of discrimination with the Commission, the Petitioner submitted a request for a reasonable accommodation.

That request was granted by the Respondent. The Petitioner never thereafter requested an additional accommodation for any disability. This is also fatal to her claim concerning failure to accommodate. An employee must request an accommodation and be denied such prior to bringing a reasonable accommodation claim under Title I of the ADA. Gaston v. Bellingrath Gardens and Home, Inc., 167 F.3d 1361, 1363-64 (11th Cir. 1999).

46. Moreover, in order to establish that the Petitioner was subjected to unlawful discrimination by failure to accommodate her purported disability, she is required to show that she suffered some adverse employment action. See Doe v. DeKalb County School District, 145 F.3d 1441, 1449 (11th Cir. 1998). The Petitioner here never suffered an adverse employment action during the relevant time period, as delineated in the above Findings of Fact. Therefore, the failure to accommodate claim is without merit because the only request to accommodate was honored by the Respondent and because no adverse employment action ever occurred.

47. In summary, the above Findings of Fact show that the Petitioner has not established with preponderant, persuasive evidence either her claim based upon racial discrimination or based upon disability discrimination. She has not established a prima facie case under either theory of discrimination because she is not established that any of the comments or other acts

she described in her evidence were racially motivated nor did she prove the required elements of establishing a disability. Moreover, she did not establish that the disability was not reasonably accommodated, if it had existed, because the only accommodation request was granted. Finally, and most pointedly, she did not establish that any adverse employment action ever occurred. Consequently, the Petitioner's claim must fail.

RECOMMENDATION

Having considered the foregoing Findings of Fact, Conclusions of Law, the evidence of record, the candor and demeanor of the witnesses, and the pleadings and arguments of the parties, it is, therefore,

RECOMMENDED that a final order be entered by the Florida Commission on Human Relations denying the petition in its entirety.

DONE AND ENTERED this 4th day of January, 2010, in Tallahassee, Leon County, Florida.

P. MICHAEL RUFF
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 4th day of January, 2010.

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.