STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DR. SHARON E. MCINTOSH,

Petitioner,

vs. Case No. 12-4015

WAL-MART STORES EAST,

Respondent.
_________________________________/

RECOMMENDED ORDER

Pursuant to notice, the final hearing was held on May 22 and July 8, 2013, by video teleconference before Administrative Law Judge Linzie F. Bogan between sites in Sebastian and Tallahassee, Florida.

APPEARANCES

For Petitioner: Sharon E. McIntosh
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For Respondent: Jonathan Beckerman, Esquire
Theresa M. Vreeland, Esquire
Littler Mendelson, PC
Wells Fargo Center
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STATEMENT OF THE ISSUE

Whether Respondent violated the Florida Civil Rights Act of 1992, as alleged in the Employment Charge of Discrimination filed by Petitioner on May 31, 2012.

PRELIMINARY STATEMENT

On May 31, 2012, Petitioner, Sharon E. McIntosh (Petitioner), filed an Employment Complaint of Discrimination with the Florida Commission on Human Relations (FCHR), which alleges that her employer, Walmart Stores East (Respondent), violated section 760.10, Florida Statutes (2011),[1/] by discriminating against her on the basis of race, color, and disability. Petitioner also states in her complaint of discrimination that Respondent retaliated against her after she complained about a co-worker's racially insensitive comments.

The allegations were investigated, and on November 21, 2012, FCHR issued its Determination: No Cause. A Petition for Relief was filed by Petitioner on December 14, 2012.

FCHR transmitted the case to the Division of Administrative Hearings on or about December 17, 2012. A Notice of Hearing by Video Teleconference was issued setting this case for final hearing on February 27, 2013. Following the granting of a continuance, the final hearing was rescheduled for May 22, 2013. The final hearing commenced on May 22, 2013, but was not completed. The final hearing concluded on July 8, 2013.

At the hearing, Petitioner testified on her own behalf and presented the testimony of Michele Payne, Angela Ward, Kelsey Arjona, Linda Harrison, Barbara Muh, Lisa Kinne, Kristen Carl, and Elizabeth McIntosh. Respondent presented the testimony of Doug Fellers, Tony Almieda, Karen Milz, and Greathel Favreau. Petitioner's Exhibits A through C, C2, D2, D3, E, E2 through E13, F1, F2, G, J, K, L, O, O2, P, P2 and Q were admitted into evidence. Respondent's Exhibits 1 through 33 were admitted into evidence. At Petitioner's request, the undersigned took official recognition of section 465.016(1)(d)3., Florida Statues.

A four-volume Transcript of the proceeding was filed with the Division of Administrative Hearings on August 9, 2013. The parties timely filed proposed recommended orders, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. For more than ten years, Petitioner has worked as a pharmacist. On April 18, 2011, Respondent extended to Petitioner an offer of employment to work as a "licensed staff pharmacist" at store 1220 in Orlando, Florida. Petitioner accepted Respondent's offer. Petitioner, as a licensed staff pharmacist, was paid $56.46 per hour. In her position as licensed staff pharmacist, Petitioner was supervised by Doug Fellers.

A. Placing a face with a name

2. In July 2011, Petitioner desired promotion to a full-time salaried position at Respondent's store 3538 in Viera, Florida. According to Petitioner, her immediate supervisor Doug Fellers, recommended to his supervisor Kelly Altman, regional pharmacy director, that Petitioner be promoted. Petitioner contends that Kelly Altman initially supported her bid for promotion but withdrew his support upon meeting Petitioner and seeing that she is African-American. Petitioner believes that Mr. Altman harbored feelings of discriminatory animus towards her because when they initially met, Mr. Altman told Petitioner that he had heard a lot about her, that it was good to finally "put a face with a name," and looked at her in a manner that she described as being with "quiet disgust." The evidence does not establish that Mr. Altman harbored any discriminatory animus towards Petitioner. Contrary to Petitioner's contention, Mr. Altman was very supportive of Petitioner as evidenced by the fact that on July 25, 2011, he approved the recommendation for Petitioner's promotion and took no action against Petitioner to thwart or otherwise interfere with her promotion.

3. In August 2011, Petitioner began working in a full-time salaried position as a licensed staff pharmacist at Respondent's store 3538 in Viera, Florida. In her new position, Petitioner earned an annual base salary of $119,516.80.

