STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CASSANDRA D. ACEVEDO GAGGI,

Petitioner,

vs. Case No. 15-2010

JC PENNEY HEADQUARTERS,

Respondent.
_______________________________/

RECOMMENDED ORDER

Pursuant to notice, a final hearing in this matter was held before Diane Cleavinger, Administrative Law Judge of the Division of Administrative Hearings, on July 2, 2015, in Panama City, Florida.

APPEARANCES

For Petitioner: Robert L. Thirston, II, Esquire
Thirston Law Firm
Post Office Box 19617
Panama City Beach, Florida 32417

For Respondent: Derek Benjamin Lipscombe, Esquire
JC Penney Corporation
6501 Legacy Drive, Mail Station 1108
Plano, Texas 75024

STATEMENT OF THE ISSUES

The issues in this proceeding are whether Respondent committed an unlawful employment practice against Petitioner in violation of the Florida Civil Rights Act, and whether

Petitioner’s Complaint of Employment Discrimination was timely filed.

PRELIMINARY STATEMENT

On October 27, 2014, Petitioner, Cassandra D. Acevedo Gaggi (Petitioner or Gaggi), filed a Complaint of Employment Discrimination against Respondent, JC Penney Headquarters (Respondent or Penney), with the Florida Commission on Human Relations (FCHR). The Complaint alleged that Respondent discriminated against Petitioner on the basis of sex by terminating her employment with Respondent because she was pregnant.

FCHR investigated the complaint. On March 12, 2015, it issued a Notice of Determination finding no cause to believe that an unlawful employment practice had occurred. The Notice also advised Petitioner of her right to file a Petition for Relief. On April 13, 2015, Petitioner filed a Petition for Relief with FCHR. Thereafter, the Petition for Relief was forwarded to the Division of Administrative Hearings (DOAH) for formal hearing.

At the hearing, Petitioner testified on her own behalf and offered one exhibit which was admitted into evidence. Respondent presented the testimony of four witnesses and offered four exhibits which were admitted into evidence.

After the hearing, the Transcript of the hearing was filed July 23, 2015. Petitioner and Respondent filed Proposed

Recommended Orders on August 4, 2015 and August 9, 2015, respectively.

FINDINGS OF FACT

1. Respondent operates a retail store located in Panama City Beach, Florida. At the time, William Todd Collins was the store manager.

2. Petitioner is female. Around October 2011, Petitioner was first employed with Respondent in Puerto Rico as a jewelry sales expert, Level II. In October 2012, she transferred to Respondent's Panama City Beach store as a Level II, jewelry sales expert. Towards the beginning of August 2013, Petitioner learned that she was pregnant. Shortly thereafter, she started displaying symptoms of her pregnancy and experienced dizziness from not eating due to her pregnancy. She was terminated on October 25, 2013.

3. During her employment with Respondent, Petitioner performed her duties well and was not disciplined by Respondent until the incident that led to her termination. Additionally, the evidence demonstrated that Petitioner's pregnancy was accommodated by allowing her breaks and to sit down as needed. She was also allowed to eat snacks as needed.

4. On October 22, 2013, the store had closed for the evening. Petitioner and other sales associates were putting merchandise away and closing down the registers throughout the

store. While standing at one of the sales counters, Petitioner was feeling dizzy from not eating, picked up a Godiva chocolate bar from the store's inventory, and began to eat it. The Department Supervisor Mindy Watson saw her eating the chocolate bar and asked Petitioner what she was doing. Petitioner responded, "what does it look like I'm doing. I'm eating a candy bar."

5. Thereafter, Ms. Watson told Petitioner she needed to pay $4 for the chocolate bar. A discussion about the price of the chocolate bar ensued but, contrary to Petitioner's claim that she offered to pay for the chocolate bar, the evidence showed that she did not offer to pay for the chocolate bar. The evidence was clear that it would have been easy to open a sales register so that Petitioner could pay for the chocolate with her credit card, which she had with her.

6. Instead, Petitioner walked away from Ms. Watson and said she was going to place the wrapper in the vault as a reminder to pay for the candy bar. When Petitioner walked away with the chocolate bar, Ms. Watson informed Human Resources Supervisor Kelly Black about Petitioner not paying for the chocolate bar. At about the same time, Ms. Black approached the area where Petitioner was and saw Customer Service Specialist Pamela Wells also approaching the same area. Ms. Black heard Ms. Wells say to Petitioner, "oh you have chocolate," to which Petitioner

responded, "yes, and I stole it." Once all the associates were gone for the day, Ms. Watson and Ms. Black checked the vault and the Fine Jewelry trash cans, but could not find the chocolate wrapper.

