STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

WANDA I. PERALES,

Petitioner,

vs. Case No. 14-2210

EZ PAWN FLORIDA, INC.,

Respondent.
_____/

RECOMMENDED ORDER

A final hearing was held in this matter before Robert S. Cohen, Administrative Law Judge with the Division of Administrative Hearings, on December 10, 2014, in Orlando, Florida.

APPEARANCES

For Petitioner: Erich Schuttauf, Esquire
Erich E. Schuttauf Attorney at Law
7901 Kingspointe Parkway, Building 9
Orlando, Florida 32819

For Respondent: Jason Matthew Leo, Esquire
Littler Mendelson, P.C.
111 North Magnolia Avenue, Suite 1250
Orlando, Florida 32801

STATEMENT OF THE ISSUE

The issue is whether Respondent committed an act of discrimination against Petitioner on the basis of her gender and national origin, and subject to retaliation in violation of the Florida Civil Rights Act.

PRELIMINARY STATEMENT

Respondent EZ Pawn Florida, Inc. ("Respondent" or "EZPAWN") operates pawnshops throughout Florida and Georgia. Petitioner was an employee of Respondent, working as a sales and lending representative at one of its locations in Orlando, Florida. Petitioner's employment was terminated on April 11, 2013, after she violated a company policy by not obtaining the identification of a customer to whom she was showing a piece of jewelry valued at more than $500, which resulted in a loss.

On December 20, 2013, Petitioner filed a Charge of Discrimination with the Florida Commission on Human Relations (FCHR) alleging that she was discriminated against based upon her gender and national origin and subject to retaliation. Respondent submitted a position statement denying all allegations contained in Petitioner's Charge of Discrimination. After completing its investigation, FCHR issued a "no cause" determination. Petitioner filed a Petition for Relief on May 15, 2014, electing an administrative hearing to contest disputed issues of material fact. The final hearing was scheduled and took place on December 10, 2014, in Orlando, Florida. Prior to the hearing, the parties filed a Joint Pre-hearing Statement, which included statements of admitted facts and law.

At the hearing, Petitioner testified as a witness. Petitioner also offered three exhibits, all of which were

admitted into evidence. Respondent presented the testimony of Joseph Roberts and Aban Basch as witnesses and offered two exhibits, which were admitted into evidence.

A one-volume Transcript was filed on January 22, 2015. Petitioner and Respondent filed their proposed findings of fact and conclusions of law on January 26, 2015, and January 22, 2015, respectively.

References to statutes are to Florida Statutes (2014) unless otherwise noted.

FINDINGS OF FACT

1. Petitioner, Wanda I. Perales, was born in Puerto Rico and moved to the United States in 2008 when she was approximately 32 years old. She has lived in Florida since that time. She considers her national origin to be Hispanic.

2. Petitioner was hired by EZPAWN in November 2009 as a sales and lending representative. Her position at EZPAWN was the first she was able to obtain in the United States after looking for employment for over a year.

3. Respondent has policies and procedures in place that prohibit discrimination on the basis of gender, national origin, or any other protected characteristics or classes of employees. Respondent's policies and procedures also prohibit retaliation.

4. Petitioner received a copy of, and read, the employee handbook containing all of Respondent's anti-discrimination

policies. She was well aware that EZPAWN had anti-discrimination and anti-retaliation policies.

5. When Petitioner first began working for Respondent, she worked at its Palm Bay Road location in the Melbourne, Florida, area. At that time, she received training on Respondent's employee handbook and about obtaining customer IDs. She was taught that "[w]hen a customer comes to the store to see jewelry and the value is more than $500, we have to ask for one ID, keep it . . . in the jewelry case. And then we can hand the . . . jewelry to the customer."

6. This policy is found in the employee handbook. The policy states that Class A Misconduct, which "may result in termination of employment on the first occurrence," includes:

> Behavior that creates actual harm or loss to another person or to the Company; damage to Company property or to the property of others while on Company time or on Company premises. This includes, but is not limited to: . . . [f]ailure to obtain a customer's ID prior to allowing the customer to handle jewelry that is priced at $500 or more (resulting in loss).

