

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RHONDA R. WILKINSON,

Petitioner,

vs.

Case No. 16-5773

PUBLIX SUPER MARKETS, INC.,

Respondent.

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RECOMMENDED ORDER

Pursuant to notice, this case was heard on November 16, 2016, via video teleconference in Tallahassee and Panama City, Florida, before Suzanne Van Wyk, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Robert L. Thirston, II, Esquire
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Panama City Beach, Florida 32417

For Respondent: Tammie L. Rattray, Esquire
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STATEMENT OF THE ISSUES

Whether Petitioner was subject to an unlawful employment practice by Respondent based on her sex in violation of section

760.10, Florida Statutes (2015)^{1/}; and if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On January 21, 2016, Petitioner filed an Employment Charge of Discrimination with the Florida Commission on Human Relations (Commission) which alleged that Respondent violated section 760.10 by discriminating against her on the basis of her sex.

On August 29, 2016, the Commission issued a Determination: No Cause and a Notice of Determination: No Cause, by which the Commission determined that reasonable cause did not exist to believe that an unlawful employment practice occurred. On September 29, 2016, Petitioner filed a Petition for Relief with the Commission, which was transmitted that same date to the Division of Administrative Hearings to conduct a final hearing.

The final hearing was scheduled for November 16, 2016, via video teleconference in Tallahassee and Panama City, Florida, and commenced as scheduled.

At the final hearing, Petitioner testified on her own behalf and introduced no exhibits.

Respondent presented the testimony of Stephen Tucker, Jeffrey Siltanen, Steven Southerland, and John Sperandeo, the Manager, Assistant Manager, and Assistant Meat Department Managers, respectively, of Publix Supermarkets (Publix) Store Number 0843 in Lynn Haven, Florida; as well as Kris Price, a

Publix Meat Retail Improvement Specialist; Nicole Shurger, a Publix Retail Associate Relations Specialist; and Patrick McGowan, a Publix District Manager. Respondent's Exhibits R26, R30 through R32, R34, R36, R37, R39, and R41 through R44 were admitted in evidence.

A one-volume Transcript of the proceedings was filed on December 20, 2016. The undersigned granted Petitioner's unopposed Motion for an Extension of Time to file proposed recommended orders, rendering post-hearing filings due on or before January 13, 2017. Respondent timely filed a Proposed Recommended Order which has been considered by the undersigned in preparing this Recommended Order.

FINDINGS OF FACT

Background

1. Petitioner, Rhonda Wilkinson, was employed by Publix in the meat department from January 8, 2004, until her discharge on January 12, 2016.

2. There are four sub-departments of the Publix meat department: lunch meat and cheese, seafood, frozen foods, and fresh meats.

3. Petitioner began as a clerk in the lunch meat and cheese sub-department at the Thomas Drive Publix in Panama City. After completing meat cutter training, Petitioner was promoted to the position of meat cutter and transferred to store 0823 in Lynn

Haven (the Lynn Haven store). She was subsequently promoted to Assistant Manager of the meat department at the same store.

4. In March 2014, Petitioner was promoted to Meat Department Manager at store number 1005 in Panama City Beach (the beach store), where she remained until July 2015.

5. During the busy season, the beach store would cut meat "as fast as they got it in" in order to keep up with demand. To help meet demand, John Sperandeo, an Assistant Meat Department Manager from the Lynn Haven store frequently assisted Petitioner as a meat cutter at the beach store. By all accounts, Petitioner's relationship with Mr. Sperandeo was professional and without conflict.

6. Petitioner transferred back to the Lynn Haven store as Meat Department Manager in July 2015. Petitioner supervised, among others, Mr. Sperandeo and Stephen Southerland, Assistant Meat Department Managers, and a meat cutter named Ervin Broxton.

7. At the Lynn Haven store, Petitioner testified that Mr. Sperandeo would not "get on the same page" with her in terms of filling out paperwork properly. Petitioner complained that he inappropriately delegated that responsibility. Petitioner testified that it was her job, as manager, to set an example for all her subordinates of the proper way to execute Publix's policies, even completion of paperwork.

8. Petitioner introduced no evidence of complaints filed against Mr. Sperandeo or any counseling or disciplinary action taken against him.

