

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

ROSEMARY CHAVEZ, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case Nos. 09-0095  
 ) 09-5280  
 LOWE'S HOME CENTERS, INC., )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

A formal hearing was conducted in these consolidated cases on April 12, 2010, in Gainesville, Florida, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Rosemary Chavez, pro se  
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For Respondent: Thomas R. Brice, Esquire  
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50 North Laura Street, Suite 3300  
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STATEMENT OF THE ISSUE

The issue is whether Respondent, Lowe's Home Centers, Inc. ("Lowe's")<sup>1</sup> committed unlawful employment practices contrary to Section 760.10, Florida Statutes (2008),<sup>2/</sup> by discriminating against Petitioner based on her gender or national origin

(Hispanic) in its allowance of a hostile work environment, or by discharging Petitioner from her employment in retaliation for engaging in protected conduct.

PRELIMINARY STATEMENT

On or about June 5, 2008, Petitioner Rosemary Chavez ("Petitioner") filed with the Florida Commission on Human Relations ("FCHR") an Employment Complaint of Discrimination (the "First Complaint") against Lowes. Petitioner alleged that she had been wrongfully subjected to discipline, continuing harassment (including threats of physical violence), and an involuntary transfer, and further stated as follows:

1) Lowe's #2365 Store Manager gave me a Final Notice on 5/2/08 which was premeditated because things were said that were not true. I gave superior quality of excellence and I have gained recognition in Commercial Sales. I am knowledgeable and graduated from Building Trades. It gives me great pleasure to help people out. I know projects, materials, multi-task, etc. I can produce a long list. I handled \$400,000 projects. I am a good person. I do not swear or curse. I love my job and people.

2) I endured eight months of slurs based on my gender and my national origin by co-worker Mr. John Wayne Edwards. He threatened me by telling me if I wasn't a woman, he'd beat me up in the parking lot. Mr. Edwards said, "We need to build a fence around the Mexican border" on three occasions. The harassment was reported in writing to several Managers but no corrective action was taken. I did not even get a response.

3) I was involuntarily transferred from Commercial Sales as a result of the Final Notice. At the time, I was handling a \$300,000 project which I feel I am owed the commission.

The FCHR investigated Petitioner's Complaint. FCHR Investigative Specialist Emily Davis issued an investigative memorandum on November 5, 2008. The memorandum recited Petitioner's allegations, detailed the findings of Ms. Davis' investigation, and then concluded that there was not reasonable cause to believe either that Lowes had subjected Petitioner to unlawful discrimination based on her national origin or her sex, or Lowes unlawfully subjected Petitioner to hostile working environment harassment.

In a letter dated December 3, 2008, the FCHR issued its determination that there was no reasonable cause to believe that an unlawful employment practice occurred as alleged by the First Complaint.

On January 5, 2009, Petitioner timely filed a Petition for Relief with the FCHR. On January 8, 2009, the FCHR referred the case to the Division of Administrative Hearings ("DOAH"). The case was issued DOAH Case No. 09-0095 and was initially scheduled to be held on April 6 and 7, 2009.

On March 30, 2009, Petitioner filed an Employment Charge of Retaliation against Lowes (the "Second Complaint"). Petitioner alleged that she had been retaliated against because she filed a

formal complaint of discrimination against her employer.

Petitioner stated that Lowes was notified of her charge on June 6, 2008, and terminated her employment on August 8, 2008, after four years of employment.

On August 20, 2009, FCHR investigation specialist Pamela Dupree issued an investigative memorandum finding there was no reasonable cause to believe that Lowes unlawfully discriminated against Petitioner in retaliation for her initial complaint. On August 27, 2009, the FCHR issued its determination that there was no reasonable cause to believe that an unlawful employment practice occurred as alleged by the Second Complaint.

On or about September 23, 2009, Petitioner timely filed a second Petition for Relief with the FCHR. On September 28, 2009, the FCHR referred the case to DOAH. The case was issued DOAH Case No. 09-5280. By order dated October 6, 2009, DOAH Case Nos. 09-0095 and 09-5280 were consolidated for hearing. The consolidated cases were scheduled for hearing on April 12 through 14, 2010. The hearing was convened and completed on April 12, 2010.

