STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SUSAN SWEATT,

Petitioner,

vs. Case No. 15-5979

WALT DISNEY WORLD,

Respondent.
_______________________________/

## RECOMMENDED ORDER

On March 24, 2016, an evidentiary hearing was conducted by video teleconference, with sites in Orlando and Tallahassee, Florida, before Elizabeth W. McArthur, Administrative Law Judge, Division of Administrative Hearings (DOAH).

## APPEARANCES

For Petitioner: Amber Nichole Williams, Esquire
Coye Law Firm
730 Vassar Street
Orlando, Florida 32828

For Respondent: Patrick M. Muldowney, Esquire
Baker and Hostetler, LLP
Post Office Box 112
Orlando, Florida 32802

## STATEMENT OF THE ISSUE

The issue to be determined is whether Respondent terminated Petitioner's employment because of her disability or age.

## PRELIMINARY STATEMENT

On April 2, 2015, Susan Sweatt (Petitioner) filed with the Florida Commission on Human Relations (FCHR) a charge of discrimination against her former employer, Walt Disney World (Respondent or Disney), in which she alleged that she was terminated because of her disability and age. FCHR conducted an investigation, after which it determined there was no reasonable cause to believe that an unlawful employment practice occurred. Petitioner timely requested an administrative hearing, and FCHR referred the case to DOAH to conduct the requested hearing.

The hearing was first scheduled for January 14, 2016, to be conducted by video teleconference with sites in Tallahassee and Orlando. Petitioner's unopposed motion for continuance was granted, and the video teleconference hearing was rescheduled for March 24, 2016.

Prior to the hearing, the parties filed a Joint Pre-Hearing Stipulation, in which they stipulated to a number of facts and legal conclusions. The stipulations have been incorporated in the findings and conclusions below, to the extent relevant.

At the hearing, Petitioner testified on her own behalf, and also presented the testimony of Rodney Jones and William Bohn. Petitioner's Exhibits 1 through 3 were admitted in evidence.

Respondent presented the testimony of Christine Neuberg, Susan Morgan, Jennifer Fallon (*nee* Zignauskas),[1/] Kathy Behrens,

and Daniel Wilkes. Respondent's Exhibits 1 through 16 were admitted in evidence.

The parties offered Joint Exhibit 1, which was admitted.

At the conclusion of the hearing, post-hearing deadlines were discussed. A transcript was ordered, and the parties jointly requested that they be afforded 20 days after the filing of the transcript in which to file their proposed recommended orders (PROs). Their request was granted.

The two-volume Transcript of the final hearing was filed on April 19, 2016. Both parties filed PROs one day after the deadline; however, both PROs have been fully considered in the preparation of this Recommended Order.[2/]

FINDINGS OF FACT

1. Petitioner was employed by Disney from October 1996 until January 19, 2015.

2. At the time her employment was terminated, Petitioner was 60 years old, and she had been working as a concierge at the Old Key West Resort (OKW) for the past seven or eight years.

3. Petitioner's job performance was considered "adequate." Over her many years working for Disney, she received some awards, as well as some performance-related discipline. However, her termination was not related to her performance as a concierge.

4. The incident giving rise to her termination occurred on January 2, 2015. That day, Disney records show that Petitioner

was scheduled to work for eight hours: her work shift was to begin by clocking in at 8:45 a.m.; she was allotted a 30-minute uncompensated lunch break from 1:45 p.m. to 2:15 p.m.; and then she was scheduled to end her workday by clocking out at 5:15 p.m.

5. OKW employees such as Petitioner documented their work hours two different ways: first, they employed a "card swipe" to clock in and out at a card-reader time clock located inside the employee entrance to OKW; second, on a printed daily schedule worksheet (also called a P/U sheet) that listed employee names and each employee's scheduled "in" time and "out" time, in blank columns for "actual" times next to the scheduled times, the employees would handwrite their actual in times and out times, and initial the entries.

6. Petitioner left her home on time on the morning of January 2, 2015,[3/] and recalled no particular incidents during her commute that would have made her late. However, Disney had been very busy during the holiday weeks leading up to January 2, 2015, and Petitioner acknowledged that it had been very difficult to find a parking spot. There is open parking in several parking areas adjacent to OKW, with spots available for use by guests and employees alike.