9. By all accounts, Petitioner's career with Publix was without incident.

Meat Department Policies

10. Fresh meats are processed by the Publix meat department as follows: employees unload the supplier's delivery trucks, scan the bar code on each box of meat product into the meat-cooler inventory, and store the product in the meat cooler. Each box is dated with the supplier's pack date of the product.

11. Publix's policy is to store product in the cooler such that the meat with the oldest pack date is most readily accessible. The employee unloading the product is responsible to stack boxes so that the oldest product is on the top of the stack.

12. Publix maintains a strict policy governing the shelf life of all meat products. The shelf life is the amount of time a product is available for sale, and is noted on the product packaging as the "sell by date."

13. Pursuant to Publix's policy, fresh meat products generally have a five-day shelf life (the supplier's pack date plus four days).

14. It is against Publix's policy for an employee to apply additional shelf life to any product when it reaches the end of the original shelf life. If product must be rewrapped during its shelf life, due to wet or bloody outside packaging, the employee must maintain the original sell-by date on the rewrapped package.

15. The meat cooler is inventoried each day at or before store closing for product exceeding its shelf life, or "out-of-date." This practice is referred to as "dating the cooler." All product identified as out-of-date is designated for disposal and scanned out of the inventory system. Each morning, the store generates an adjustment transaction report which lists the specific products which were disposed of at the store on the prior closing date. The report also includes the "extended cost" of disposing of the particular products from the department. The adjustment transaction report is one tool the meat department uses to determine the appropriate amount of product to order from each supplier, as well as the amount of product to cut on a given day.

The Dismissal Incident

16. On January 6, 2016, Petitioner worked the early shift and was nearing the end of the shift, which is 4:00 p.m. Mr. Sperandeo was scheduled to close, and was preparing to take the standard lunch break--4:00-5:00 p.m.--for a closer.

Mr. Braxton was dating the cooler at Petitioner's direction, and Mr. Southerland was assisting him.

17. Mr. Southerland and Mr. Braxton exited the cooler and reported to Petitioner that they had identified six boxes of out-of-date product. Petitioner said something to the effect of "don't throw it out, John [Sperandeo] will cut it anyway."

Mr. Braxton re-entered the cooler. Mr. Sperandeo was in close proximity preparing to take his lunch break and remarked that he would not cut the meat. Mr. Southerland, who had reached the end of his shift, left the store.

18. Petitioner did not deny making the statement. Her position is that the statement was meant as a joke and made in an off-hand manner. However, she did acknowledge that the remark was unprofessional and she knew she should not have said it to her subordinates.

19. Shortly thereafter, Petitioner entered the cooler and told Mr. Braxton to put the boxes of out-of-date meat aside so that Mr. Sperandeo could "take care of it" at closing. Mr. Sperandeo did indeed dispose of the six boxes of out-of-date product and the quantities were included on the following day's adjustment transaction report.

20. At no time did Petitioner explain to Mr. Sperandeo that she had made the statement in jest and retract her direction to cut the out-of-date product.

21. As he left the store, Mr. Southerland approached Mr. Sparedeo, who was taking his lunch break in his car in the parking lot. They discussed the incident and determined that they should report the incident to their superior.

22. Mr. Southerland and Mr. Sparedeo approached Jeff Siltanen, the store Assistant Manager, who was on his lunch break in his car. They related the incident to Mr. Siltanen. Mr. Southerland left for the day, and Mr. Sparedeo returned to the meat department after his lunch.

23. Later that evening, Mr. Siltanen and store Manager, Stephen Tucker, visited the meat department. Mr. Sparedeo showed them the subject boxes of out-of-date product, which Mr. Siltanen photographed. At Mr. Tucker's direction, Mr. Siltanen also took written statements about the incident from both Mr. Braxton and Mr. Sparedeo.

24. Later that same evening, Mr. Tucker notified Publix Regional Manager, Pat McGowan, of the incident.

25. The following day, January 7, 2016, Mr. McGowan met with Mr. Tucker and Nicole Shurgar from Publix Human Resources.

26. When Petitioner returned to work on January 7, 2016, she was called to Mr. Tucker's office. When she arrived, she was met by Mr. Tucker, Mr. McGowan, and Ms. Shurgar. Mr. McGowan asked Petitioner about the allegation that she had instructed Mr. Sparedeo to cut out-of-date product. Petitioner admitted

making the statement, although she explained that it was meant in jest.