7. Ms. Black called Mr. Collins that night and reported the incident. Additionally, both Ms. Black and Ms. Watson sent an email to Mr. Collins detailing these events.

8. The day after the incident, Mr. Collins began an investigation. During the investigation, he interviewed Ms. Watson and Ms. Black, as well as other associates who were working the evening of October 22, 2013. Mr. Collins also learned that Petitioner was seen eating a Godiva chocolate bar from the store's inventory several weeks before the October 22, 2013, incident. With that report, Mr. Collins checked Petitioner's associate files to see whether she had purchased any chocolate over the last three months and to determine if she had purchased the chocolate bar from October 22, 2013. There was no record of Petitioner paying for any chocolate.

9. On October 25, 2013, at 9:30 a.m., Petitioner returned to work. She did not pay for the chocolate bar either before or during her shift, even though, contrary to her claim at hearing that she could not pay for the chocolate during work, she had the ability to do so. After she did not pay for the chocolate bar

during her shift, around 3:30 p.m., Sarah Menchaca, the manager on duty, told Petitioner that Mr. Collins, the store manager, wanted to speak to her. Petitioner went into Mr. Collins' office and was terminated due to Misuse of Property/Assets.

10. At the time of her termination, Petitioner signed dismissal papers agreeing to a summary of the events on October 22, 2013, and the reason for her termination. The dismissal papers did not mention Petitioner's pregnancy and dizziness as the reason she took the candy bar. However, at the same meeting, Petitioner also wrote another two-paged detailed statement where she mentioned her pregnancy, the dizziness, and the fact that she had not eaten for hours.

11. As indicated, Petitioner was terminated on October 25, 2013, and clearly was aware she had suffered an adverse employment action on that day. Thereafter, Petitioner obtained a Technical Assistance Questionnaire from FCHR. The questionnaire makes it clear on page 1 that it is not a substitute for filing an actual complaint with FCHR in a timely manner. It states, "REMEMBER, a charge of employment discrimination must be filed within 365 days of the alleged act of discrimination". (emphasis in original).

12. In this case, it is clear that Petitioner's complaint was filed with FCHR on October 27, 2014, 367 days after she was

terminated by Respondent. As such, her claims are time-barred and should be dismissed as a matter of law.

13. Even assuming that Petitioner's complaint was timely, the better evidence establishes that Respondent terminated Petitioner's employment after a reasonable investigation determined that she took a Godiva chocolate bar from inventory and failed to pay for it. Petitioner provided no testimony or other evidence that other store personnel were allowed to take chocolate bars and not pay for them or that such individuals were not terminated for theft. Additionally, there was no evidence that Respondent discriminated against women who were pregnant or had difficult pregnancies. In fact, the evidence showed that Respondent employed pregnant women and made accommodations for such pregnancies when needed. Given these facts, the Petition for Relief should be dismissed.

CONCLUSIONS OF LAW

14. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2015).

15. The Florida Civil Rights Act (FCRA) in section 760.10, Florida Statutes, states in pertinent part as follows:

> (1) It is an unlawful employment practice for an employer:
> (a) To discharge or to fail or refuse to hire an 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.

16. The Florida Civil Rights Act was patterned after Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000, et seq. As such, FCHR and Florida courts have determined federal case law interpreting Title VII is applicable to cases arising under FCRA. See Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17 (Fla. 3d DCA 2009); Green v. Burger King Corp., 728 So. 2d 369, 370-371 (Fla. 3d DCA 1999); Fla. State Univ. v. Sondel, 685 So. 2d 923 (Fla. 1st DCA 1996); and Brand v. Fla. Power Corp., 633 So. 2d 504 (Fla. 1st DCA 1994).

17. Under FCRA, Petitioner has the burden to establish by a preponderance of the evidence that she was the subject of discrimination by Respondent. In order to carry her burden of proof, Petitioner can establish a case of discrimination through direct or circumstantial evidence. See Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997).

18. Direct evidence of discrimination is evidence that, if believed, establishes the existence of discriminatory intent behind an employment decision without inference or presumption. Maynard v. Bd. of Regents, 342 F.3d 1281, 1289 (11th Cir. 2003). Direct evidence is composed of "only the most blatant remarks, whose intent could be nothing other than to discriminate" on the

