STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JAVIER F. RIVADENEIRA,

Petitioner,

vs. Case No. 17-5510

WALMART,

Respondent.
_______________________________/

RECOMMENDED ORDER

The final hearing in this matter was conducted before J. Bruce Culpepper, Administrative Law Judge of the Division of Administrative Hearings, pursuant to sections 120.569 and 120.57(1), Florida Statutes (2016),[1/] on March 9, 2018, by video teleconference at sites in Tallahassee and Tampa, Florida.

APPEARANCES

For Petitioner: Javier Fernando Rivadeneira, pro se
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Beverly Hills, Florida 34465

For Respondent: Alva Crawford, Esquire
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STATEMENT OF THE ISSUES

The issues in this matter are whether Respondent, Walmart, violated section 760.08, Florida Statutes, by discriminating

against Petitioner based on his race; and, if so, the relief to which Petitioner is entitled.

PRELIMINARY STATEMENT

On March 23, 2017, Petitioner, Javier F. Rivadeneira ("Petitioner"), filed a Complaint of Discrimination with the Florida Commission on Human Relations (the "Commission") alleging that Respondent, Walmart, violated the Florida Civil Rights Act ("FCRA") by discriminating against him in a place of public accommodation based on his race.[2/]

On September 15, 2017, the Commission notified Petitioner that it determined that no reasonable cause exists to believe that Walmart committed an unlawful public accommodation practice.

Thereafter, on October 3, 2017, Petitioner filed a Petition for Relief with the Commission alleging a discriminatory public accommodation practice. The Commission transmitted the Petition to the Division of Administrative Hearings ("DOAH") to conduct a chapter 120 evidentiary hearing.

The final hearing was held on March 9, 2018. At the final hearing, Petitioner testified on his own behalf. Petitioner did not offer any exhibits. Walmart presented the testimony of Elsie Rodriguez, Dipti Vora, and Sara Revelia. Walmart's Exhibits 1 and 2 were admitted into evidence.

The Transcript of the final hearing was filed with DOAH on April 2, 2018. At the close of the hearing, the parties were

advised of a ten-day timeframe following receipt of the hearing transcript at DOAH to file post-hearing submittals. At the final hearing, Walmart requested a ten-day extension of the filing deadline, which was granted.[3/] Both parties timely filed post-hearing submittals, which were duly considered in preparing this Recommended Order.

FINDINGS OF FACT

1. On March 6, 2017, Petitioner, who is Hispanic, visited the Walmart in his neighborhood in Tampa (store #5255) to make several purchases. Petitioner is a frequent customer of the store, shopping there every two to three days.

2. After selecting several items and placing them in a cart, Petitioner proceeded to the self-checkout area. When he arrived at the self-checkout section, Petitioner found all the registers in use by other customers. So, he waited for an opening.

3. As he stood with his cart, Petitioner observed a Walmart employee, Dipti Vora, stationed in the self-checkout area. Ms. Vora was working as the self-checkout "hostess" to assist and monitor the customers using the self-checkout registers. Petitioner was familiar with Ms. Vora who he had seen on previous visits. Petitioner recalled that they exchanged pleasantries while he waited for a free register.

4. While he waited, Petitioner noticed another Walmart employee, who he later learned was Sara Revelia, walk up to Ms. Vora. As Ms. Revelia approached Ms. Vora, Petitioner saw her raise a finger to her eye, and then point her finger at him. Petitioner also observed Ms. Revelia give him a nasty look. Petitioner interpreted Ms. Revelia's actions as instructing Ms. Vora to "keep an eye on him" because she suspected that he might steal something.

5. Petitioner believed that Ms. Revelia, who appeared to be white, pointed at him solely because he is Hispanic. Petitioner expressed that he did not see Ms. Revelia point at any other customers. Petitioner particularly noted that Ms. Revelia did not point to any other white customers who were waiting in the self-checkout area.

6. Petitioner was so upset by Ms. Revelia's presumptuous gesture that he abandoned his cart in the self-checkout area and left the store without purchasing his items. Petitioner declared that he has never returned to that Walmart store and has no plans to ever shop there again.

