STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LAWRENCE N. BROWN, III,

Petitioner,

vs. Case No. 16-5002

KMART-SEARS HOLDING CORP.,

Respondent.
_____/

RECOMMENDED ORDER

A hearing was conducted in this case pursuant to sections 120.569 and 120.57(1), Florida Statutes,[1/] before Cathy M. Sellers, an Administrative Law Judge ("ALJ") of the Division of Administrative Hearings ("DOAH"), by video teleconference on February 1 and 10, 2017, at sites in Lauderdale Lakes and Tallahassee, Florida.

APPEARANCES

For Petitioner: Lawrence Brown, III, pro se
6440 North West 110th Avenue
Pompano Beach, Florida 33076

For Respondent: Thomas G. Reynolds, Esquire[2/]
Seyfarth Shaw LLP
Suite 2500
1075 Peachtree Street, Northeast
Atlanta, Georgia 30309

STATEMENT OF THE ISSUE

The issue in this case is whether Respondent engaged in an unlawfully discriminatory employment practice against Petitioner

on the basis of race and religion, and retaliated against him, in violation of the Florida Civil Rights Act of 1992 ("FCRA").

PRELIMINARY STATEMENT

On or about March 10, 2016, Petitioner, Lawrence N. Brown, III, filed an Employment Charge of Discrimination with the Florida Commission on Human Relations ("FCHR"), alleging that Respondent, Kmart Corporation,[3/] through its employee agents, engaged in unlawful employment practices in violation of section 760.10, Florida Statutes. Specifically, Petitioner alleged that Respondent discriminated against him with respect to terms, conditions, and privileges of employment on the basis of his race and religion in violation of section 760.10(1)(a) and that Respondent retaliated against him because he opposed, made a charge of, and participated in an investigation regarding Respondent's alleged discriminatory actions against him in violation of section 760.10(7).

On or about July 18, 2016, FCHR issued a "No Reasonable Cause Determination." Petitioner timely filed a Petition for Relief, and on August 30, 2016, FCHR referred the matter to DOAH for assignment of an ALJ to conduct a de novo hearing pursuant to sections 120.569 and 120.57(1).

The final hearing initially was set for November 8, 2016, but was continued and rescheduled for February 1, 2017. The final hearing commenced on February 1, 2017, but did not conclude

that day, so was rescheduled for, and was completed on, February 10, 2017.

At the final hearing, Petitioner testified on his own behalf. Petitioner's Exhibits A, A-1, A-2, B, D, E, and G were admitted into evidence without objection, and Petitioner's Exhibits C and F were admitted into evidence over objection. Respondent presented the testimony of David Leach. Respondent's Exhibits 4, 7, 9, 11, 13 through 18, 21, 30, 31, and 34 through 36 were admitted into evidence without objection, and Respondent's Exhibits 8 and 20 were admitted into evidence over objection. Joint Exhibit 2 also was admitted into evidence.

The two-volume Transcript was filed with DOAH on March 20, 2017, but was determined to be incomplete. The complete version of the Transcript was filed on March 31, 2017. Pursuant to Respondent's motion, the parties were given until April 18, 2017, to file their proposed recommended orders. Respondent timely filed its Proposed Recommended Order on April 14, 2017, and Petitioner timely filed his Proposed Recommended Order on April 17, 2017. Both proposed recommended orders were duly considered in preparing this Recommended Order.

FINDINGS OF FACT

I. The Parties

1. Petitioner, Lawrence N. Brown, III, is an African-American male and is of the Christian faith.

2. Petitioner has been employed with Respondent since April 14, 2014, at its store located at 3800 Oakwood Boulevard, Hollywood, Florida (hereafter, the "Store"). As of the final hearing, Petitioner continued to be employed by Respondent at the Store.

3. Respondent is a corporation doing business in Florida. Respondent owns and operates the Store at which Respondent was employed at the time of the alleged discriminatory and retaliatory actions.

II. Employment Charge of Discrimination and Petition for Relief

4. Petitioner filed an Employment Charge of Discrimination ("Discrimination Charge") with FCHR on or about March 10, 2016.[4/] The pages attached to the Discrimination Charge form (which apparently was filled out in typewritten form by FCHR staff) were prepared by Petitioner.

5. On or about July 18, 2016, Respondent issued a Determination: No Reasonable Cause, determining that Petitioner had not shown reasonable cause to believe that Respondent had committed unlawful employment practices against him.

6. On or about August 16, 2016, Petitioner timely filed a Petition for Relief requesting a hearing to determine whether Respondent committed unlawful employment practices against him.

7. The Petition for Relief alleges that Respondent engaged in unlawful discrimination against him on the basis of both his race and religion, and also alleges that Respondent engaged in unlawful retaliation. These charges, as specifically set forth in the Petition for Relief, are the subject of this de novo proceeding.[5/]

8. In the Petition for Relief, Petitioner claims that Respondent discriminated against him on the basis of race by failing to promote him into supervisory or managerial positions for which he claims he was qualified; by giving him lower scores on his employment evaluations than were given to a white employee working in the same position (part-time hardlines merchandiser); by not paying him as much as they paid that same white employee; and by retaining that same white employee as a part-time hardlines merchandiser in the Toy Department, while moving Petitioner to another position as cashier.

9. Petitioner also claims that Respondent discriminated against him on the basis of his religion by scheduling him to work on Christmas Day 2015, while giving other employees that day off.

10. Additionally, Petitioner claims that Respondent retaliated against him for complaining to Respondent's corporate legal department about having to work on Christmas Day 2015, by removing him as a hardline merchandiser in the Toy Department and

reassigning him to a cashier position, then subsequently effectively "terminating" (in his words) his employment.

11. Petitioner seeks an award of $5,000,000 in damages in this proceeding.

III. Background Events

12. As noted above, Petitioner was hired by Respondent on or about April 14, 2014. Petitioner initially was hired in a part-time position as a part-time overnight hardlines replenishment associate. In this position, Petitioner's work scheduling availability was between 10:30 p.m. and 6:00 a.m.

13. When Petitioner was hired, Alberto Rodriquez was the Store manager.

14. In his position as a part-time employee with Respondent, Petitioner was not guaranteed any specific number of weeks or hours of employment in any given calendar year, nor was he guaranteed that he would attain full-time employee status. The number of work hours Petitioner was assigned was dependent on the company's business needs and on Petitioner's ability to meet the applicable job performance standards. Petitioner acknowledged these and the other conditions of his employment as evidenced by his signature on the Pre-training Acknowledgment Summary dated April 14, 2014.

15. As a result of the elimination of the overnight replenishment associate position, on or about October 26, 2014,

Petitioner was transferred to another position as a part-time daytime hardlines merchandiser. In this position, his work scheduling availability was between 6:00 a.m. and 1:00 p.m.

16. As a hardlines merchandiser, Petitioner was responsible for stocking store shelves with merchandise, straightening merchandise on store shelves, putting returned merchandise on shelves, and generally keeping the hardlines departments neat and the shelves fully stocked.

17. The Toy Department at the Store was one of several departments that were categorized as "hardlines" departments.

18. In his duties as a hardlines merchandiser, Petitioner was not assigned to any specific hardlines department, and his responsibilities entailed working in any hardlines department as needed. However, as a practical matter, due to the work demand, Petitioner worked mostly, if not exclusively, in the Toy Department until he was reassigned to the cashier position after Christmas 2015.

