STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ADRIAN RICO,

Petitioner,

vs. Case No. 17-1550

HIGBEE COMPANY, d/b/a
DILLARD'S,[1/]

Respondent.
_______________________________/

RECOMMENDED ORDER ON REMAND

A formal hearing was convened in this case on June 29, 2017, in Tallahassee, Florida, before Suzanne Van Wyk, a duly-designated Administrative Law Judge ("ALJ") with the Division of Administrative Hearings. The hearing was concluded on July 28, 2017, in Tallahassee, Florida, before Lawrence P. Stevenson, also a duly-designated ALJ with the Division of Administrative Hearings. ALJ Stevenson is the author of this Recommended Order.

APPEARANCES

For Petitioner: Adrian G. Rico, pro se
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Destin, Florida 32541

For Respondent: Christopher W. Deering, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Respondent, Higbee Company, d/b/a Dillard's ("Dillard's"), discriminated against Petitioner based upon his national origin or disability, in violation of section 760.10, Florida Statutes (2016).[2/]

PRELIMINARY STATEMENT

On August 5, 2016, Petitioner, Adrian Rico ("Petitioner"), filed with the Florida Commission on Human Relations ("FCHR") an Employment Charge of Discrimination against Dillard's. Petitioner alleged that he had been discriminated against pursuant to chapter 760 and Title VII of the Federal Civil Rights Act, based upon national origin and handicap, as follows:

> I am a Mexican male with a disability. I have been discriminated against on the basis of national origin and disability. I began employment with Respondent on 4/20/2014 as a Sales Associate and later as a Fragrance Specialist. Respondent treated me differently and on several instances I was made fun of because of my accent. After I disclosed my disability to the Store Manager, Allen Gustason, I was terminated on 11/29/2015. I firmly believe that Respondent discriminated against me on the basis of national origin and disability.

The FCHR conducted an investigation of Petitioner's allegations. On March 6, 2017, the FCHR issued an amended written determination[3/] that there was no reasonable cause to believe that an unlawful practice occurred. The FCHR's amended determination stated as follows, in relevant part:

> Complainant worked for Respondent, a retail store, as a fragrance specialist. He alleged that he was subjected to disparate treatment based on his disability. Complainant committed several infractions. He failed to report to work, gave gifts with purchase for merchandise that was not part of the gift with purchase promotion, and walked out of a counseling session with a supervisor. Thus, Respondent had a legitimate nondiscriminatory reason for terminating Complainant. Also, Complainant alleged that he was harassed based on his national origin. Complainant fails to prove a prima facie case. Complainant stated that coworkers did not invite him to office parties and one coworker made fun of his accent. He reported this to Respondent's sales manager, who stated that Complainant said coworkers were "picking on him." Complainant provided witness statements which merely indicated that coworkers disliked Complainant. Therefore, Complainant failed to provide evidence that the harassment was severe or pervasive.

On March 14, 2017, Petitioner timely filed a Petition for Relief with the FCHR. Also on March 14, 2017, the FCHR referred the case to the Division of Administrative Hearings ("DOAH"). The case was assigned to ALJ Van Wyk and scheduled for hearing on May 18, 2017. On motion of Dillard's, a continuance was granted and the hearing was rescheduled for June 29, 2017. ALJ Van Wyk convened the hearing on June 29 and heard the testimony of Petitioner and his witnesses. Dillard's was allowed to defer its case-in-chief to a later date because of the unavailability of its witness. The hearing was scheduled to reconvene on July 28, 2017.