27. Mr. McGowan then informed Petitioner that she was suspended for a week, pending an investigation into the incident.

28. During the investigation, Ms. Shurgar interviewed Mr. Sparedeo, Mr. Southerland, and Mr. Broxton. She found their statements consistent and corroborating. Ms. Shurgar also reviewed Publix's policies and her files relating to discipline for violations of Publix's food safety policies. Ms. Shurgar recommended to Mr. McGowan that termination was appropriate.

29. On January 12, 2016, Mr. McGowan discharged Petitioner from her employment with Publix. The discharge notification contained the following description:

On 1/6/16 after learning of multiple boxes of out of date product and in the presence of witnesses, Rhonda instructed AMM [Assistant Meat Market Manager] John Sparedeo to cut the out of date product. Rhonda is being discharged for violating Publix food safety practices and instructing another associate to violate the practice.

Comparison Incident

30. Petitioner complains that her discharge was discriminatory in light of the more favorable treatment of male associates who violated Publix's food safety practices.

31. Over the 2015 Thanksgiving holidays, an associate at the Lynn Haven store informed Mr. Siltanen that the sell-by date

of a pot roast had been extended. The associate had been considering buying the pot roast on a Friday and noted the sell-by date of November 30, 2015. On Sunday the 30th, the associate observed that the package had been rewrapped, repriced, and the sell-by date extended.

32. Mr. Siltanen retrieved the subject pot roast and briefly asked the meat department employees if they knew anything about the rewrapping and redating of the product. No employee was forthcoming.

33. Mr. Siltanen notified Mr. Tucker of the incident via email. Mr. Tucker interviewed the employees, but did not obtain any information. Mr. Siltanen then viewed the Lynn Haven store's internal video feed, from Friday evening through Sunday morning, to determine which employee had rewrapped and redated the product.

34. Mr. Siltanen's review of the video was inconclusive. Mr. Sparendeo, Mr. Broxton, and a third employee, a meat cutter named Addison Sharp, all appeared in the video handling a variety of meats in the case. However, Mr. Siltanen was unable to determine whether the particular pot roast was handled by any of the three men specifically.

35. Petitioner was not working on the date of this incident, and was out on vacation for a few days during the Thanksgiving holidays.

36. Mr. Siltanen and Mr. Tucker decided that, since they could not tie a specific employee to the redated meat, they would hold a departmental meeting, bring the incident to the attention of all meat department employees, and review department policy on shelf-life of products with all relevant employees. Mr. Siltanen took a picture of the offending pot roast and posted it on the bulletin board for all employees to see. He conducted the departmental meeting the following day, December 1, 2015.

37. When Petitioner returned to work on December 1, 2015, Mr. Siltanen informed her of the incident and decision to hold the meeting and review policy with employees.

38. None of the three employees observed in the video who had access to the pot roast during the time it was rewrapped and redated were disciplined in any manner. All three employees were male.

CONCLUSIONS OF LAW

39. The Division has jurisdiction over the subject matter and parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

40. Petitioner has the burden of proving by a preponderance of the evidence that Respondent committed an unlawful employment practice. See § 120.57(1)(j), Fla. Stat.

41. Section 760.10(1)(a), Florida Statutes, makes it unlawful for an employer to take adverse action against an individual because of the individual's sex.

42. The Act is patterned after Title VII of the Civil Rights Act of 1964, as amended. Thus, case law construing Title VII is persuasive when construing the Act. See, e.g., Fla. State Univ. v. Sondel, 685 So. 2d 923, 925 n.1 (Fla. 1st DCA 1996).

43. Petitioner may establish unlawful discrimination based on gender through the use of direct evidence or circumstantial evidence. Harris v. Shelby Cnty. Bd. of Educ., 99 F.3d 1078, 1083 (11th Cir. 1996). Direct evidence is evidence that, "if believed, proves [the] existence of [a] fact in issue without inference or presumption." Burrell v. Bd. of Tr. of Ga. Military Coll., 125 F.3d 1390, 1393 (11th Cir. 1997). Direct evidence consists of "only the most blatant remarks, whose intent could be nothing other than to discriminate" on the basis of an impermissible factor. Carter v. City of Miami, 870 F.2d 578, 582 (11th Cir. 1989). There is no direct evidence of gender discrimination in the record.