basis of some impermissible factor. Evidence that only suggests discrimination, or that is subject to more than one interpretation, is not direct evidence. See Schoenfeld v. Babbitt, 168 F.3d 1257, 1266 (11th Cir. 1999), and Carter v. Three Springs Residential Treatment, 132 F.3d 635, 462 (11th Cir. 1998). Direct evidence is evidence that, if believed, would prove the existence of discriminatory intent without resort to inference or presumption and must in some way relate to the adverse actions of the employer. Denney v. City of Albany, 247 F.3d 1172, 1183 (11th Cir. 2001); see Jones v. BE&K Eng'g, Inc., 146 Fed. Appx. 356, 358-359 (11th Cir. 2005)("In order to constitute direct evidence, the evidence must directly relate in time and subject to the adverse employment action at issue."); see also Standard v. A.B.E.L. Servs., Inc., 161 F.3d 1318 (11th Cir. 1998)(concluding that the statement, "we'll burn his black a**" was not direct evidence where it was made two and a half years prior to the employee's termination). See also Hamilton v. Southland Christian Sch., Inc., 680 F.3d 1316 (11th Cir. 2012) and Rojas v. Fla., 285 F.3d 1339 (11th Cir. 2002)

19. Herein, Petitioner presented no direct evidence of discriminatory intent on the part of Respondent. Therefore, Petitioner must establish her case through inferential and circumstantial proof. Walker v. Prudential Prop. & Cas. Ins. Co., 286 F.3d 1270, 1274 (11th Cir. 2002); Kline v. Tenn. Valley

Auth., 128 F.3d 337, 348 (6th Cir. 1997); Shealy v. City of Albany, 89 F.3d 804, 806 (11th Cir. 1996).

20. Where a complainant attempts to prove intentional discrimination using circumstantial evidence, the shifting burden analysis established by the United States Supreme Court in McDonnell Douglas v. Green, 411 U.S. 792 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), is applied. Under this well-established model of proof, the complainant bears the initial burden of establishing a prima facie case of discrimination. When the charging party, i.e., Petitioner, is able to make out a prima facie case, the burden to go forward with the evidence shifts to the employer to articulate a legitimate, non-discriminatory explanation for the employment action. See Dep't of Corr. v. Chandler, 582 So. 2d 1183 (Fla. 1st DCA 1991). Importantly, the employer has the burden of production, not persuasion, and need only present the finder of fact with evidence that the decision was non-discriminatory. Id. See also Alexander v. Fulton Cnty., 207 F.3d 1303 (11th Cir. 2000). The employee must then come forward with specific evidence demonstrating that the reasons given by the employer are pretexts for discrimination. Schoenfeld v. Babbitt, supra at 1267. The employee must satisfy this burden by showing that a discriminatory reason more likely than not motivated the decision, or indirectly by showing that the proffered reason for

the employment decision is not worthy of belief. Dep't of Corr. v. Chandler, supra at 1186; Alexander v. Fulton Cnty., supra.

21. Notably, "although the intermediate burdens of production shift back and forth, the ultimate burden of persuading the trier of fact that the employer intentionally discriminated against the [Petitioner] remains at all times with the [Petitioner]." EEOC v. Joe's Stone Crabs, Inc., 296 F.3d 1265, 1273 (11th Cir. 2002); see also Byrd v. RT Foods, Inc., 948 So. 2d 921, 927 (Fla. 4th DCA 2007)("The ultimate burden of proving intentional discrimination against the plaintiff remains with the plaintiff at all times."). Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 148 (2000). See also Pace v. S. Ry. Sys., 701 F.2d 1383, 1391 (11th Cir. 1983); Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17, 22-23 (Fla. 3d DCA 2009).

22. In order to carry her burden in making out a prima facie case of discrimination under FCRA, Petitioner "must present sufficient evidence to provide a basis for an inference that [the protected characteristic] was a factor in the employment decision." Ingle v. Specialty Distrib. Co., 681 F. Supp. 1556, 1559 (N.D. Ga. 1998)(citing Pace, 701 F.2d at 1387).

23. On the other hand, this proceeding was not halted based on a summary judgment, but was fully tried before DOAH. Where the administrative law judge does not halt the proceedings for "lack of a prima facie case and the action has been fully tried,

it is no longer relevant whether the [Petitioner] actually established a prima facie case. At that point, the only relevant inquiry is the ultimate, factual issue of intentional discrimination . . . . [W]hether or not [Petitioner] actually established a prima facie case is relevant only in the sense that a prima facie case constitutes some circumstantial evidence of intentional discrimination." Beaver v. Rayonier, Inc., 200 F.3d 723, 727 (11th Cir. 1999); Green v. Sch. Bd. of Hillsborough Cnty., 25 F.3d 974, 978 (11th Cir. 1994). See also U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 713-715(1983):

> Because this case was fully tried on the merits, it is surprising to find the parties and the Court of Appeals still addressing the question of whether Aikens made out a prima facie case. We think that by framing the issue in these terms, they have unnecessarily evaded the ultimate question of discrimination vel non . . . . [W]hen the defendant fails to persuade the district court to dismiss the action for lack of a prima facie case, and responds to the plaintiff's proof by offering evidence of the reason for the plaintiff's rejection, the fact-finder must then decide whether the rejection was discriminatory within the meaning of Title VII. At this stage, the McDonnell-Burdine presumption "drops from the case," and "the factual inquiry proceeds to a new level of specificity."