7. Petitioner was unable to quickly find a spot in the parking areas nearest to the OKW employee entrance. Before proceeding to the next closest parking area, she drove to the

front of the OKW employee entrance. She stopped her white SUV in the road and put her emergency flashers on, not because there was a vehicle emergency, but presumably to call attention to her vehicle stopped in the middle of the road so another vehicle would not hit it. Petitioner then left her vehicle and went in the employee entrance and swiped her employee card to clock in.

8. Rather than proceed to work, as represented by the act of clocking in, Petitioner went back outside to her vehicle, and drove off to go find a parking spot.

9. By leaving her vehicle in the middle of the road to go inside and clock in, Petitioner managed to clock in at 8:44 a.m., one minute before she was scheduled to clock in. Had Petitioner not clocked in until after she had parked her vehicle, she would have clocked in late. As she admitted, the reason she parked in the middle of the road, put her flashers on, and ran inside to clock in was "so I wouldn't be late."

10. Petitioner repeated the representation that she began her workday on time when she handwrote on the daily schedule worksheet for January 2, 2015, next to her scheduled "in" time of 8:45 a.m., that her actual "in" time was 8:45 a.m.

11. Petitioner's card swipe to clock in at 8:44 a.m. and her handwritten entry on the daily schedule worksheet that she was in at 8:45 a.m. were false representations by Petitioner on her employee time records.

12. Petitioner's clocking-in actions--stopping her vehicle in the middle of the road with emergency flashers on, running into the employee entrance to clock in, and then getting back in her vehicle and driving off--were observed by two OKW employees.

13. One eyewitness was Maniala Lucien, the OKW front desk supervisor. Ms. Lucien reported what she observed to Jennifer Zignauskas, and also reported that another employee had witnessed the incident. Ms. Zignauskas was one of six OKW "guest experience" managers to whom cashiers, concierges, and other staff report. Ms. Zignauskas was in her office when she was informed of the incident, and she went to the office next to hers to report the matter to Daniel Wilkes, the OKW guest service operations manager with supervisory authority over the guest experience managers, including Ms. Zignauskas. Mr. Wilkes instructed Ms. Zignauskas to collect statements from witnesses and from Petitioner.

14. Ms. Zignauskas obtained a witness statement from Ms. Lucien. She then approached Susan Morgan--an OKW cashier working that morning--to ask whether she had seen anything that morning that might have been unsafe. Ms. Zignauskas did not describe what might have been unsafe, nor did she name Petitioner. Ms. Morgan responded by asking Ms. Zignauskas whether she meant something like "the SUV that was parked outside in the middle of the road." Ms. Zignauskas said yes, and asked

if Ms. Morgan would be able to write a witness statement about what she saw. Ms. Morgan said she would.

15. The procedures employed and steps taken to investigate the reported incident were standard means employed by Respondent's managers to investigate a report of an employee matter, such as Ms. Lucien's report of Petitioner's feigned vehicle emergency. Petitioner contends that the question posed to Ms. Morgan regarding whether she saw anything unsafe that morning was unduly suggestive, apparently conceding that Petitioner's feigned car emergency was, indeed, unsafe. However, the question does not suggest the answer. The question would not have enabled Ms. Morgan to describe an SUV parked in the middle of the road if she had not actually witnessed it. And nothing in the question would have implicated Petitioner, whose actions were described in the witness statement written by Ms. Morgan.

16. Near the end of the day, Ms. Zignauskas asked to see Petitioner, after arranging to have a room available and a union shop steward, William Hause (who was a fellow concierge at OKW), present. Ms. Zignauskas asked Petitioner to provide a statement regarding what happened that morning with regard to clocking in and parking her car. Ms. Zignauskas provided a blank witness statement form and left the room so that Petitioner could confer with Mr. Hause and provide the statement regarding that morning's

incident. Petitioner was entitled to that shop steward representation, since she was the employee being investigated.[4/]

17. Petitioner's statement on January 2, 2015, was as follows, in its entirety:

> Because of the holiday crowd [and] the resort being at 100%, the past few weeks have been very difficult to find a parking spot. Even coming in earlier you have to drive around [and] around looking for a parking spot. This morning the lots surrounding the area were all full [and] upon a second trip around I left my car running [and] put my hazards on outside the back door, ran inside [and] clocked so I wouldn't be late [and] drove around till I found a guest who pulled out of a spot near bldg. 23 [and] came into work. Guest[s] have commented that they also didn't have enough parking spots; [and] they've complained when cast members park in "their" spots in designated parking areas.