44. To prove unlawful discrimination by circumstantial evidence, a party must establish a prima facie case of discrimination by a preponderance of the evidence. If successful, this creates a presumption of discrimination. Then

the burden shifts to the employer to offer a legitimate, non-discriminatory reason for the adverse employment action. If the employer meets that burden, the presumption disappears and the employee must prove that the legitimate reasons were a pretext. Valenzuela v. Globe Ground N. Am., LLC, 18 So. 3d 17 (Fla. 3d DCA 2009).

45. Petitioner must prove discrimination by indirect or circumstantial evidence by first establishing a prima facie case of gender discrimination showing (a) she is a member of a protected class; (b) she was qualified for the job; (c) she was subjected to an adverse employment action; and (d) other similarly-situated employees, who are not members of the protected group, were treated more favorably than Petitioner. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

46. Petitioner meets three of the four elements of a prima facie case. Petitioner is a female, a protected class. By all accounts, Petitioner was qualified for her job, having been promoted to the position of manager after years of experience in subordinate, but increasingly more responsible, positions. Petitioner suffered an adverse employment action, namely discharge.

47. To make a prima facie case, Petitioner must also establish that similarly-situated male employees were treated more favorably than herself. Petitioner failed to prove that

element. While Mr. Sparedeo, Mr. Broxton, and Mr. Sharpe were all suspected of having violated Publix product shelf-life policy, neither the store manager nor assistant store manager was able to prove which, if any, of them committed the violation. Petitioner offered no evidence that any one of the male employees violated the same policy, thus, Petitioner did not establish the existence of a similarly-situated non-protected comparator.

48. Even if Petitioner had proven that Mr. Sparedeo, Mr. Broxton, or Mr. Sharpe, violated the Publix shelf-life policy by extending the sell-by date of the pot roast, none of those male employees would be an adequate comparator. An adequate comparator must be "similarly situated 'in all relevant respects.'" Valenzuela, 18 So. 3d at 23. In Valenzuela, the court explained as follows:

Similarly situated employees 'must have reported to the same supervisor as the [Petitioner], must have been subject to the same standards governing performance evaluation and discipline, and must have engaged in conduct similar to the [Petitioner's], without such differentiating conduct that would distinguish their conduct or the appropriate discipline for it.'

Id. at 23 (quoting Knight v. Baptist Hosp. of Miami, Inc., 330 F.3d 1313, 1316 (11th Cir. 2003)). Mr. Sparedeo was Petitioner's assistant manager, and both Mr. Broxton and Mr. Sharpe were meat cutters. By contrast, Petitioner was the

department manager, in a position of authority over all the employees to whom she was speaking on January 6, 2016, when she remarked that Mr. Sparedeo would cut the out-of-date product. Petitioner was responsible to uphold store policy and ensure that her subordinates did as well.

49. Because Petitioner failed to establish that a similarly-situated male employee was treated more favorably, Petitioner failed to establish a prima facie case of sex discrimination.

50. Petitioner seemed sincere in her explanation that the offending remark was made in a joking manner. Unfortunately for her, Mr. Sparedeo did not find it humorous and responded directly that he would not cut the out-of-date product. If Petitioner intended the direction as a joke, she should have clarified that with Mr. Sparedeo directly as soon as she realized that it was inappropriate and unprofessional.

51. The undersigned is sympathetic to Petitioner's dismay at being fired for making a statement she thought was a joke. However, it is not the undersigned's role to determine whether Publix's reason for terminating Petitioner was fair, but whether it was motivated by discriminatory animus. See Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d 1354, 1361 (Fla. 11th Cir. 1999). Petitioner did not carry her burden to demonstrate unlawful discrimination.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Florida Commission on Human Relations enter a final order dismissing the Petition for Relief filed by Petitioner against Respondent in Case No. 201600629.

DONE AND ENTERED this 17th day of January, 2017, in Tallahassee, Leon County, Florida.



SUZANNE VAN WYK
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Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of January, 2017.

ENDNOTE

^{1/} Except as otherwise noted herein, all references to the Florida Statutes are to the 2015 version, which was in effect when the alleged discriminatory action against Petitioner took place.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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