STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARCELLA TAGGART,

Petitioner,

vs. Case No. 16-0147

PUBLIX SUPER MARKETS, INC.,

Respondent.
_____/

RECOMMENDED ORDER

On March 22, 2016, an administrative hearing in this case was held by video teleconference in Lakeland and Tallahassee, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Katherine A. Heffner, Esquire
Council on American-Islamic Relations
8076 North 56th Street
Tampa, Florida 33617

For Respondent: Edmund J. McKenna, Esquire
Ogletree, Deakins, Nash, Smoak
and Stewart, P.C.
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STATEMENT OF THE ISSUE

The issue in the case is whether Marcella Taggart (Petitioner) was the subject of unlawful discrimination by

Publix Super Markets, Inc. (Respondent), in violation of chapter 760, Florida Statutes.

PRELIMINARY STATEMENT

By Complaint of Discrimination filed with the Florida Commission on Human Relations (FCHR) on June 25, 2015, the Petitioner alleged that the Respondent committed unlawful discrimination on the basis of race, color, sex, age, and in retaliation.

By Notice of Determination dated December 7, 2015, the FCHR determined that there was "no reasonable cause to believe that an unlawful employment practice occurred."

On January 11, 2016, the Petitioner filed a Petition for Relief with the FCHR. On January 13, 2016, the FCHR forwarded the Petition for Relief to the Division of Administrative Hearings, which scheduled and conducted the proceeding.

At the hearing, the Petitioner testified on her own behalf, presented the testimony of four additional witnesses, and had Exhibits identified as E, G, I, J and K admitted into evidence. The Respondent presented the testimony of three witnesses, and had Exhibits numbered 14, 16, 17, 20, 33, 34, and 46 admitted into evidence.[1/]

A Transcript of the hearing was filed on May 2, 2016. Proposed recommended orders were due to be filed by May 12, 2016. On May 9, 2016, the Respondent filed a Proposed

Recommended Order. On May 13, 2016, the Petitioner filed a Motion for Extension of Time to File Proposed Recommended Order seeking to extend the deadline to May 20, 2016. On May 16, 2016, the Respondent filed a Memorandum in Opposition to the Petitioner's motion. On May 20, 2016, the Petitioner filed a Proposed Recommended Order.

The Petitioner's motion failed to comply with Florida Administrative Code Rule 28-106.204(3) which requires that a motion include a statement that the movant has conferred with all other parties of record and state whether any party objects. Additionally, the motion failed to comply with rule 28-106.204(4) which requires that motions for extensions of time must be filed prior to the deadline sought to be extended and must state good cause for the request. Nonetheless, both Proposed Recommended Orders have been reviewed in the preparation of this Order.

FINDINGS OF FACT

1. Beginning in June 2007, and at all times material to this case, the Petitioner was employed as a systems analyst in the Respondent's Information Technology (IT) department.

2. The Respondent is a Florida corporation that operates a chain of grocery stores.

3. The Respondent's IT department is a high-security unit. A systems analyst working in the IT department has access to the

Respondent's financial and product pricing systems. Such an employee would also have access to some confidential human resources department data, including names, addresses, social security numbers, and banking information of the Respondent's other employees.

4. At the hearing, the Petitioner testified that some co-workers harassed her by repeatedly asking questions about her hair when she wore it in a braided hairstyle.

5. The Respondent has adopted an explicit policy prohibiting all forms of harassment. In relevant part, the policy states as follows:

> The very nature of harassment makes it virtually impossible to detect unless the person being harassed registers his or her discontent with the appropriate company representative. Consequently, in order for the company to deal with the problem, offensive conduct or situations must be reported.

6. The policy identifies a specific formal process by which an employee who feels harassed may lodge a complaint about such behavior.

7. The Petitioner did not file a formal complaint about the alleged harassment related to her hairstyle.

8. The evidence fails to establish that the Petitioner informally complained to the Respondent about such alleged harassment prior to her termination from employment.

