STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARY L. SMITH,

Petitioner,

vs. Case No. 15-3942

WAL-MART STORES, EAST, LP,

Respondent.
_____/

RECOMMENDED ORDER

An administrative hearing was conducted in this case on January 21, 2016, in Tallahassee, Florida, before James H. Peterson, III, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Mary L. Smith, pro se
3137 Atwater Road
Chattahoochee, Florida 32324

For Respondent: Jonathan A. Beckerman, Esquire
Littler Mendelson, PC
Wells Fargo Center
333 Southeast 2nd Avenue, Suite 2700
Miami, Florida 33131-2187

STATEMENT OF THE ISSUES

Whether Respondent, Wal-Mart Stores, East, LP (Respondent or Wal-Mart), violated the Florida Civil Rights Act of 1992, sections 760.01–760.11 and 509.092, Florida Statutes,[1/] by discriminating against Petitioner, Mary L. Smith (Petitioner),

based upon Petitioner's race, age, or in retaliation for her participation in protected activity.

PRELIMINARY STATEMENT

On March 3, 2014, Petitioner filed an Employment Charge of Discrimination (Complaint) with the Florida Commission on Human Relations (Commission or FCHR) alleging that Respondent had discriminated and retaliated against her based on her race and age in violation of the Florida Civil Rights Act. The Commission investigated the Complaint, which was assigned FCHR No. 201500596.

Following completion of its investigation, the Commission's executive director issued a Determination dated June 18, 2015, stating that that "no reasonable cause exists to believe that an unlawful employment practice occurred." The next day, June 19, 2015, the Commission sent Petitioner a Notice of Determination: No Cause (Notice) which advised Petitioner of her right to file a Petition for Relief for an administrative proceeding on her Complaint within 35 days of the Notice, or a civil action within one year from the Notice. Petitioner elected to pursue administrative remedies and timely filed a Petition for Relief with FCHR on or about July 10, 2015. FCHR referred the matter to the Division of Administrative Hearings (DOAH) and the case was assigned to the undersigned to conduct an administrative hearing pursuant to chapter 120, Florida Statutes.

The final hearing was first scheduled to be held on September 23, 2015, but was continued until January 21, 2016. At the final hearing, Petitioner testified on her own behalf and offered a composite exhibit of seven photographs received into evidence as Exhibit P-1. Respondent presented the testimony of one witness, Sandra Davis, and offered five exhibits which were received into evidence as Exhibits R-1, R-4, R-6, R-7, and R-9.

The proceedings were recorded and a transcript was ordered. The parties were given 30 days from the filing of the transcript within which to file proposed recommended orders. A one-volume Transcript of the proceeding was filed February 8, 2016. Respondent timely filed its Proposed Recommended Order on March 9, 2016, which was considered in preparing this Recommended Order. Petitioner did not file a proposed recommended order.

FINDINGS OF FACT

1. As she describes herself, Petitioner, Mary L. Smith, is an 82-year-old, Black American woman.

2. Petitioner has worked as an associate for Walmart since 2004 in Store 488 located in Quincy, Florida.

3. During her employment with Walmart, Petitioner received training about Walmart's core beliefs and open door policies.

4. Throughout her employment at Walmart, Petitioner received wage increases and was not disciplined for the two

incidents related to Petitioner's Complaint, as further detailed below.

5. In October 2014, while helping unload freight, Walmart Assistant Manager Saundra Davis saw Petitioner yelling at two other Walmart associates. Ms. Davis instructed Petitioner to go to the office, but Petitioner refused to do so. Next, Ms. Davis instructed Petitioner to clock out for the remainder of her shift. During the discussion, Petitioner informed Ms. Davis that she would leave the store only if she were escorted by police. Petitioner did not clock out. Rather, she refused to leave and completed her shift.

6. Assistant Manager Davis considered Petitioner's refusal to follow instructions an act of insubordination. Petitioner, however, was not reprimanded for this incident.

7. Subsequently, in January 2015, all associates, including Petitioner, were instructed to go retrieve shopping carts left in the parking lot by customers. Petitioner refused to comply with that request. Instead, Petitioner became visibly upset and told everyone that she would not go outside.