7. Petitioner was very embarrassed and disturbed by Ms. Revelia's action singling him out to be watched. Petitioner is convinced that Ms. Revelia racially profiled him because he is Hispanic. Based on her demeanor, Petitioner declared that

Ms. Revelia acted in a very arrogant and authoritative manner and prejudged his character.

8. When questioned by Walmart at the final hearing, Petitioner conceded that he did not hear any words pass between Ms. Vora and Ms. Revelia. Nor did any Walmart employee (including Ms. Revelia) accuse him of stealing or instruct him to leave Walmart. However, Petitioner firmly believes that Ms. Revelia perceived him as a thief or a bad person who might not pay for the items he was carrying. Petitioner asserts that Ms. Revelia's action was an "injustice," and Walmart must take responsibility for its employee's actions.

9. Walmart denied that it failed to allow Petitioner access to its facility or services or took any actions based on his race. Walmart further asserts that at no time did it ask Petitioner to leave or refuse to sell him the items he wished to purchase. Walmart specifically refuted Petitioner's allegation that an employee suspected that he was going to steal from the store or singled him out as a thief.

10. Walmart presented the testimony of Ms. Vora, the employee who was assigned as the "hostess" in the self-checkout area at the time of Petitioner's visit. Ms. Vora had worked in store #5255 for approximately 12 years. She was familiar with Petitioner and had regularly seen him shopping at that Tampa Walmart.

11. Ms. Vora recalled the incident involving Petitioner. Ms. Vora also remembered the encounter with Ms. Revelia, the employee who allegedly pointed at Petitioner.

12. Ms. Vora testified that while Petitioner was standing in the self-checkout area, another customer with a baby stroller was also waiting to use a register. Just at that moment, Ms. Revelia walked up to her and alerted her to watch the woman with the stroller. Ms. Vora explained that the woman had placed several items in the open compartment below the stroller seat. Ms. Revelia was cautioning her to ensure that the woman did not neglect to scan all the items she brought to the register, specifically including the items in the lower section of the stroller.

13. Ms. Vora stated that Ms. Revelia was not pointing at Petitioner. Instead, she was signaling Ms. Vora to monitor the woman pushing the stroller, who was standing just ahead of Petitioner.

14. Ms. Vora also recalled that, after Ms. Revelia walked away, Petitioner approached her and asked who was the employee who had just talked to her. At that time, Ms. Vora did not know Ms. Revelia's name because she was visiting from another store.

15. Ms. Revelia testified at the final hearing. Ms. Revelia is an Asset Protection Manager for Walmart. She principally works in a Walmart store in Largo, Florida. However,

she does visit the Tampa store regularly as part of her area of assignment.

16. Ms. Revelia explained that her job duties include overseeing inventory preparation and compliance at Walmart facilities, as well as assisting with the detection and apprehension of shoplifters. She was specifically trained on how to "shrink" financial losses at Walmart facilities due to theft. Ms. Revelia relayed that she was instructed to constantly watch for any suspicious behavior from Walmart customers.

17. Ms. Revelia recalled working at the Walmart Petitioner visited on March 6, 2017. However, she did not remember talking to Ms. Vora, pointing at a customer, or seeing Petitioner while he waited in the self-checkout area. Instead, Ms. Revelia conveyed that she was primarily focused on helping store #5255 prepare for its annual inventory.

18. Although she did not recall specifically pointing out a customer to Ms. Vora, Ms. Revelia described suspicious situations she frequently sees that cause her alarm. Such activity includes customers who wear heavy jackets in summer or carry open backpacks. In addition (and particularly relevant to this matter), Ms. Revelia is also cognizant of customers who bring in strollers that are equipped with a compartment or shelf under the baby seat. Ms. Revelia expounded that, in her experience as an asset manager, she has personally witnessed customers place goods

and items in a stroller's "undercart" and forget (either intentionally or unintentionally) to scan them at the self-checkout register.