18. Petitioner's statement, at least with respect to her feigned vehicle emergency and clocking-in actions, were corroborated by the statements of the two eyewitnesses. Ms. Morgan stated that when she was walking to the employee entrance, she "noticed a white SUV parked just before the bridge on Peninsular Road. . . . [T]he vehicle had its flashers on but I could not see if anyone was in the vehicle. As I got closer to the entrance door, I saw another cast member, Susan Sweatt, come out of the same door and cross the street. She got into the white SUV on the driver's side and drove over the bridge."

19. Similarly, Ms. Lucien, the eyewitness who reported the incident to Ms. Zignauskas, wrote that she saw Petitioner's car parked "in the middle of the street with the emergency light on," and then saw Petitioner cross the street to move her car. She stated: "I guess she park[ed] and [went to] clock in[; I] am not sure why she did that."

20. At Mr. Wilkes' direction, Ms. Zignauskas provided the statements to Respondent's Labor Relations Department. Labor Relations requested some follow-up investigation. In particular, supplemental witness statements were requested, to address what happened after Petitioner parked her vehicle, and what time Petitioner arrived in the lobby and assumed a concierge station.[5/]

21. Petitioner offered several different versions of what happened after she found a parking spot. According to her Petition for Relief and her January 2, 2015, witness statement, she went right to work after parking her vehicle. According to her PRO, however, she remained in the vehicle to do breathing exercises to overcome a panic attack. Her testimony at hearing seemed to indicate that after she parked her vehicle, she proceeded into the OKW building, and called her husband on her cell phone either before or after entering the building so that he could calm her down. Yet another variation was that Petitioner may have gone into the break room to do breathing exercises after entering the building, before "going onstage."[6/]

22. In addition to speaking to her husband and possibly going to the break room, Petitioner proceeded through the work-related steps necessary to equip herself to go onstage and begin providing services to OKW guests. These steps included storing her personal items, getting her keys, retrieving her laptop, getting her bank in the bank-out room, and counting her bank to reconcile it with the records.

23. It was expected that a concierge such as Petitioner would be able to complete the necessary work steps to assume a concierge station in OKW's lobby within 15 minutes after clocking in. Therefore, Petitioner would have been expected to assume a concierge station by 9:00 a.m.

24. Instead, it was 9:11 a.m. before Petitioner logged onto the computer system; it may have been later than that when she actually assumed a concierge station in the lobby.

25. Petitioner acknowledges that she was late, suggesting that she was onstage by 9:11 a.m., and arguing that such a slight episode of being tardy should be excused. However, Petitioner did not admit that she was late in her time records. Instead, she falsely represented on two different time records that she was on time.

26. Petitioner contends that she "flexed" her own time and made up for being late, by taking only 30 minutes for lunch when she would normally be allowed an hour. Her time records do not

bear that out; they show that her scheduled lunch break on January 2, 2015, was from 1:45 p.m. to 2:15 p.m.--30 minutes.

27. Petitioner contended in her Charge of Discrimination that Disney employees often “flex” their time to make up for being late, by shortening their lunch breaks, and that this was permissible with a supervisor’s approval. Petitioner offered no evidence that this was an actual practice that was approved by Respondent, either expressly or tacitly. Petitioner offered no evidence that she informed a supervisor that she was late on January 2, 2015, much less that a supervisor approved her “flexing” her time to compensate for being late.

28. Due to a guest situation near the end of the day on January 2, 2015, Petitioner clocked out and signed “out” on the P/U sheet at 5:30 p.m., when her scheduled out time was 5:15 p.m. The result was 15 minutes of overtime, which had to be approved by a supervisor. In a “comments” section on the P/U sheet for that day, Petitioner handwrote: “extend per [guest] situation per Maria.” Maria O’Neil was an OKW guest experience manager and one of Petitioner’s immediate supervisors.

29. The P/U sheet does not reflect in the comments section or anywhere else that Petitioner was actually late to work on January 2, 2015, or that Maria O’Neil or another manager had approved “flex time” to make up for the late start. Petitioner’s false representation on her time records resulted in her being

paid time-and-a-half pay for a quarter-hour of overtime on January 2, 2015, when, in fact, she did not work more than eight hours that day.

30. On January 19, 2015, Petitioner's employment was terminated for falsifying her time records. William Bohn was the union steward representing Petitioner at the meeting at which she was informed of her termination.