8. Afterward, Petitioner reiterated that she was not going to do as instructed by management. Once again, Ms. Davis instructed Petitioner to clock out for the remainder of her shift, but Petitioner refused. This time, Walmart management called police to escort Petitioner out of the store.

9. As before, Petitioner was not reprimanded for the January 16, 2015, incident.

10. Petitioner never complained to Walmart management that she was being discriminated against based on her race, age, or membership in any other protected category. Assistant Manager Davis denied harboring any discriminatory animus towards Petitioner, and the evidence did not otherwise demonstrate any such animus on the part of Ms. Davis or Walmart.

CONCLUSIONS OF LAW

11. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes (2011), and Florida Administrative Code Rule 60Y-4.016(1).

12. The State of Florida, under the legislative scheme contained in sections 760.01–760.11 and 509.092, Florida Statutes, is known as the Florida Civil Rights Act of 1992 (FCRA or the Act). FCRA incorporates and adopts the legal principles and precedents established in the federal anti-discrimination laws specifically set forth under Title VII of the Civil Rights Act of 1964, as amended. See 42 U.S.C. § 2000e, et seq. Further, as noted by the Florida Fourth District Court of Appeal in City of Hollywood v. Hogan, 986 So. 2d 634 (Fla. 4th DCA 2008):

> The Florida Civil Rights Act of 1992 (FCRA) prohibits age discrimination in the workplace. See § 760.10(1)(a), Fla. Stat. (2007). It follows federal law, which prohibits age discrimination through the Age Discrimination in Employment Act (ADEA). 29 U.S.C. § 623. Federal case law interpreting Title VII and the ADEA applies to cases arising under the FCRA. Brown Distrib. Co. of W. Palm Beach v. Marcell, 890 So. 2d 1227, 1230 n.1 (Fla. 4th DCA 2005).

986 So. 2d at 641.

13. Section 760.10(2)(b) of the Act prohibits discrimination in the workplace. Among other things, the Act makes it unlawful for an employer:

> To limit, segregate, or classify employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities, or adversely affect any individual's status as an employee, because of such individual's race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status.

§ 760.10(b)(2), Fla. Stat.

14. Petitioner alleges that Walmart discriminated against her based upon Petitioner's race, age, or in retaliation for her participation in protected activity. The evidence, summarized in the Findings of Fact, above, do not support those claims and Petitioner otherwise failed to present sufficient evidence necessary to establish even a prima facie case for any of those

claims. Analysis of Petitioner's claims are analyzed under separate headings A through C, below.

A. Race Discrimination

15. To prevail on a race discrimination claim, Petitioner is required to prove by a preponderance of the evidence, which may be direct or circumstantial, that (1) she belongs to a protected group; (2) she was qualified for the position held; (3) she suffered an adverse employment action; and (4) either she was replaced by someone outside the protected class or a similarly-situated employee outside the protected class was treated more favorably. If a prima facie claim of race discrimination is established, the employer must proffer a legitimate non-discriminatory reason for the adverse action. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). If the proffer is made, then burden shifts back to the employee to directly rebut the proffered reasons for the adverse action and establish that such reasons are pretext for discriminatory animus. Id.

16. "Demonstrating a prima facie case is not onerous; it requires only that the plaintiff establish facts adequate to permit an inference of discrimination." Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997). In this case, however, Petitioner failed to establish a prima facie claim of race discrimination because she failed to present direct or

circumstantial evidence that she suffered an adverse employment action.

17. Petitioner admitted that she did not suffer a loss of income. At the time of the final hearing, she was still employed in the same position as before the two incidents outlined in the Findings of Fact, above, which Petitioner suggested as the basis of her claims.

18. Petitioner was never disciplined or coached regarding the two incidents.

19. Moreover, despite being told to clock out for the remainder of her shifts, Petitioner refused to do so. On the first occasion, Petitioner completed her shift. On the second occasion, Petitioner was escorted out by police.

20. Even if Petitioner had established a prima facie claim of racial discrimination, Respondent's legitimate, non-discriminatory reason Respondent proffered at the final hearing was that Petitioner was asked to clock out of the shifts because Petitioner refused to follow her manager's directives.

21. Petitioner failed to demonstrate "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its actions that a reasonable factfinder could find them unworthy of credence." Combs v. Plantation Patterns, Meadowcraft, Inc., 106 F.3d 1519, 2538 (11th Cir. 1997).