19. Despite not remembering the incident involving Petitioner, Ms. Revelia offered that, if she did walk by the self-checkout area and saw a stroller with items stored under the seat, she very well may have instructed the hostess to "keep an eye on" that customer. Conversely, Ms. Revelia denied that she would point at any Walmart customer simply because he or she was Hispanic. Neither would she automatically suspect that a customer would steal from Walmart because of their race. Ms. Revelia adamantly denied that she took any discriminatory action against Petitioner.

20. As additional evidence that Walmart did not discriminate against Petitioner, Elsie Rodriguez, the store manager for store #5255, testified that approximately 70 percent of the customers who shop at her store are Hispanic. Furthermore, in light of the populace it serves, store #5255 specifically offers Spanish based foods and other products catering to the Latino community. Consequently, Ms. Rodriguez asserted that it would not make sense for Walmart, or any of its employees, to discriminate against its Hispanic customers.

21. Walmart also maintains a Statement of Ethics and Discrimination, as well as a Harassment Prevention Policy, which

prohibit discrimination by its employees based on race and national origin.

22. Ms. Rodriguez also testified that store #5255 does not hold itself out as, nor does it include, a cafeteria, dining facility, or restaurant. Ms. Rodriguez explained that store #5255 is a "Neighborhood Market." The store does not offer food principally for consumption on its premises. Neither does it contain an area where customers can sit and dine. Instead, all the facility sells is groceries.

23. In response to the testimony from the Walmart witnesses, Petitioner insisted that the Walmart employees were not telling the truth. Petitioner vigorously maintained that Ms. Revelia was pointing at him and not another customer with a baby stroller.

24. Based on the competent substantial evidence in the record, the preponderance of the evidence does not establish that Walmart discriminated against Petitioner based on his race. Accordingly, Petitioner failed to meet his burden of proving that he was denied full and equal enjoyment of goods or services in a place of public accommodation in violation of the FCRA.

CONCLUSIONS OF LAW

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

760.11(7), Florida Statutes (2017). See also Fla. Admin. Code R. 60Y-4.016(1).

26. Petitioner claims that Walmart discriminated against him in violation of the FCRA. Petitioner specifically alleges public accommodation discrimination, based on his race, in violation of section 760.08.

27. Section 760.08, entitled "Discrimination in places of public accommodation," states:

> All persons are entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation without discrimination or segregation on the ground of race, color, national origin, sex, pregnancy, handicap, familial status, or religion.

28. Section 760.02(11) states, in pertinent part:

> "Public accommodations" means places of public accommodation, lodgings, facilities principally engaged in selling food for consumption on the premises, gasoline stations, places of exhibition or entertainment, and other covered establishments. Each of the following establishments which serves the public is a place of public accommodation within the meaning of this section:
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> * * *
>
> (b) Any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment, or any gasoline station.

29. The FCRA is patterned after Title VII of the Federal Civil Rights Act of 1964, as amended. As such, Florida courts have held that federal decisions construing Title VII are applicable when considering claims under the FCRA. Harper v. Blockbuster Entm't Corp., 139 F.3d 1385, 1387 (11th Cir. 1998); Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17, 21 (Fla. 3d DCA 2009); and Fla. State Univ. v. Sondel, 685 So. 2d 923, 925 n.1 (Fla. 1st DCA 1996).

30. Specifically regarding discrimination in places of public accommodation, Title II of the Federal Civil Rights Act prohibits discrimination in language similar to that found in section 760.08. See 42 U.S.C. § 2000a. Both Title II and section 760.08 prohibit discrimination on the grounds of race.[4/]

31. The burden of proof in an administrative proceeding, absent a statutory directive to the contrary, is on the party asserting the affirmative of the issue. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981); see also Dep't of Banking & Fin., Div. of Sec. & Investor Prot. v. Osborne Stern & Co., 670 So. 2d 932, 935 (Fla. 1996)("The general rule is that a party asserting the affirmative of an issue has the burden of presenting evidence as to that issue."). Therefore, Petitioner carries the burden of proving that Walmart, as a "place of public accommodation," discriminated against him. The preponderance of

the evidence standard is applicable to this matter. See § 120.57(1)(j), Fla. Stat.