At the hearing, Petitioner testified on her own behalf and presented the testimony of Lowes employees Cynthia Leland and Albert Conerly. Petitioner offered no exhibits. Lowes presented the testimony of Chris Bayne and Lowes employees John Wayne Edwards, Charles Raulerson, Lynette White, and excerpts

from the deposition testimony of Karla Daubney.<sup>3/</sup> Lowes' Exhibits 1 through 6, 9 through 13, 17 through 23, 26, 27, 40, and 42 through 46 were admitted into evidence. Petitioner testified in rebuttal.

The two-volume transcript was filed at the Division of Administrative Hearings on May 5, 2010. On May 17, 2010, Lowes filed a motion for extension of the time to file its proposed recommended order, which was granted by order dated May 20, 2010. In accordance with the order granting extension, Lowes filed its Proposed Recommended Order on June 14, 2010. Without objection, Petitioner filed her Proposed Recommended Order on June 18, 2010.

#### FINDINGS OF FACT

1. Lowes is an employer as that term is defined in Subsection 760.02(7), Florida Statutes.
2. In November 2004, Petitioner, a Mexican-American female, was hired by Lowes to work at store number 2365 in Gainesville as a Commercial Sales Associate ("CSA") in the Commercial Sales department, which serves contractors and large institutional customers. Petitioner's primary duty was to assist customers in the selection, demonstration and purchase of products.
3. At the time she was hired, Petitioner received from Lowes copies of the following documents: Lowes' Code of Ethics,

Lowe's Equal Employment Opportunity Policy, Lowe's No Harassment Policy, and Lowe's Performance Management Policy 315 setting forth the company's standards of conduct and discipline. These policies were in effect during the entirety of Petitioner's employment at Lowe's.

4. Lowe's Code of Ethics specifically provides that employees "must maintain the confidentiality of information entrusted to them by Lowe's or its suppliers or customers," unless such disclosure is authorized by the company's lawyers or is required by law. Lowe's Equal Employment Opportunity Policy provides that all reports and investigations of harassment "will be treated confidentially to the extent possible, and with the utmost discretion." Lowe's Performance Management Policy 315 provides that unauthorized disclosure of company information is a "Class A violation," which will normally subject an employee to immediate termination on the first occurrence.

5. Petitioner's allegations of harassment and hostile work environment center on a single Lowe's co-worker, John Wayne Edwards. Mr. Edwards was another CSA in Commercial Sales. He had no supervisory authority over Petitioner and exercised no control over the terms and conditions of Petitioner's employment. Petitioner has not alleged that Mr. Edwards subjected her to any unwanted sexual comments, sexual touching, or sexual advances.

6. Petitioner's factual allegations against Mr. Edwards involve three incidents. The first incident, in September 2007, was an argument between Petitioner and Mr. Edwards at work. Petitioner accused Mr. Edwards of taking a customer file from her. Mr. Edwards denied taking the file, pointing out to Petitioner that he had no reason to take her file. If Mr. Edwards wanted the information contained in Petitioner's customer file, he could simply take it from the Commercial Sales department's computer.

7. Petitioner called Mr. Edwards a liar. Mr. Edwards denied being a liar. Petitioner said, "I'm going to get you." Mr. Edwards asked Petitioner what she meant by that statement, and Petitioner called him coward. Mr. Edwards then said to Petitioner, "If you were a man, me and you'd go across the street right now and settle this."

8. Petitioner reported the incident to Lynette White, the Human Relations ("HR") manager for Lowes store number 2365, alleging that Mr. Edwards had threatened to beat her up in the parking lot.<sup>4/</sup> Ms. White investigated the matter, interviewing Petitioner, Mr. Edwards and two or three other CSAs who witnessed the incident. Ms. White concluded that Mr. Edwards had not threatened any physical harm to Petitioner, but that Mr. Edwards' statement was nonetheless inappropriate. She counseled Mr. Edwards to take care in his workplace

conversations so that no one could construe anything he said as a threat, and to avoid contact with Petitioner whenever possible.