19. David Leach became the Store manager in April 2015.

20. At some point before Christmas Day 2015, the work schedule for the week of December 20 through 26, 2015, was posted. Petitioner was scheduled to work on Christmas Day, December 25, 2015. Petitioner did not volunteer, and had not otherwise requested, to work on Christmas Day 2015.

21. The Store was closed on Christmas Day 2015, which was a paid holiday for Respondent's employees.

22. On or about December 23, 2015, Petitioner contacted Respondent's corporate legal department, requesting to be removed from the work schedule for Christmas Day 2015. Pursuant to a directive from Respondent's corporate office, Petitioner was removed from the work schedule for that day.

23. Petitioner was not required to work on Christmas Day 2015, and he did not work that day. Petitioner was paid for the Christmas Day holiday.

24. Although the Store was closed on Christmas Day 2015, some Store employees were scheduled to work, and did work, that day on a volunteer basis, for which they were paid.

25. On December 28, 2015, Leach presented Petitioner with a Request for Religious Accommodation form to sign. Petitioner signed the form. The form was marked as showing that Respondent "granted" the religious accommodation.

26. Also on December 28, 2015, Leach informed Petitioner that he had eliminated the part-time daytime hardlines merchandiser position. He offered Petitioner other part-time positions, either as a cashier or in making pizza at the Little Caesar's pizza station in the Store. Leach did not offer any other positions to Petitioner at that time.

27. Petitioner was reassigned to the cashier position, but informed Leach that he was unable to stand in a single place for long periods of time due to injuries he previously had sustained while working on the overnight shift.

28. Petitioner was reassigned to the cashier position, effective January 3, 2016.[6/]

29. Petitioner's hourly wage did not change when his position changed to cashier. He continued to make the same hourly wage that he had made as a daytime hardlines merchandiser.

30. At some point on or after December 28, 2015, Petitioner signed a Personnel Interview Record form that reflected his revised work hours associated with his position change to cashier. The form stated his availability to work between 8:00 a.m. and 5:00 p.m., Monday through Saturday.

31. The evidence is unclear as to whether Petitioner did (or did not) call in to inform the appropriate Store personnel that he would not be working on Tuesday, December 29, or on Thursday, December 31, 2015. Regardless, the persuasive evidence shows that Petitioner worked on Monday, December 28, 2015; did not work on Tuesday, December 29, or Thursday, December 31, 2015; and worked on Saturday, January 2, 2016.

32. The work schedule for the week of January 3 through 10, 2016, was computer-generated some time during the week of December 27, 2015, through January 3, 2016. If an employee does

not report to work when scheduled and does not call in to be excused from work on those days, this situation is termed a "no call-no show," and the employee will not be scheduled to work the following week. This is to ensure that there are cashiers available as needed to work on upcoming dates.

33. Regardless of whether Petitioner did or did not call in to inform Respondent he would not be working on Tuesday, December 29, or Thursday, December 31, 2015, the posted work schedule for the week of January 3 through 10, 2016, showed Petitioner as not being scheduled to work that week.

34. However, the evidence shows that Petitioner did, in fact, work a total of 15.90 hours the week of January 3 through 10, 2016.

35. The work schedule posted as of Saturday, January 9, 2016, also showed Petitioner as not being scheduled to work the week of January 10 through 16, 2016.

36. However, the evidence shows that Petitioner worked a total of 15.41 hours the week of January 10 through 16, 2016.

37. At some point between January 13 and January 26, 2016, Petitioner was moved from the cashier position to the Store's date code specialist position.

38. The date code specialist position also is a part-time position, for which Petitioner is paid the same hourly wage as he was paid as a daytime hardlines merchandiser.

39. As of the final hearing, Petitioner continued to be employed by Respondent, working as the Store's date code specialist.

IV. Race Discrimination Claims

40. As previously noted, Petitioner began working for Respondent at the Store on April 14, 2014. His initial employment position was as a part-time overnight replenishment associate. In October 2014, he moved to a part-time daytime hardlines merchandiser position. In both positions, he was responsible for stocking and restocking merchandise in all hardlines departments, so was not assigned exclusively to the Store's Toy Department. However, as noted above, due to work demand in the Toy Department, Petitioner did most, if not all, of his work in that department until he was moved to the cashier position in late December 2015.[7/]

41. Petitioner contends that starting in mid-2014,[8/] he periodically requested to be promoted to "Toy Lead" or to another supervisory or managerial position. He testified that he had undertaken many activities and implemented various systems to improve the efficiency and productivity of the Toy Department and other departments at the store, and had documented these activities and transmitted that information to the Respondent for inclusion in his personnel file. He testified that rather than promoting him to a supervisory position in the Toy Department,

Respondent instead hired a non-African-American person to fill that position.[9/] Petitioner additionally testified that he periodically would request to be transferred or promoted to other supervisory positions, but that Respondent did not grant these requests. He contends that since he was qualified for these positions, the only basis for Respondent's decision to fill those positions with other employees was discrimination against him on the basis of his race.

42. In response, Leach testified that there was no formal "Toy Lead" position at the Store; rather, the person supervising the Toy Department is an assistant store manager, a position that entails supervising other hardlines departments besides the Toy Department. Further, Leach testified that in his view, Petitioner was not qualified to occupy certain supervisory positions because of his lack of experience in those areas and his relatively short period of employment with Respondent. Leach also testified that Petitioner had not ever formally applied for a promotion through Respondent's online application process.

43. Petitioner further asserts that Respondent discriminated against him on the basis of race because he was not paid the same amount as Corey Harper, a white male hardlines merchandiser who also often worked part-time in the Toy Department on the afternoon or evening shift, even though he

worked harder and received higher evaluation scores than did Harper.[10/]

44. However, Leach credibly testified that Respondent does not currently base its pay rate for part-time employees on job performance evaluation scores, but instead pays them a set hourly pay rate. According to Leach, Respondent has not given an hourly pay rate raise to part-time employees since 2009, so that any pay differential depended on whether employees were hired before or after 2009. Leach credibly testified that Harper has been employed by Respondent since 2004, so had received hourly pay rate raises between 2004 to November 2008; this would result in his hourly pay rate being higher than Petitioner's, even though both are part-time employees.

45. Petitioner testified that when he was moved from the daytime hardlines merchandiser position to the cashier position after Christmas 2015, he made it clear that he wanted to remain in the Toy Department; however, Respondent transferred him out of that department while allowing Harper to remain in a hardlines merchandiser position, which entailed work in the Toy Department. Petitioner also made clear that he wished to return to the hardlines merchandiser position in the Toy Department when such a position became available; however, at some point, Leach reassigned Carol Yaw, who was white, from her previous office manager job to a hardlines merchandiser position. Petitioner

asserts that Respondent's actions in allowing Harper to remain as a part-time hardline merchandiser and reassigning Yaw to a hardlines merchandiser position constituted discrimination against him on the basis of his race.

