STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JANCIE VINSON,

Petitioner,

vs. Case No. 16-4123

HIGBEE COMPANY, d/b/a DILLARD'S,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, this case was heard on January 17, 2017, via video teleconference in Tallahassee and Miami, Florida, before Yolonda Y. Green, a duly-designated Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner: Carla D. Franklin, Esquire
Carla D. Franklin, P.A.
204 West University Avenue, Suite 3
Gainesville, Florida 32601

For Respondent: Christopher W. Deering, Esquire
Ogletree, Deakins, Nash,
Smoak & Stewart, P.C.
420 North 20th Street, Suite 1900
Birmingham, Alabama 35203

STATEMENT OF THE ISSUE

Whether Respondent subjected Petitioner to an unlawful employment practice on the basis of her race or age; or in

retaliation to her engagement in a lawful employment activity, in violation of section 760.10, Florida Statutes.

PRELIMINARY STATEMENT

Petitioner, Jancie Vinson ("Ms. Vinson" or "Petitioner"), filed a Complaint of Employment Discrimination with the Florida Commission on Human Relations ("FCHR") on September 18, 2015. The complaint alleged that Respondent, Higbee Company, d/b/a Dillard's ("Dillard's" or "Respondent"), had discriminated against her on the basis of race and age and had retaliated against her for engaging in a protected employment activity. Following its investigation of the allegations, FCHR issued a determination of "No Reasonable Cause" regarding Petitioner's complaint on June 16, 2016.

On July 15, 2016, Petitioner filed a Petition for Relief requesting an administrative hearing regarding FCHR's "No Cause" determination pursuant to section 760.11(7).

FCHR referred the matter to DOAH on July 21, 2016, and on July 22, 2016, this matter was assigned to Administrative Law Judge E. Gary Early. On August 2, 2016, this matter was transferred to the undersigned and the undersigned issued a Notice of Hearing, setting the final hearing for September 16, 2016. However, at the request of the parties, the final hearing was continued twice, and ultimately scheduled to commence on January 17, 2017.

The final hearing was convened on January 17, 2017. At hearing, Joint Exhibits J-1 through J-4 were admitted.

Petitioner testified on her own behalf. Petitioner offered Exhibits P-1 through P-10, P-13 through P-17, P-20, and P-22 through P-27, which were admitted.

Respondent offered the testimony of Tiffany A. Lobdill, former store manager of Dillard's Store No. 234. Respondent offered Exhibits R-2 through R-10, R-14 through R-16, R-18, R-20, R-22, R-23, R-27, R-28, R-31, R-33, R-38, R-39, R-42, and R-43, which were admitted.

The proceeding was recorded by a court reporter and Respondent ordered a copy of the transcript. A one-volume Transcript of the final hearing was filed with the DOAH on February 10, 2017. The parties timely filed Proposed Recommended Orders, which have been carefully considered in the preparation of this Recommended Order.

All statutory citations are to Florida Statutes (2014), unless otherwise indicated.

FINDINGS OF FACT

1. At all times material to this matter, Ms. Vinson, an African-American female, was employed by Dillard's. Ms. Vinson was 56 years old at the time of her termination from Dillard's.

2. Dillard's is a retail department store operating in Gainesville, Florida. Ms. Vinson worked at Dillard's Store

No. 0234. At all times material to this matter, Dillard's employed more than fifteen full-time employees.

3. On June 8, 2004, Ms. Vinson was hired by Dillard's as a part-time sales associate and assigned to the Ladies Ready-to-Wear department. She worked in Ready-to-Wear until her termination on October 3, 2014. As a sales associate, Ms. Vinson was responsible for selling merchandise to customers and protecting Dillard's assets.

4. During Ms. Vinson's orientation, she received a copy of Dillard's Associate Work Rules, General Policies, and Benefits manual, which include Dillard's attendance policy and expectations for associates. Ms. Vinson signed an Associate Certification form acknowledging receipt of Dillard's policies.