9. The second of the three incidents occurred on or about October 2, 2007. According to Petitioner, she was standing near a filing cabinet in Commercial Sales. Mr. Edwards was "talking and talking and talking," "bragging about all sorts of stuff." Petitioner told Mr. Edwards not to talk to her, but he continued in a very loud voice. Then, when he was finished bragging and talking, Mr. Edwards rushed toward the filing cabinet "like a football player" and hit the cabinet hard. Petitioner testified that Mr. Edwards hurt himself and ran and told management. Store managers came running to make sure that Petitioner was not hurt in the incident.

10. Mr. Edwards had no recollection of such an incident. He stated that there are three CSAs and an assistant in an area that is 12 feet long and 42 inches wide, with a filing cabinet that is in use directly behind the computer work stations. It is unavoidable that people moving through such a space will touch or bump one another. Mr. Edwards was positive he would have excused himself if he inadvertently bumped Petitioner, and denied ever doing anything that could be construed as "charging" at the filing cabinet with the intention of hurting or frightening Petitioner.



11. Ms. White investigated this incident, interviewing Petitioner, Mr. Edwards, and other persons who were in the area when the incident allegedly occurred. During her interview with Ms. White, Petitioner conceded that neither Mr. Edwards nor the file cabinet touched her. Ms. White asked Petitioner to show her how the incident occurred, using a file cabinet in Ms. White's office. Petitioner was unable to show a scenario that, in Ms. White's words, "added up to someone coming towards you to attack you." The two other employees who had been in the area saw nothing to indicate that Mr. Edwards made contact with or sought to harm Petitioner. Ms. White concluded that, at most, Mr. Edwards accidentally bumped the file cabinet while Petitioner was nearby.

12. As to the third incident, Petitioner alleged that on three or four occasions in early 2008, Mr. Edwards approached her and, apropos of nothing, announced, "We need to build a fence around the Mexican border." Petitioner testified that these bigoted comments were clearly intended to intimidate her and cast aspersions on her heritage. Petitioner took this complaint to Karla Daubney, then Lowes' HR district manager. Ms. Daubney investigated Petitioner's complaint by interviewing Petitioner, Mr. Edwards, and other employees in Commercial Sales.

13. Mr. Edwards denied making a comment about "building a fence around the Mexican border." He testified that the only possible source for Petitioner's allegation (aside from sheer invention) was a conversation he had with a male co-worker about the Iraq War. Mr. Edwards had stated his opinion that the United States would be better off bringing its soldiers home from Iraq and using the savings to shore up our borders with Mexico and Canada.<sup>5/</sup> He had no idea whether Petitioner was within earshot during this conversation, and denied ever making anti-Mexican comments, whether or not they were aimed at Petitioner.

14. Mr. Edwards testified that this allegation was particularly hurtful because he is the adoptive father of two Mexican children, a brother and sister. At the time Mr. Edwards adopted them, the girl was three years old and the boy was nine months old. The children are now adults. Mr. Edwards' daughter is a surgeon, and his son is in the air-conditioning business.

15. After her investigation, Ms. Daubney concluded that Petitioner's allegations were unsupported by the evidence. Mr. Edwards was not disciplined for this incident.

16. At the final hearing in this matter, Petitioner and Mr. Edwards testified about all three incidents. Petitioner produced two witnesses, neither of whom witnessed any of these events first-hand or had any clear recollection of the incidents

as related by Petitioner. No witness other than Petitioner characterized Mr. Edwards as anything other than a good Lowes employee and a solid citizen. Far from allowing a hostile work environment, Lowes diligently investigated every accusation made by Petitioner. Mr. Edwards was by far the more credible witness, and was genuinely puzzled as to why Petitioner had selected him as the continuing focus of her ire.

17. The evidence indicated that Petitioner had job performance issues that predated her odd vendetta against Mr. Edwards. She received an "Initial Notice" on November 6, 2006, for failure to follow up on various customer orders.