46. However, Leach credibly testified that the part-time daytime hardlines merchandiser position that Petitioner had occupied was eliminated because of the lack of work in that position, primarily due to declining Toy Department sales after the holiday season. Additionally, immediately after Christmas 2015, Leach consolidated the overnight merchandise unloading and daytime shelf stocking positions and moved the overnight unloading employees to the day shift, where their duties consist of unloading merchandise from trucks and stocking shelves.[11/] Leach credibly testified that Harper was not moved from his position because Leach had specifically decided not to move others unaffected by this reorganization out of their existing positions, and that Harper was an afternoon/evening hardlines merchandiser. Leach also credibly testified that he had moved Yaw to a full-time hardlines merchandiser position after her office manager position was eliminated because she was a 25-year employee of Respondent, and he felt that she deserved that position out of loyalty for being a long-term employee of Respondent.

47. Petitioner also contends that Respondent's evaluation of his job performance was unfair because it was conducted by an assistant store manager, Marjorie McCue, who was not his direct supervisor. Specifically, he contends that McCue was unfamiliar with his job performance, so did not appropriately consider, in his evaluation, improved Toy Department sales performance and efficiency that were due to measures that he had implemented. Petitioner also contends that McCue initially deliberately gave him an inaccurately low job performance evaluation in an effort to create a record to support terminating his employment, but that when he complained, those lower scores were changed to higher scores.

48. The only performance evaluation regarding Petitioner's job performance that was admitted into evidence is a document titled "Employee Review" that was dated January 31, 2015; Petitioner received a 3.10 overall performance score on this performance evaluation.[12/] The Employee Review for Harper dated January 31, 2015, also was admitted into evidence; Harper's overall performance score was 3.00.

49. Upon careful consideration of the competent substantial evidence in the record, it is determined that Petitioner failed to carry his burden[13/] to establish a prima facie case of employment discrimination by Respondent on the basis of his race. To do so, Petitioner must show that: (1) he is a member of a

protected class; (2) he was subject to adverse employment action; (3) he was qualified to do the job; and (4) his employer treated similarly-situated employees outside of his protected class more favorably than he was treated.[14/]

50. It is undisputed that Petitioner, as an African-American, is a member of a protected class.

51. However, the evidence does not support a finding that Petitioner was subject to adverse employment action.

52. With respect to his assertion that Respondent failed to promote him on the basis of his race, Petitioner needed to show that, in addition to being a member of a protected class, he applied for and was qualified for a promotion; that he was rejected despite his qualifications; and that other equally or less-qualified employees outside of his class were promoted.[15/]

53. While Petitioner frequently sent email correspondence to Respondent's corporate legal office requesting to be promoted, the evidence does not show that he followed Respondent's formal online application process for applying for promotions.[16/] Further, although the evidence indicates that Petitioner is very hard-working, energetic, bright, and detail-oriented, he did not demonstrate that those characteristics necessarily qualified him for the supervisory positions about which he inquired. He also did not demonstrate that Respondent filled the positions about which he had inquired with less-qualified non-African-American

employees. In fact, Petitioner acknowledged, in testimony at the final hearing and in email correspondence with Respondent's corporate legal office, that in his view, some of the individuals who had been promoted were qualified for the positions to which they had been promoted. For these reasons, it is determined that Petitioner did not demonstrate adverse employment action by Respondent by failing to promote him on the basis of his race.

54. Petitioner also did not show that he received a lower pay rate and lower evaluation scores than did other similarly-situated employees who were not members of his protected class. The only comparator to which Petitioner referred was Harper, the other part-time hardlines merchandiser that sometimes worked in the Toy Department. However, as discussed above, the evidence showed that Harper actually scored lower than did Petitioner on the January 31, 2015, evaluation.[17/] Further, Harper was not similarly situated to Petitioner with respect to pay rate because Harper is a longer-term employee who had received hourly pay rate raises in 2005 through 2008, before Respondent ceased giving raises of hourly pay rates in 2009, but Petitioner was hired in 2014, after Respondent ceased giving hourly pay raises.

55. Petitioner also did not show, by the greater weight of the evidence, that Leach discriminated against him on the basis of his race by electing to reassign him, rather than Harper, to a cashier position after Christmas 2015, and by later reassigning

Yaw to fill a full-time hardlines merchandiser position that included responsibilities of working in the Toy Department. As discussed above, when Leach decided to eliminate the part-time daytime hardlines merchandiser position, he chose not to reassign other employees who were not directly affected by the elimination of that position. The evidence shows that Leach did not reassign Harper to a cashier position because Harper's position was not directly affected by the elimination of the daytime hardlines merchandiser position——not because Leach favored Harper over Petitioner due to race. Also as discussed above, Leach reassigned Yaw to a full-time hardlines merchandiser position after her office manager position——also a full-time position——was eliminated. Because Yaw was a full-time employee, she did not fill a position for which Petitioner was eligible as a part-time employee; furthermore, under any circumstances, she was not similarly situated to Petitioner because of her longer term of employment with Respondent. For these reasons, neither Harper nor Yaw are similarly situated to Petitioner for purposes of being comparators.

56. For these reasons, it is found that Petitioner did not establish a prima facie case of employment discrimination against him by Respondent on the basis of his race.

57. Further, even if Petitioner had established a prima facie case of employment discrimination on the basis of race, Respondent articulated legitimate, non-discriminatory reasons for its actions with respect to Petitioner.

58. As discussed above, Respondent did not promote Petitioner because he did not go through Respondent's formal application process for seeking promotions, and also because Leach determined, on the basis of Petitioner's lack of experience and employment longevity, that Petitioner was not qualified for supervisory positions at that time.

59. Additionally, Leach's decisions regarding reassigning Petitioner to a cashier position while retaining Harper and reassigning Yaw to hardlines merchandiser positions were management decisions based on business needs and requirements, rather than on the basis of race.

60. Petitioner did not present evidence showing that these reasons were a pretext for discrimination against him on the basis of his race.

61. Based on the foregoing, it is determined that Respondent did not discriminate against Petitioner on the basis of his race, in violation of section 760.10(1)(a).

V. Religious Discrimination Claim

62. As previously discussed, shortly before Christmas Day 2015, the employee work schedule for the week of December 20

through 26, 2015, was posted in the Store. This schedule showed Petitioner as being scheduled to work from 6:00 a.m. to 3:00 p.m. on Christmas Day, which fell on a Friday in 2015.

63. The Store was closed on Christmas Day 2015, which was a paid employee holiday; however, employees could work that day on a voluntary basis and they would be paid time-and-a-half for doing so. As noted above, Petitioner did not volunteer or otherwise indicate that he was willing to work that day.

64. Upon seeing that he was scheduled to work on Christmas Day, Petitioner contacted Respondent's corporate legal department, which then contacted Leach.

65. Leach had Petitioner removed from the work schedule for December 25, 2015. Petitioner was not required to work that day, did not work that day, and was paid for the Christmas Day 2015 holiday.

66. Petitioner claims that by scheduling him to work on Christmas Day, Respondent discriminated against him on the basis of his religion. Petitioner asserts, as evidence of Respondent's discriminatory intent, that there are others who worked in the Toy Department who were not of the Christian faith, so that if someone was needed to work on Christmas Day, one of those individuals could instead have been scheduled.

67. As previously noted, on December 28, 2015, Leach presented Petitioner with a Request for Religious Accommodation

form to sign. Leach credibly testified that the purpose of having Petitioner sign the form was to have a written record of Petitioner's religion so that Petitioner would not again be assigned to work on a Christian religious holiday.