32. The first issue to determine in this matter is whether Walmart constitutes a "place of public accommodation" as defined by the FCRA. See § 760.02(11), Fla. Stat.

33. Governing case law establishes that not all businesses that make food products available to the public are included in the FCRA's definition of "public accommodation." See Pena v. Fred's Stores of Tenn., Inc., 2009 U.S. Dist. LEXIS 121360, at *6 (N.D. Fla. Dec. 31, 2009)(A retail store chain that sold pre-packaged food and beverage items that were not specifically sold for consumption on the premises (as there was no eating area) was not a "public accommodation" under the FCRA.); Amiri v. Safeway, Inc., 1999 U.S. Dist. LEXIS 933, *2-3 (D.D.C. Jan. 26, 1999)("A grocery store . . . does not fall within the definition of public accommodation."); Jones v. Wal-Mart, 2010 U.S. Dist. LEXIS 9801, at *5 (W.D. La. Jan. 14, 2010)(Retail stores, food markets and the like are not within the ambit of 42 U.S.C. § 2000a.); Gigliotti v. Wawa, Inc., 2000 U.S. Dist. LEXIS 1021, 2000 WL 133755, at *1 (E.D. Pa. Feb. 2, 2000)(A retail store "was not principally engaged in selling food for consumption on premises where store sold food which was ready to eat but had no facilities for consumption of food on premises."); Moralez v. Whole Foods Mkt. Cal., Inc., 2015 U.S. Dist. LEXIS 165174, at *9

(N.D. Cal. Dec. 9, 2015)(The ability to purchase food ready-to-eat at a grocery store and to eat it on or near the property does not convert the location into a restaurant or other public accommodation within the meaning of 42 U.S.C. § 2000a.); cf. Thomas v. Tops Friendly Mkts., 1997 U.S. Dist. LEXIS 15887 (N.D. N.Y. 1997)(The presence of an "eating area" inside or outside of a grocery store was deemed sufficient to establish that the store was a "public accommodation.").

34. DOAH has also consistently held the same. In Darrell Alford v. Publix Super Markets, Inc., Case No. 15-3620 (Fla. DOAH Feb. 2, 2016), the Administrative Law Judge ("ALJ") concluded that a grocery store was not a "public accommodation" without some evidence of an "eating area" on the premises. In Morales v. Winn-Dixie Stores, Inc., Case No. 08-5166 (Fla. DOAH Dec. 24, 2008; FCHR Mar. 16, 2009), the Commission adopted the ALJ's conclusion that the Winn-Dixie grocery store at issue was not a place of public accommodation under the facts presented. (Although, the Commission did not exclude the possibility that a grocery store could be a 'public accommodation' under a different set of facts.) In Baker v. Maycom Commc'n/Sprint-Nextel, Case No. 08-5809 (Fla. DOAH Dec. 22, 2008; Fla. FCHR Mar. 16, 2009), the ALJ observed that the FCRA "only prohibits discrimination by statutorily-defined "public accommodations; it does not prohibit discrimination in all business contexts." See also Robert

Mannarino v. Cut The Cake Bakery, Case No. 16-3465 (Fla. DOAH Feb. 9, 2017). Accordingly, the undersigned concludes that the omission of "grocery stores" from the list of places of public accommodation specifically identified in section 760.02(11) reflects a legislative intent that the statute does not encompass such establishments.

35. At the final hearing, Walmart credibly and persuasively testified that the Walmart store Petitioner visited on March 6, 2017, did not meet the definition of "public accommodation" for purposes of the FCRA. The Neighborhood Market does not contain a "restaurant, cafeteria, lunchroom, lunch counter, [or] soda fountain." Neither is it "principally engaged in selling food for consumption on the premises." Further, the Neighborhood Market does not hold itself out as serving food to patrons at its location; does not maintain a designated on-site eating area for its customers; and does not sell groceries intended for on-site consumption.