On June 30, 2017, ALJ Van Wyk issued a Notice of Ex Parte Communication which stated as follows:

> This cause came before the undersigned on notice of a communication with Petitioner initiated by a person affiliated with the Division of Administrative Hearings, but who is not an employee of the Division.
>
> On June 29, 2017, the final hearing was convened in this case. In attendance as an observer was the person identified above. The hearing was not concluded, and has been rescheduled for July 28, 2017, for taking testimony from Respondent. After the conclusion of the June 29, 2017, proceedings, the person affiliated with the Division called Petitioner to discuss aspects of his case. The specifics are unclear. Nonetheless, the communication was improper. The undersigned did not communicate with Petitioner, nor has she discussed the specifics of the conversation with either Petitioner or the person affiliated with the Division. No Administrative Law Judge or other employee of the Division has discussed the merits of Petitioner's case, or of Respondent's defense outside of the confines of the administrative hearing.
>
> It is axiomatic that there may be no written or verbal communication between the Administrative Law Judge and any party concerning matters of substance in this case unless the other parties are involved in that communication. Despite there having been no direct communication between the undersigned and Petitioner, it is in the best interests of the parties and the Division to avoid the appearance of impropriety or favoritism. Thus, upon the filing of this Notice, further activities regarding this case will be reassigned to a different Administrative Law Judge pursuant to separate notice.

The case was reassigned to the undersigned, who presided at the reconvened hearing on July 28, 2017, after having reviewed the record and read the Transcript of the June 29, 2017, portion of the hearing. The hearing was completed on July 28, 2017.

At the hearing, Petitioner testified on his own behalf and presented the testimony of Santiago Garcia and Claudia Pimentel, both customers of Dillard’s. Petitioner’s Exhibit 1 was admitted into evidence. Respondent presented the testimony of Dillard’s men’s Department Manager Mark Kronenberger. Respondent’s Exhibits 2, 3, 5, 8, 20, 22, 25 and 27 were admitted into evidence.

The one-volume Transcript of the June 29, 2017, portion of the hearing was filed at DOAH on July 21, 2017. The one-volume Transcript of the July 28, 2017, portion of the hearing was filed at DOAH on August 16, 2017. On August 22, 2017, Respondent filed a motion to extend the time for submitting proposed recommended orders, which was granted by Order dated August 25, 2017. In accordance with the Order granting extension, Respondent timely filed its Proposed Recommended Order on September 18, 2017. On July 31 and August 16, 2017, Petitioner filed letters addressed to the undersigned, which have been treated without objection as Petitioner’s Proposed Recommended Order.

FINDINGS OF FACT

1. Dillard's is an employer as that term is defined in section 760.02(7). Dillard's is a department store chain.

2. Petitioner, a Mexican male, was hired as a sales associate in the men's department of Dillard's store at Tallahassee's Governor's Square Mall on May 13, 2014. Petitioner's job was to sell men's fragrances directly to customers at the store.

3. Allen Gustason was manager of the Dillard's store at Governor's Square Mall during the time Petitioner was employed there. Dee Thomas was the assistant store manager. Mark Kronenberger, who testified at the final hearing, was the men's department sales manager and was Petitioner's direct supervisor during the entire time that Petitioner worked at Dillard's.

4. Petitioner started at a salary of $12.00 per hour as a sales associate. His job performance and pay increases were assessed primarily on the basis of sales. On January 6, 2015, Petitioner received a raise to $12.60 per hour. On April 14, 2015, Petitioner was promoted to the position of fragrance specialist and received a raise to $14.50 per hour. Petitioner's promotion did not change his basic duties, i.e., direct sales to customers. Petitioner's employment at Dillard's ended on November 28, 2015.

5. Dillard's did not dispute Petitioner's testimony that he was a good and effective salesperson. Petitioner developed a regular clientele of Spanish-speaking customers who liked his ability to communicate with them in their native language.

6. At the time of his hiring, Petitioner received, read, and agreed to abide by Dillard's Associate Work Rules and General Policies, which among other things forbade insubordination by sales associates. "Insubordination" was defined to include failure to follow lawful instructions from a supervisor and engaging in contemptuous or taunting conduct that undermines the authority of management.

7. As noted in the Preliminary Statement above, Petitioner claims that he is a Mexican male with a disability. The claimed disability is the human immunodeficiency virus ("HIV"). Dillard's did not dispute that Petitioner has HIV.

8. Petitioner claims that he was harassed by fellow employees because of his Mexican national origin. Petitioner claims that he complained to his supervisors, Mr. Kronenberger and Mr. Gustason, about the harassment. Petitioner claims that no effective action was taken to curb the harassment.