5. Throughout Ms. Vinson's employment at Dillard's, she also worked full-time as a parole officer with the State of Florida Department of Corrections ("DOC").

6. When Ms. Vinson began working at Dillard's, she advised her manager that her Dillard's work availability may fluctuate based upon the work responsibilities of her full-time job as a parole officer. As a parole officer who works with sexual offenders, Ms. Vinson's schedule at her full-time job depends upon several variables, including court appearances and visits with offenders. Because some of these variables are beyond Ms. Vinson's control, the manager of Dillard's at the time of

her hire agreed to work around Ms. Vinson's work schedule at her full-time job.

7. At times, Ms. Vinson would be late for her shift at Dillard's due to the work responsibilities as a parole officer. However, three prior store managers accepted an excuse from Ms. Vinson's full-time job to excuse Ms. Vinson's tardiness. Ms. Vinson's schedule accommodations changed when Ms. Lobdill became the store manager of Dillard's store No. 0234.

8. In July 2011, Ms. Lobdill became the store manager at Dillard's store No. 0234 in Gainesville. She worked at store No. 0234 until March 2016.

9. Ms. Lobdill was tasked with improving the conditions of the store. Among other things, she conducted an evaluation of all sales associates, including compliance with Dillard's policies. Ms. Lobdill discovered that Ms. Vinson was not following the attendance and scheduling policies.

10. Under Dillard's attendance policies, all employees are required to notify their supervisor or management if unable to arrive on time prior to the scheduled reporting time. All schedules must be followed unless a change is approved and posted by management staff. Ms. Lobdill testified that an accumulation of: 1) nine exceptions for tardiness; 2) four unexcused absences; or 3) three "no-shows" within a six-month period may result in termination.

11. On February 25, 2012, Ms. Lobdill informed Ms. Vinson that the excuse notes from her full-time job would no longer be accepted and if she were late for a scheduled shift, she would receive a "tardy exception." Ms. Vinson informed Ms. Lobdill and Mr. Heil, the district manager and Ms. Lobdill's supervisor, in writing that she considered the change in the practices involving her employment discriminatory. This would be one of many complaints of discrimination. The most relevant complaints will be discussed further below.

12. After Ms. Vinson spoke with corporate management, Dillard's accepted excuse notes from Ms. Vinson. This practice changed again on September 28, 2013, when Ms. Lobdill informed Ms. Vinson that Dillard's would no longer accept the excuse notes.

13. From October 2011 to August 2014, Ms. Vinson complained of what she considered were discriminatory acts including, reduction in hours, being refused the opportunity to "swap" shifts, and discontinuance of accepting excused tardiness. Ms. Vinson also informed Mr. Heil about alleged discrimination by copying him on the emails.

14. On July 2, 2014, Ms. Vinson received documentation of disciplinary action for working off-schedule on June 24, 2014. She was advised that schedules must be followed especially on

"key peak" days, including Saturdays. Ms. Lobdill testified that Saturdays and Sundays are considered "key peak" days.

15. The last week of August until September 8, 2014, Ms. Vinson was out sick. On September 9, 2014, when Ms. Vinson returned to work to obtain her schedule, she discovered that she had been removed as an employee from the Dillard's system. On that same date, she contacted the Dillard's legal department and expressed her concerns that she had been removed from the system and was not treated in the same manner as other employees. On September 23, 2014, Ms. Vinson complained in writing to Ray Brewer, her assistant manager, that she would be filing a complaint alleging discrimination on the basis of race, age, and retaliation alleging that removing her from the Dillard's system was a discriminatory act. Ms. Vinson's removal from the system was not considered termination from employment but rather, it was deemed a technical error.

16. The second or third week of September 2014, Ms. Lobdill directed employees to complete a form indicating weekly availability. Ms. Lobdill was aware that Ms. Vinson's job responsibilities of her full-time job impeded her ability to provide a weekly schedule of availability. On September 24, 2014, Ms. Vinson met with Ms. Lobdill and Mr. Brewer and submitted a completed availability form. The availability form indicated availability as indicated in the chart below.