9. In April 2009, the Petitioner participated in a work-related meeting, during which the Petitioner perceived that she was treated by another female employee in a demeaning manner.

10. The Petitioner reported the other employee's behavior in an email to supervisor Terry Walden.

11. The other employee wrote a similar email complaining about the Petitioner's behavior at the meeting, and, according to the Petitioner's email, the Petitioner was aware of the other employee's report.

12. Although the Petitioner now asserts that she complained that the incident was discriminatory, the Petitioner's email, which was written at the time of the incident, does not state or imply that the incident was related to some type of discriminatory conduct by the other employee, or that the altercation was related to anything other than assigned work responsibilities.

13. In May 2014, the Petitioner and a white male co-worker engaged in an office confrontation about assigned work responsibilities. Both the Respondent and the other employee separately reported the incident to supervisors. The Respondent investigated the incident and interviewed other employees who observed, but were not involved in, the confrontation.

14. As a result of the incident, the Petitioner received a written memo of counseling on June 16, 2014, from supervisor

Greta Opela for "poor interpersonal skills." The memo reported that the Petitioner "consistently performed well in her position from a technical standpoint" but that she "has had ongoing associate relations issues."

15. The memo stated that the Petitioner was unable to work appropriately with other employees and that "many associates have requested not to work with her because of their previous interactions with her."

16. The memo noted that the Petitioner's behavior towards her co-workers had been referenced in previous performance evaluations, as well as in direct discussions between the Petitioner and her immediate managers.

17. In relevant part, the memo further stated as follows:

> Of concern, when coached or provided constructive criticism, Marcella is very unreceptive and often becomes defensive and deflects blame to others. Given Marcella has had interpersonal conflicts with numerous individuals, Marcella needs to recognize her role in these conflicts, take ownership for her actions, and work to correct her behavior.
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> * * *
>
> Marcella must treat her fellow associates with dignity and respect. Also Marcella must take ownership for her actions and work to improve upon her relationships with her peers. Should Marcella fail to improve upon her interpersonal skills, she will be issued additional counseling, removed from her position, or separated from Publix.

18. The Petitioner's written acknowledgement of her receipt of the memo indicated that she disagreed with the assessment.

19. The Petitioner asserts that the Respondent committed an act of discrimination against her because the Respondent did not issue a similar memo to the other employee. The evidence fails to support the assertion.

20. The evidence fails to establish that the Respondent had any reason to issue a similar memorandum to the other employee, or that the other employee had a documented history of exhibiting "poor interpersonal skills" that could warrant counseling.

21. There is no evidence that the June 2014 memo was related in any manner to the Petitioner's race, color, sex, age, or was retaliatory. Although the memo was placed in the Petitioner's personnel file, the Respondent took no adverse employment action against the Petitioner as a result of the memo or the underlying incident.

22. On June 23, 2014, the Petitioner's house, which she owned with her husband, was partially destroyed in a fire. The Petitioner had been called to the scene after the fire commenced, and was present as the structure burned.

23. The fire and subsequent events resulted in an investigation by the State Fire Marshall's Office.

24. On April 1, 2015, the Petitioner informed supervisor Opela that the Petitioner had to go to the Hillsborough County Sheriff's Office (HCSO) and was unsure whether she would return to work on that day. Thereafter, the Petitioner left the workplace and traveled to the HCSO where she presented herself for arrest on a felony charge of making a "false and fraudulent insurance claim."

25. After the Petitioner left her place of employment, Ms. Opela accessed an internet resource and learned of the pending charge against the Petitioner.

26. Ms. Opela reported the information to her own supervisor, Ms. Walden, and to Susan Brose, a manager in the Respondent's human resources department. Ms. Brose reviewed the available internet information, and then arranged with the Petitioner to meet upon her return to the workplace.