9. Petitioner described a pervasive sense of discrimination at Dillard's of which he became conscious only after about a year of working there. He testified that he is from California and had no real concept of being discriminated

against because of his Mexican heritage. It took some time for him to realize and acknowledge to himself that it was happening.

10. However, Petitioner was unable to describe many specific instances of discriminatory behavior by fellow employees. People were "mean," or "picked on me," or "didn't like me," but few of Petitioner's complaints pointed toward racial discrimination as opposed to personal dislike. He complained that co-workers planned parties and get-togethers away from work but never asked him along, even for Mr. Kronenberger's birthday party, but could only speculate as to the reason for his exclusion.

11. Petitioner testified that he was an aggressive and successful salesperson. While its salespeople are assigned to specific departments, Dillard's allows them to cross-sell in other departments. Several of the incidents described by Petitioner began when he took customers to other departments to sell them something. The undersigned infers that at least some of the bad feelings toward Petitioner were due to his perceived "poaching" of sales from other sections of the store.

12. Petitioner testified that an employee named Carol would yell at him, apparently without provocation, so consistently that he went out of his way to avoid crossing her path. Petitioner stated that one day Carol screamed that he was good-for-nothing and was a "damn Mexican," in front of customers

and co-workers. Petitioner testified that he had no idea why she did this because he had done nothing to provoke her. He walked away, covering his ears from her abuse. Petitioner testified that he went upstairs and spoke to Mr. Gustason about the incident but that nothing was done.

13. Petitioner stated that he returned to the sales floor. Other employees told him that Carol had worked for Dillard's for many years and was a friend of Mr. Gustason and that he should not expect anything to be done about her behavior.

14. Petitioner testified that an employee named Eric, who worked in the men's department, made fun of his accent, particularly Petitioner's difficulty in pronouncing "Saturday."

15. Petitioner testified that another fellow employee, a white woman named Amber who also worked in fragrance, was constantly rude and mean to him. In front of customers, Amber would say that she did not know why Petitioner was there, that he was only good for cleaning the counters. Petitioner repeatedly complained to Mr. Kronenberger about Amber. Mr. Kronenberger told him to continue doing a good job and not to focus on Amber. Petitioner stated that Mr. Kronenberger directed Amber to stay away from Petitioner's counter, but she ignored the order and continued to harass him.

16. Petitioner stated that matters came to a head when he was helping some female customers and went to Amber's counter

one day. He reached behind her to get the fragrance the customers wanted and Amber struck him with her elbow. The customers were aghast and complained to Dillard's management despite Petitioner's entreaties that they let the matter drop.

17. Petitioner and Amber were called to the office to meet with Mr. Kronenberger and Yami Yao, the manager of women's cosmetics. Amber denied everything. The supervisors told Petitioner and Amber to get along. They told Amber to stay away from Petitioner's counter. Petitioner testified that Amber ignored the instruction and continued to harass him.

18. Petitioner testified that on another day he was approached by a customer who wanted to pay Petitioner for a pair of shoes. Petitioner testified that he asked Mr. Kronenberger about it, because he did not want to steal a sale or anger anyone. Mr. Kronenberger told him that he was there to sell and that cross-selling was fine. As Petitioner was completing the sale, an older white man working in the shoe department threw a shoe at Petitioner and said, "You damn Mexican, I'm going to raise hell against you."

19. Petitioner testified about an altercation with Risa Autrey, a fragrance model who worked in Dillard's and who Petitioner stated was another longtime friend of Mr. Gustason. One day, Ms. Autrey approached Petitioner--again, with zero provocation, according to Petitioner--and began berating him,

saying that she had no idea why Dillard's kept Petitioner around. This occurred in front of co-workers and customers. The customers went upstairs and complained to Mr. Gustason, who followed up by admonishing Petitioner to stop telling people to complain to him because nothing was going to come of it.

20. Petitioner testified that a day or so after the incident with Ms. Autrey, he met with Mr. Gustason and Mr. Thomas.[4/] During the course of this meeting, Petitioner disclosed his HIV status. Petitioner testified that Mr. Gustason's attitude towards him changed immediately, and that Mr. Gustason had him fired two weeks later on a pretextual charge of stealing and insubordination.