18. On May 2, 2008, Petitioner received a "Final Notice," the last step in Lowes' progressive discipline system prior to termination. Petitioner had used Lowes' confidential customer contact information to telephone a regular commercial customer, Justice Steele, at his home. Shortly after this conversation, Mr. Steele telephoned Charles Raulerson, the manager of store number 2365, to complain about Petitioner's unprofessional conduct. Mr. Steele followed up the phone call with a letter, dated April 25, 2008, which stated as follows, verbatim:

The evening of April 23, at approximately 6:30 P.M., I received a call from Rosie [Chavez] in Commercial Sales when I answered she proceeded to tell me that, she had heard John and I talking earlier. So I asked her what the problem was? At this point she started to tell me I had no right to

critique her work, I tried to explain to her that I was quite unhappy that she had lost one order of mine and had mixed up another one in the same week. And had I known she was there I would have spoken to her face to face, at this point she became very argumentative and started telling me how she was the only person who did her job in commercial sales. And her co-workers where [sic] lazy and stupid that they should not even be there, personally I thought this was very very unprofessional on her part. Not to mention calling me at home considering I am in the store almost daily placing orders, getting estimates, etc. In the years I have been doing business with your company I always found the staff to be quite knowledgeable and courtesy I'm surprised that you would allow an employee to act in this manner. I'm aware you do your best to screen employees but if this issue is not addressed I will not continue doing any further business with your company. Thank you for your attention to this matter.

19. In her meeting with Mr. Raulerson about Mr. Steele's complaint, Petitioner asserted that her boss could not tell her what to do on her own time, and that Mr. Steele was lying about her phone conversation with him.<sup>6/</sup> Mr. Raulerson attempted to explain that Petitioner was conducting Lowes business when she called Mr. Steele, and she was therefore a representative of Lowes whether or not the call was placed from the store. Petitioner continued to assert that she could do anything she wanted if she was not physically at the store.

20. Mr. Raulerson issued the Final Notice and transferred Petitioner to the position of cashier in response to

Mr. Steele's complaint.<sup>7/</sup> The transfer was a lateral move, involving no change in Petitioner's employee status or pay. During the meeting at which the Final Notice was issued, Mr. Raulerson reminded Petitioner of Lowes' confidentiality policies and provided her with another copy of Performance Management Policy 315.

21. The referenced Performance Management Policy would have allowed Mr. Raulerson to terminate Petitioner's employment for her unauthorized use of confidential customer information. However, Mr. Raulerson decided to give Petitioner another chance to salvage her job, away from the Commercial Sales department.<sup>8/</sup>

22. On July 25, 2008, Mr. Raulerson received another complaint about Petitioner from Lowes customer Chris Bayne. Mr. Bayne was a registered nurse working in the emergency room at North Florida Regional Medical Center in Gainesville. On July 24, 2008, Petitioner phoned Mr. Bayne at his private cell phone number, which he had given to Lowes two years previously when buying lumber. Mr. Bayne was without knowledge of Petitioner's grievances against Mr. Edwards, Mr. Raulerson and/or Lowes.

23. Nonetheless, Petitioner caused Mr. Bayne to leave the emergency room in the middle of a procedure to take her phone call. Petitioner solicited Mr. Bayne to write a letter of character reference for her, to be used in a discrimination

lawsuit against Lowes. Mr. Bayne had no idea what Petitioner was talking about. In an effort to get her off the phone and get back to his job, Mr. Bayne gave Petitioner his email address and told her to send any information via that route.

24. After work, with more time to think about the call, Mr. Bayne became increasingly disturbed. He wondered how Petitioner had obtained his private phone number and began to worry about identity theft. The next morning, he telephoned Lowes and complained to Mr. Raulerson. Mr. Bayne later sent Mr. Raulerson a copy of the letter that Petitioner had emailed to Mr. Bayne. The letter read as follows:

Hi. As many of you already know, I have been demoted to cashier. Mr. Justice Steele wrote a letter to Lowe's. According to Mr. Charlie Raulerson, store manager and Mr. Tom Bragdon, operation manager, Mr. Steele claimed that I called him on his personal time and that I argued with him.

I always follow up on my orders. I overheard Mr. Steele tell someone that I lost his order. So I called him up to find out what happened and what is going on. I had informed Mr. Steele that I will be placing a copy of his estimate in front of his file folder because he had not paid for it yet. The copy was still there in front of his file folder. There was no argument.