31. Petitioner contends that the incident on January 2, 2015, was used as a pretext, because other Disney employees have engaged in similar conduct and were treated more favorably. Petitioner offered no proof of a single person who engaged in the same or similar conduct who was not terminated.

32. Instead, Respondent offered evidence of several former employees who were terminated for falsifying company documents. While the details were scant, the evidence certainly did not support Petitioner's claim that she received disparate treatment.

33. Petitioner ended up unwittingly offering the most compelling evidence to refute her position that others were not treated as harshly for similar offenses. Mr. Bohn was called as a witness by Petitioner at the hearing. His testimony, elicited by Petitioner, was as follows:

> Q: Okay. Were you involved as a union steward at any point on Mrs. Sweatt's behalf?
>
> A: Yes, I was.

Q: Do you recall being involved in an incident that occurred in January of 2015?

* * *

A: . . . Yes.

Q: Can you tell us briefly the nature of that incident?

A: From what I remember it was -- it had something to do with her parking illegally, coming in and clocking in while her car was parked in an illegal spot. . . . And parking it –

* * *

Q: Okay. Mr. Bohn, what was your reaction to Disney's decision to terminate Ms. Sweatt on that day?

A: I was not surprised.

Q: Okay. And can you tell us why that was?

A: Because of what had happened, what she had done and the statements that I had seen from the other cast members that had – that had noticed what she had done.

* * *

Q: Are you aware of any incidents involving a Disney employee clocking in and then not reporting to their shift?

A: Yes.

Q: Okay. And were those employees terminated?

A: Yes. The one I was -- the one I was involved with was terminated.

Q: Are you aware of any employees who had done that who were not terminated?

A: No.

(Tr. 110-114).

34. After Petitioner was terminated, the union filed a grievance on her behalf, protesting her termination as "unjust" in violation of Article 18 of the union contract (addressing discipline, standards of conduct, and discharge), and "all other [articles or sections of the union contract] that may apply."

35. Article 18 of the Union Agreement provides than an employee may be discharged for just cause, which includes: "Falsification of records, such as medical forms, time cards, or employment applications." Art. 18, § 7(c), Union Agreement. Similarly, Respondent's Employee Policy Manual provides:

> Certain actions by employees can result in immediate termination. Such actions include, but are not limited to:
>
> * * *
>
> L. Making false entries on, or material omissions from, Company records.
>
> M. Altering or falsifying, or materially omitting information from, any time record[.]

Employee Policy Manual at 55-56 (Jan. 2004).

36. Consistent with the tenor of the policy manual, Respondent presented evidence reflecting its zero tolerance for falsifying records. Petitioner offered no persuasive evidence that this policy was inconsistently applied.

37. Petitioner’s grievance was heard through all four steps of the grievance process, and she did not prevail in her claim that her termination was unjust. The last step was consideration by a Joint Standing Committee comprised of a Disney representative and a Union representative, both of whom denied the grievance.

38. During the course of the grievance process, for the first time Petitioner disclosed to Respondent that her actions on January 2, 2015, should be excused as an accommodation under the Family Medical Leave Act (FMLA).

39. Throughout her tenure at Disney, Petitioner sought and received both leave and workplace accommodations under the FMLA. Insofar as relevant to this case, Petitioner has suffered from post-traumatic stress disorder (PTSD) for the last ten years. She and her husband witnessed a motorcycle accident on a highway ten years ago, and they stopped to aid the motorcyclist who died on the scene. Since that time, Petitioner experiences intermittent panic attacks. Sometimes, at the onset of an attack, she is able to calm herself down with breathing exercises, or her husband can calm her by talking her down, before a full-blown attack sets in.

40. The evidence established that Respondent was very accommodating of Petitioner’s need for intermittent leeway, whether it be actual leave (coming in late, leaving early, or

missing one or more whole days), or simply a few moments to go "offstage" to collect herself.

41. In 2006, Petitioner applied to Respondent and was approved for intermittent FMLA leave, which she could invoke when needed to deal with her PTSD. Petitioner has applied for and renewed the intermittent FMLA leave approval since then, so that it has been in effect continuously from 2006 through the date of her termination.

42. During her grievance process, Petitioner acknowledged: "Prior to January 19th[, 2015], reasonable accommodation had been provided to me by a compassionate management team for my disability."

43. Petitioner elaborated on these accommodations at the hearing. She explained that everyone she worked with was aware of her need for FMLA. If she had a panic attack before her shift started, she "would call in the call-in line and just say I'm calling FMLA late." This would occur several times a month.