21. Petitioner testified that he got sick a few days before Black Friday, which in 2015 was on November 27. When he returned to work on November 25, he attempted to give Mr. Gustason a doctor's note that would have entitled Petitioner to paid leave, but Mr. Gustason would not talk to him.

22. Petitioner worked a long shift on Black Friday. On Saturday, November 28, 2015, he was called to Mr. Thomas's office about an altercation he had on November 25 with Ms. Yao, the woman's cosmetics manager. Mr. Kronenberger was also in the office. Petitioner testified that Mr. Thomas accused him of stealing, as well as insubordination to Ms. Yao, and fired him. Two mall security officers, the Dillard's security officer, and

Mr. Kronenberger escorted Petitioner out of the store. Petitioner testified that he was given no paperwork to memorialize his firing or the reasons therefor.

23. Mr. Kronenberger testified at the final hearing. He testified that Petitioner constantly complained about someone not liking him or picking on him. Petitioner never gave him specifics as to what happened. Mr. Kronenberger stated that Petitioner never complained about racial slurs or that any of his alleged mistreatment had a discriminatory element. It was always, "This person doesn't like me."

24. Petitioner had issues with tardiness and absenteeism throughout his employment with Dillard's. Mr. Kronenberger testified that there would be days when Petitioner simply would not show up for work, or would send a text message to Mr. Kronenberger saying that he had things to do or someone he had to meet. Employment records submitted by Dillard's supported the contention that Petitioner was frequently late for, or absent from, work.

25. Mr. Kronenberger testified that Petitioner was erratic in his communications. Petitioner would send a text message saying he could not come in. Then he would send a text telling Mr. Kronenberger how happy he was to have the job. Mr. Kronenberger recalled once receiving a text from Petitioner at midnight that read, "I know I've been bad."

26. In November 2015, Petitioner had six unexcused absences, including four consecutive days from November 21 through 24. Mr. Kronenberger testified that Petitioner finally admitted that he needed to cut his hours in order to qualify for some form of public assistance. Mr. Gustason told Petitioner that something could be worked out to cut his hours, but that just not showing up for work was unfair to Mr. Kronenberger and the other employees.

27. Mr. Kronenberger testified that Dillard's would normally terminate an employee with six unexcused absences in one month under the heading of job abandonment. He stated that Mr. Gustason bent over backward to work with Petitioner and keep him on the job. When Petitioner was absent, Mr. Gustason would leave messages for him, asking him to call and let him know what was going on.

28. During the string of November absences, Mr. Kronenberger phoned Petitioner, who said that he was afraid to come into work for fear that Mr. Gustason would fire him. Mr. Kronenberger assured Petitioner that Mr. Gustason had no such intent, but that in any event no one would have to fire him because he had not been to work in a week. Petitioner was effectively "firing himself" by abandoning his position.

29. Petitioner showed up for work on November 25, 2015, at 4:50 p.m. He had been scheduled to come in at 9:45 a.m.

Mr. Kronenberger testified that he was not present for Petitioner's altercation with Ms. Yao, but that Ms. Yao reported she had attempted to counsel Petitioner about gifts with purchases. The promotional gifts were to be given away only with the purchase of certain items, but Petitioner was apparently disregarding that restriction and giving the gifts with non-qualifying purchases.

30. Ms. Yao told Mr. Kronenberger that Petitioner quickly escalated the counseling into a shouting match in front of customers and co-workers. He yelled, "You're not going to talk to me that way." Ms. Yao told Petitioner that she worked in another department and did not have to deal with his antics. She told him that she was going to report the matter to Mr. Kronenberger and Mr. Thomas.[5/]

31. Mr. Kronenberger testified that his conversation with Ms. Yao was brief because there was no need to give many particulars. He was used to getting reports of employee run-ins with Petitioner and did not need much explanation to get the gist of what had happened.