There were a couple of other things that were mentioned in which not a single word was brought up. I asked Charlie Raulerson the store manager for a copy of the letter and he refused to show me the letter because it was Lowe's property.

I am defending myself. There is more than what you know is going on. I have been discriminated based on my national origin and my gender now for over eight months at Lowe's #2365 in Gainesville Florida on 13<sup>th</sup> Street. You are my fifth proof. I am knowledgeable about construction. I graduated from Building Trades. I loved my job and I loved the people. Please submit a character reference to Emily Davis, EEOC Investigator (Equal Employment Opportunity Commission) at Emily.davis@fchr.myflorida.com. For those who do not have e-mail, please mail reference to 2009 Apalachee Parkway, Suite 200, Tallahassee, FL 32301-4857. Tell her everything you know. Do not fear anything. The reference letter is not going to Lowe's. It is going to Emily Davis only. Everything is strictly confidential. Ms. Davis is currently investigating my case #15D200800721.

Please keep me in your prayers. In addition, please give a copy of this letter to the prayer group at your church and ask them to pray for me.

Please pass the word around because I did not get everyone's phone number since I was immediately demoted to cashier on May 2, 2008, on a Final Notice. Please ask everyone to e-mail Emily Davis or write to her.

Please help me and thank you for your help.

Rosie

25. At the hearing, Petitioner testified that she sent this letter to hundreds of people. As the text indicates, most of the recipients were current or former Lowes employees, but many were customers such as Mr. Bayne. None of the recipients

had any personal knowledge of Petitioner's allegations.

Petitioner appeared to have no understanding that her actions were in clear violation of Lowes' confidentiality policies, not to mention common sense.

26. Mr. Raulerson asked Ms. Daubney to investigate Mr. Bayne's complaint. Ms. Daubney interviewed Petitioner in an attempt to understand why she called Mr. Bayne. Petitioner refused to answer Ms. Daubney's questions. She insisted that her conversation with Mr. Bayne was none of Lowes' business.

27. Mr. Raulerson testified that Mr. Bayne's complaint provided more than adequate grounds for terminating Petitioner's employment, but that he decided to give Petitioner yet another chance to turn her situation around and become a productive employee.

28. Shortly after investigating Mr. Bayne's complaint and learning that Petitioner had used Lowes' confidential business records to circulate her own complaint to hundreds of people, Ms. Daubney received a copy of a memorandum written by Linda Brown, Records Bureau Chief of the Alachua County Sheriff's Office. Ms. Brown was the supervisor of Nanci Middleton, the wife of Larry Middleton, one of Petitioner's co-workers at Lowes. Ms. Brown's memo stated that she had received a telephone call from Petitioner seeking to discuss "an EEOC issue of discrimination" involving Mr. Middleton, and asking to speak



with Ms. Middleton. Ms. Brown told Petitioner that it was inappropriate to contact Ms. Middleton at work about an issue unrelated to the Alachua County Sheriff's Office.

29. Petitioner testified as to her purpose in phoning Ms. Brown. Petitioner sought permission to eavesdrop on a proposed conversation between the Middletons, during which Mr. Middleton would somehow be urged by his wife to "tell the truth" about Mr. Edwards' "fence around the Mexican border" statements. Petitioner wanted Ms. Brown to join her in eavesdropping on this conversation in order to serve as Petitioner's witness in her discrimination case. Not surprisingly, Ms. Brown declined Petitioner's proposition.

30. Ms. Daubney concluded that Petitioner's telephone call to Ms. Brown violated Lowes' confidentiality policies. In consultation with Ms. Raulerson, Ms. Daubney decided to terminate Petitioner's employment with Lowes, effective August 8, 2008. The grounds for Petitioner's termination were repeated customer complaints about Petitioner's job performance and intrusions into customers' privacy, and her repeated violations of Lowes' confidentiality policies despite numerous warnings.

31. Petitioner's position, repeated in her testimony at the hearing, was that Chapter 760, Florida Statutes, gave her the right to "defend" herself in any way she deemed appropriate,

and to contact anyone who might help her, regardless of whether they had any knowledge of or connection to her disputes with Lowes. Petitioner refused to acknowledge that any of her actions had been inappropriate.