7. Petitioner understood that if she violated this policy she could be subject to discharge or termination.

8. Petitioner testified that the training did not address what to do if two people came into the store at the same time. It was her understanding that if a couple came into the store together, she was only required to ask for one ID. Both Joseph

Roberts from Respondent's human resources, and Aban Basch, the store manager, testified that the policy applies as it is written and that if a couple comes into the store, the ID must be received from the person (or persons) to whom the jewelry is actually handed. One ID is all that is required if only one member of the couple will handle the jewelry.

9. There is also a sign in the jewelry case at each of Respondent's locations that states, "[a] state issued photo identification is REQUIRED for all jewelry items being shown valued over $500."

10. While working in the Palm Bay store in January 2010, "John" (last name unknown by Petitioner) became Petitioner's supervisor. She alleged that on a few occasions he wanted to transfer her because of the language barrier. After Petitioner complained of John's comments, Mr. Roberts, the human resources business partner overseeing Central Florida, went to the store to investigate. Mr. Roberts coached John on his comments and provided him with additional training. Petitioner seemed to be satisfied with these results. John never made derogatory comments about Puerto Ricans or women. Further, John never took any adverse employment action against Petitioner.

11. In July 2010, Petitioner requested a transfer to a store closer to where she lived. This was at her request and was not disciplinary on the part of her employer. She had never been

written up or disciplined by Respondent while in the Palm Bay store.

12. Petitioner's transfer request was granted and she moved to a store located on South Semoran Boulevard in Orlando, Florida. At the Semoran store, the majority of EZPAWN's customers (estimated by the manager at 80-85 percent) are Hispanic. Petitioner communicated with them in Spanish as necessary for those who only spoke Spanish.

13. Of the 12 employees Petitioner worked with at the Semoran store, ten of them were Puerto Rican or Hispanic, and seven were women.

14. At some point, Mr. Basch became Petitioner's supervisor. In February 2012, he brought in flowers and chocolates for all the employees for Valentine's Day. Petitioner rejected the gifts and believed that thereafter, Mr. Basch changed completely when dealing with her.

15. Petitioner believes Mr. Basch cut her hours on one occasion because she had rejected the candy and flowers he brought her and the other employees. Mr. Basch testified he cut hours because his district manager had directed him to reduce hours for that week to manage payroll. When she thought Mr. Basch was being disrespectful, Petitioner called the employee hotline and made a complaint against him. In response to the complaint, Mr. Roberts visited the store to investigate, and

Petitioner also spoke with Cindy Bradley, Respondent's Vice President of Human Resources. Both Mr. Roberts and Ms. Bradley found Petitioner's claims to be unsubstantiated.

16. On April 8, 2013, a man and a woman walked into the Semoran store. Petitioner assumed they were together since they asked to look at engagement rings. The woman gave Petitioner her photo ID, and Petitioner handed the ring valued at $1,500 to the man. Upon receiving the ring, the man ran from the store. Petitioner admitted she gave the ring to a person from whom she had not secured a photo ID.

17. District Manager Corey Day, Manager Mr. Basch, and Assistant Manager Valdemar Santos (of Puerto Rican descent) were in the store when the incident occurred. According to Petitioner, Mr. Santos ran from the store in pursuit of the individual who took the ring. Petitioner believed that running after someone who steals from the store is a violation of company policy. This was contradicted by Messrs. Roberts and Basch who both said it was important to pursue a thief to be able to tell the police in which direction he or she ran and whether the thief got into a vehicle which they could later identify to law enforcement.

18. The only reason given by Petitioner that she was discriminated against based on her gender is that Mr. Santos, a male employee, was not terminated for following the shoplifter

out of the store, an act she believed to be in violation of company policy.

19. Following the incident, Mr. Basch called the police who came to the store. They approached the suspect, but were not able to retrieve the ring because he no longer had it in his possession. The stolen ring was never returned to EZPAWN.

20. Since Petitioner violated EZPAWN's policy of securing an ID from any person who is handed a piece of jewelry valued at more than $500, resulting in a loss of the property, the decision was made to terminate her employment with Respondent. Mr. Roberts made the decision to terminate Petitioner's employment after discussing the matter with Messrs. Day and Basch. Mr. Roberts testified that the decision to terminate Petitioner's employment had nothing to do with her national origin or gender.