32. Mr. Kronenberger decided not to raise the issue with Petitioner on Black Friday, the busiest day of the year at the store. On the next day, November 28, Petitioner was called into the office to meet with Mr. Kronenberger and Mr. Thomas. Mr. Kronenberger testified that this meeting was not just about

the incident with Ms. Yao but also Petitioner's absences. In Mr. Kronenberger's words, "[I]t was to follow up with the incident with Yami, and it was to follow up with, 'Hey, you've just missed a week, you've been back a day, and you're having this blow-up with a manager on the floor.' Like, 'What's going on?'"

33. Mr. Kronenberger testified that neither he nor Mr. Thomas went into this meeting with any intention of terminating Petitioner's employment. However, two minutes into the conversation, Petitioner was on his feet, pointing fingers, and shouting that he knew what they were trying to do and he was not going to let them do it. He was quitting.

34. Petitioner walked out of the office. Mr. Thomas asked Mr. Kronenberger to walk Petitioner out of the store so that there would be no incidents on the floor with the other employees. Mr. Kronenberger accompanied Petitioner to the fragrance area, where Petitioner retrieved some personal items, then walked him to the door. They shook hands and Petitioner left the store.

35. Mr. Kronenberger was firm in his testimony that no security personnel were involved in removing Petitioner from the store. Petitioner was not accused of stealing. His parting with Mr. Kronenberger was as cordial as it could have been under the circumstances.[6/]

36. After Petitioner left his office, Mr. Thomas prepared a "Separation Data Form" confirming Petitioner's dismissal for "violation of company work rules." The specific ground stated for Petitioner's dismissal was violation of the Associate Work Rule forbidding insubordination. Mr. Kronenberger testified that in his mind the "insubordination" included not just the scene with Ms. Yao, but the explosion Petitioner had in the meeting with Mr. Thomas.

37. At the time of Petitioner's dismissal, Mr. Kronenberger was unaware of Petitioner's HIV status. Mr. Kronenberger credibly testified that Petitioner's HIV status had nothing to do with his dismissal from employment at Dillard's.

38. Mr. Gustason, who apparently was aware of Petitioner's HIV status, was not at work on November 28, 2015, and was not involved in the events leading to Petitioner's dismissal. Mr. Thomas, the assistant store manager, made the decision to treat Petitioner's situation as a dismissal for cause.[7/]

39. Mr. Kronenberger's testimony is credited regarding the circumstances of Petitioner's dismissal and as to the general tenor of Petitioner's employment at Dillard's. Petitioner was constantly in the middle of conflicts, but never alleged until after his termination that these conflicts were due to his national origin or disability.

40. Petitioner's demeanor at the hearing was extremely emotional. He cried frequently and seemed baffled that Mr. Kronenberger was disputing his testimony. The undersigned finds that Petitioner's version of events was genuine in the sense that it conveyed Petitioner's subjective experience of his employment as he recollected it. However, the undersigned must also find that Petitioner's subjective experience did not conform to objective reality. However, Petitioner internalized the experiences, it is not plausible that Dillard's employees were yelling at Petitioner without provocation, hitting him, throwing shoes at him, and calling him a "damn Mexican" in front of customers. It is not plausible that Petitioner's superiors would ignore such flagrant discriminatory behavior when it was brought to their attention. Petitioner's feelings about the motives of his co-workers and superiors cannot substitute for tangible evidence of unlawful discrimination.

41. Petitioner offered the testimony of two Dillard's customers, neither of whom saw behavior from Petitioner's co-workers that could be attributed to anything beyond personal dislike or sales poaching. Santiago Garcia testified that he noted other Dillard's employees rolling their eyes at Petitioner, but he thought the reason might be that Petitioner talked too loud. Mr. Garcia also saw "bad looks" from other employees and believed that the atmosphere among Dillard's

employees was “tense,” but did not offer a reason for the tension.

42. Claudia Pimentel testified, through a Spanish language interpreter, that she always went directly to Petitioner because she speaks only Spanish and Petitioner was able to help her. Ms. Pimentel noted that a female Dillard’s employee got mad at Petitioner because he sold Ms. Pimentel a cream from her counter.