44. If Petitioner was already at work when she experienced a panic attack, she would go "offstage" and she "would tell the front desk adviser" and also let "a manager know if one was available. . . . [If] it was bad enough, the manager would have to count my bank and I just would have to go home."

45. On January 2, 2015, however, Petitioner did not call the call-in line to invoke her right to "FMLA late" leave. She

did not inform the front desk adviser/supervisor, Maniala Lucien, that she needed to take FMLA leave for any part of her workday, nor did she inform a manager at any time during the day that her workday was shortened somewhat because she had needed to take some FMLA leave time that morning.

46. Petitioner claimed, but did not prove, that a Disney change in policy described to her by three different managers would have required her to call in at least 30 minutes before her shift was to begin if she was going to be late. Instead, the evidence established only that there was a change in general policy to require employees to call in at least 30 minutes before the scheduled start time of their workday if they were going to be absent that day. Without the 30-minute advance notice for an absence, the employee absence had the potential of being treated as a "no-call, no show."[7/]

47. Even if Petitioner was under the misimpression that there was a change in policy that applied to late arrivals as well as absences, in this context of an unanticipated need to invoke approved FMLA leave, it is difficult to imagine any new general employee policy taking precedence over the need to claim FMLA leave to which an employee is entitled. See, e.g., Union Agreement, Art. 17, § 6 ("The Company and the Union acknowledge that the provisions of the [FMLA] apply to the employees working under this Agreement. Thus, nothing in this Agreement shall be

construed as being inconsistent with the requirements of the [FMLA]. In this regard, the Company and the Union commit to meet to resolve potential conflicts between the [FMLA] and the Agreement.”).

48. The timing of Petitioner’s assertion of this claim, and the inadequacy of her explanations for not asserting it sooner, cast doubt on the credibility of her claim. But even if the belated claim of a need for FMLA leave were accepted, that claim would not excuse falsifying time records.

49. Petitioner failed to explain why she did not invoke her right to FMLA leave on January 2, 2015, if not by calling in on the call-line, then at least by explaining to the front desk adviser, Ms. Lucien, when she took the station right next to her sometime after 9:00 a.m., that she was late going onstage because she needed some FMLA time. Petitioner could have offered that same explanation to one of the managers who were there that day. While Petitioner claims she could not find one when she arrived late, she could have reported the matter later in the day.

50. While invoking FMLA would not excuse Petitioner’s feigned vehicle emergency to clock in just under the wire before continuing her search for a parking spot, perhaps Petitioner could have mitigated the consequences of her errant card swipe by honestly writing her actual “in” time on the P/U sheet, and noting in the comment section that she was “FMLA late.” Indeed,

Petitioner was able to find a manager to approve her "overtime" when she stayed 15 minutes past the end of her scheduled shift to address a guest situation; she could have informed that same manager that the 15 extra minutes at the end of the day should be offset by 15 minutes (or 30 minutes) at the beginning of the day, because she was "FMLA late."

51. Petitioner did not mention that she needed to invoke her right to FMLA leave in her witness statement on January 2, 2015, nor in the supplemental witness statement on January 7, 2015. Petitioner sought to defend this omission two different ways. First, she said was tired and just wanted to go home, so she just answered the specific question asked of her. The January 2, 2015, statement itself refutes this claim. More than half of the 13 lines of her statement dealt with matters other than what happened that morning. Petitioner put quite a bit of effort into attempting to excuse her behavior by pointing the blame elsewhere, embellishing on the holiday parking problems and relaying complaints she had heard from guests about insufficient parking spots and about employees parking in their spots.

52. Petitioner also sought to explain the omission by stating that FMLA leave was a private matter, and that it was none of the managers' business. That claim is inconsistent with Petitioner's testimony regarding the procedures she followed to take FMLA leave: she would either call the call-in line, or

inform the front desk adviser/supervisor and a manager that she was FMLA late, needed FMLA time during the day, or needed FMLA to leave early. As confirmed by one manager, Mr. Jones, although Petitioner was not required to inform a manager of the medical condition she was experiencing, she was required to inform a manager that she needed to take FMLA leave or call in FMLA late.

