STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SANDRA M. MINNIE,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 10-10316
	)	
WAL-MART STORES, INC.,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case by video teleconference on July 11, 2012, and by teleconference on August 23, 2012, in Tampa and Tallahassee, Florida, before W. David Watkins, the duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Sandra M. Minnie, pro se
309 West Fairground Street
Marion, Ohio 43302

For Respondent: Amy R. Harrison Turci, Esquire
Ford and Harrison, LLP
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STATEMENT OF THE ISSUE

The issue is whether Respondent engaged in an unlawful employment practice pursuant to chapter 760, Florida Statutes, against Petitioner due to her age.

PRELIMINARY STATEMENT

Petitioner filed a Complaint of Discrimination with the Florida Commission on Human Relations (Commission) on June 4, 2010. The Commission entered a Notice of Determination: No Cause on or about October 25, 2010. Petitioner then filed a Petition for Relief. The Petition was forwarded to the Division of Administrative Hearings on November 22, 2010, for assignment of an Administrative Law Judge to conduct a formal hearing. A Notice of Hearing was issued on December 3, 2010, originally scheduling the final hearing for December 30, 2010. After being continued several times at the request of the parties, the final hearing was ultimately held in two parts, on July 11, 2012, and August 23, 2012.

At the final hearing, Petitioner testified on her own behalf. Petitioner's Exhibits 1 and 2 were received into evidence. Respondent presented the testimony of Sherri Maness, co-manager of Wal-Mart Store No. 5300 (Store 5300) and Vicki Tillman, former store manager of the same Wal-Mart. Respondent's Exhibits 1 through 9 were received into evidence. The two-volume transcript of the final hearing was filed with the Division on September 7, 2012.

At the conclusion of the hearing, the parties agreed to file proposed recommended orders within 10 days of the transcript filing. Both parties timely filed Proposed

Recommended Orders which have been considered in preparation of this Recommended Order.

All citations are to Florida Statutes (2012) unless otherwise indicated.

FINDINGS OF FACT

1. Petitioner, Sandra Minnie, is a 62-year-old female.

2. Ms. Minnie had been working as an assistant manager at a Wal-Mart store in Marion, Ohio, but in late 2008, applied for a transfer to Store 5300 in Gibsonton, Florida.

3. Store manager Vicki Tillman interviewed Ms. Minnie and in November 2008, hired her as an assistant manager at Store 5300. Ms. Tillman is currently 61 years old.

4. While in Ohio, Ms. Minnie had worked as the front-end assistant manager[1/] for Wal-Mart, and accordingly, was hired to work in the same capacity at Store 5300.

5. Wal-Mart assistant managers are routinely scheduled to work between 52 and 56 hours per week. Ms. Minnie's scheduling would have been dictated by the position that she held, to wit, front-end manager.

6. Ms. Minnie received a copy of, and was familiar with, Wal-Mart's Discrimination and Harassment Prevention Policy. The Discrimination and Harassment Prevention Policy instructs employees who experience harassment or discrimination to report

the violation to a salaried member of management, or to call the Wal-Mart Ethics Hotline.

7. Ms. Minnie was also familiar with Wal-Mart's Open Door Policy, which allows associates to report any concerns they have up the chain of command, all the way to the CEO.

8. Despite being aware of both of these policies, Ms. Minnie never utilized either policy, and never reported that she believed that Vicki Tillman, or anyone else with Wal-Mart, was discriminating against her or harassing her because of her age. Although Ms. Minnie made several handwritten notes of occasions on which she felt her superiors had mistreated her, she never approached a member of Wal-Mart management to discuss her complaints.

9. Soon after Ms. Minnie began as an assistant manager at Store 5300, it became apparent that she did not perform many of her job responsibilities properly, and that there were many assistant manager duties that she did not know how to perform, and often performed incorrectly.

10. After several informal conversations between Ms. Minnie and both Co-Manager Maness and Store Manager Tillman regarding Ms. Minnie's performance deficiencies, and after seeing no improvement, Ms. Minnie was given a verbal "coaching"[2/] on January 8, 2009, for failure to adequately perform her duties as an assistant manager. Several of the issues covered during

this verbal coaching had been informally discussed with Ms. Minnie on prior occasions. Ms. Minnie did not challenge this coaching.

11. On the same day as her coaching, Ms. Minnie's niece was caught shoplifting at Store 5300. While Ms. Minnie was not held responsible for the actions of her niece, she felt that management "seemed to distrust [her] integrity after that point."

12. Despite continued informal conversations and counseling by members of management, Ms. Minnie's performance did not improve. Furthermore, Store Manager Tillman began to receive complaints from other assistant managers about having to take on too many of Ms. Minnie's responsibilities because she was not pulling her own weight.