B. Store 3538 and "Buckwheat"

4. Petitioner alleges that while working at store 3538 she was subjected to racially insensitive remarks. Specifically, Petitioner alleges that her co-worker, Lauren Harmon, often in response to questions from Petitioner, would respond by saying "o'tay."[2/] Petitioner took offense to Ms. Harmon's "speaking to [her] like '[B]uckwheat.'"

5. It is undisputed that Ms. Harmon, who by all accounts is Caucasian, was employed at store 3538 prior to Petitioner's arrival. According to several witnesses, Ms. Harmon, well in advance of Petitioner's transfer to the store, would often say "o'tay" when responding to statements made by co-workers and would do so regardless of the race of the co-worker. Although Petitioner was offended by Ms. Harmon's use of "o'tay," other employees did not find "o'tay" to be objectionable and merely thought that Ms. Harmon was "speaking in baby talk." Nevertheless, Petitioner subjectively believed Ms. Harmon's remarks to be highly offensive and racially motivated.

6. Petitioner formally complained to her superiors about Ms. Harmon and her use of "o'tay." An investigation was conducted and once it was determined that Ms. Harmon had in fact said "o'tay," she was instructed by management to immediately cease and desist saying "o'tay" because Petitioner found the pseudo-word offensive. Ms. Harmon complied with the cease and

desist directive, except for one isolated instance when she inadvertently repeated the offensive language. Respondent, upon learning of Petitioner's concerns about the pejorative nature of the pseudo-word "o'tay," took prompt and appropriate remedial action to address Petitioner's concerns.

C. Pharmacist-in-charge

7. Michelle Graziani was the pharmacy manager when Petitioner arrived at store 3538 in Viera, Florida. During this same period, Ms. Graziani also served as the store's pharmacist-in-charge (PIC).[3/] The PIC is responsible for ensuring the security of the pharmacy and compliance with all laws and related rules.

8. In late December 2011, Ms. Graziani ceased working at store 3538, thereby leaving the store in need of a PIC. Around the time of Ms. Graziani's departure, Doug Fellers approached Petitioner and asked if she would be willing to temporarily serve as the PIC for store 3538. As part of this same conversation, Mr. Fellers advised Petitioner that if she desired, she could also apply for the head pharmacy position previously occupied by Ms. Graziani. Petitioner accepted Mr. Feller's offer and started working as the PIC for store 3538 in late December 2011.

9. It is typically the case that the pharmacy manager for a particular store will also serve as the PIC. In instances where a pharmacy is temporarily without a manager, a PIC will be

designated to serve on an interim basis. Respondent, through its personnel system, assigns classification codes to positions occupied by employees of the company. The personnel classification system does not however contain a classification code for PIC. When an employee serves as PIC on a temporary basis, Respondent classifies these employees as "Assistant Pharmacy Managers" and "Assistant Pharmacists."[4/]

10. Petitioner asserts that when she was asked by Doug Fellers to serve as temporary PIC for store 3538, he also offered her promotion to the permanent position of assistant pharmacy manager. Doug Fellers denies that Petitioner was either made or offered the position of permanent assistant pharmacy manager for store 3538.

11. On January 13, 2012, Petitioner signed an employment offer from Respondent wherein she accepted the position of Assistant Pharmacy Manager at store 3538. Petitioner's annual salary was increased to $121,596.80. The document signed by Petitioner is silent on the question of whether the appointment to assistant pharmacy manager was temporary or permanent. However, one of the supporting documents used to generate the assistant pharmacy manager offer sheet signed by Petitioner states that "[t]his is just an offer to go from Salaried Staff to PIC at 3538 until we finalize the RxMgr position. She is just receiving the $1.00 more increase and job code to Asst MGR[.]"[5/]

12. The credible evidence establishes that Petitioner was temporarily placed in the position of assistant pharmacy manager/PIC at store 3538 until such time as a new store pharmacy manager/PIC could be hired by Respondent. Respondent eventually hired a store pharmacy manager following Ms. Graziani's departure and upon doing so, Petitioner was relieved of the responsibility of serving as PIC for store 3538. Although Petitioner was relieved of her duties as PIC, her salary continued at the same level and her official job title, to this day, remains assistant pharmacist.[6/] Respondent removed Petitioner from the PIC position for non-discriminatory, legitimate business reasons.

D. Vacant pharmacy store manager's position

13. During the period when Petitioner served as PIC for store 3538, Respondent accepted applications for the vacant pharmacy manager's position. It is undisputed that Petitioner did not apply for the manager's position. Petitioner claims that she "was harassed to the point where [she] couldn't apply for the position." The evidence does not support Petitioner's allegation.