68. Petitioner signed the form, but protested being required to do so, because, in his view, Respondent already was on notice that he is of the Christian faith because he always had Sundays off of work. Petitioner testified that when he was hired in April 2014 (notably, before Leach became Store manager) he had verbally requested Sundays off, effectively placing Respondent on notice that he is of the Christian faith. On this basis, Petitioner asserts that Leach and other managers and supervisors at the Store knew that he is Christian and that they nonetheless intentionally scheduled him to work on Christmas Day.

69. Petitioner acknowledged that he never heard Leach make any comments with respect to his (Petitioner's) religion.

70. Leach credibly testified that before he was contacted by Respondent's corporate office regarding Petitioner's concerns about being scheduled to work on Christmas Day 2015, he did not know that Petitioner was Christian, and he had not inferred that from the fact that Petitioner did not work on Sundays.[18/]

71. Leach testified, credibly and persuasively, that Petitioner was scheduled to work on Christmas Day 2015 by mistake. He explained that the work schedule for the week of

December 20 through 26, 2015, was generated using a pre-populated "template" method. This method, which is a method by which the Store sets its weekly work schedules, entails week-to-week copying of the regular——i.e., "template"——work schedule for all Store employees, then modifies that schedule as needed to address changes to individual employee work schedules. Leach explained that in using this method to establish the work schedule for the week of December 20 through 26, 2015, Respondent had inadvertently scheduled employees who had not volunteered to work on Christmas Day. He surmised that this was a possible explanation for why Petitioner mistakenly was scheduled to work that day.

72. As noted above, Petitioner was not the only Store employee scheduled to work on Christmas Day 2015.

73. Upon consideration of the competent substantial evidence in the record, it is determined that Petitioner failed to carry his burden to establish a prima facie case of employment discrimination by Respondent on the basis of his religion. To do so, Petitioner must show that he: (1) was a member of a protected class; (2) informed Respondent of this belief; and (3) suffered adverse employment action as a result of failing to comply with the employment requirement that conflicted with his belief.

74. It is undisputed that Petitioner falls within a protected class for purposes of a discrimination claim on the basis of religion.

75. However, Petitioner did not prove the existence of the other two elements necessary to establish a prima facie case of employment discrimination on the basis of religion.

76. Specifically, Petitioner did not prove that Respondent knew that he was Christian or that his Christian faith prohibited him from working on Christmas Day. As noted above, Petitioner was hired at the Store before Leach became Store manager. Further, because Petitioner had not been required to complete a written religious accommodation form when he was hired in April 2014, Respondent did not have any written notice in its possession that would have informed Leach that Petitioner was Christian or that Petitioner needed certain Christian holidays, such as Christmas Day, off of work. As noted above, Leach credibly testified that he did not know that Petitioner was Christian until Respondent's corporate legal office contacted him regarding Petitioner's religion-based complaint about being scheduled to work on Christmas Day 2015.

77. The evidence also shows that Petitioner did not suffer any adverse employment action. As soon as Respondent was informed of Petitioner's complaint, Petitioner was removed from

the work schedule for Christmas Day 2015, did not work that day, and was paid for that holiday.

78. For these reasons, it is determined that Petitioner did not establish, by the greater weight of the evidence, a prima facie case of discrimination by Respondent against him on the basis of his religion.

79. However, even if Petitioner had established a prima facie case of discrimination on the basis of religion, Respondent produced credible, persuasive evidence showing a legitimate, non-discriminatory basis for its action——that is, that through the Store's use of the template work scheduling system, Petitioner was mistakenly scheduled to work on Christmas Day 2015. As noted above, as soon as Petitioner complained to Respondent, Respondent immediately accommodated his request by removing him from the Christmas Day 2015 work schedule.

80. Petitioner did not present any evidence showing that Respondent's proffered reason for scheduling him to work on Christmas Day 2015 was a pretext for discrimination on the basis of his religion.

81. For these reasons, it is determined that Petitioner did not show, by a preponderance of the evidence, that Respondent discriminated against him on the basis of his religion, in violation of section 760.10(1)(a).

VI. Retaliation Claim

82. Petitioner claims that Respondent retaliated against him for complaining to Respondent's corporate legal office about being scheduled to work on Christmas Day 2015 by reassigning him from his position as a daytime hardlines merchandiser——a position that he clearly liked and at which he believed he excelled——to a cashier position——a position that he clearly considered demeaning and that also was physically difficult for him to perform due to a previous injury.

83. Petitioner was informed that he was being reassigned to a cashier position only five days (and the first workday) after he complained to Respondent's corporate legal office about being scheduled to work on Christmas Day.[19/]

84. Petitioner testified that Leach told him that the part-time daytime merchandiser position had been eliminated due to the lack of work demand, particularly in the Toy Department, after the Christmas season was over.

85. Petitioner testified that when he asked Leach about available positions in to which he could transfer, Leach told him that only cashier or pizza-making positions were available. Petitioner provided evidence that a softlines customer service job, which he claims he would have preferred, was open at the time he was reassigned and that Leach did not inform him of that opening or offer him that position.

86. Petitioner also disputes that the part-time daytime merchandiser job that he had occupied had been eliminated. As evidence, he contends that Harper continued to occupy that position, and also that Leach subsequently reassigned Yaw to a full-time hardlines merchandiser rather than transferring him back into a hardlines merchandiser position, as he had requested.

87. The part-time cashier position to which Petitioner was transferred was the same level of employment position in Respondent's employment hierarchy as was the part-time daytime merchandiser position that he previously held. Additionally, as discussed above, as a part-time cashier, Petitioner continued to receive the same hourly pay rate and work scheduling availability as he had received when he was employed as a part-time daytime hardlines merchandiser.

88. As discussed above, on or before January 26, 2016, Petitioner was reassigned to the Store's date code specialist position. According to Leach, that position came open after Petitioner was reassigned to the cashier position, and Leach believed that the date code specialist position would play well to Petitioner's strengths of being methodical and detail-oriented.

89. Petitioner bears the burden, by the greater weight of the evidence, to establish a prima facie case of retaliation by Respondent. To establish a prima facie case of retaliation,

Petitioner must show that: (1) he engaged in a protected activity; (2) he suffered a materially adverse employment action; and (3) there was a causal connection between the protected activity and the adverse action.[20/] For the following reasons, it is found that Petitioner did not satisfy his burden to establish a prima facie case of retaliation.

90. It is determined that Petitioner engaged in a "protected activity" when he complained to Respondent's corporate legal office, by email dated December 23, 2015, that he had been scheduled to work on Christmas Day 2015. The email stated:

> Attn: Legal
>
> My schedule states that I am scheduled for Christmas day. I am a Christian I exercise religious right no work on a high religious day. Christmas is the day I celebrate the birth of Christ thus the name Christmas day.
>
> A Jewish person was assigned to my department (toys) and was allowed to have off all the Jewish holidays. I was told that is his right and approved, I said fine, I don't know who was arguing this but this was fine with me, because I have many Jewish friends, so I understand.
>
> Easter which falls on a Sunday and Christmas are my holidays. I am requesting off. I am requesting Christmas day off with holiday pay as my religious day, just like I requested Sundays off. Only I can change my religious day and work on Sunday, which I might have to when promoted.
>
> If management tells me I cannot be promoted because I exercise my religious right not to work on the seventh day, then I will have to

> do as Jewish people have done for centuries, they are released from the commandment that they may only eat Kosher. If captured by the enemy they may eat to survive. So if I can only be manager if I give up my religious right not to work on Sunday, then I will do what management says is a requirement.
>
> Thank you.
>
> Lawrence Brown
> Kmart-Hollywood, Fl Oakwood Plaza

91. To be a "protected activity," the activity giving rise to the alleged retaliatory action must, at the very least, communicate to the employer that the complainant believes the employer is engaging in discrimination against him.