32. Petitioner offered no evidence to establish that her employment was terminated because of her gender or national origin. Petitioner testified that her firing was unrelated to her national origin or her gender.

33. Petitioner offered no credible evidence that Lowes discriminated against her because of her national origin or her gender, subjected her to harassment because of her national origin or gender, or retaliated against her in violation of Chapter 760, Florida Statutes.

34. Petitioner offered no credible evidence to support her factual allegations against Mr. Edwards. The evidence did not establish that Mr. Edwards threatened physical harm to Petitioner or made derogatory remarks to Petitioner regarding her national origin.

35. Petitioner offered no credible evidence disputing the legitimate, non-discriminatory reasons given by Lowes for terminating Petitioner's employment.

36. The evidence established that Petitioner's First and Second Complaints were devoid of merit. The evidence

established that Lowes showed great forbearance in not firing Petitioner well before August 8, 2008.

CONCLUSIONS OF LAW

37. 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).

38. The Florida Civil Rights Act of 1992 (the "Florida Civil Rights Act" or the "Act"), Chapter 760, Florida Statutes, prohibits discrimination in the workplace, and prohibits retaliation against an employee for engaging in protected activity such as filing a charge of discrimination with the FCHR.

39. Subsection 760.10, Florida Statutes, states the following, in relevant 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 of employment, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.

\* \* \*

(7) It is an unlawful employment practice for an employer, an employment agency, a joint labor-management committee, or a labor organization to discriminate against any person because that person has opposed any

practice which is an unlawful employment practice under this section, or because that person has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section.

40. Lowes is an "employer" as defined in Subsection 760.02(7), Florida Statutes, which provides the following:

(7) "Employer" means any person employing 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such a person.

41. Florida courts have determined that federal case law applies to claims arising under the Florida's Civil Rights Act, and as such, the United States Supreme Court's model for employment discrimination cases set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), applies to claims arising under Section 760.10, Florida Statutes. See Paraohao v. Bankers Club, Inc., 225 F. Supp. 2d 1353, 1361 (S.D. Fla. 2002); Florida State University v. Sondel, 685 So. 2d 923, 925 n.1 (Fla. 1st DCA 1996); Florida Department of Community Affairs v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991).

42. Under the McDonnell analysis, in employment discrimination cases, Petitioner has the burden of establishing by a preponderance of evidence a prima facie case of unlawful discrimination. If the prima facie case is established, the

burden shifts to Lowes, as the employer, to rebut this preliminary showing by producing evidence that the adverse action was taken for some legitimate, non-discriminatory reason. If the employer rebuts the prima facie case, the burden shifts back to Petitioner to show by a preponderance of evidence that Lowes' proffered reasons for its adverse employment decision were pretextual. See Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981).

43. In order to prove a prima facie case of unlawful employment discrimination under Chapter 760, Florida Statutes, Petitioner must establish that: (1) she is a member of the protected group; (2) she was subject to adverse employment action; (3) Lowes treated similarly situated employees outside of her protected classifications more favorably; and (4) Petitioner was qualified to do the job and/or was performing her job at a level that met Lowes' legitimate expectations. See, e.g., Jiles v. United Parcel Service, Inc., 360 Fed. Appx. 61, 64 (11th Cir. 2010); Knight v. Baptist Hospital of Miami, Inc., 330 F.3d 1313, 1316 (11th Cir. 2003); Williams v. Vitro Services Corporation, 144 F.3d 1438, 1441 (11th Cir. 1998); McKenzie v. EAP Management Corp., 40 F. Supp. 2d 1369, 1374-75 (S.D. Fla. 1999).

44. Petitioner has failed to prove a prima facie case of unlawful employment discrimination.

45. Petitioner established that she is a member of a protected group, in that she is a Mexican-American (Hispanic) female. Petitioner was subject to an adverse employment action insofar as she was terminated. Petitioner was qualified to perform the job of cashier, the job she held at the time of her dismissal, though her actual job performance was less than adequate.