53. Also inconsistently, Petitioner testified to an apparent change of heart sometime after January 7, 2015, regarding this so-called private matter that was none of the managers' business. According to Petitioner, she asked Maria O'Neil for a blank witness statement form. She said that she intended to supplement her prior witness statements so she could "add the additional information about my FMLA." Petitioner said she did not get a form from Ms. O'Neil (who did not refuse the request; apparently she just did not follow through). Petitioner did not communicate the additional information regarding FMLA by any other means (e.g., verbally or in a written statement on a blank sheet of paper) to any supervisor or manager, to the office that processed her FMLA applications, or to anyone else at Disney prior to her termination on January 19, 2015.

54. It was not until after Petitioner was terminated and the union filed a grievance on her behalf that Petitioner apparently wrote to the union representative to explain that she needed FMLA leave time that morning because she was feeling

panicky when she could not find a parking spot right away. The written explanation, dated February 10, 2015, was provided to Respondent in the grievance proceeding.[8/] That was the first time that Respondent was informed, formally or informally, that Petitioner needed FMLA time on the morning of January 2, 2015.

55. Even more belatedly, Petitioner raised for the first time in her filings with FCHR the claim that she was terminated, if not because of her disability, then because of her age.

56. No credible evidence was offered to substantiate the charge of age discrimination. Petitioner offered only a few instances in which she interpreted comments as age-related. In each instance, her interpretation was conclusively refuted by the more credible testimony of the persons to whom the comments were attributed.

Ultimate Findings of Fact

57. Petitioner failed to prove that she was terminated because of her handicap.

58. Petitioner failed to prove that she was terminated because of her age.[9/]

59. Instead, the credible evidence established that Petitioner was terminated because she falsified her time records. Though that result may be viewed as harsh, Petitioner failed to prove that she was singled out for such harsh treatment or that others who were not in Petitioner's protected classes engaged in

the same or similar conduct and were treated more favorably. To the contrary, the only evidence offered on the subject suggested that Respondent was equally harsh in its response to similar actions by others. Thus, while Respondent's actions may have been harsh, they were not discriminatory.

## CONCLUSIONS OF LAW

60. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding, pursuant to sections 120.569, 120.57(1), and 760.11(7), Florida Statutes (2015).[10/]

61. Section 760.10(1) provides that it is an unlawful employment practice for an employer to discharge or otherwise discriminate against an employee "because of" the employee's age or handicap/disability.

62. Respondent is an "employer" within the meaning of the Florida Civil Rights Act (FCRA). § 760.02(7), Fla. Stat.

63. FCHR and Florida courts have determined that federal discrimination law should be used as guidance when construing the FCRA. 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).

64. To establish a prima facie case of age discrimination under the FCRA, Petitioner must show that: (1) she was a member of a protected age group; (2) she was subject to an adverse

employment action; (3) she was qualified to do the job; and (4) that she was replaced by, or treated less favorably than, a person of a different age. McQueen v. Wells Fargo, 573 Fed. Appx. 836, 839 (11th Cir. 2014); see Ellis v. Am. Aluminum, Case No. 14-5355 (Fla. DOAH July 14, 2015; modified, Fla. Comm'n on Human Relations, Sept. 17, 2015), FO at 2-3 (noting different interpretation of FCRA regarding whether comparator must be younger or just of a different age).

65. To establish a prima facie case of handicap discrimination under the FCRA, Petitioner must show that: (1) she has a handicap, or is regarding as having a handicap; (2) she is a qualified individual; and (3) she was unlawfully subjected to discrimination because of her handicap (used interchangeably with disability). St. Johns Cnty. Sch. Dist. v. O'Brien, 973 So. 2d 535 (Fla. 5th DCA 2007); Corning v. LodgeNet Interactive Corp., 896 F. Supp. 2d 1138, 1144 (M.D. Fla. 2012).

66. A "handicap" is an impairment that substantially limits a major life activity. Lenard v. A.L.P.H.A. "A Beginning," Inc., 945 So. 2d 618, 622 (Fla. 2d DCA 2006).

67. Petitioner proved that her PTSD constitutes a handicap or disability within the meaning of the FCRA, or at least that she was regarded as having a handicap or disability by Respondent since 2006. Respondent does not contend otherwise in its PRO.

68. Petitioner offered no direct evidence to prove that she was terminated because of age or disability. Accordingly, in the absence of any direct evidence of discrimination, a finding of discrimination, if any, must be based on circumstantial evidence.

