STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

STEPHEN BROOKS,

Petitioner,

vs. Case No. 16-0345

WALMART,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in Tallahassee, Florida, on October 12, 2016, before W. David Watkins, the duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Stephen Brooks, pro se
Apartment 325
3000 South Adams Street
Tallahassee, Florida 32301

For Respondent: Grissel Seijo, Esquire
Littler Mendelson, P.C.
Wells Fargo Center
333 Southeast 2nd Avenue, Suite 2700
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STATEMENT OF THE ISSUE

Did Respondent, Walmart, discriminate against Petitioner on account of his sex or retaliate against Petitioner in violation of chapter 760, Florida Statutes?

PRELIMINARY STATEMENT

Petitioner filed an Employment Complaint of Discrimination (Complaint) with the Florida Commission on Human Relations (FCHR) on April 20, 2015, claiming that Walmart had discriminated against him on the basis of his sex (male) and had retaliated against him for engaging in a protected activity. Following its investigation of the allegation, the FCHR rendered a "No Cause" determination on December 17, 2015.

On January 21, 2016, Petitioner filed a Petition for Relief requesting an administrative hearing regarding the FCHR's "No Cause" determination pursuant to section 760.11(7).

The matter was referred to the Division of Administrative Hearings on January 22, 2016, and on February 1, 2016, the undersigned issued a Notice of Hearing, setting the final hearing for April 17, 2016. However, at the request of the parties, the final hearing was twice continued, and ultimately scheduled to commence on October 12, 2016.

The final hearing was convened as noticed on October 12, 2016. At hearing, Petitioner testified on his own behalf and called one other witness, Cusheena Brown, his girlfriend and the mother of his child. Petitioner did not offer any exhibits in evidence.[1/]

Respondent offered the testimony of John H. Williams, Walmart market resources manager; William Harrell, former manager

of Walmart Store No. 1077; Gregory Bontz, manager of Walmart Store No. 1077; and Ternessia Nicole Nelson, assistant manager of Walmart Store No. 1077. Walmart offered two exhibits in evidence, both of which were received.

A Transcript of the final hearing was filed on October 26, 2016. Thereafter, both parties filed Proposed Recommended Orders, which have been carefully considered in the preparation of this Recommended Order.

All statutory citations are to Florida Statutes (2016), unless otherwise indicated.

FINDINGS OF FACT

Based upon the demeanor and credibility of the witnesses and other evidence presented at the final hearing and on the entire record of this proceeding, the following findings of fact are made:

1. Petitioner, Stephen L. Brooks, has worked as an associate in the electronics department at Walmart in Store 1077 located in Tallahassee, Florida, since July 3, 2013. Mr. Brooks is an articulate and hardworking individual, working a second job and helping to care for his daughter. In addition, Mr. Brooks attends college.

2. Petitioner received training about Walmart's core beliefs and open-door policies. Additionally, Petitioner

received training and was aware of posters in the employee areas regarding Walmart's anti-discrimination and anti-harassment policies.

3. On March 23, 2015, Plaintiff received a written warning from his direct line manager, Tarnessia Nelson, for absenteeism. Subsequent to receiving this warning, Mr. Brooks approached market human relations (HR) manager, John Williams, and store manager, William S. Harrell, and complained that he did not like how Ms. Nelson was treating him (being nasty and mean) and that he was not being scheduled for enough hours.

4. Both managers separately explained to Mr. Brooks that Ms. Nelson did not control Mr. Brooks' schedule. Rather, Walmart uses scheduling software, called Client Service Scheduling (CSS), to schedule associates.

5. CSS considers multiple variables when scheduling associates, including historic sales records for the department, forecasted budgeting, and employee availability. CSS gives scheduling preference to an associate that is available to work the entire shift or, if the employee is an afternoon or evening employee, preference goes to an employee that can work through the end of the shift--specifically close of business.

6. In light of how CSS works, Mr. Williams and Mr. Harrell discussed with Petitioner, on multiple occasions, that his Customer Service Scheduling Availability form reflected a limited

availability. CSS, therefore, scheduled him for limited hours because the electronics department needed an associate who could work until 10:00 p.m. Since Petitioner's availability form specified that he was not available after 9:30 p.m., CSS gave priority to associates with availability to work through the entire shift. Indeed, very shortly before transferring to another store, Mr. Harrell again reminded Petitioner that if he was seeking more hours, he needed to change his availability.