92. Petitioner's email can be read broadly to inform Respondent that he believed he was being discriminated against on the basis of his religion by being scheduled to work on Christmas Day 2015. To that point, Petitioner specifically compared his circumstances to those of a Jewish employee who had requested and been allowed to have all Jewish holidays off of work. While not specifically using the word "discrimination," Petitioner's email can be reasonably read to place Respondent on notice that Petitioner believed he was being treated differently than a similarly-situated employee who was not a member of Petitioner's protected class and who had been excused from work on the holidays observed by his religion. Additionally, Leach was aware that Petitioner had complained to Respondent's corporate legal

department about being scheduled to work on a Christian holiday. Accordingly, it is determined that Petitioner has established the "protected activity" element of his retaliation claim.

93. However, Petitioner did not show that he suffered a materially adverse employment action as a result of having engaged in protected activity. His reassignment to the part-time cashier position effectively was a lateral transfer that did not affect his hourly pay rate or hours of work scheduling availability. Although Petitioner subjectively considered the cashier position to be demeaning and below his skill level[21/] and although his job responsibilities changed, the evidence shows that Petitioner was not reassigned to an objectively less prestigious or otherwise inferior employment position.

94. Furthermore, in any event, approximately three weeks after Petitioner was reassigned to the cashier position, Respondent reassigned him to a position as the Store's date code specialist——a position that he has officially held since January 26, 2016, and from which he has not requested to be transferred. In this position, Petitioner earns the same hourly wage and has the same number of hours of work availability as he did in the hardlines merchandiser and cashier positions. He is solely responsible in the Store for ensuring that date-coded merchandise on the shelves has not exceeded its expiration date——

a position that entails significant responsibility and, as Leach put it, is "very important."

95. The evidence also does not support Petitioner's assertion that his removal from the work schedule in early January meant that he was effectively terminated.

96. Although the evidence does not clearly show what days Petitioner did not work during the week after Christmas in 2015, or whether he did (or did not) call in to notify Respondent that he would be absent, the evidence does clearly establish that Petitioner was not scheduled to work the first week of January 2016, and it is also clear that management personnel at the Store did not believe that he had called in to notify them of his absence. Leach explained that if an employee does not report to work when scheduled and does not call in to notify the Store of his or her absence, the employee will not be scheduled to work the following week; this is to ensure that there are enough cashiers available as needed to work in the upcoming week. In any event, when Petitioner noticed that he had not been scheduled to work, he contacted the Store's human relations manager, who told him to come back to work. In fact, Petitioner worked the first and second weeks of January 2016, and thereafter, and he continues to be employed at the Store. Further, Petitioner was never told or otherwise notified, formally or informally, that his employment with Respondent had been terminated.

97. For these reasons, it is determined that Petitioner did not suffer a materially adverse employment action by being reassigned for a short period of time from a part-time daytime hardlines merchandiser to a part-time cashier position.

98. Petitioner also did not demonstrate the existence of a "causal link" between a protected activity and adverse employment action. As discussed above, Petitioner's sending an email to Respondent's corporate legal office about being scheduled to work on Christmas Day 2015 constituted a "protected activity." However, as discussed above, it is determined that Respondent did not engage in an adverse employment action; thus, Petitioner's engagement in protected activity did not "cause" Respondent to take any material adverse employment action against him.

99. Furthermore, in any event, Respondent articulated a legitimate, non-discriminatory reason for reassigning Petitioner to a cashier position shortly after Christmas Day 2015—— specifically, that the part-time daytime merchandiser position that Petitioner had held was eliminated due to seasonal workload decline and other business management decisions reallocating hardlines merchandise-related tasks between the overnight and daytime shifts.

100. For these reasons, it is determined that Petitioner did not prove, by the greater weight of the evidence, that

Respondent retaliated against him for engaging in a protected activity, in violation of section 760.10(7).

VII. Damages

101. Petitioner has requested an award of damages in the amount of $5,000,000. However, section 760.11(6), which governs the award of remedies in administrative proceedings brought under the FCRA, does not authorize DOAH to award damages.

102. Further, the evidence establishes that Respondent did not engage in any unlawful employment practices with respect to Petitioner, and, in any event, Petitioner did not present any evidence to support his entitlement to an award of damages in this proceeding.

CONCLUSIONS OF LAW

103. DOAH has jurisdiction over the parties to, and subject matter of, this proceeding. §§ 120.569, 120.57(1), Fla. Stat.

104. The FCRA is codified at sections 760.01 through 760.11, Florida Statutes.[22/]

105. Section 760.11(1)(a) makes it an unlawful employment practice to: "discharge or 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, pregnancy, national origin, age, handicap, or marital

status." This provision makes employment discrimination on the basis of race and religion unlawful.

106. Section 760.10(7) states:

> 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 section 760.10, or because that person has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section.

This provision makes it unlawful for an employer to retaliate against a person for opposing unlawful employment practices, including discrimination.

107. Respondent is an "employer," as that term is defined in section 760.02(7).[23/]

I. Burden and Standard of Proof and Applicable Case Law

108. In cases involving claims of unlawful employment discrimination and retaliation, the burden of proof is on the complainant——here, Petitioner——to establish, by a preponderance of the evidence, the conduct comprising the alleged unlawful discrimination and the conduct comprising the alleged retaliation. EEOC v. Joe's Stone Crabs, Inc., 296 F.3d 1265, 1273 (11th Cir. 2002); St. Louis v. Fla. Int'l Univ., 60 So. 3d 455, 458-59 (Fla. 3d DCA 2011). The "preponderance of the evidence" standard means the "greater weight" of the evidence, or evidence that "more likely than not" tends to prove the fact at

issue. As discussed above, this means that even if the undersigned were to determine that the competent substantial evidence presented by each party should be given equal weight, Petitioner would not have proved his claims by the "greater weight" of the evidence, so would not prevail in this proceeding. See Gross v. Lyons, 763 So. 2d 276, 289 n.1 (Fla. 2000).

109. The FCRA is modeled after Title VII of the Civil Rights Act of 1964, the principle federal anti-discrimination statute. Accordingly, case law interpreting Title VII is applicable to proceedings under the FCRA. 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)(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).

II. Discrimination Claims

110. When bringing a claim of discrimination under the FCRA based on race, religion, or other protected characteristic, a complainant may proceed on a theory of disparate impact, disparate treatment, or both. EEOC v. Joe's Stone Crab, Inc., 220 F.2d 1263, 1273 (11th Cir. 2000).

111. To prevail in a disparate impact case, the complainant must present evidence proving the existence of an adverse or disproportionate impact on him or her as a member of a protected

class of persons resulting from facially neutral acts or practices by Respondent. Id. at 1274.