24. In this case, Petitioner alleged that Respondent discriminated against her on the basis of sex due to her pregnancy.

25. As indicated, in order to establish a prima facie case of discrimination based on circumstantial evidence, a plaintiff must show that he or she: (1) belongs to a protected class, (2) was qualified to do the job; (3) was subjected to an adverse employment action; and, (4) the employer treated similarly-situated employees outside the class more favorably.

26. While Petitioner was a member of a protected class (female), and suffered an adverse employment action (termination), Petitioner presented no evidence that she was treated differently than others outside her class or that she was treated differently due to her pregnancy. Further, she produced no evidence to show that her pregnancy caused her termination.

27. Additionally, the evidence did not establish that Respondent's legitimate, non-discriminatory reason for termination was a pretext for discrimination.

28. As in other discrimination settings, once the employer has offered a legitimate, nondiscriminatory reason for its action, the charging party must demonstrate "such weaknesses, implausibility's, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable fact finder could find [all of those reasons] unworthy of credence." See Standard v. A.B.E.L. Servs., Inc., 161 F.3d 1318, 1333 (11th Cir. 1998). In evaluating the plausibility of the employer's explanation, "the relevant inquiry

is not whether [the employer's] proffered reasons were wise, fair, or correct, but whether [the employer] honestly believed those reasons and acted in good faith upon those beliefs." Stover v. Martinez, 382 F.3d 1064, 1076 (10th Cir. 2004). See also Valenzuela, 18 So. 3d at 26 ("The inquiry into pretext centers upon the employer's beliefs, and not the employee's own perception of [her] performance.").

29. As the court said in Chapman v. AI Transport, 229 F.3d 1012, 1030 (11th Cir. 2000)(en banc):

> A plaintiff is not allowed to recast an employer's proffered nondiscriminatory reasons or substitute his business judgment for that of the employer. Provided that the proffered reason is one that might motivate a reasonable employer, an employee must meet that reason head on and rebut it, and the employee cannot succeed by simply quarreling with the wisdom of that reason.

30. Moreover, absent evidence of intentional discrimination, it is not the role of administrative agencies or the courts to micro-manage internal business decisions. See Elrod v. Sears, Roebuck & Co., 939 F.2d 1466, 1470 (11th Cir. 1991)(federal courts do not sit as a "super-personnel department" to reexamine an entity's business decisions); Nix v. WLCY Radio/Rahall Commc'ns, 738 F.2d 1181, 1187 (11th Cir. 1984) ("[t]he employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason.").

31. In this case, the evidence only showed that Petitioner was a woman who happened to be pregnant when she was legitimately terminated from employment with Respondent. The evidence did not show that her termination was based on her gender or her pregnancy. Given these facts, the Petition for Relief should be dismissed.

32. Finally, section 760.11 provides in relevant part:

> (1) Any person aggrieved by a violation of ss. 760.01-760.10 may file a complaint with the commission within 365 days of the alleged violation, naming the employer, employment agency, labor organization, or joint labor-management committee, or, in the case of an alleged violation of s. 760.10(5), the person responsible for the violation and describing the violation . . . .

The evidence was clear that Petitioner did not file her Complaint of Employment Discrimination within the 365-day time period. As such, the Petition for Relief is time-barred and should be dismissed.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission of Human Relations enter a final order finding Respondent not guilty of discrimination and dismissing the Petition for Relief.

DONE AND ENTERED this 21st day of October, 2015, in Tallahassee, Leon County, Florida.

DIANE CLEAVINGER
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 21st day of October, 2015.

COPIES FURNISHED:

Tammy S. Barton, Agency Clerk
Florida Commission on Human Relations
Room 110
4075 Esplanade Way
Tallahassee, Florida 32399
(eServed)

Merrill W. Daily, Esquire
JC Penney Headquarters
Mail Station 1111
6501 Legacy Drive
Plano, Texas 75024

Robert L. Thirston, II, Esquire
Thirston Law Firm
Post Office Box 19617
Panama City Beach, Florida 32417
(eServed)

Derek Benjamin Lipscombe, Esquire
JC Penney Corporation
6501 Legacy Drive, MS 1108
Plano, Texas 75024
(eServed)

Cheyanne Costilla, General Counsel
Florida Commission of Human Relations
4075 Esplanade Way, Room 110
Tallahassee, Florida 32399
(eServed)

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.