7. The Customer Service Scheduling Availability form expressly states that "Changing your availability could affect the number of hours you receive." Petitioner last changed his availability form on April 11, 2015, which reflected his unavailability past 9:30 p.m.

8. Petitioner was well aware of how CSS worked and acknowledged that CSS assigned shifts three weeks in advance and that the computer-generated schedules are not altered "unless you negotiate with another associate" for a schedule change.

9. During the final hearing, Petitioner argued that two other employees, Ms. Kaye and Mr. Johnny (one female, and one male), with limited availabilities, were regularly scheduled to work by CSS. Yet, neither Ms. Kaye nor Mr. Johnny worked in the same department as Petitioner. More importantly, Ms. Kaye and

Mr. Johnny were available after 10:00 p.m., which meant that CSS would give them scheduling preference since they were available through the end of the shift.

10. Mr. Brooks also complained to Mr. Williams that Ms. Nelson was discriminating against him because of his gender. In accordance with Walmart anti-discrimination policies, Mr. Williams investigated whether Ms. Nelson treated Mr. Brooks differently because of his gender.

11. Mr. Williams interviewed Ms. Nelson and a few other employees who worked in the same department to see if they had any firsthand information to support the allegation that Ms. Nelson was treating Mr. Brooks differently. Mr. Williams was unable to uncover any evidence establishing that Ms. Nelson was singling out Mr. Brooks for any reason. Mr. Williams testified that he could not substantiate Petitioner's gender discrimination allegations because "there were other male individuals in the area, and I could not see – I didn't have any data to support that she [Ms. Nelson] was treating him differently because of his gender. I could not confirm that."

12. In his deposition, which he reaffirmed at hearing, Petitioner stated that Ms. Nelson was mean to him "and to the other men and female in the (electronics) department."

13. Nonetheless, on April 20, 2015, Petitioner filed a Charge of Discrimination (Charge) claiming that he was being

discriminated against because of his gender by his manager, Ms. Nelson. Mr. Brooks alleged that Ms. Nelson spoke to him in a disrespectful, demeaning, and hostile manner and that he had been unfairly written up for unexcused absences. Petitioner also claimed that his work hours had been reduced. Finally, he claimed that he was retaliated against for complaining about Ms. Nelson's treatment of him. The retaliation was manifested by a reduction in Mr. Brook's scheduled hours, and not being scheduled for any shifts for a period of three and a half months.

14. On December 17, 2015, the Florida Commission on Human Relations issued a no cause determination.

15. During the investigation, and again at the final hearing, Ms. Nelson admitted to being a hard-line supervisor who is tough on all of her subordinates. Nevertheless, she unequivocally denied discriminating against Petitioner because of his gender. She also denied retaliating against him for complaining about her when she held him accountable for missing shifts in late April 2015.[2/]

16. At hearing, Petitioner affirmed that "Ms. Nelson was actually equally nasty to every person on her staff." More importantly, at hearing Petitioner admitted that he had no proof that Ms. Nelson treated him differently because of his gender.

17. Subsequent to the April 29, 2015, warning, CSS continued to schedule all associates, including Mr. Brooks, based on availability and the needs of each department.

18. In September 2015, despite being encouraged by multiple members of management to either increase his availability or consider changing departments, Petitioner began a three-and-a-half-month period in which CSS did not schedule him for any shifts due to his lack of availability.

19. As noted earlier, CSS scheduled associates based on multiple factors, including historic sales records for the department, forecasted budgeting, and employee availability. Thus, during the holiday season of 2015, when the historic sales records and forecasted budgeting required more associates to be scheduled in the electronics department, CSS scheduled Petitioner for shifts in the electronics department.

20. On or about June 2016, Ms. Nelson was transferred to another department and no longer supervised Petitioner. Yet, Petitioner continued to be scheduled for limited shifts due to his stated unavailability.

21. The persuasive and credible evidence of record established that Petitioner last changed his availability in April 2015, which has since affected how Walmart's scheduling software, CSS, selects him for shifts.