112. By contrast, to prevail on a disparate treatment employment discrimination claim, the complainant must show that he or she was intentionally treated differently than similarly-situated employees on the basis of one or more characteristics protected under the applicable anti-discrimination statute. Ricci v. DeStephano, 557 U.S. 557, 577 (2009); EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1024 (11th Cir. 2016).

113. Here, Petitioner has alleged facts giving rise to a claim of disparate treatment on the basis of his race and religion.[24/] Under the disparate treatment theory of discrimination, the claim is that the employer has treated some people less favorably than others because of their race, color, religion, sex, or national origin. Teamsters v. U.S., 431 U.S. 324, 335 n.15 (1977). Liability in a disparate treatment case depends on whether the protected trait actually motivated the employer's decision. Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993). "The ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination." Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 153 (2000)(emphasis added).

114. Discriminatory intent can be established through direct or circumstantial evidence. Schoenfeld v. Babbitt, 168 F.3d 1257, 1266 (11th Cir. 1999).

115. Direct evidence of discrimination is evidence that, if believed, establishes the existence of discrimination as the basis for an employment decision without inference or presumption. Id. Direct evidence is composed of only "the most blatant remarks," the intent of which could be nothing other than to discriminate on the basis of some impermissible factor. Id.

116. Here, Petitioner did not present direct evidence of discrimination by Respondent on the basis of his race or religion. Accordingly, a finding of discrimination, if any, in this case must be based on circumstantial evidence.[25/]

117. Where a complainant attempts to prove intentional discrimination using circumstantial evidence, the burden-shifting analysis established by the U.S. Supreme Court in McDonnell Douglas v. Green, 411 U.S. 792 (1973), applies. Under this analytical framework, the complainant bears the initial burden of establishing a prima facie case of discrimination. Id. at 802.

118. For Petitioner to establish a prima facie case of unlawful employment discrimination on the basis of race, Petitioner must show that: (1) he is a member of a protected class; (2) he was subject to adverse employment action; (3) he was qualified to do the job; and (4) his employer treated

similarly-situated employees outside of his protected class more favorably than he was treated. See id.; Knight v. Baptist Hosp. of Miami, 330 F.3d 1313, 1316 (11th Cir. 2003).

119. To establish a prima facie case of unlawful employment discrimination on the basis of religion under the McDonnell burden-shifting standard, Petitioner must show that he: (1) is a member of a protected class; (2) informed the employer of this belief; and (3) suffered adverse employment action as a result of failing to comply with the employment requirement that conflicted with his or her belief. Abeles v. Metro. Wash. Airports Auth., 2017 U.S. App. LEXIS 1400, *10 (4th Cir. 2017); see MackMuhammad v. Cagle's Inc., 379 Fed. Appx. 801, 803-804 (11th Cir. 2010); see also Lubetsky v. Applied Card. Sys., 296 F.3d 1301, 1305 (11th Cir. 2002).

120. Under the McDonnell burden-shifting analysis, if the complainant meets his or her burden to establish a prima facie case, the burden then shifts to the employer to articulate a legitimate, non-discriminatory explanation for the employment action. See McDonnell, 411 U.S. at 802-803. Case law characterizes this burden as "exceedingly light," in which the employer must only produce evidence that would allow a rational fact finder to conclude that the employer's actions were not motivated by discriminatory animus. Alexander v. Fulton Cnty.,

207 F.3d 1303 (11th Cir. 2000); Standard v. A.B.E.L. Servs., 161 F.3d 1318, 1331 (11th Cir. 1998).

121. If the employer meets its burden of production, the inference of discrimination is erased and the burden shifts back to the complainant, who must then present evidence to show the reasons given by the employer are a pretext for discrimination—— that is, that the employer's proffered reason for the employment action is not worthy of belief, or that a discriminatory basis more likely than not motivated the employment decision. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 255-56 (1981); Schoenfeld, 168 F.3d at 1267.

Discrimination on the Basis of Race

122. Applying these standards to this proceeding, it is concluded that Petitioner did not establish, by the preponderance of the evidence, a prima facie case of discrimination against him by Respondent on the basis of his race. As discussed above, Petitioner did not prove that Respondent failed to promote him due to his race, nor did Petitioner prove that Respondent paid him less than a white hardlines merchandiser due to his race.[26/] He also failed to prove that Respondent discriminated against him on the basis of race by reassigning him to a cashier position, while retaining and reassigning white employees to hardlines merchandiser positions.[27/]

123. However, even if Petitioner had established a prima facie case, Respondent articulated legitimate, non-discriminatory reasons, discussed above, for its actions regarding Petitioner's employment.

124. As discussed above, Petitioner did not present evidence showing that these reasons were a pretext for discrimination.

125. Accordingly, it is concluded that Petitioner did not prove, by a preponderance of the evidence, that Respondent discriminated against him on the basis of his race in violation of section 760.10(1)(a).

Discrimination on the Basis of Religion

126. It is also concluded that Petitioner did not prove, by a preponderance of the evidence, that Respondent discriminated against him on the basis of his religion.

127. As discussed above, Petitioner is a member of a protected class.

128. However, the evidence shows that Leach, who was responsible for setting the work schedule for the week that included Christmas Day 2015, did not know that Petitioner was Christian until he complained to Respondent's corporate legal office about being scheduled to work that day.

129. Upon being informed that Petitioner requested to have Christmas Day 2015 off of work, Respondent immediately removed

him from the Christmas Day 2015 work schedule, and Petitioner was not required to work, did not work, and was paid for that day. Accordingly, Petitioner did not suffer any adverse employment action.

130. Further, Respondent articulated a legitimate, non-discriminatory reason why Petitioner had been scheduled to work on Christmas day 2015——namely, that he had been scheduled by mistake.

131. Petitioner did not present evidence showing that Respondent's articulated reason was a pretext for discrimination.

132. For these reasons, it is concluded that Petitioner failed to prove that Respondent discriminated against him on the basis of his religion in violation of section 760.10(1)(a).

III. Retaliation Claim

133. The FCRA's anti-retaliation provision, codified at section 760.10(7), prohibits employer actions that "discriminate against" an employee because he or she has "opposed" a practice that the statute forbids, or has testified, assisted, or participated in an investigation, proceeding, or hearing. Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 59 (2006). The term "discriminate against" has been found to refer to "distinctions or differences in treatment that injure protected individuals." Id. at 59-60.

134. To establish a prima facie case of retaliation, the employee must show that: (1) he participated in an activity protected by the statute; (2) he suffered a materially adverse employment action; and (3) there is a causal connection between participation in the protected activity and the adverse employment action. Debene v. BayCare Health Sys., 2017 U.S. App. LEXIS 9494 at *10 (11th Cir. 2017); Gupta v. Fla. Bd. of Regents, 212 F.3d 571, 587 (11th Cir. 2000); St. Louis v. Fla. Int'l Univ., 60 So. 3d 455 (Fla. 3d DCA 2011).

135. For opposition to an employment practice to constitute activity that is protected, that opposition must be sufficient to communicate to the employer that the employee believes that the employer is engaging in unlawfully discriminatory conduct. Murphy v. City of Aventura, 616 F. Supp. 2d 1267, 1279 (S.D. Fla. 2009); Webb v. R & B Holding Co., Inc., 992 F. Supp. 1382, 1389 (S.D. Fla. 1998).