43. During the years 2015 and 2016, the Dillard’s store in Governor’s Square Mall terminated two other sales associates for insubordination. Neither of these sales associates was Mexican. One was a black female and the other was a black male. Neither of these sales associates had a known disability at the time of termination.

44. Petitioner offered no credible evidence disputing the legitimate, non-discriminatory reason given by Dillard’s for his termination.

45. Petitioner offered no credible evidence that Dillard’s stated reason for his termination was a pretext for discrimination based on Petitioner’s national origin or disability.

46. Petitioner offered no credible evidence that Dillard’s discriminated against him because of his national origin or his disability in violation of section 760.10.

CONCLUSIONS OF LAW

47. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

48. The Florida Civil Rights Act of 1992 (the "Florida Civil Rights Act" or the "Act"), chapter 760, Florida Statutes, prohibits discrimination in the workplace.

49. Section 760.10 states the following, in relevant part:

> (1) It is an unlawful employment practice for an employer:
>
> (a) To discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.

50. Dillard's is an "employer" as defined in section 760.02(7), which provides the following:

> (7) "Employer" means any person employing 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such a person.

51. Florida courts have determined that federal case law applies to claims arising under the Florida's Civil Rights Act, and as such, the United States Supreme Court's model for employment discrimination cases set forth in McDonnell Douglas Corporation v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d

668 (1973), applies to claims arising under section 760.10, absent direct evidence of discrimination.[8/] See Harper v. Blockbuster Entm't Corp., 139 F.3d 1385, 1387 (11th Cir. 1998); Paraohao v. Bankers Club, Inc., 225 F. Supp. 2d 1353, 1361 (S.D. Fla. 2002); Fla. State Univ. v. Sondel, 685 So. 2d 923, 925 n.1 (Fla. 1st DCA 1996); Fla. Dep't of Cmty. Aff. v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991).

52. Under the McDonnell analysis, in employment discrimination cases, Petitioner has the burden of establishing by a preponderance of evidence a prima facie case of unlawful discrimination. If the prima facie case is established, the burden shifts to the employer to rebut this preliminary showing by producing evidence that the adverse action was taken for some legitimate, non-discriminatory reason. If the employer rebuts the prima facie case, the burden shifts back to Petitioner to show by a preponderance of evidence that the employer's offered reasons for its adverse employment decision were pretextual. See Texas Dep't of Cmty. Aff. v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981).

53. In order to prove a prima facie case of unlawful employment discrimination under chapter 760, Petitioner must establish that: (1) he is a member of the protected group; (2) he was subject to adverse employment action; (3) Dillard's treated similarly situated employees outside of his protected

classifications more favorably; and (4) Petitioner was qualified to do the job and/or was performing his job at a level that met the employer's legitimate expectations. See, e.g., Jiles v. United Parcel Serv., Inc., 360 Fed. Appx. 61, 64 (11th Cir. 2010); Burke-Fowler v. Orange Cnty., 447 F.3d 1319, 1323 (11th Cir. 2006); Knight v. Baptist Hosp. of Miami, Inc., 330 F.3d 1313, 1316 (11th Cir. 2003); Williams v. Vitro Serv. Corp., 144 F.3d 1438, 1441 (11th Cir. 1998); McKenzie v. EAP Mgmt. Corp., 40 F. Supp. 2d 1369, 1374-75 (S.D. Fla. 1999).

54. Petitioner has failed to prove a prima facie case of unlawful employment discrimination.

55. Petitioner established that he is a member of a protected group, in that he is a Mexican male and has the acknowledged handicap of HIV.[9/] Petitioner established that he was subject to an adverse employment action, in that he was dismissed from his position as a fragrance specialist after holding the job for approximately 18 months.

56. However, no evidence supports an inference that Petitioner was discriminated against based upon his national origin or handicap. Petitioner offered no evidence to establish that any similarly situated employee was treated differently by Dillard's.[10/] While Petitioner was qualified to do the job of fragrance specialist, and performed adequately, if sporadically, he was ultimately fired for failing to follow the express

Associate Work Rules and General Policies that he acknowledged and accepted at the time he began his employment with Dillard's.