CONCLUSIONS OF LAW

22. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this cause pursuant to sections 120.569 and 120.57(1), Florida Statutes.

23. The Florida Civil Rights Act of 1992 ("FCRA") prohibits discrimination in the workplace. Among other things, FCRA 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(1)(b), Fla. Stat.

24. Florida's chapter 760 is patterned after Title VII of the Civil Rights Act of 1964, as amended. Consequently, Florida courts look to federal case law when interpreting chapter 760. Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17 (Fla. 3rd DCA 2009).

Sex Discrimination Claim

25. Petitioner claims he was discriminated against by Walmart because of his sex (male) in violation of FCRA. Specifically, Petitioner alleges that Ms. Nelson repeatedly spoke to him in a disrespectful, demeaning and hostile manner, and

assigned tasks involving heavy lifting to him. Petitioner also alleges that he was retaliated against for complaining about Ms. Nelson's treatment of him by being taken off the Walmart work schedule for a period of three and a half months.

26. Section 760.11(7) permits a party who receives a no cause determination to request a formal administrative hearing before the Division of Administrative Hearings. "If the administrative law judge finds that a violation of the Florida Civil Rights Act of 1992 has occurred, he or she shall issue an appropriate recommended order to the commission prohibiting the practice and recommending affirmative relief from the effects of the practice, including back pay." Id.

27. Petitioner claims disparate treatment (as opposed to disparate impact) under the FCRA; in other words, he claims he was treated differently because of his gender. Petitioner has the burden of proving by a preponderance of the evidence that Respondent discriminated against him. See Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981). A party may prove unlawful sex discrimination by direct or circumstantial evidence. Smith v. Fla. Dep't of Corr., Case No. 2:07-cv-631, (M.D. Fla. May 27, 2009); 2009 U.S. Dist. LEXIS 44885 (M.D. Fla. 2009).

28. Direct evidence is evidence that, "if believed, proves [the] existence of [a] fact in issue without inference or

presumption." Burrell v. Bd. of Tr. of Ga. Military College, 125 F.3d 1390, 1393 (11th Cir. 1997). Direct evidence consists of "only the most blatant remarks, whose intent could be nothing other than to discriminate" on the basis of an impermissible factor. Carter v. City of Miami, 870 F.2d 578, 582 (11th Cir. 1989).

29. The record in this case did not establish unlawful gender discrimination by direct evidence.

30. To prove unlawful discrimination by circumstantial evidence, a party must establish a prima facie case of discrimination by a preponderance of the evidence. If successful, this creates a presumption of discrimination. Then the burden shifts to the employer to offer a legitimate, non-discriminatory reason for the adverse employment action. If the employer meets that burden, the presumption disappears and the employee must prove that the legitimate reasons were a pretext. Valenzuela v. GlobeGround N. Am., LLC, supra. Facts that are sufficient to establish a prima facie case must be adequate to permit an inference of discrimination. Id.

31. Accordingly, Petitioner must prove discrimination by indirect or circumstantial evidence under the McDonnell Douglas framework. Petitioner must first establish a prima facie case by showing: (1) he is a member of a protected class; (2) he was qualified for the position held; (3) he was subjected to an

adverse employment action; and (4) other similarly-situated employees, who are not members of the protected group, were treated more favorably than Petitioner. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). "When comparing similarly situated individuals to raise an inference of discriminatory motivation, these individuals must be similarly situated in all relevant respects." Jackson v. BellSouth Telecomm., 372 F.3d 1250, 1273 (l1th Cir. 2004).

32. Thus, in order to establish a prima facie case of disparate treatment based on gender, Petitioner must show that Walmart treated similarly-situated female employees differently or less severely. Valdes v. Miami-Dade Coll., 463 Fed. Appx. 843, 845 (11th Cir. 2012); Camara v. Brinker Int'l, 161 Fed. Appx. 893 (11th Cir. 2006). See also Longariello v. Sch. Bd. of Monroe Cnty., Fla., 987 F. Supp. 1440, 1449 (S.D. Fla. 1997) (quoting Coleman v. B-G Maint. Mgmt. of Colo., Inc., 108 F.3d 1199, 1204 (10th Cir. 1997))("Gender-plus plaintiffs can never be successful if there is no corresponding subclass of members of the opposite gender. Such plaintiffs cannot make the requisite showing that they were treated differently from similarly-situated members of the opposite gender.").