136. A "materially adverse employment action" is an ultimate employment decision, such as discharge or failure to hire, or other conduct that alters the employee's compensation, terms, conditions, or privileges of employment, deprives him or her of employment opportunities, or adversely affects his or her status as an employee. Gupta, 212 F. 3d at 587. Whether an employee has suffered a materially adverse employment action is determined on a case-by-case basis. Id. at 586. The change to

the terms, conditions, or privileges of the employment must be objectively serious and material. Gray v. City of Jacksonville, 492 Fed. Appx. 1, 9 (11th Cir. 2012). A change in employment duties, by itself, does not arise to the level of a materially adverse employment action. Holmes v. Newark Pub. Sch., 2016 U.S. Dist. LEXIS 68494, *8 (D.N.J. 2016). A nominally lateral reassignment that does not significantly negatively affect an employee's compensation, prestige, responsibility, or opportunity for advancement is not considered a materially adverse employment action. Nichols v. S. Ill. Univ.-Edwardsville, 510 F.3d 772, 780 (7th Cir. 2007). Case law also makes clear that position changes, even to more inconvenient jobs, that may cause an employee to suffer a "bruised ego" but that do not adversely affect the employee's pay, prestige, supervisory responsibilities, or earning potential are not "materially adverse" employment actions. Brennan v. Tractor Supply Co., 237 Fed Appx. 9, 24 (6th Cir. 2007); D'Ambrosio v. Crest Haven Nursing and Rehab. Ctr., 2016 U.S. Dist. LEXIS 129398, *28 (D.N.J. 2016).

137. If the employee establishes a prima facie case of retaliation, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for its action. Addison v. Fla. Dep't of Corr., 2017 U.S. App. LEXIS (11th Cir. 2017); Sierminski v. Transouth Fin. Corp., 216 F.3d 945, 950 (11th Cir.

2000). As in discrimination cases, this burden is a very light one. Holifield v. Reno, 115 F. 3d 1555, 1564 (11th Cir. 1997).

138. The burden then shifts to the employee to show that the employer's proffered reason is mere pretext. James v. Total Sols., Inc., 2017 U.S. App. LEXIS 9488, *5 (11th Cir. 2017); Quigg v. Thomas Cty. Sch. Dist., 814 F.3d 1227, 1237 (11th Cir. 2016).

139. As explained above, it is concluded that Petitioner engaged in a protected activity in contacting Respondent's corporate legal office about his being Christian and being assigned to work on Christmas Day 2015.

140. However, the evidence shows that Respondent did not take materially adverse employment action against Petitioner. His reassignment from a part-time daytime hardlines merchandiser position to a part-time daytime cashier position[28/] did not adversely affect his hourly pay rate or work scheduling. As noted above, although Petitioner considered the reassignment demeaning and although his job responsibilities changed, this is not sufficient to render his reassignment to a cashier position a materially adverse employment activity. Further, the evidence clearly establishes that Respondent did not terminate Petitioner. In fact, shortly after he was reassigned to the cashier position, Leach transferred Petitioner to the date code specialist position——a position that Leach believed would play to

Petitioner's strengths. In that position——which Petitioner continues to hold——he earns the same hourly wage, has the same number of hours of work availability, and occupies an important employment position at the Store.

141. Further, the evidence failed to establish the existence of a "causal link" between Petitioner's protected activity and a material adverse employment action.

142. Case law holds that if there is close temporal activity between an employee's protected activity and a materially adverse employment action by the employer, a causal link between the two may be inferred. Olmstead v. Taco Bell Corp., 141 F.3d 1457, 1460 (11th Cir. 1998). As noted above, here, only five days elapsed between Petitioner's complaint to Respondent's corporate legal department about being scheduled to work on Christmas Day 2015 and his reassignment to a part-time cashier position.

143. However, as discussed above, the evidence shows that Respondent did not take a materially adverse employment action against Petitioner in reassigning him to a cashier position. Because there was no materially adverse employment action to which Petitioner's protected activity could be linked, the "causal" element of Petitioner's retaliation claim is not met. Clover v. Total Sys. Servs., 176 F.3d 1346, 1354 (11th Cir. 1999).

144. Further, even if Petitioner had proved a prima facie case of retaliation, Respondent articulated a legitimate, non-discriminatory basis for his reassignment to a part-time cashier position, and Petitioner did not present evidence showing that this articulated basis was a pretext for discrimination.

145. For these reasons, it is concluded that Petitioner did not show, by the greater weight of the evidence, that Respondent retaliated against him in violation of section 760.10(7).

IV. Damages

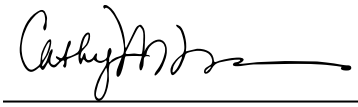
146. As discussed above, section 760.11(6) does not authorize an award of damages in administrative proceedings; however, even if authorized, Petitioner would not be entitled to an award of damages because he did not prove, by a preponderance of the evidence, that Respondent discriminated against him on the basis of his race or religion, in violation of section 760.10(1)(a).

147. In sum, there is no doubt, in the undersigned's view, that Petitioner sincerely believed that Respondent discriminated and retaliated against him. However, for the reasons discussed herein, neither the facts nor the law support his claims in this proceeding.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations issue a final order dismissing the Petition for Relief.

DONE AND ENTERED this 14th day of June, 2017, in Tallahassee, Leon County, Florida.



CATHY M. SELLERS
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 14th day of June, 2017.

ENDNOTES

[1/] All references to chapter 120, Florida Statutes, are to the 2016 version of Florida Statutes, unless otherwise stated.

[2/] Two days before the final hearing, Respondent moved, pursuant to Florida Administrative Code Rule 28-106.106, to have Mr. Reynolds, who is not a member of the Florida Bar, authorized to appear on its behalf in this proceeding as a qualified representative. At the final hearing, Petitioner did not object to Mr. Reynolds' appearance as a qualified representative. The undersigned determined, during the final hearing, that Mr. Reynolds met the applicable standards in rule 28-106.106(4) to appear as a qualified representative, and granted the motion.

[3/] Petitioner is employed by Kmart Corporation. Kmart Corporation is a wholly-owned subsidiary of the Sears Holding

Corporation, which does not have any employees. The style of this case has been amended to reflect the correct name of Respondent, which is the employer against which Petitioner filed discrimination and retaliation claims.

[4/] The Discrimination Charge was date-stamped as having been filed on March 10, 2016. Petitioner signed the form on or about February 22, 2016, and the attached pages prepared by Petitioner were dated February 25, 2016.

[5/] This is a de novo proceeding, and the Petition for Relief, rather than the Notice of Hearing issued by the then-assigned ALJ, sets forth the discrimination and retaliation charges that are at issue in this proceeding.

[6/] However, as discussed below, the evidence indicates that Petitioner actually worked as a cashier two days the week of December 27, 2016, through January 3, 2016.

[7/] According to Petitioner, Alberto, the previous Store manager, had assigned him exclusively to the Toy Department and had trained him to merchandise the Toy Department.