Day	Availability Request	Reason
Sunday		Work for State
Monday		Work for State Depends due subpoena's
Tuesday	12-9	depends usually 12-9 p
Wednesday	9:50-5 pm	9:50-6 pm varies depending on state
Thursday	12-9 pm	varies depending on state
Friday	9:50-5 pm	varies depends on state jo (sic)
Saturday	Usually 9:50-6 pm	depends on state job varies

Ms. Vinson also included additional writing on the available form as follows: "To the best of my ability I cannot predict day to day this based upon being sick and out for subpoena for state job is not predictable. It is hard for me to write without listing the dates in the future."

17. Following the meeting, Ms. Vinson emailed a proposed monthly schedule to Ms. Lobdill requesting each Friday and two of four Saturdays off for October 2014. Ms. Vinson received her October schedule on October 2, 2014, which scheduled her to work two Fridays and three Saturdays in October.

18. On October 3, 2014, Ms. Vinson was terminated. There is a dispute regarding the basis for the separation. The reasons Ms. Lobdill provided on Ms. Vinson's separation form indicated she voluntarily resigned "to accept other work--better schedule, pay." Ms. Lobdill testified that Ms. Vinson was terminated for failing to provide a concrete work schedule.

19. On the other hand, Ms. Vinson testified that she did not resign and instead was terminated based on discriminatory and retaliatory reasons.

20. Ms. Vinson alleges Dillard's unlawfully terminated her on the basis of race, age, and in retaliation for engaging in a protected employment activity.

21. Pursuant to Dillard's policy manual, an employee who has been harassed, including discrimination on the basis of race, should report the harassment to: 1) a member of executive management at the employee's work location; 2) the district manager; or 3) office of general counsel. Each complaint shall be investigated and a determination of the facts will be made on a case-by-case basis and appropriate action will be taken.

22. Ms. Vinson properly reported her complaints according to Dillard's policy.

23. Other than the attendance issues, Ms. Vinson was an otherwise good sales associate. She received wage increases based on her sales performance. Dillard's sales performance Dashboard report shows that she was ranked one out of eleven for sales in her department for the period September 1, 2013, to August 29, 2015, and 15 out of 193 in the district. Ms. Vinson received recognition for her sales performance and good customer service. In September 2013, she received a $2.00 per hour wage increase to $15.30 due to exceeding her sales per hour goals.

24. Ms. Vinson offered evidence regarding Troy Zednek to prove a similarly-situated employee outside her protected class was treated more favorably than her.

25. Mr. Zednek is a white male who was approximately 23 years of age during the relevant time period. Mr. Zednek was terminated for excessive absenteeism on October 11, 2014, approximately eight days after Ms. Vinson.

CONCLUSIONS OF LAW

26. Pursuant to sections 120.569 and 120.57(1), Florida Statutes (2016), DOAH has jurisdiction over the subject matter and parties to this proceeding.

27. Section 760.10(1)(a), Florida Statutes, makes it unlawful for an employer to take adverse action against an individual because of that employee's race or sex.

28. The civil rights act defines "employer" as "any person employing 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person." § 760.02(7), Fla. Stat.

29. The parties stipulated that Dillard's meets the definition of employer.

30. Petitioner filed a complaint alleging Respondent discriminated against her on the basis of her race, age, and retaliated against her for engaging in a protected employment activity.

31. Section 760.11(1) provides, in pertinent part, that "[a]ny person aggrieved by a violation of ss. 760.01-760.10 may file a complaint with the [FCHR] within 365 days of the alleged violation." Petitioner timely filed her complaint.

32. Section 760.11(7) provides that upon a determination by the FCHR that there is no reasonable cause to believe that a violation of the Florida Civil Rights Act of 1992 has occurred, "[t]he aggrieved person may request an administrative hearing under ss. 120.569 and 120.57, but any such request must be made within 35 days of the date of determination of reasonable cause." Following the FCHR determination of no cause,

Petitioner timely filed her Petition for Relief from Unlawful Employment Practices and Request for Administrative Hearing requesting this hearing.