33. The findings of fact here are not sufficient to establish a prima facie case of discrimination based on gender.

34. Outside of his own beliefs, Petitioner cannot point to any similarly-situated employee outside of his protected class that was treated more favorably than him. Indeed, at hearing Petitioner admitted to having no proof to substantiate his discrimination allegations.

35. Although Petitioner alluded to Ms. Kaye and Mr. Johnny as potential comparators, neither employee worked in the electronics department. Further, both Ms. Kaye and Mr. Johnny had greater availability and worked until 10:00 p.m. More importantly, if Mr. Johnny was treated more favorably than Petitioner, it also defeats his claim of gender discrimination as Mr. Johnny is male. Therefore, Ms. Kaye and Mr. Johnny are invalid comparators.

36. Since Petitioner cannot establish that anyone outside of his protected category was treated more favorably, his claim of gender discrimination fails as a matter of law.

37. Even had Petitioner established a prima facie claim of gender discrimination, Respondent credibly proved that Petitioner's hours were reduced by the CSS from April 2015 onward based on his limited availability and the needs of the business. Petitioner was counseled on multiple occasions, and by multiple managers, that his availability was not consistent with the Walmart scheduling shifts in the electronics department, and therefore, he would not be assigned to those shifts. Petitioner

was specifically advised by Store Manager Harrell that, despite Mr. Brooks' personal expectation that the available Walmart shift allocation should be molded to fit his limited schedule, Petitioner needed to conform to Walmart's business needs. Further, Petitioner failed to demonstrate how Walmart's scheduling software, CSS, discriminated against him based on his gender, even after Ms. Nelson no longer supervised him.

38. It has been consistently held that the court's role is to prevent unlawful employment practices and "not to act as a super personnel department that second-guesses employers' business judgments." Wilson v. B/E Aerospace, Inc., 376 F.3d 1079, 1092 (11th Cir. 2004). An employee cannot succeed by simply quarreling with the wisdom of the employer's reason. Chapman v. AI Transp., 229 F.3d 1012 (l1th Cir. 2000); see also Alexander v. Fulton Cnty., Ga., 207 F.3d 1303, 1341 (l1th Cir. 2000)("[I]t is not the court's role to second-guess the wisdom of an employer's decisions as long as the decisions are not racially motivated.").

39. Since 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," his claims must fail as a matter of law. Combs v. Plantation Patterns, Meadowcraft, Inc., 106 F.3d 1519, 2538 (11th Cir. 1997).

Retaliation Claim

40. Petitioner also asserts a claim of unlawful retaliation based upon the reduced number of hours he was assigned following the filing of his Charge of Discrimination in April 2015.

41. "It is an unlawful employment practice for an employer . . . to discriminate against any person because the 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." § 760.10(7), Fla. Stat.

42. Section 760.10(7) is identical to the language found at 42 U.S.C. § 2000e-3(a), with the exception that the paragraph begins, "It is" in the Florida version and begins, "It shall be" in the Federal version. The difference in the first few words has no effect on the meaning of the statutes.

43. "Under the opposition clause, an employer may not retaliate against an employee because the employee 'has opposed any practice made an unlawful employment practice by this subchapter.' 42 U.S.C. § 2000e-3(a). And, under the

participation clause, an employer may not retaliate against an employee because the employee 'has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.'" EEOC v. Total Sys. Servs., Inc., 221 F.3d 1171, 1174 (11th Cir. 2000).

44. "The statute's participation clause 'protects proceedings and activities which occur in conjunction with or after the filing of a formal charge with the EEOC.' . . . The opposition clause, on the other hand, protects activity that occurs before the filing of a formal charge with the EEOC, such as submitting an internal complaint of discrimination to an employer, or informally complaining of discrimination to a supervisor." Muhammad v. Audio Visual Servs. Grp., 380 Fed. Appx. 864, 872 (11th Cir. Ga. 2010) (quoting Total Sys. Servs., 221 F.3d at 1174); see also Rollins v. State of Fla. Dep't of Law Enf., 868 F.2d 397, 400 (11th Cir. 1989).