14. Petitioner cites numerous incidents that, in her mind, establish impermissible discrimination. One instance of alleged discrimination occurred when Doug Fellers visited Petitioner's store for the purpose of having her sign the contract that temporarily promoted her to the position of assistant pharmacy

manager. Petitioner alleges that several employees complained to Doug Fellers that Petitioner was bragging about being the favored candidate for the vacant pharmacy manager's position. According to Petitioner, when Doug Fellers became aware of Petitioner's alleged boasting, he admonished Petitioner by telling her that she was not guaranteed the position of pharmacy manager. Petitioner responded to Doug Fellers by denying that she had made such statements regarding the vacant position. Petitioner internalized the admonishment from Doug Fellers as an indication that he would not favorably consider her for the vacant position. Doug Fellers credibly testified, however, that he harbored no such ill will towards Petitioner and would have favorably considered her application for pharmacy manager had she applied.

15. Another instance of alleged discrimination occurred when Petitioner was instructed by her supervisor to retrieve from a waste bin information that may have contained sensitive patient information. Petitioner believes that she was instructed to retrieve the patient information from the waste bin because of her race. Respondent testified that there were problems at store 3538 with patient identifying information being improperly disposed of by individuals in the pharmacy. As the PIC, Petitioner was responsible for ensuring that patient identification information was properly protected. Respondent instructed Petitioner to personally review the contents of the

waste bin to ensure that private patient information was not contained therein. This directive to Petitioner was in furtherance of Respondent's legitimate business interests associated with protecting patient privacy. While Petitioner took offense at being charged with this task, there is no evidence indicating that Respondent's directive to Petitioner to filter the contents of the waste bin was motivated by racial animus.

16. Petitioner cites as additional evidence of impermissible discrimination, the fact that during the time she served as PIC, Respondent placed her under excessive scrutiny when it relocated the pharmacy's hazardous waste bin to a location where the bin was constantly monitored by video surveillance. Respondent explained that its risk management protocols require that the hazardous waste bin be continuously monitored by video surveillance and that the bin at Petitioner's store was relocated in order to bring it into compliance with the established protocol. Petitioner offered no credible evidence demonstrating that Respondent's asserted reason is pre-textual or that Respondent applied the policy in such a way as to single out Petitioner.

17. Petitioner also claims that the contents of the hazardous waste bin were given extra scrutiny by Respondent while she served as PIC. However, credible testimony was offered

explaining that the level of scrutiny given by Respondent to the hazardous waste bin during Petitioner's tenure as PIC was the same as it was prior to Petitioner's serving as PIC. Even if the level of scrutiny of the contents of the hazardous waste bin was intensified during Petitioner's service as PIC, Petitioner offered no credible evidence establishing that the alleged heightened scrutiny resulted from impermissible discriminatory animus.

18. Finally, Petitioner alleges that Respondent harassed her by manipulating the tracking data that it uses to monitor the productivity of its pharmacists. Petitioner's theory as to this issue seems to be that Respondent manipulated Petitioner's productivity numbers in an attempt to dissuade her from applying for the vacant pharmacy manager's position previously referenced. In response to this allegation, Respondent offered credible evidence that the data in question may be used for myriad reasons, but it is not used in and of itself as a basis for taking disciplinary or other forms of employment action against its pharmacists. While there may have been anomalies with some of Petitioner's productivity data, there is no credible evidence establishing that the data was manipulated by Respondent for impermissible discriminatory reasons.

E. Alleged leg disability

19. Petitioner suffers from venous insufficiency that causes her legs to "jerk, hurt, burn, and swell." Petitioner claims that Respondent discriminated against her "because of [her] leg disability."

20. In early April 2012, Petitioner, after having worked "3 days straight at Walmart," suffered, while at home, a leg cramp that caused her to fall and injure her arm. Petitioner missed two weeks of work as a consequence of the injury to her arm. During her period of convalescence, Michael Judd contacted Petitioner and inquired about the cause of her injury and the status of her recovery. In response to Mr. Judd's inquiry, Petitioner explained that she had a leg cramp that caused her to fall and injure herself. Petitioner, neither before, nor during Mr. Judd's inquiry, disclosed that she suffers from venous insufficiency.

21. When Petitioner returned to work on or about April 15, 2012, Mr. Judd again inquired about the circumstances surrounding Petitioner's arm injury and the status of her recovery. The following day, April 16, 2012, Petitioner was instructed by Respondent to complete a number of outstanding training modules and finalize paperwork for insurance-related payroll deductions. Petitioner believes that the enumerated actions collectively establish that she was harassed because of her venous

insufficiency. Contrary to Petitioner's assertion, the above-described events do not establish a reasonably objective hostile or abusive work environment.