33. Chapter 760, Part I, is patterned after Title VII of the Civil Rights Act of 1964, as amended. When "a Florida statute is modeled after a federal law on the same subject, the Florida statute will take on the same constructions as placed on its federal prototype." Brand v. Fla. Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994); see also Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17 (Fla. 3d DCA 2009); Fla. State Univ. v. Sondel, 685 So. 2d 923 (Fla. 1st DCA 1996); Fla. Dep't of Cmty. Aff. v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991).

34. Petitioner has the burden of proving by a preponderance of the evidence that Respondent committed an unlawful employment practice. See St. Louis v. Fla. Int'l Univ., 60 So. 3d 455 (Fla. 3d DCA 2011); Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981).

Discrimination-Race

35. Employees may prove discrimination by direct, statistical, or circumstantial evidence. Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d at 22.

36. Direct evidence is evidence that, if believed, would prove the existence of discriminatory intent without resort to inference or presumption. Denney v. City of Albany, 247 F.3d

1172, 1182 (11th Cir. 2001); Holifield v. Reno, 115 F.3d 1555, 1561 (11th Cir. 1997). It is well established that "'only the most blatant remarks, whose intent could be nothing other than to discriminate . . .' will constitute direct evidence of discrimination." Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d 1354, 1358-59 (11th Cir. 1999)(citations omitted).

37. Petitioner did not present any direct evidence of racial or age-related discriminatory bias.

38. Petitioner presented no statistical evidence of discrimination by Respondent in its personnel decisions affecting Petitioner.

39. In the absence of any direct or statistical evidence of discriminatory intent, Petitioner must rely on circumstantial evidence. In McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973), and as refined in Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), and St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993), the United States Supreme Court established the procedure for determining whether employment discrimination has occurred when employees rely upon circumstantial evidence of discriminatory intent.

40. Under McDonnell Douglas, Petitioner has the initial burden of establishing a prima facie case of unlawful discrimination.

41. To establish a prima facie case of racial discrimination, Petitioner must demonstrate by a preponderance of the evidence that: 1) she is a member of a protected class; 2) she was qualified for the position; 3) she was subjected to an adverse employment action; and 4) her employer treated similarly-situated employees outside of her protected class more favorably than she was treated. Burke-Fowler v. Orange Cnty., 447 F.3d 1319, 1323 (11th Cir. 2006).

42. The first, second and third elements of the prima facie case have been met by Petitioner. Ms. Vinson is an African-American female, she was qualified for the position, and she was terminated from her position at Dillard's.

43. Petitioner did not, however, prove the fourth element, that other similarly-situated employees were treated more favorably than her.

44. An adequate comparator for Petitioner must be "'similarly-situated' in all relevant respects." Valenzuela v. GlobeGround N. Am., 18 So. 3d at 23 (internal citations omitted); Johnson v. Great Expressions Dental Ctrs. of Fla., 132 So. 3d 1174 (Fla. 3d DCA 2014). The Johnson court explained the exacting nature of the similarly-situated comparator, as follows:

> Similarly situated employees must have reported to the same supervisor as the plaintiff, must have been subject to the

> same standards governing performance evaluation and discipline, and must have engaged in conduct similar to plaintiff's, without such differentiating conduct that would distinguish their conduct of the appropriate discipline for it.

Id. at 1176.

45. Petitioner has failed to prove by a preponderance of the evidence that Respondent treated similarly-situated employees outside her protected class more favorably than her.

46. Petitioner's only evidence offered of a similarly-situated employee comparator was related to Troy Zednek, a white male, who requested each Saturday off as reflected on his availability form. This argument is rejected.

47. The evidence in this case establishes that Petitioner was terminated for failure to provide concrete availability. Mr. Zednek also provided inadequate availability when he requested Saturdays off. He was a no-show for a Saturday shift and was terminated for excessive absenteeism. The issue regarding attendance problems was the reason for both Mr. Zednek's and Petitioner's termination. Therefore, Petitioner failed to prove a prima facie case of unlawful discrimination based on her race under the McDonnell Douglas standard.