45. "To establish a prima facie case of retaliation under Title VII, Plaintiff 'must show that: (1) [he] engaged in statutorily protected activity; (2) [he] suffered a materially adverse action; and (3) there was a causal connection between the protected activity and the adverse action.'" Root v. Miami-Dade Cnty., 2010 U.S. Dist. LEXIS 117811 at *11 (S.D. Fla. Aug. 6,

2010)(quoting Howard v. Walgreen Co., 605 F.3d 1239, 2010 WL 1904966, at *5 (11th Cir. 2010)); see also Goldsmith v. Bagby Elevator Co., 513 F.3d 1261, 1277 (11th Cir. 2008).

46. The first element of Petitioner's prima facie case of retaliation under the opposition clause requires him to establish that he engaged in statutorily-protected opposition conduct. To do so, Petitioner must show that he opposed conduct by the employer based upon an objectively reasonable belief that the employer was engaged in unlawful employment practices. See, e.g., Harper v. Blockbuster Ent. Corp., 139 F.3d 1385, 1388 (llth Cir. 1998); Brown v. Sybase, Inc., 287 F. Supp 2d 1330, 1346-47 (S.D. Fla. 2003).

47. In addition, Petitioner must show that the decision-maker responsible for the adverse action was actually aware of the employee's protected opposition at the time the decision maker took the adverse action. See Brown, 287 F. Supp. 2d at 1347; see also Brungart v. BellSouth Telecomm., Inc., 231 F.3d 791, 799 (11th Cir. 2000); Holifield v. Reno, 115 F.3d 1555, 1566 (11th Cir. 1997). A court will not presume that a decision-maker was motivated to retaliate by something unknown to him or her. See Brungart, 231 F.3d at 799. Thus, in order to constitute protected opposition activity, Petitioner must, at the very least, communicate his belief that illegal discrimination is occurring. See Webb v. R & B Holding Co., 992 F. Supp. 1382,

1389 (S.D. Fla. 1998) ("It is not enough for the employee merely to complain about a certain policy or certain behavior . . . and rely on the employer to infer that discrimination has occurred."); see also Johnson v. Fla., 2010 U.S. Dist. LEXIS 42784, 4-5 (N.D. Fla. Mar. 30, 2010).

48. Petitioner alleges that he was not scheduled for work from September through November 2015, because he complained about Ms. Nelson and how she treated him. Yet, it was established through multiple witnesses that Walmart associates' schedules are generated by the computer software, CSS. The evidence established that Ms. Nelson did not reduce Petitioner's hours because of his gender or because of retaliation.

49. Moreover, there is no evidence of a causal connection between Mr. Brooks complaining about Ms. Nelson, his reduced hours in April 2015, and his continued reduced hours after filing his Charge of Discrimination. Even after Ms. Nelson no longer supervised Petitioner, he continued to experience the same problems with scheduling as he did while she supervised him, because CSS creates the schedules based on associate availability and Walmart needs.

50. Petitioner did not establish that his reduced hours since April 2015 were caused by his filing a Charge of

Discrimination. Since he did not establish that "but for" his complaint, he would have been assigned increased hours, his claims fail as a matter of law.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations dismiss the Petition for Relief from an Unlawful Employment Practice filed against Respondent.

DONE AND ENTERED this 30th day of December, 2016, in Tallahassee, Leon County, Florida.

W. DAVID WATKINS
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of December, 2016.

ENDNOTES

[1/] Several documents were attached to Petitioner's Proposed Findings of Fact. Those documents consist of three letters, as well as various shift schedules. While these documents are accompanied by a Certificate of Authenticity of Documents from the Senior Clerk of the FCHR, they were not offered by Petitioner at the final hearing, and accordingly, are not received in evidence.

[2/] On April 29, 2015, in accordance with Walmart policies, Petitioner received another written warning for unexcused absences on April 24, 25, and 27, 2015. This warning, however, was removed from his performance record once Mr. Brooks provided medical documentation justifying his absences.

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.