22. And, Petitioner failed to present credible evidence presented to show that the reasons proffered by the Respondent for its actions were pretext for discriminatory racial animus.

B. Age Discrimination

23. To prevail on an age discrimination claim, an employee must prove that: (1) she is a member of a protected class because of her age; (2) she was qualified for the position; (3) she was subjected to an adverse employment action; and (4) her employer treated similarly-situated employees of a "different" age more favorably.[2/] Once an employee establishes a prima facie claim of age discrimination, the burden shifts to the employer to proffer a legitimate non-discriminatory reason for its adverse employment decision. The burden shifts back to the employee to directly rebut and to prove that the proffered reason is pretext for age animus. Holifield v. Reno, 115 F.3d 1555 (11th Cir. 1997). This burden-shifting analysis is applied to cases with direct and circumstantial evidence.

24. Despite Petitioner's insistence at the final hearing that her age was the basis of Respondent's actions, that conclusion, without supporting evidence, amounted to "conclusory allegations, unwarranted factual deductions or legal conclusions masquerading as facts," and was not sufficient to meet Petitioner's burden of proof to demonstrate even a prima facie

case of age discrimination. See generally, Davila v. Delta Air Lines, Inc., 326 F.3d 1183, 185 (11th Cir. 2003).

25. Both Petitioner and Assistant Manager Davis testified that no member of management ever made discriminatory comments about Petitioner's age, and the evidence did not otherwise support Petitioner's allegation of age discrimination.

26. In sum, Petitioner failed to present credible or persuasive evidence to show that Respondent discriminated against Petitioner because of her age when she was instructed to clock out for the remainder of two shifts or when she was escorted out of the store for refusing to do so.

C. Retaliation

27. FCRA prohibits an employer from retaliating against an employee that has opposed an unlawful act. See § 760.10, Fla. Stat. This opposition is often referred to as the employee "engaging in protected activity." Similar to claims of race and age discrimination, claims of retaliation are analyzed under the McDonnell Douglas burden shift paradigm. See McDonnell Douglas Corp., supra.

28. In order to demonstrate a prima facie case of retaliation, Petitioner must show: (1) that she was engaged in statutorily-protected expression or conduct; (2) that she suffered an adverse employment action; and (3) that there is

some causal relationship between the two events. Holifield, 115 F.3d at 1566.

29. If the employee makes out a prima facie case of retaliation, then the burden shifts to the employer to demonstrate a legitimate, non-retaliatory reason for its challenged action. Once the employer does so, the burden returns to the employee to demonstrate that the employer's articulated reason is pretext for retaliatory action. Id.

30. Petitioner did not provide any credible or persuasive evidence that she engaged in protected activity.

31. Further, Petitioner presented no credible or persuasive evidence that Respondent retaliated against her for complaining of alleged race or age discrimination.

32. In sum, as in her other claims based on race and age, Petitioner failed to present even a prima facie case of retaliation.

33. When a Petitioner fails to present a prima facie case, the inquiry ends and the case should be dismissed. Ratliff v. State, 666 So. 2d 1008, 1013 n.6 (Fla. 1st DCA 1996).

34. Even if Petitioner had established a prima facie case for any of her claims, Walmart advanced legitimate, non-retaliatory reasons for its actions in asking Petitioner to clock out and for having the police escort Petitioner from the workplace. Petitioner failed to show that those reasons were

mere pretext for discrimination based on Petitioner's race, age, or retaliation.

35. Further, despite being aware of Walmart's open door policy, Petitioner admitted during the final hearing that she never told a member of management that she was being discriminated against based on her race, age, or any other protected category.

36. Petitioner did not suffer any loss of wages, change of title, disciplinary action or change of duties as a result of the incidents that were the subject of Petitioner's claims, and Petitioner otherwise failed to present sufficient evidence to support those claims.

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 dismissing Petitioner's Complaint and Petition for Relief consistent with the terms of this Recommended Order.

DONE AND ENTERED this 25th day of March, 2016, in Tallahassee, Leon County, Florida.

JAMES H. PETERSON, III
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of March, 2016.