36. Based on the statute's plain and unambiguous language, regarding public accommodation discrimination, FCRA protections only apply to businesses that are "principally engaged in selling food for consumption on the premises." The FCRA clearly envisions an establishment whose principal purpose is to provide an area at which its customers may consume food or drink. Because the evidence in the record establishes that the Walmart

facility does not engage in this principal purpose, the undersigned concludes that the Neighborhood Market is not a "place of public accommodation." Accordingly, Walmart is not subject to the public accommodation provisions of the FCRA as they pertain to Petitioner's complaint.

37. Notwithstanding the above, assuming arguendo that Walmart is a "place of public accommodation" under the FCRA, Petitioner failed to establish a claim of unlawful discrimination based on his race.

38. Discrimination may be proven by direct, statistical, or circumstantial evidence. Valenzuela, 18 So. 3d at 22. Direct evidence is evidence that, if believed, would prove the existence of discriminatory intent behind the employment decision without any inference or presumption. Denney v. City of Albany, 247 F.3d 1172, 1182 (11th Cir. 2001); see also Holifield v. Reno, 115 F.3d 1555, 1561 (11th Cir. 1997). Courts have held that "'only the most blatant remarks, whose intent could be nothing other than to discriminate . . .' will constitute direct evidence of discrimination." Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d 1354, 1358-59 (11th Cir. 1999)(citations omitted).

39. Petitioner did not present direct or statistical evidence of race discrimination on the part of Walmart. Petitioner did not introduce evidence or elicit testimony that

Walmart refused to offer him its goods or services simply because he is Hispanic.

40. In the absence of direct or statistical evidence of discriminatory intent, Petitioner must rely on circumstantial evidence of discrimination to prove his case. For discrimination claims involving circumstantial evidence, Florida courts follow the three-part, burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and its progeny. Valenzuela, 18 So. 3d at 21-22; see also St. Louis v. Fla. Int'l Univ., 60 So. 3d 455, 458 (Fla. 3d DCA 2011).

41. Due to the relative scarcity of case law under Title II discrimination cases, federal courts find guidance in federal court decisions applying Title VII, including the law of the shifting burdens of production of evidence expressed in McDonnell. See Fahim v. Marriott Hotel Serv., 551 F.3d 344, 349 (5th Cir. 2008); and Bivins v. Wrap It Up, Inc., No. 07-80159-CIV, 2007 U.S. Dist. LEXIS 77670, at *13 (S.D. Fla. Oct. 18, 2007). Accordingly, in order to prove a prima facie case of unlawful public accommodation discrimination under section 760.08, Petitioner must establish that: (1) he is a member of a protected class (race); (2) he attempted to contract for goods and services from a place of public accommodation; (3) he was denied the right to contract for those goods and services; and (4) the goods and services were made available to similarly-

situated persons outside his protected class.[5/] Fahim, 551 F.3d at 350.

42. If Petitioner proves a prima facie case, he creates a presumption of public accommodation discrimination. At that point, the burden shifts to Walmart to articulate a legitimate, nondiscriminatory reason for denying its goods and services to Petitioner. See Texas Dept. of Cmty. Aff. v. Burdine, 450 U.S. 248, 101 S. Ct. 1089 (1981); Valenzuela, 18 So. 2d at 22. The reason for Walmart's decision should be clear, reasonably specific, and worthy of credence. See Dep't of Corr. v. Chandler, 582 So. 2d 1183, 1186 (Fla. 1st DCA 1991). Walmart has the burden of production, not the burden of persuasion, to demonstrate to the finder of fact that the decision was nondiscriminatory. See Wilson v. B/E Aerospace, Inc., 376 F.3d 1079, 1087 (11th Cir. 2004). This burden of production is "exceedingly light." Holifield, 115 F.3d at 1564. Meeting the burden involves no credibility assessment. Walmart needs only to produce evidence of a reason for its decision. It is not required to persuade the trier of fact that its decision was actually motivated by the reason given. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 509.