69. The shifting burden analysis established by the U.S. Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), applies to this circumstantial evidence-based discrimination claim. Under this well-established model of proof, the complainant bears the initial burden of establishing a prima facie case of discrimination. If Petitioner establishes a prima facie case, the burden 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, 1186 (Fla. 1st DCA 1991) (discussing shifting burdens of proof in discrimination cases under McDonnell and Burdine). The employer has the burden of production, not persuasion, and need only articulate that the decision was non-discriminatory. Id.; Alexander v. Fulton Cnty., Ga., 207 F.3d 1303, 1339 (11th Cir. 2000). Petitioner must then come forward with specific evidence demonstrating that the reasons given by the employer are a pretext for discrimination. Dep't of Corr. v. Chandler, supra, at 1187. Petitioner must satisfy this burden by showing directly 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. Id.; Alexander v. Fulton Cnty., Ga., supra.

70. "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 employee 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. BT 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.").

71. In this case, Petitioner sought to establish a prima facie case of discrimination through a disparate treatment theory. A prima facie case of discrimination based on a disparate treatment theory requires proof that: (1) Petitioner belongs to a protected class; (2) Petitioner was subjected to adverse employment action; (3) similarly-situated employees, who are not members of Petitioner's protected class(es), were treated more favorably than Petitioner; and (4) Petitioner was qualified to do the job. City of W. Palm Bch. v. McCray, 91 So. 3d 165, 171 (Fla. 4th DCA 2012) (citing U.S. E.E.O.C. v. Mallinckrodt, Inc., 590 F. Supp. 2d 1371, 1376 (M.D. Fla. 2008)).

72. Petitioner failed to meet the third element of a prima facie case. She did not identify a single person who is not a member of Petitioner’s protected classes, who engaged in the same or similar conduct, and who was treated more favorably than Petitioner.

73. Even if Petitioner had established a prima facie case of discrimination, Respondent met its burden of articulating a legitimate reason for terminating Petitioner's employment that had nothing to do with Petitioner's handicap or age.

74. Petitioner failed to meet her ultimate burden to prove that she was terminated because of her disability or age. Instead, Respondent not only articulated, but proved that it had a legitimate reason for its action. Petitioner failed to present any persuasive evidence that Respondent’s action was more likely motivated by a discriminatory reason, or that Respondent’s stated reason is not worthy of belief. Instead, as found above, the evidence showed that Petitioner was terminated because she falsified her time records on January 2, 2015, and by doing so, committed an offense expressly designated in Respondent’s Employee Policy Manual as one that could result in immediate termination. That is reason enough to terminate her employment.

75. Petitioner’s belated attempt, after she was terminated, to invoke FMLA leave time to make up for being late to work on January 2, 2015, is wholly insufficient to transform her

termination into a failure to accommodate Petitioner's disability. Indeed, Petitioner lauded Respondent for its compassionate management that provided reasonable accommodation for her disability throughout her tenure, up to the day she was terminated. Petitioner's opportunity to invoke her right to intermittent FMLA leave on January 2, 2015, was on that day, when she admittedly was able to work the rest of the day after her rocky start. Petitioner never tried to invoke FMLA leave time pursuant to the procedures she acknowledged: either by calling into a call-line; or by informing a front desk adviser/supervisor and a manager when one is available.

76. Petitioner's disability cannot be used as an excuse for falsifying time records. Respondent acted in accordance with its Employee Policy Manual by immediately terminating Petitioner because she committed that offense.

77. Petitioner may believe that Respondent's reason for firing her was not good enough, and that its action was too harsh. However, the civil rights laws invoked by Petitioner in this case are not concerned with whether an employment decision is fair or reasonable, but only whether it was motivated by unlawful discriminatory intent. Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d 1354, 1361 (11th Cir. 1999). An "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." Nix v. WLCY Radio/Rahall Commc'ns, 738 F.2d 1181, 1187 (11th Cir. 1984). Petitioner failed to prove that Respondent's decision was motivated by unlawful discriminatory intent.

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 Susan Sweatt's Petition for Relief.

DONE AND ENTERED this 16th day of June, 2016, in Tallahassee, Leon County, Florida.

ELIZABETH W. MCARTHUR
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 16th day of June, 2016.

ENDNOTES

1/ Jennifer Fallon recently changed her last name. During the time relevant to this case, she was known as Jennifer Zignauskas, and is referred to by that name in exhibits and in most of the testimony. She will be referred to herein as Jennifer Zignauskas, for clarity of the record.