ENDNOTES

[1/] Unless otherwise indicated by context, citations to all statutes, rules, and regulations are to current versions, the substantive provisions of which have not changed since the pertinent facts in this case.

[2/] These elements for a prima facie showing of age discrimination differ than those identified in City of Hollywood v. Hogan, 986 So. 2d 634, 641 (Fla. 4th DCA 2008), which, in relying on federal precedent, stated:

> The plaintiff must first make a prima facie showing of discriminatory treatment. He or she does that by proving: 1) the plaintiff is a member of a protected class, i.e., at least forty years of age; 2) the plaintiff is otherwise qualified for the positions sought; 3) the plaintiff was rejected for the position; 4) the position was filled by a worker who was substantially younger than the plaintiff.

As this Recommended Order will be subject to the Commission's Final Order authority, rather than relying on Hogan, supra, the undersigned has applied the elements for age

discrimination as described by the Commission, for example, in its Final Order rendered in Johnny L. Torrence v. Hendrick Honda Daytona, Case No. 14-5506 (DOAH Feb. 26, 2015; FCHR May 21, 2015), wherein the Commission observed:

> With regard to element (1), Commission panels have concluded that one of the elements for establishing a prima facie case of age discrimination under the Florida Civil Rights Act of 1992 is a showing that individuals similarly-situated to Petitioner of a "different" age were treated more favorably, and Commission panels have noted that the age "40" has no significance in the interpretation of the Florida Civil Rights Act of 1992. See, e.g., Downs v. Shear Express, Inc., FCHR Order No. 06-036 (May 24, 2006), and cases and analysis set out therein; see also, Boles v. Santa Rosa County Sheriff's Office, FCHR Order No. 08013 (February 8, 2008), and cases and analysis set out therein.
>
> Consequently, we yet again note that the age "40" has no significance in the interpretation of the Florida Civil Rights Act of 1992. Accord, e.g., Grasso v. Agency for Health Care Administration, FCHR Order No. 15-001 (January 14, 2015), Cox v. Gulf Breeze Resorts Realty, Inc., FCHR Order No. 09-037 (April 13, 2009), Toms v. Marion County School Board, FCHR Order No. 07-060 (November 7, 2007), and Stewart v. Pasco County Board of County Commissioners, d/b/a Pasco County Library System, FCHR Order No. 07-050 (September 25, 2007). But, cf, City of Hollywood, Florida v. Hogan, et al., 986 So. 2d 634 (4th DCA 2008).
>
> With regard to element (4), while we agree that such a showing could be an element of a prima facie case, we note that Commission panels have long concluded that the Florida Civil Rights Act of 1992 and its predecessor law, the Human Rights Act of 1977, as amended, prohibited age discrimination in employment on the basis of any age "birth to

death." See Green v. ATC/VANCOM Management, Inc., 20 F.A.L.R. 314 (1997), and Simms v. Niagara Lockport Industries, Inc., 8 F.A.L.R. 3588 (FCHR 1986). A Commission panel has indicated that one of the elements in determining a prima facie case of age discrimination is that Petitioner is treated differently than similarly situated individuals of a "different" age, as opposed to a "younger" age. See Musgrove v. Gator Human Services, c/o Tiger Success Center, et al., 22 F.A.L.R. 355, at 356 (FCHR 1999); accord Qualander v. Avante at Mt. Dora, FCHR Order No. 13-016 (February 26, 2013), Collins, supra, Lombardi v. Dade County Circuit Court, FCHR Order No. 10-013 (February 16, 2010), Deschambault v. Town of Eatonville, FCHR Order No. 09-039 (May 12, 2009), and Boles, supra. But, cf., Hogan, supra.

COPIES FURNISHED:

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

Mary L. Smith
3137 Atwater Road
Chattahoochee, Florida 32324
(eServed)

Jonathan A. Beckerman, Esquire
Littler Mendelson, PC
Wells Fargo Center
333 Southeast 2nd Avenue, Suite 2700
Miami, Florida 33131-2187
(eServed)

Grissel T. Seijo, Esquire
Littler Mendelson, P.C.
Wells Fargo Center, Suite 2700
333 Southeast 2nd Avenue
Miami, Florida 33131
(eServed)

Cheyanne Costilla, General Counsel
Florida Commission on 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.