57. Dillard's presented ample evidence of legitimate, non-discriminatory reasons for Petitioner's termination. Petitioner's on-the-job dramatics were tolerated by his immediate superior, Mark Kronenberger, throughout his time at Dillard's. Store Manager Alan Gustason could have terminated Petitioner's employment for abandonment after Petitioner missed six days without excuse in the month of November 2015. Instead, Mr. Gustason and Mr. Kronenberger cajoled and persuaded Petitioner to return to work on November 25, only to have Petitioner engage in yet another confrontation with a fellow employee, this time a supervisor who was attempting to instruct Petitioner on the store's gift with purchase policy. Mr. Kronenberger and Mr. Thomas brought Petitioner in for what was intended to be a counseling session. Petitioner stormed out of the meeting and announced that he was quitting. Only then did Mr. Thomas commence the paperwork to terminate Petitioner's employment. Far from discriminating, Dillard's showed great forbearance with Petitioner, terminating his employment only after his repeated angry outbursts and confrontational behavior escalated into outright insubordination.

58. Petitioner's complaint not only addressed the circumstances of his separation from Dillard's but alleged

harassment during his employment. As noted in the above Findings of Fact, there was no credible evidence that Petitioner’s various conflicts with fellow employees were due to his national origin. Petitioner’s dramatic personality and aggressive sales behavior were more likely than not the chief causes of the animosity expressed by his co-workers.

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 finding that Higbee Company, d/b/a Dillard’s, did not commit any unlawful employment practices, and dismissing the Petition for Relief filed in this case.

DONE AND ENTERED this 18th day of January, 2018, in Tallahassee, Leon County, Florida.

LAWRENCE P. STEVENSON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 18th day of January 2018.

ENDNOTES

[1/] The style of the case has been amended to reflect Respondent's full name.

[2/] Citations shall be to Florida Statutes (2016) unless otherwise specified. Section 760.10 has been unchanged since 1992, save for a 2015 amendment adding pregnancy to the list of classifications protected from discriminatory employment practices. Ch. 2015-68, § 6, Laws of Fla.

[3/] The original determination is not part of the record.

[4/] Petitioner did not present a coherent chronology of events. It was unclear whether there was a single meeting with Mr. Gustason a day or two after the altercation with Ms. Autrey, or whether Petitioner met with Mr. Gustason immediately after the altercation and then again a day or two later.

[5/] These hearsay statements are recounted not for their truth as to the altercation between Petitioner and Ms. Yao, but to establish Mr. Kronenberger's reason for calling Petitioner into the office on November 28, 2015.

[6/] At the hearing, Petitioner spoke very highly of Mr. Kronenberger and completely exempted him from any of his allegations.

[7/] Dillard's made no claim as to Mr. Thomas's motive. However, the undersigned is cognizant of the fact that by terminating Petitioner's employment rather than accepting the angrily tendered resignation, Mr. Thomas ensured Petitioner's eligibility for unemployment benefits. Petitioner testified that he did in fact receive such benefits.

[8/] "Direct evidence is 'evidence, which if believed, proves existence of fact in issue without inference or presumption.'" Rollins v. TechSouth, Inc., 833 F.2d 1525, 1528 n.6 (11th Cir. 1987) (quoting Black's Law Dictionary 413 (5th ed. 1979)). In Carter v. City of Miami, 870 F.2d 578, 582 (11th Cir. 1989), the court stated:

> This Court has held that not every comment concerning a person's age presents direct evidence of discrimination. [Young v. Gen. Foods Corp., 840 F.2d 825, 829 (11th Cir. 1988)]. The Young Court made clear that

> remarks merely referring to characteristics associated with increasing age, or facially neutral comments from which a plaintiff has inferred discriminatory intent, are not directly probative of discrimination. Id. Rather, courts have found only the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of age, to constitute direct evidence of discrimination.

Petitioner offered no evidence that would satisfy the stringent standard of direct evidence of discrimination.