21. During Petitioner's next scheduled work shift, Mr. Day asked to speak with her in the manager's office. Mr. Basch was also present. Mr. Day told Petitioner that the decision had been made to terminate her employment after conferring with Messrs. Roberts and Basch. He told Petitioner that he would give her a good reference for future employment because he believed her to be a good employee, who violated a company policy that requires termination. Petitioner did not say anything during the meeting and left EZPAWN. She did not complain to her bosses

assembled at the meeting that she believed she had been discriminated against for her gender or national origin.

22. Petitioner testified that no one told her she was terminated for being Puerto Rican or for being a woman. She specifically stated she did not believe she had been terminated because of her Puerto Rican heritage.

23. Petitioner was unable to identify any other store employee who had not been terminated for violating the policy concerning securing a photo ID when showing jewelry with a value of more than $500. She was aware of another employee named Jose in a different one of Respondent's stores who had been terminated for violation of the same policy. Mr. Roberts confirmed Petitioner's testimony when he testified that every employee who violated the ID for jewelry policy had been terminated from employment.

24. Petitioner was aware of one other employee named Jessica who left the jewelry case keys on the counter that caused rings to be stolen. Jessica was not terminated, however, because the rings had been recovered.

25. While working at EZPAWN, no employee had made derogatory comments to Petitioner about her gender or national origin. Further, Petitioner had never complained to anyone at EZPAWN about being discriminated against on the basis of her gender or national origin. She testified that, if she needed to

make a complaint, she was aware of the process for doing so. She responded "yes" when asked if she knew to call the hotline if she felt she had been discriminated against.

CONCLUSIONS OF LAW

26. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the parties thereto pursuant to sections 120.569, 120.57(1), and 760.11(4)(b), Florida Statutes.

27. Section 760.10(1)(a), Florida Statutes, states as follows:

> (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.

28. Petitioner is an "aggrieved person," and Respondent is an "employer" within the meaning of section 760.02(10) and (7), respectively.

29. The Florida Civil Rights Act (FCRA), sections 760.01 through 760.11, as amended, was patterned after Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 et seq. Federal case law interpreting Title VII is applicable to cases arising under the FCRA. See Green v. Burger King Corp., 728 So. 2d 369,

370-71 (Fla. 3d DCA 1999); FSU v. Sondel, 685 So. 2d 923 (Fla. 1st DCA 1996).

30. Petitioner has the burden of proving by a preponderance of the evidence that Respondent has discriminated against her. See Fla. Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

31. The United States Supreme Court has established an analytical framework within which courts should examine claims of discrimination. In cases alleging discriminatory treatment, Petitioner has the initial burden of establishing, by a preponderance of the evidence, a prima facie case of discrimination. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993); Combs v. Plantation Patterns, 106 F.3d 1519 (11th Cir. 1997).

32. To establish a prima facie case of discrimination, Petitioner must establish the following: (1) she is a member of a protected class; (2) she suffered an adverse employment action; (3) that she received disparate treatment from other similarly-situated individuals in a non-protected class; and (4) that there is sufficient evidence of bias to infer a causal connection between her gender or national origin and the disparate treatment.

33. While the evidence established that Petitioner is a member of a protected class as a Puerto Rican female, and that an

adverse employment action occurred, namely, that she was terminated from her employment, she failed to prove that Respondent subjected her to different treatment for violation of the clearly expressed company policy due to her gender or national origin. Petitioner was not able to prove she received disparate treatment from other similarly-situated individuals in a non-protected class. She was terminated from her employment because she gave a piece of jewelry valued at more than $500 to a customer from whom she had not received a photo ID. The customer took the ring and ran from the store. The ring was never recovered, therefore, the result of the theft was a loss to the store. Petitioner could identify no other employees whose similar actions resulted in a loss and who were not terminated from employment as a result of the ensuing loss of property by Respondent. In fact, the testimony at hearing proved that all other company employees who violated the policy were terminated from employment when the violation resulted in a loss. In short, Petitioner proved no causal connection between her gender or national origin and the alleged discriminatory treatment.