13. On April 9, 2009, Ms. Minnie received a written coaching for giving manager's keys to an hourly associate, and for failing to accurately verify a cash deposit before approving it, resulting in the bank deposit being $1,000.00 short. Again, Ms. Minnie did not challenge this coaching.

14. On another occasion, Ms. Minnie violated Wal-Mart policy by cashing her own check personally in the cash office instead of having the next level of management above her cash it. Ms. Tillman instructed Co-Manager Maness to have a conversation with Ms. Minnie about the correct procedure for

check cashing, and instructed Ms. Maness not to formally coach Ms. Minnie at that time.

15. In the weeks prior to Father's Day, all managers received an e-mail notifying them that a specific model of television was due into the stores, in limited quantities, for the Father's Day sale. The e-mail specifically stated that there would be a "sale-block" placed on the television, and that the televisions could not be sold prior to the sales event. As the assistant manager in charge of the front end and back room, Ms. Minnie would have received this e-mail.

16. On the evening of June 9, 2009, prior to the Father's Day sale, Ms. Minnie took one of the Father's Day sale televisions from the back stockroom (which had never been on the sales floor) and brought it to the electronics department cash register to purchase. When the television was rung up, the cash register prompted: "sale not allowed." Despite this clear instruction, Ms. Minnie permitted the cashier to call over another assistant manager (Terry), who overrode the sale block and allowed the sale to be completed.

17. Associates are not permitted to bring merchandise that has never been on the sales floor directly from the back room to a cash register for purchase. Moreover, associates are not permitted to override "sale not allowed" register prompts.

18. When Co-Manager Maness arrived at work on June 10, 2009, she was informed by the electronics department manager that a sale block override had been performed on a television that was being held for the Father's Day sale.

19. Ms. Maness investigated the sale and discovered that Ms. Minnie had violated Wal-Mart policy by removing the television, which was being held for a future sales event, from the back room, and purchasing it, despite the register prompt, "sale not allowed." Ms. Maness further concluded that the assistant manager who had overridden the sale block had also violated Wal-Mart policy.

20. Even though overriding a sale block was potentially a terminable offense, Ms. Maness consulted with Store Manager Tillman, who instructed Ms. Maness to just coach both Ms. Minnie and the assistant manager to the next level. Because Ms. Minnie had already received a verbal and a written coaching, Ms. Maness drafted a Decision-Day Coaching for Ms. Minnie.[3/]

21. Ms. Minnie never returned to work at Store 5300 after purchasing the television on June 9, 2009. Although Ms. Minnie was scheduled to work on June 12, 2009, she called in sick. She then took her previously scheduled vacation from June 13-19, 2009.

22. At the end of her vacation, instead of returning to work, Ms. Minnie submitted leave of absence paperwork indicating

that she needed to be out until October 23, 2009. Ms. Minnie's leave of absence paperwork was approved by Store Manager Tillman.

23. Under Wal-Mart's leave of absence policy, Ms. Minnie technically remained an active employee of Wal-Mart until June 6, 2012. As such, she could have returned to Store 5300 at any time prior to that date as an assistant manager.

24. Ms. Minnie felt that Ms. Tillman was a very demanding store manager. This opinion was shared by other assistant managers at Store 5300. At least three other assistant managers (all of whom were significantly younger than Ms. Minnie) confided in Ms. Minnie that they believed that Ms. Tillman was a difficult store manager to work with.[4/]

25. Although it is undisputed that Ms. Tillman was a demanding and difficult store manager to work for, the evidence of record does not support the conclusion that Ms. Minnie was treated differently than other employees because of her age. Nor does the evidence establish that the series of "coachings" leading up to Ms. Minnie's departure from Wal-Mart had anything to do with her age.

26. Ms. Minnie testified that she felt "disrespected" by Ms. Tillman, and had been referred to by her as a "wet rag mop," while younger assistants were referred to as "perky new brooms." Petitioner also alleged that Ms. Tillman made disparaging

remarks about her hairstyle and dress. The result of this mental harassment, according to Petitioner, was that Petitioner suffered a severe mental breakdown that made it impossible for her to return to work. However, no corroborating witnesses provided any evidence that Ms. Tillman, who is less than a year younger than Ms. Minnie, made any disparaging comments about Ms. Minnie's age, and Ms. Tillman vehemently denied making such remarks.

CONCLUSIONS OF LAW

27. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569, 120.57(1), and 760.11, Fla. Stat. (2012).

28. According to Ms. Minnie's Petition for Relief and the testimony given at final hearing, Ms. Minnie contends that she has been discriminated against by Store Manager Tillman because of her age.

29. Pursuant to section 760.10:

> (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.

30. Florida courts interpret chapter 760, Florida Statutes, in accordance with federal anti-discrimination laws, codified under Title VII of the Civil Rights Act of 1964 (Civil Rights Act), as amended in 42 U.S.C. section 2000e, et seq.