27. At the hearing, Ms. Brose testified that the Respondent requires complete honesty from its employees, and that, according to the Respondent's policies, dishonest of any kind is unacceptable and can result in termination from employment. Ms. Brose testified that she restates the requirement at the commencement of every personnel disciplinary meeting, and did so at the beginning of her meeting with the Petitioner, after which she asked the Petitioner to explain the situation.

28. The Petitioner responded by stating that there had been a fire at the house, that there had been no insurance on the house, that her husband had filed a claim, and that she had asked the insurance carrier not to pursue the claim. The Petitioner denied to Ms. Brose that she had been arrested at the HCSO.

29. Ms. Brose also spoke with William Harrison, a detective with the Florida Department of Financial Services, Division of Insurance Fraud. Mr. Harrison prepared and executed the Summary of Offense and Probable Cause Statement (Probable Cause Statement), dated December 4, 2014, which formed the basis for the Petitioner's arrest on April 1, 2015.

30. According to the Probable Cause Statement: the Petitioner was aware at the time of the fire that the homeowner's insurance on the house had lapsed for non-payment of the premium; the Petitioner was present at the scene of the fire and became aware that the policy could be reinstated during the "grace period" by payment of the premium due, as long as the house had suffered no damage during the uninsured period; the Petitioner was warned at the scene of the fire by an employee of the State Fire Marshall's office that the reinstatement of the lapsed policy without disclosing the damage could constitute insurance fraud; and the Petitioner was overheard on the phone at the scene of the fire having the lapsed policy reinstated.

31. Ms. Brose became aware that, when having the lapsed insurance policy reinstated, the Petitioner executed a "Statement of No Loss" form that provided in relevant part as follows:

> I CERTIFY THAT THERE HAVE BEEN NO LOSSES, ACCIDENTS OR CIRCUMSTANCES THAT MIGHT GIVE RISE TO A CLAIM UNDER THE INSURANCE POLICY WHOSE NUMBER IS SHOWN ABOVE.

32. After completing her review of the circumstances, Ms. Brose concluded that the Petitioner had been dishonest during their meeting.

33. Ms. Brose recommended to Ms. Walden that the Petitioner's employment be terminated because the Petitioner worked in a high-security unit of the IT department where she had access to confidential financial information and systems, the Petitioner had been arrested for fraud, and the Petitioner was not honest when asked to explain the circumstances.

34. On April 13, 2015, Ms. Walden terminated the Petitioner's employment as a systems analyst for the reasons identified by Ms. Brose.

35. The Petitioner presented no evidence that the Respondent's termination of her employment was related to the Petitioner's race, color, sex, age, or in retaliation for any complaint of discrimination.

CONCLUSIONS OF LAW

36. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat. (2015).[2/]

37. The Petitioner has alleged that she was subjected to unlawful discrimination by the Respondent on the basis of race, color, sex, age, and in retaliation, in violation of chapter 760, Florida Statutes. The Petitioner has the burden of proving by a preponderance of the evidence that the Respondent committed an unlawful employment practice. Fla. Dep't of Transp. v. J.W.C. Co., 396 So.2d 778 (Fla. 1st DCA 1981). The burden has not been met.

38. Chapter 760, Part I, sets forth the Florida Civil Rights Act of 1992 (the "Act"). The Respondent is an "employer" as defined in section 760.02(7). Section 760.10, provides in relevant part 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.
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> * * *
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> (7) It is an unlawful employment practice for an employer, an employment agency, a

> joint labor-management committee, or a labor organization to discriminate against any person because that person has opposed any practice which is an unlawful employment practice under this section, or because that person has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section.

39. Florida courts interpreting the provisions of section 760.10, have held that federal discrimination laws should be used as guidance when construing provisions of the Florida law. See Brand v. Fla. Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994); Fla. Dep't of Cmty. Affairs v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991).