Discrimination-Age

48. To establish a prima facie case of age discrimination, the undersigned recognizes that Florida judicial case law on age discrimination clearly establishes that:

> 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. (emphasis added).

City of Hollywood v. Hogan, 986 So. 2d 634, 641 (Fla. 4th DCA 2008). However, the FCHR has determined, citing its own orders as authority, that:

> 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. 08-013 (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.

Johnny L. Torrence v. Hendrick Honda Daytona, Case No. 14-5506 (DOAH Feb. 26, 2015; FCHR May 21, 2015).

49. If Petitioner is able to prove her prima facie case by a preponderance of the evidence, the burden shifts to Respondent

to articulate a legitimate, non-discriminatory reason for its employment decision. Tex. Dep't of Cmty. Aff. v. Burdine, 450 U.S. at 255; Dep't of Corr. v. Chandler, 582 So. 2d 1183 (Fla. 1st DCA 1991). An employer has the burden of production, not persuasion, to demonstrate to the finder of fact that the decision was non-discriminatory. Dep't of Corr. v. Chandler, supra. This burden of production is "exceedingly light." Holifield v. Reno, 115 F.3d at 1564; Turnes v. Amsouth Bank, N.A., 36 F.3d 1057, 1061 (11th Cir. 1994).

50. If the employer produces evidence that the decision was non-discriminatory, then the complainant must establish that the proffered reason was not the true reason but merely a pretext for discrimination. St. Mary's Honor Ctr. v. Hicks, 509 U.S. at 516-518. In order to satisfy this final step of the process, Petitioner must "show[] 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." Dep't of Corr. v. Chandler, 582 So. 2d at 1186 (citing Tex. Dep't of Cmty. Aff. v. Burdine, 450 U.S. at 252-256). "[A] reason cannot be a pretext for discrimination 'unless it is shown both that the reason was false, and that discrimination was the real reason.'" Fla. State Univ. v. Sondel, 685 So. 2d at 927, citing St. Mary's Honor Ctr. v. Hicks, 509 U.S. at 515; see also Jiminez v. Mary

Washington Coll., 57 F.3d 369, 378 (4th Cir. 1995). The demonstration of pretext "merges with the plaintiff's ultimate burden of showing that the defendant intentionally discriminated against the plaintiff." Holifield v. Reno, 115 F.3d at 1565.

51. In a proceeding under the Civil Rights Act, "[w]e are not in the business of adjudging whether employment decisions are prudent or fair. Instead, our sole concern is whether unlawful discriminatory animus motivates a challenged employment decision." Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d at 1361. As established by the Eleventh Circuit Court of Appeals, "[t]he employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason." Nix v. WLCY Radio/Rahall Commc'ns, 34 738 F.2d 1181, 1187 (11th Cir. 1984). Moreover, "[t]he employer's stated legitimate reason . . . does not have to be a reason that the judge or jurors would act on or approve." Dep't of Corr. v. Chandler, 582 So. 2d at 1187.

52. In determining whether Respondent's actions were pretextual, the undersigned "must evaluate whether the plaintiff has demonstrated 'such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence.'"

Combs v. Plantation Patterns, Meadowcraft, Inc., 106 F.3d 1519, 1538 (11th Cir. 1997).

53. Petitioner was 56 years old at the time of her termination, and as such, was a member of a protected class.

54. As established above, Petitioner met the qualifications for the position of sales associate and was terminated from employment, which is an adverse employment action.

55. However, Petitioner has failed to establish a prima facie case that persons of a different age were subject to employment actions that were different from those applied to her.

56. Similar to the analysis of the race-based discrimination referenced above, Mr. Zednek was the only employee offered as a younger employee comparator. As stated in paragraphs 46 and 47, the employment actions applied to Mr. Zednek were not materially different than those applied to Petitioner.