[2] The DOAH docket reflects that both PROs were filed at 8:00 a.m. on May 10, 2016. Pursuant to DOAH's procedural rules, filings made after 5:00 p.m. are considered filed as of 8:00 a.m. the next morning. See Fla. Admin. Code R. 28-106.104(3). Therefore, presumably both parties filed their PROs after hours on the deadline day. The undersigned points this rule out for future reference, as sometimes the actual filing deadline is significant. Here, however, under the "no harm, no foul" rule, neither party is faulted for the technically-late PRO filing.

[3] Contrary to the proposed finding of fact in Petitioner's PRO, Petitioner never testified that she left home early that day. Instead, she said that she left her home on time. (Tr. 31, 56).

[4] Petitioner's PRO contends that the investigation was flawed because William Hause, a fellow concierge at OKW, was selected as the union shop steward to represent Petitioner on January 2, 2015, when she was asked to write a statement. According to Petitioner's PRO, Mr. Hause "was later determined to have been the employee that brought Petitioner's actions to the attention of management." (PRO, ¶ 77). That is false; the employee who reported Petitioner's actions to management was Maniala Lucien. The PRO also inaccurately contends that when Respondent selected Mr. Hause to be the shop steward representing Petitioner, Respondent "was well aware" that he was a witness against her, because "they secured a witness statement from him prior to asking him to serve as a representative." (PRO, ¶ 78). Again, that is false. Mr. Hause was not an eyewitness to the clocking-in actions and provided no witness statement on January 2, 2015.

[5] Supplemental witness statements were provided by Ms. Lucien, Ms. Morgan, and Petitioner on January 7, 2015. In Ms. Lucien's supplemental statement, she identified Mr. Hause as someone who could address when Petitioner arrived at a concierge station in the OKW lobby, because he was another concierge on duty that morning. Apparently Mr. Hause gave a witness statement at that point. However, no evidence was offered to prove whether his statement was given before or after Petitioner gave her supplemental statement (with Mr. Hause again representing her). No evidence was offered to prove whether the statement Mr. Hause apparently gave was favorable or adverse to Petitioner, or added any information useful to the investigation at all. The statement itself was not offered into evidence by either party. Petitioner failed to prove her theory that Mr. Hause's representation of Petitioner while she gave her statement on January 2, 2015, and her supplemental statement on January 7, 2015, somehow tainted Respondent's investigation.

[6/] Using the Disney vernacular, concierges and other employees staffing its resort hotels are "cast members" who wear "costumes." When they assume their work stations--such as Petitioner manning a concierge station in the resort lobby--they go "onstage."

[7/] Petitioner identified the three managers who informed her of a change in policy as Maria O'Neil, Rodney Jones, and Kathy Behrens. The latter two testified at hearing. Mr. Jones was asked about a change in policy "regarding being late <u>or</u> calling out for work." He described a change in policy without saying which of the two categories the policy applied to. On the other hand, Ms. Behrens testified quite clearly that she only discussed with Petitioner that there would be a policy change requiring calling in 30 minutes prior to her shift "[i]f she was calling in [to be absent] for the day." She clarified, "I don't think we talked about it in terms of [calling in] late." The greater weight of the evidence did not establish a policy of having to call in 30 minutes before an employee's shift began if that employee was going to be late.

[8/] Petitioner's written explanation to her union representative was not offered into evidence by either party, although Petitioner identified the document and its date, answered some questions about the document, and acknowledged the truth of a sentence she wrote that was read into the record (quoted in paragraph 42 above).

[9/] It appears that, recognizing the dearth of evidence arguably related to Petitioner's claim of age discrimination, Petitioner has abandoned that claim. Petitioner's PRO does not propose a single finding of fact or conclusion of law to support her claim that she was terminated because of her age.

[10/] References herein to Florida Statutes are to the 2015 codification, unless otherwise provided.

COPIES FURNISHED:

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

Amber Nichole Williams, Esquire
Coye Law Firm
730 Vassar Street
Orlando, Florida 32828
(eServed)

Armando A. Rodriguez-Feo, Esquire
Walt Disney Parks and Resorts U.S., Inc.
Post Office Box 10000
Lake Buena Vista, Florida 32830
(eServed)

Patrick M. Muldowney, Esquire
Baker and Hostetler, LLP
Post Office Box 112
Orlando, Florida 32802
(eServed)

Gregory R. Schmitz, Esquire
Baker Hostetler, LLP
200 South Orange Avenue
Orlando, Florida 32801
(eServed)

Cheyanne Costilla, General Counsel
Florida Commission on Human Relations
Room 110
4075 Esplanade Way
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.