[8/] The competent substantial evidence does not establish precisely when Petitioner requested to be promoted to supervisory positions. Section 760.11(1) establishes a 365-day statute of limitation between the alleged violation of chapter 760 and the filing of a complaint with the FCHR. The Charge of Discrimination was filed on March 10, 2016; accordingly, any alleged discrimination that occurred more than 365 days prior to that date, i.e., March 11, 2015, are time-barred by section 760.11(1).

[9/] Petitioner claims that on various occasions, he had requested to be made supervisor of the Toy Department, but that when the previous supervisor left the position, Respondent hired a person named "Will" to fill the position. Petitioner did not contend or prove that Will was not qualified for the position.

[10/] In his Petition for Relief, Petitioner initially alleged that, on the basis of his race, he had received lower evaluation scores than Harper had received. At the hearing, he acknowledged that FCHR staff had brought to his attention that he had received a higher evaluation score than Harper on the January 31, 2015, Employee Record that had been submitted to FCHR in support of his Charge of Employee Discrimination.

[11/] According to Leach, this workforce reorganization has saved the Store approximately $2,000 per week in labor costs.

[12/] It is noted, based on Respondent's Exhibit 15, that Petitioner is reviewed on an annual basis, and, per that exhibit, would have been reviewed on January 31, 2016. Petitioner asserted that on May 27, 2016——while his Discrimination Charge was pending before FCHR——he was given a performance review by McCue and Leach in which he received scores of "2's" (with "3's" being required) for certain performance categories. If that were the case, it would give rise to a strong inference that the out-of-cycle evaluation was retaliatory, and if Petitioner had suffered adverse employment action as a result, Respondent's action may have given rise to a claim of retaliation for engaging in protected activity. However, it is noted that no independent documentation regarding the May 27, 2016, evaluation (such as the evaluation instrument itself) was made part of the record. In any event, the evidence did not show that this evaluation resulted in any adverse employment action against Petitioner. As discussed above, Petitioner remains employed at the Store as a part-time date code specialist, which, as previously discussed is an equivalent position to his daytime merchandiser and cashier positions with respect to hourly pay rate and hours of work.

[13/] As discussed in greater detail below, Petitioner has the ultimate burden of proof in this case to prove, by a preponderance, or "greater weight," of the evidence, that Respondent engaged in unlawful discrimination against him on the basis of his race and religion and retaliated against him for complaining about the alleged discrimination. This necessarily means that even if the undersigned determines that the competent substantial evidence presented by each party is equally credible, so should be given equal weight, Petitioner would not have proved his claims by the "greater weight" of the evidence, so would not prevail in this proceeding.

[14/] Knight v. Baptist Hosp. of Miami, Inc., 330 F.3d 1313, 1216 (11th Cir. 2003); see McDonnell Douglas v. Green, 411 U.S. 792, 802 (1973).

[15/] "Failure to promote" is a type of adverse employment action. Brown v. Ala. Dep't of Transp., 597 F.3d 1160, 1174 (11th Cir. 2010); Vinson v. Koch Foods of Ala., LLC, 2013 U.S. Dist. LEXIS 139118, *10-11 (M.D. Ala. 2013).

[16/] On this point, Leach credibly testified that Respondent has an online application process for seeking promotions. The

evidence shows that Petitioner had access to Respondent's job opening postings through the Store's computers for employee use, so had access to jobs postings and the formal online process for applying for promotions and other jobs in the company.

[17/] As previously noted, the Employee Review documents for the January 31, 2015, evaluation review were the only job performance evaluation documents tendered at the final hearing and admitted into the evidentiary record of this proceeding.

[18/] Leach noted that many Store employees have specific days of the week off of work, and that he typically does not question the reasons why they have those days off. He testified that if an employee needs a specific day of the week off, that request is typically granted and the Store prepares its work schedule accordingly.

[19/] As further discussed below, a causal link may be inferred if there is close temporal proximity between the protected activity and the adverse employment action. Respondent's Exhibit 20, the Personnel Interview Record dated January 5, 2016, states that Petitioner was reassigned to a cashier position effective January 3, 2016.

[20/] Sullivan v. AMTRAK, 170 F.3d 1056, 1059 (11th Cir. 1999); Murphy v. City of Aventura, 616 F. Supp. 2d 1267, 1280 (S.D. Fla. 1998).

[21/] See Brennan v. Tractor Supply Co., 237 Fed Appx. 9, *24 (6th Cir. 2007)(subjective dissatisfaction with a job reassignment that does not adversely affect the employee's wages, prestige, supervisory responsibilities, or advancement opportunities does not constitute a materially adverse employment action).

[22/] The discriminatory conduct at issue in this proceeding is alleged to have occurred between April 2014 and January 2016, and the retaliatory conduct is alleged to have occurred in December 2015 and January 2016. During this time frame, the 2014 and 2015 versions of Florida Statutes were in effect. Although during the 2015 Legislative Session, section 760.10 was amended to add pregnancy to the classes protected under the FCRA, that amendment is not germane to this proceeding. Therefore, as a practical matter, the 2014 and 2015 versions chapter 760 are the same for purposes of this proceeding.

[23/] Section 760.02(7) 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 year, and any agent of such a person."

[24/] In other words, Petitioner claims that he was treated in a discriminatory manner because of his race and religion.

[25/] "Circumstantial evidence" is evidence of some collateral fact from which the existence or non-existence of some fact in question may be inferred as a probable consequence. See United States v. Silvestri, 409 F.3d 1311, 1328 (11th Cir. 2005). It is often referred to as "indirect evidence." Black's Law Dictionary 576 (7th ed. 1999).

[26/] For Harper to have been a valid comparator for purposes of determining whether Petitioner was treated in a discriminatory manner with respect to his pay, Harper needed to be "similarly situated" to Petitioner in all material respects. Feise v. N. Broward Hosp. Dist., 2017 U.S. App. LEXIS 5222, *11 (11th Cir. 2017); Rioux v. City of Atlanta, Ga., 520 F.3d 1269, 1280 (11th Cir. 2008). As discussed above, Harper was employed by Respondent for several years before Petitioner was hired, and received hourly wage raises between 2005 and 2008, before Respondent ceased giving raises to hourly employees. Accordingly, Harper is not similarly situated to Petitioner.

[27/] See id. As discussed above, Harper was an afternoon and evening shift hardlines merchandiser whose position was not affected by the elimination of the daytime merchandiser, and Yaw was a long-time full-time employee who was reassigned to a full-time hardlines merchandiser job. Neither of these employees is similarly situated to Respondent, who is a part-time employee who worked, and continues to work, during the daytime shift.

[28/] The evidence shows that Respondent had a formal online employment position posting and application process in place and that Petitioner had the opportunity to access Respondent's online postings of employment positions that came open at the store. Thus, the evidence shows that Respondent did not rely on "word of mouth" informal processes to provide notice of open positions; this distinguishes the circumstances in this case from other cases in which such informal processes have been determined to lead to racial discrimination because information regarding open positions was only available to non-minority employees. See Carmichael v. Birmingham Saw Works, 738 F.2d 1126, 1133 (11th Cir. 1984).

COPIES FURNISHED:

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

Lawrence Brown, III
6440 North West 110th Avenue
Pompano Beach, Florida 33076
(eServed)

Thomas G. Reynolds, Esquire
Seyfarth Shaw LLP
Suite 2500
1075 Peachtree Street, Northeast
Atlanta, Georgia 30309
(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.