[9/] In Daniels v. Kiser and Soltesz, Case No. 10-10425 (Fla. DOAH April 13, 2011), FCHR Order No. 11-052 (Final Order, June 28, 2011), the FCHR concluded as follows:

> The Administrative Law Judge concluded that Petitioner failed to establish a prima facie case of handicap/disability discrimination, in part, because "Petitioner did not establish that, as a matter of law, being HIV positive constitutes a 'handicap' as that term is used in the law. Petitioner did not establish that his condition substantially limits one or more major life activities." Recommended Order, ¶ 27. We note that one of the "Miscellaneous Provisions" of the Civil Rights chapter of the Florida Statutes, entitled "Discrimination on the basis of AIDS, AIDS-related complex and HIV prohibited," states as follows: "Any person with or perceived as having acquired immune deficiency syndrome, acquired immune deficiency syndrome related complex, or human immunodeficiency virus shall have every protection made available to handicapped persons." Section 760.50(2), Florida Statutes (2010).
>
> Based on this pronouncement, we conclude that an individual who is HIV positive is entitled to the protections "made available to handicapped persons" under the Fair Housing Act, and is a "handicapped" person

within the meaning of the Fair Housing Act. Accord, generally, Balkan v. Block Drug Company, Inc., 16 F.A.L.R. 4154 (FCHR 1994), in which a Commission Panel deciding a case interpreting the Human Rights Act of 1977 adopted the following conclusions of law set out in the Recommended Order for the case: "Section 760.50(2), Florida Statutes, provides in pertinent part that '[a]ny person with . . . human immunodeficiency virus [HIV] shall have every protection made available to handicapped persons.' Accordingly, inasmuch as handicapped persons are protected against employment discrimination by the Act, persons with HIV, by operation of Section 760.50(2), Florida Statutes, enjoy the same protection thereunder. It is therefore an unlawful employment practice in violation of Section 760.10(1)(a), Florida Statutes, for an employer to refuse to hire a person because that person is HIV-positive."

In modifying this conclusion of law of the Administrative Law Judge, we conclude: (1) that the conclusion of law being modified is a conclusion of law over which the Commission has substantive jurisdiction, namely a conclusion of law interpreting the definition of "handicap" under the Fair Housing Act; (2) that the reason the modification is being made by the Commission is that the conclusion of law as stated appears to run contrary to the interrelationship of the Fair Housing Act and Section 760.50(2) Florida Statutes; and (3) that in making this modification the conclusion of law being substituted is as or more reasonable than the conclusion of law which has been rejected. See, Section 120.57(1)(1),Florida Statutes (2010).

[10/] As to the question of disparate treatment, the applicable standard was set forth in Maniccia v. Brown, 171 F.3d 1364, 1368-1369 (11th Cir. 1999):

> "In determining whether employees are similarly situated for purposes of establishing a prima facie case, it is necessary to consider whether the employees are involved in or accused of the same or similar conduct and are disciplined in different ways." Jones v. Bessemer Carraway Med. Ctr., 137 F.3d 1306, 1311 (11th Cir.), opinion modified by 151 F.3d 1321 (1998) (quoting Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997)). "The most important factors in the disciplinary context are the nature of the offenses committed and the nature of the punishments imposed." Id. (internal quotations and citations omitted). We require that the quantity and quality of the comparator's misconduct be nearly identical to prevent courts from second-guessing employers' reasonable decisions and confusing apples with oranges. See Dartmouth Review v. Dartmouth College, 889 F.2d 13, 19 (1st Cir. 1989) ("Exact correlation is neither likely nor necessary, but the cases must be fair congeners. In other words, apples should be compared to apples."). (Emphasis added).

The Eleventh Circuit has questioned the "nearly identical" standard enunciated in Maniccia, but has in recent years reaffirmed its adherence to it. See, e.g., Brown v. Jacobs Eng'g, Inc., 572 Fed. Appx. 750, 751 (11th Cir. 2014); Escarra v. Regions Bank, 353 Fed. Appx. 401, 404 (11th Cir. 2009); Burke-Fowler, 447 F.3d at 1323 n.2.

In any event, Petitioner in the instant case failed to provide any persuasive evidence to establish disparate treatment.

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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.