57. Petitioner did not meet her burden by a preponderance of the evidence that she was terminated on the basis of her age.

Retaliation

58. A claim of retaliation involves section 760.10(7), which provides that: "It is an unlawful employment practice for an employer, . . . 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."

59. "Section 760.10(7), Florida Statutes, is virtually identical to its Federal Title VII counterpart, 42 U.S.C. § 2000e-3(a). The FCRA [Florida Civil Rights Act] is patterned after Title VII; federal case law on Title VII applies to FCRA claims." Hinton v. Supervision Int'l, Inc., 942 So. 2d 986, 989 (Fla. 5th DCA 2006)(citing Guess v. City of Miramar, 889 So. 2d 840, 846, n.2 (Fla. 4th DCA 2005)).

60. In construing 42 U.S.C. § 2000e-3(a), the Eleventh Circuit has held that: [t]he 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. (citations omitted). Muhammed v. Audio Visual Servs. Group, 380 Fed. Appx. 864, 872 (11th Cir. 2010). The division of section 760.10(7) into the "opposition clause" and the "participation clause" is recognized by Florida state

courts. See Blizzard v. Appliance Direct, Inc., 16 So. 3d 922, at 925-926 (Fla. 5th DCA 2009).

61. In explaining the difference between the two clauses, the Second District Court of Appeal has held that:

> FCRA's "opposition clause [protects] employees who have opposed unlawful [employment practices]. . . ." However, opposition claims usually involve "activities such as 'making complaints to management, writing critical letters to customers, protesting against discrimination by industry or by society in general, and expressing support of coworkers who have filed formal charges. . . .'" Cases involving retaliatory acts committed after the employee has filed a charge with the relevant administrative agency usually arise under the participation clause.

Carter v. Health Mgmt. Assoc., 989 So. 2d 1258, 1263 (Fla. 2d DCA 2008).

62. Petitioner did not introduce any direct or statistical evidence that proves Respondent retaliated against her as a result of Petitioner's opposition to acts of discrimination. Absent any direct or statistical evidence, Petitioner must prove her allegations of retaliation by circumstantial evidence. Circumstantial evidence of retaliation is subject to the burden-shifting analysis established in McDonnell Douglas.

63. To establish a prima facie case of retaliation under the opposition clause under McDonnell Douglas, Petitioner must demonstrate by a preponderance of the evidence "(1) that [she]

engaged in statutorily protected expression; (2) that [she] suffered an adverse employment action; and (3) there is some causal relationship between the two events." (citations omitted). Holifield v. Reno, 115 F.3d at 1566; see also Muhammed v. Audio Visual Servs. Group, 380 Fed. Appx. at 872; Tipton v. Canadian Imperial Bank, 872 F.2d 1491 (11th Cir. 1989).

a. Statutorily-Protected Activity

64. Not every act an employee takes in opposition to discrimination is a protected activity. Laincy v. Chatham Cnty. Bd. of Assessors, 780, 782 (11th Cir. 2013), 520 Fed. App'x. at 782 (citing Butler v. Ala. Dep't of Transp., 536 F.3d 1209, 1214 (11th Cir. 2008)). The employee must show: "(1) that she had a subjective good-faith belief 'that [her] employer was engaged in unlawful employment practices'; and (2) that her belief, even if mistaken, was objectively reasonable in light of the record." Id. (emphasis added).

65. The standard requires an intensely fact-specific analysis. In Laincy, the court found that plaintiff did not engage in a protected activity because his belief that his coworkers' allegedly harassing comments constituted an unlawful employment practice was objectively unreasonable, where it was limited to three innocuous comments asking him if he was dating someone. Laincy, 520 Fed. App'x. at 783. See also MacKenzie v.