34. As to her claim of retaliation, Petitioner is protected if "[s]he has opposed any practice made an unlawful employment practice by this sub-chapter (the opposition clause) or '[s]he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this

subchapter' (the participation clause)." Crawford v. City of Fairburn, 479 F.3d 774, 777 (11th Cir. 2007) (quoting 42 U.S.C. § 2000e-3(a)). A petitioner may only establish a prima facie case of retaliation under the opposition clause of Title VII if she shows she has a good faith, reasonable belief that the employer engaged in unlawful employment practices. Little v. United Tech., Carr Transicold Div., 103 F.3d 956, 961 (11th Cir. 1997).

35. Because Petitioner alleges a retaliation claim based on circumstantial evidence, the burden shifting framework in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) applies. To establish a prima facie case of retaliation, Petitioner must show that: 1) she was engaged in an activity protected under Title VII; 2) she suffered an adverse employment action; and 3) there was a causal connection between the protected activity and the adverse employment action. See Pennington v. City of Huntsville, 261 F.3d 1262 (11th Cir. 2001).

36. The first element of Petitioner's claim of retaliation requires her to establish she engaged in statutorily protected activity. She testified she never complained to anyone at EZPAWN about feeling discriminated against based upon her Puerto Rican national origin or gender. She testified she knew how to raise a complaint, if she had one, through use of the employee hotline.

Since she admitted she never engaged in protected activity, her claim for retaliation must fail.

37. Petitioner did complain to Mr. Roberts that her manager, John, at the Palm Bay Road store wanted to transfer her due to a language barrier. The complaint was investigated by Mr. Roberts and that manager was instructed on how to behave in such situations. Even if this were protected activity, there is no causal connection between it and Petitioner's ultimate termination for violating the company's policy concerning handing over jewelry to customers without first securing a photo ID. The only logical conclusion is that Petitioner has failed to participate in protected activity so as to bring a retaliation claim. Other than a statement made by Petitioner at hearing that Mr. Basch had allegedly been rude to her on one occasion, causing her to make a hotline complaint, there is no evidence that this had anything to do with her gender or national origin, or any other protected characteristic. She testified it could have been because she rejected the chocolates and flowers brought by Mr. Basch to all the employees around Valentine's Day, but that is pure speculation on Petitioner's part, not borne out by the evidence at hearing. Petitioner failed to connect this to her termination and, therefore, her retaliation claim must fail.

38. Based upon the lack of evidence that Petitioner was terminated based upon discrimination or that she was treated

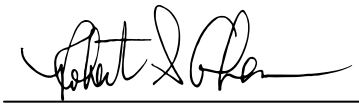
differently for her violation of company policy than other employees who were not members of a protected class, Petitioner failed to establish a prima facie case against Respondent for racial discrimination. Further, she has failed to prove she was terminated as retaliation for any complaints she made or actions she took against her employer. Accordingly, Respondent cannot be found to have committed the "unlawful employment practice" alleged in the employment discrimination charge, which is the subject of this proceeding. Therefore, the employment discrimination charge should be dismissed.

RECOMMENDATION

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

RECOMMENDED that the Florida Commission on Human Relations issue a final order finding Respondent did not commit the "unlawful employment practice" alleged by Petitioner and dismissing Petitioner's employment discrimination charge.

DONE AND ENTERED this 25th day of February, 2015, in Tallahassee, Leon County, Florida.



ROBERT S. COHEN
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of February, 2015.

COPIES FURNISHED:

Erich Schuttauf, Esquire
Erich E. Schuttauf Attorney at Law
7901 Kingspointe Parkway, Building 9
Orlando, Florida 32819
(eServed)

Laura Steege, Associate General Counsel
2801 Via Fortuna, Suite 460
Austin, Texas 78746

Jason Matthew Leo, Esquire
Littler Mendelson, P.C.
111 North Magnolia Avenue, Suite 1250
Orlando, Florida 32801
(eServed)

Cheyanne Michelle Costilla, General Counsel
Florida Commission on Human Relations
4075 Esplanade Way, Room 110
Tallahassee, Florida 32399

Tammy Barton, Agency Clerk
Florida Commission on Human Relations
4075 Esplanade Way, Room 110
Tallahassee, Florida 32399

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.