40. The Petitioner has the ultimate burden to establish discrimination either by direct or indirect evidence. Direct evidence is evidence that, if believed, would prove the existence of discrimination without inference or presumption. Carter v. City of Miami, 870 F.2d 578, 581-582 (11th Cir. 1989). Blatant remarks, whose intent could be nothing other than to discriminate, constitute direct evidence of discrimination. See Earley v. Champion Int'l Corp., 907 F.2d 1077, 1081 (11th Cir. 1990). There is no credible evidence of direct discrimination in this case.

41. Absent direct evidence of discrimination, Petitioner has the burden of establishing a prima facie case of discrimination. St. Mary's Honor Center v. Hicks, 509 U.S. 502

(1993); Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

42. When there is no direct evidence of discrimination, the Petitioner may establish unlawful discrimination through the presentation of circumstantial evidence. Such evidence is subject to the analysis set forth in McDonnell Douglas and Burdine, 450 U.S. 248 (1981). Under such analysis, the Petitioner has the initial burden of establishing a prima facie case of unlawful discrimination.

43. If the Petitioner is able to prove a prima facie case by a preponderance of the evidence, the burden shifts to the Respondent to articulate a legitimate, non-discriminatory reason for its actions. Assuming the employer articulates a legitimate, nondiscriminatory reason for the employment decision, the burden then shifts back to the Petitioner who must establish that the reason offered by the employer is not the true reason, but is mere pretext for the decision. The question becomes whether or not the proffered reasons are "a coverup for a . . . discriminatory decision." McDonnell Douglas, 411 U.S. at 805.

44. The ultimate burden of persuading the trier of fact that there was intentional discrimination by the Respondent remains with the Petitioner. Burdine, 450 U.S. at 253.

45. The evidence presented in this case is insufficient to meet the burden of establishing a prima facie case of discrimination against the Petitioner based on the Petitioner's race, color, sex, or age. Because the failure to establish a prima facie case ends the analysis, the Petitioner's complaint of discrimination must be dismissed.

46. In order to establish a prima facie case of retaliation, the Petitioner must satisfy four requirements. The Petitioner must show that she engaged in a statutorily protected activity, that the Respondent was aware of the protected activity, that the Petitioner suffered adverse employment action, and that the adverse action was causally related to the protected activity. See Little v. United Technologies, Carrier Transicold Div., 103 F.3d 956, 959 (11th Cir. 1997)(citing Coutu v. Martin Cnty. Bd. of Cnty. Comm'rs, 47 F.3d 1068, 1074 (11th Cir. 1995)).

47. The evidence fails to establish that the Petitioner filed any formal complaint (the "statutorily protected activity") alleging unlawful discrimination or harassment by any employee while she was employed by the Respondent. The Petitioner's specific allegations of unlawful harassment were first raised after the Petitioner's employment was terminated. Accordingly, the evidence fails to establish that the Petitioner's termination (the "adverse employment action") was

in retaliation for any such complaint. The Petitioner has failed to establish a prima facie case of retaliation. Accordingly, the analysis ends and the complaint of retaliation must be dismissed.

48. Even had the Petitioner met the burden of establishing a prima facie case of discrimination or retaliation, the Respondent more than met its burden to articulate a legitimate, non-discriminatory reason for its termination of the Petitioner from employment.

49. The Petitioner was employed in a position allowing access to confidential data of the Respondent and its employees. The Petitioner's employment was terminated by the Respondent for being dishonest when she was asked to disclose the details of her felony arrest for making a false and fraudulent insurance claim. The Petitioner presented no evidence whatsoever that the rationale offered by the Petitioner for the termination was mere pretext for an act of discrimination or retaliation.

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 the Petitioner's complaint of discrimination.

DONE AND ENTERED this 24th day of May, 2016, in Tallahassee, Leon County, Florida.

William F. Quattlebaum

WILLIAM F. QUATTLEBAUM
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of May, 2016.

ENDNOTES

[1/] Petitioner's Exhibit K and Respondent's Exhibit 17 are the same document, which was also referenced as Joint Exhibit 17 during the hearing.

[2/] All statutory references are to Florida Statutes (2015).

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.