Denver, 414 F.3d 1266, 1281 (10th Cir. 2005)(plaintiff's claim of age harassment was both subjectively and objectively unreasonable where she likewise lobbed age-related comments at her supervisor, thus participating in a form of "mutual bantering"); Atkinson v. Stavro's Pizza, Inc., Case No. 13-2880 (Fla. DOAH Jan. 29, 2015) (petitioner's complaint of sexual harassment based on a single "weird conversation" between petitioner and another employee, in which the other employee stated he "knew everything about her, including where she lived, and that her favorite color was blue," was objectively unreasonable).

66. Unlike the examples referenced above, Petitioner had submitted written complaints of discrimination from 2011 through 2014. Petitioner credibly testified that she was concerned that several personnel actions related to her schedule, pay, and removal from the employee system were due to racial discrimination. She reported her complaints to management and to the legal team. Thus, Petitioner established a subjective good-faith belief for her reports of racial and age discrimination.

67. Ms. Vinson's beliefs were reasonable as well. The district manager, Mr. Heil, met with Ms. Vinson and discussed her complaints of discriminatory acts. Thus, Petitioner has

proven that she had an objectively reasonable belief for her claim.

68. Therefore, Petitioner proved by a preponderance of the evidence that she engaged in a statutorily-protected activity when she reported complaints of racial and age discrimination to Dillard's management.

b. Adverse Employment Action

69. Petitioner claims that Respondent engaged in a series of retaliatory actions against her after she repeatedly reported acts of discriminatory conduct to Dillard's management. The alleged retaliatory acts include: reduction of hours; failure to give pay raise; transfer to a different department; discontinuance of accepting excuses from her primary job; and termination from employment on October 3, 2014.

70. Ms. Vinson acknowledged at hearing that the issues involving her reduction of hours, pay raise and transfer to a different department were resolved by Dillard's management. Thus, there is no evidence to establish adverse employment action related to those claims.

71. Petitioner's claim that discontinuance of accepting excuses was an adverse action is unfounded. Respondent complied with its attendance policy when it refused to accept the excuses. Ms. Lobdill was not required to follow the practice of accepting excuses that was permitted by previous managers. In

addition, Petitioner acknowledged that she was able to comply with the attendance schedule without work excuses.

72. There is no question that Petitioner suffered an adverse employment action when she was terminated on October 3, 2014.

73. Thus, Petitioner satisfied her burden to establish that she met the second element of the prima facie case for retaliation.

c. Causal Connection

74. To prove the third element, Petitioner must demonstrate a causal connection between the protected activity and the adverse employment decision. This causal link element is construed broadly, and may be established by a demonstration that the employer was aware of the protected conduct and that the protected activity and the adverse action were not "wholly unrelated." Farley v. Nationwide Mut. Ins., 197 F.3d 1322, 1337 (11th Circ. 1999)(internal citations omitted); Olmstead v. Taco Bell Corp., 141 F.3d 1457, 1460 (11th Cir. 1998). Moreover, for purposes of demonstrating a prima facie case, close temporal proximity may be sufficient to show that the protected activity and adverse action were not wholly unrelated. Gupta v. Fla. Bd. of Regents, 212 F.3d 571, 590 (11th Cir. 2000).

75. Petitioner must finally prove a causal connection between the protected activity and the adverse employment action.

76. Petitioner argues in her Proposed Recommended Order that the proximity in time between her protected activity and her termination demonstrates a causal connection. On the other hand, Respondent argued that Petitioner did not file her claim until nearly one year after her termination.

77. Respondent's argument is rejected in that Petitioner must only demonstrate a connection between the protected activity and adverse employment action under the opposition clause. Petitioner filed her most recent claim of discrimination--prior to filing her formal complaint--on September 23, 2014. Approximately, ten days later she was terminated. The evidence supports a finding that Petitioner proved that her termination was temporally proximate her complaints of discrimination. The undersigned finds Petitioner's termination was causally related to her complaints of discrimination.