31. When a Petitioner alleges disparate treatment under chapter 760, or the Civil Rights Act, the Petitioner must prove that her age "actually motivated the employer's decision. That is, the Plaintiff's age must have actually played a role [in the employer's decision making] process and had a determinative influence on the outcome." Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 141, 120 S. Ct. 2097, 2105, 147 L. Ed. 2d 105 (2000) (quotation marks omitted) (alteration in original). "A plaintiff may establish a claim of illegal age discrimination through either direct or circumstantial evidence." Van Voorhis v. Hillsborough Cnty. Bd. of Cnty. Comm'rs, 512 F.3d 1296, 1300 (11th Cir. 2008).

32. Petitioner has the ultimate burden to prove discrimination by direct or indirect evidence. Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). Direct evidence is admissible evidence, which if believed, would prove the existence of discrimination without any need for inference or presumption. Petitioner offered no such evidence.

33. Absent direct evidence of discrimination, Petitioner must prove discrimination by indirect or circumstantial evidence. To prove discrimination by indirect or circumstantial evidence, Petitioner must first establish a prima facie case of the following elements: (a) she is a member of a protected group; (b) she is qualified to do her job; (c) she was subjected to an adverse employment action; and (d) similarly-situated employees, who are not members of a protected group, were treated more favorably than Petitioner. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

34. If Petitioner proves her prima facie case, the employer then must articulate a legitimate, non-discriminatory reason for the challenged employment decision. Burdine, 450 U.S. at 254. The employer is required only to "produce admissible evidence, which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus." Burdine, 450 U.S. at 257.

35. If the employer produces evidence of a nondiscriminatory reason for the adverse action, the burden shifts back to Petitioner to prove that the employer's reason was a pretext for discrimination. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 503 (1993).

36. In the instant case, it appears that Petitioner is alleging that the "adverse employment action" she suffered was

constructive discharge, precipitated by repeated discipline (coaching) and critical and disparaging comments. In order for a petitioner to demonstrate that she was constructively discharged because of her age, she must show that "the work environment and conditions of employment were so unbearable that a reasonable person in that person's position would be compelled to resign." Johnson v. Woodruff, 28 F. Supp. 2d 1248, 1250 (M.D. Fla. 1998) (citing Virgo v. Riviera Beach Assocs., Ltd., 30 F.3d 1350, 1363 (11th Cir. 1994)); see Bryant v. Jones, 575 F.3d 1281, 1298 (11th Cir. 2009) ("Constructive discharge occurs when an employer deliberately makes an employee's working conditions intolerable and thereby forces him to quit his job.") (citations omitted).

37. Petitioner has failed to prove a prima facie case of discrimination. The greater weight of the evidence does not establish that Ms. Minnie's working conditions were so unbearable that a reasonable person in her circumstances would have been compelled to resign. Ms. Minnie was given numerous opportunities to improve her performance, and was further counseled informally about ways in which to improve her performance so that she did not receive another coaching.

38. Moreover, there is no evidence that Ms. Minnie was treated less favorably than other assistant managers because of her age. As detailed above, several other assistant managers

viewed Store Manager Tillman as a difficult manager to work with. As such, Ms. Tillman's high expectations were universal, and were not directed solely at Ms. Minnie.

39. Even assuming, arguendo, that Petitioner established a prima facie case of discrimination, Respondent presented persuasive documentary and testimonial evidence that Ms. Minnie's coachings were related solely to her failures as an assistant manager, and were not related to her age. As such, Wal-Mart has met its burden to establish legitimate, non-discriminatory business reasons for the coachings.

40. Petitioner did not present any credible evidence that Respondent's reason for the adverse employment action was a pretext for discrimination.

41. "The ultimate burden of persuading the trier of fact that the [employer] intentionally discriminated against the [employee] remains at all times with the [employee]." Texas Dept. of Cmty. Affairs v. Burdine, 450 U.S. at 253. In this case, Petitioner failed to meet her burden.

RECOMMENDATION

Based on the foregoing Findings of Facts 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 5th day of October, 2012, in Tallahassee, Leon County, Florida.

W. DAVID WATKINS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of October, 2012.

ENDNOTES

[1/] Front-end assistant managers are responsible for the operation of the registers, customer service areas in the front of the store, and the accounting office.

[2/] Walmart's "Coaching for Improvement" program establishes a progressive system of discipline and instruction intended to improve the performance of its employees. Repeated written "coachings" without performance improvement may ultimately result in termination.

[3/] Under Wal-Mart's Coaching for Improvement program, the next level of action following a "decision day" coaching is termination.

[4/] Ms. Minnie testified that 17 assistant managers had left Store 5300 (either by virtue of resignation or transfer) during Ms. Tillman's tenure as store manager.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 10 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.