F. Retaliation

22. Petitioner contends that Respondent retaliated against her after she complained about Lauren Harmon. Petitioner claims that Respondent elevated its scrutiny of the hazardous materials (hazmat) bin following Petitioner's work shifts, that Respondent launched a bogus investigation against her for an alleged HIPPA violation, and that two of Respondent's store managers were whispering with a third party but stopped doing so once they realized that Petitioner was present.

23. Respondent credibly explained that it moved the hazmat bin in view of the surveillance camera as required by its loss prevention/risk management policy. While it is true that Respondent investigated Petitioner for an alleged HIPPA violation, the investigation completely exonerated Petitioner of any wrongdoing and no adverse employment action resulted to Petitioner as a consequence of the investigation. Finally, Petitioner, by her own admission, has absolutely no idea what the store managers were whispering about when they became aware of Petitioner's presence. Petitioner has failed to offer any credible evidence to support her claim of retaliation.

CONCLUSIONS OF LAW

24. The Division of Administrative Hearings has jurisdiction over the parties and subject matter in this case. §§ 120.569 & 120.57, Fla. Stat. (2013).

25. Section 760.10(1) provides in part that it is an unlawful employment practice for an employer to discharge or otherwise discriminate against an individual on the basis of "race, color . . . [o]r handicap . . . ." Section 760.10(7) provides in part that "it is an unlawful employment practice for an employer . . . 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."

26. FCHR and Florida courts have determined that federal discrimination law should be used as guidance when construing provisions of section 760.10. See Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17, 21 (Fla. 3d DCA 2009); Brand v. Fla. Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994).

27. Petitioner asserts that Respondent's discriminatory harassment created a hostile working environment. "A hostile work environment claim is comprised of a series of separate acts that collectively constitute one unlawful employment practice." Amtrak v. Morgan, 536 U.S. 101, 117 (2002).

28. In order to be actionable, harassment based on race, color, or disability, must be so severe or pervasive that the harassment alters the conditions of employment and creates a hostile work environment. "When the workplace is permeated with discriminatory intimidation, ridicule, and insult, that [are] sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, Title VII is violated." Harris v. Forklift Sys., 510 U.S. 17, 21 (1993). In determining whether an actionable hostile work environment claim exists, the courts look to "all the circumstances," including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Id. at 23.

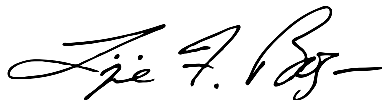
29. In evaluating "all the circumstances" of the instant matter as contained in the Findings of Fact set forth herein, Petitioner has failed to meet her burden of proving that the alleged discrimination in her workplace was so severe or pervasive that it reasonably created a hostile or abusive work environment. Finally, a closing note about Ms. Harmon is warranted. As previously stated, Ms. Harmon used the pseudo-word "o'tay" when responding to Petitioner. Although use of the pseudo-word "o'tay," and contextually related matters,[7/] may be

reasonably considered offensive in some instances, it is not so considered in the present case.

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 finding that Respondent, Walmart Stores East, did not commit an unlawful employment practice as alleged by Petitioner, Dr. Sharon E. McIntosh, and denying Petitioner's Charge of Discrimination.

DONE AND ENTERED this 4th day of September, 2013, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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this 4th day of September, 2013.

ENDNOTES

[1/] All subsequent references to Florida Statutes will be to 2011, unless otherwise indicated.

[2/] It is generally known that Buckwheat was one of the characters in the Our Gang/Little Rascals series. In the Our Gang episodes

where the character Buckwheat appeared, he was known to say "o'tay," as opposed to the more grammatically correct "o'kay," in response to statements made by other cast members.

3/ See § 465.022(11), Fla. Stat.

4/ Respondent's offer letter to Petitioner dated January 12, 2012, refers to the position as Assistant Pharmacy Manager and Respondent's Associate History Profile references Petitioner's position as "Asst. Pharmacist."

5/ Petitioner's salary actually increased by more than the stated amount of one dollar.

6/ Since August 6, 2012, Petitioner has been on medical leave of absence.

7/ Richardson v. New York State Dep't of Corr. Servs., 180 F.3d 426 (2d Cir. 1999)(plaintiff established prima facie case of harassment where supervisors and co-workers allegedly called African-American employees "Buckwheats" and other pejorative terms).

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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.