78. Thus, Petitioner established a prima facie case of retaliation.

Legitimate Non-Discriminatory Reason

79. The burden now shifts to Respondent to proffer a legitimate reason for the adverse employment action. Assuming

Respondent does proffer a legitimate reason for the adverse employment action, the burden then shifts back to Petitioner to prove by a preponderance of the evidence that the "legitimate reason" is merely a pretext for the prohibited, retaliatory conduct. Russell v. KSL Hotel Corp., 887 So. 2d 372 (Fla. 3d DCA 2004) (citing Sierminski v. Transouth Fin. Corp., 216 F.3d 945, 950 (11th Cir. 2000)).

80. Respondent's proffered legitimate non-discriminatory reason for terminating Petitioner was Petitioner's failure to provide a concrete work availability schedule. Respondent offered credible testimony regarding the importance of the availability form to schedule employees for work shifts to ensure proper coverage for sales and asset protection. A preponderance of the evidence supported a finding that Petitioner did not comply with the request for concrete availability, despite repeated reminders to do so and an in-person meeting with management on the subject.

81. Thus, Respondent met its burden to produce evidence of a legitimate non-discriminatory reason for Petitioner's termination.

Pre-text for Discrimination

82. To meet the requirements of the pretext step, Petitioner must produce sufficient evidence for a reasonable fact finder to conclude that the employer's legitimate,

nondiscriminatory reason was "a pretext for discrimination." Laincy, 520 F. App'x. at 781 (citing Vessels v. Atlanta Indep. Sch. Sys., 408 F.3d 763, 771 (11th Cir. 2005)). "Provided that the proffered reason is one that might motivate a reasonable employer, an employee must meet that reason head on and rebut it, and the employee cannot succeed by simply quarreling with the wisdom of that reason." Id. Rather, the plaintiff must show "such weaknesses, implausibilities, inconsistencies, incoherencies or contradictions in the employer's proffered legitimate reasons . . . that a reasonable factfinder could find them unworthy of credence." Id.

83. Petitioner introduced testimony that Ms. Lobdill was aware that a weekly schedule would be a problem for Ms. Vinson when she initiated the policy. However, Ms. Vinson was aware of the importance of providing a concrete weekly schedule, including availability on "key peak" days, as she was warned in her documentation of disciplinary action that availability on "key peak" days is critical to adequately care for customers. Thus, Ms. Vinson did not establish her burden to prove that Dillard's nondiscriminatory reason was a pretext for discrimination.

84. For the reasons set forth herein, Petitioner did not meet her burden to establish discrimination by retaliation in her termination. Respondent put forth persuasive evidence that

Petitioner was terminated from employment as a result of her inability to provide a concrete availability form, and not in retaliation for her participation in a protected activity. Respondent's legitimate nondiscriminatory reason was not refuted by Petitioner's efforts to demonstrate pretext.

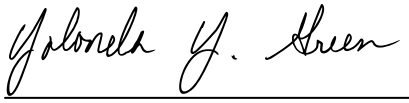
Conclusion

85. Based on the foregoing, Petitioner did not prove her Charge of Discrimination. The undersigned therefore concludes that Respondent did not violate the Florida Civil Rights Act of 1992, and is not liable to Petitioner for discrimination in employment based on race, age, 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 Petitioner's Discrimination Complaint and Petition for Relief consistent with the Findings of Fact and Conclusions of Law of this Recommended Order.

DONE AND ENTERED this 20th day of March, 2017, in Tallahassee, Leon County, Florida.



YOLONDA Y. GREEN
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 20th day of March, 2017.

COPIES FURNISHED:

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

Carol A. Koros
Dillard's Inc.
1600 Cantrell Road
Post Office Box 486
Little Rock, Arkansas 72203

Christopher W. Deering, Esquire
Ogletree, Deakins, Nash,
Smoak & Stewart, P.C.
420 North 20th Street, Suite 1900
Birmingham, Alabama 35203
(eServed)

Jancie Vinson
5350 Southwest 62nd Avenue
Gainesville, Florida 32608

Carla D. Franklin, Esquire
Carla D. Franklin, P.A.
204 West University Avenue, Suite 3
Gainesville, Florida 32601
(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.