46. Petitioner presented no evidence that her race, nationality or gender played any role in her termination or in her failure to achieve promotion at Lowes. She presented no evidence, aside from her own less-than-reliable testimony, that any similarly situated employee was treated any better than was Petitioner. The evidence indicated that at least one similarly situated white male employee was fired immediately for a single violation of the same confidentiality policies for which Petitioner received repeated warnings prior to her dismissal. Having failed to establish this element, Petitioner has not established a prima facie case of employment discrimination.

47. Even if Petitioner had met the burden, Lowes presented evidence of legitimate, non-discriminatory reasons for disciplining and terminating Petitioner, thereby rebutting any presumption of racial or color discrimination. The evidence presented by Lowes established that Petitioner was given a Final Notice and transferred to a cashier's position after the company

investigated the incident involving Mr. Steele. Petitioner disputed the facts surrounding the incident, but did not dispute that this was Lowes' reason for disciplining her. There was no showing that Lowes' reasons for the Final Notice and transfer of Petitioner were pretextual.

48. The evidence presented by Lowes established that Petitioner's employment with Lowes was terminated in the immediate aftermath of Petitioner's entirely improper eavesdropping request to the supervisor of the wife of Petitioner's co-worker. Ms. Daubney and Mr. Raulerson were also cognizant of the repeated customer complaints against Petitioner and Petitioner's repeated violations of Lowes' confidentiality policies despite repeated warnings and specific instruction to the contrary. Petitioner admitted that she repeatedly violated Lowes' confidentiality policies by discussing details of on-going investigations with other employees, customers, and persons entirely outside the orbit of Lowes, such as Ms. Brown. Petitioner admitted to sending correspondence relating to her complaints against Lowes to hundreds of persons, none of whom had any personal knowledge of her claims.

49. Lowes' reasons for disciplining Petitioner and ultimately terminating her employment were legitimate and non-discriminatory. Petitioner presented no evidence that her firing was in retaliation for her filing a complaint with the

FCHR. Petitioner was fortunate not to have been fired before August 8, 2008, for reasons unrelated to her national origin or gender. Petitioner wholly failed to prove that the reasons given by Lowes for firing her are pre-textual.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Florida Commission on Human Relations issue a final order finding that Lowe's Home Centers, Inc., did not commit any unlawful employment practices and dismissing the Petitions for Relief filed in these consolidated cases.

DONE AND ENTERED this 31st day of August, 2010, in Tallahassee, Leon County, Florida.



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LAWRENCE P. STEVENSON  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 31st day of August, 2010.



## ENDNOTES

<sup>1/</sup> For reading clarity, "Lowe's" has been shortened to "Lowe's" in the text of this Recommended Order, except when used in direct quotations.

<sup>2/</sup> Citations shall be to Florida Statutes (2008), unless otherwise specified. Petitioner was given a "Final Notice" (Lowe's last step in progressive discipline before termination) on May 5, 2008, then was discharged from her position with Lowe's on August 8, 2008. Section 760.10, Florida Statutes, has been unchanged since 1992.

<sup>3/</sup> Ms. Daubney's entire deposition was admitted as Lowe's Exhibit 46, with the understanding that Lowe's would file the deposition transcript at DOAH prior to the submission of proposed recommended orders. However, the deposition was never filed. Therefore, the only portions of Ms. Daubney's testimony that have formed the basis for findings of fact are excerpts read into the record at the final hearing.

<sup>4/</sup> As these cases have progressed, Petitioner's description of this incident has intensified to an allegation that Mr. Edwards threatened her life.

<sup>5/</sup> Mr. Edwards stated that at the time of this conversation, there had been talk in the news about "suitcase nukes" being smuggled into the United States through Canada.

<sup>6/</sup> A theme of the hearing was Petitioner's persistent denial of the consistent observations by co-workers and Lowe's customers that she is inordinately argumentative. Petitioner's behavior throughout the hearing confirmed the accuracy of those observations.

<sup>7/</sup> As noted in the Preliminary Statement, supra, this Final Notice was the precipitating event to Petitioner's filing of the First Complaint.

<sup>8/</sup> During roughly the same time period, Mr. Raulerson terminated the employment of a white male CSA for using confidential customer contact information to telephone a customer and ask her out on a date.

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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.