43. If Walmart meets its burden, the presumption of discrimination disappears. The burden then shifts back to Petitioner to prove that Walmart's proffered reason was not its

true reason but merely a "pretext" for discrimination. See Combs v. Plantation Patterns, 106 F.3d 1519, 1538 (11th Cir. 1997); Valenzuela, 18 So. 3d at 25. Evidence of pretext reveals "such weaknesses, implausibilities, inconsistencies, incoherencies or contradictions in the employer's proffered legitimate reasons for its actions that a reasonable factfinder could find them unworthy of credence." Vessels v. Atlanta Indep. Sch. Sys., 408 F.3d 763, 771 (11th Cir. 2005); Furcron v. Mail Ctrs. Plus, LLC, 843 F.3d 1295 (11th Cir. 2016).

44. In order to satisfy this final step of the process, the petitioner must show "directly that a discriminatory reason more likely than not motivated the decision, or indirectly by showing that the proffered reason for the . . . decision is not worthy of belief." Chandler, 582 So. 2d at 1186 (citing Burdine, 450 U.S. at 252-256 (1981)). The proffered explanation is unworthy of belief if the petitioner demonstrates "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence." Combs, 106 F.3d at 1538; see also Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000). The petitioner must prove that the reasons articulated were false and that the discrimination was the real reason for the action. City of Miami v. Hervis, 65 So. 3d 1110, 1117 (Fla. 3d DCA

2011)(citing St. Mary's Honor Ctr., 509 U.S. at 515)("[A] reason cannot be proved to be 'a pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason.").

45. Despite the shifting burdens of proof, "the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the [petitioner]." Burdine, 450 U.S. at 253; Valenzuela, 18 So. 3d at 22. The demonstration of pretext "merges with the plaintiff's ultimate burden of showing that the defendant intentionally discriminated against the plaintiff." Holifield, 115 F.3d at 1565.

46. Turning to the facts found in this matter, Petitioner did not prove a prima facie case of unlawful discrimination based on his race. Initially, Petitioner sufficiently demonstrated that he belongs to a protected class (Hispanic), and that he attempted to contract for goods from Walmart. Petitioner also presented evidence (through his testimony) that Walmart treated him differently from similarly-situated, white customers. (Petitioner observed that Ms. Revelia did not point at or single out white customers in the self-checkout area.)

47. However, Petitioner failed to establish the third prong of a prima facie case by showing that Walmart denied him the ability to buy the products he brought to the self-checkout area.

(Assuming that Petitioner's allegations are true) while Petitioner was quite upset by Ms. Revelia's actions, no evidence shows that she, or any other Walmart employee, actually prevented Petitioner from using the self-checkout register or completing his purchase. Even if Ms. Revelia did alert the self-checkout hostess to "keep her eyes on" Petitioner, her gesture did not interfere with his ability to pay for the items he selected.

48. Therefore, the competent substantial evidence in the record does not support Petitioner's allegation that Walmart denied him the "full and equal enjoyment" of its goods and services. Accordingly, Petitioner failed to prove a prima facie case of discrimination by circumstantial evidence.

49. Going further, even assuming that Petitioner did establish a prima facie case of public accommodation discrimination, Walmart articulated a legitimate, nondiscriminatory reason for the conduct about which Petitioner complains. Walmart's burden to refute Petitioner's prima facie case is light. Walmart met this burden by providing clear and specific testimony that Ms. Revelia's actions were legitimately based on her job responsibilities to ensure "asset protection" at the Walmart store. Walmart's witnesses believably testified that the (nondiscriminatory) reason for Ms. Revelia's gesture was to ensure that any/all items stored in a baby stroller's undercarriage were paid for.

50. Completing the McDonnell Douglas burden-shifting analysis, Petitioner did not prove, by a preponderance of the evidence, that Walmart's stated reasons for (allegedly) singling him out in the self-checkout area were not its true reasons, but were merely a "pretext" for discrimination. The record in this proceeding does not support a finding or conclusion that Walmart's explanation for Ms. Revelia's gesture was false and discrimination was her real motivation.

51. While Petitioner sincerely believes that Ms. Revelia wanted to "keep an eye on" him because he is Hispanic, the evidence in the record does not establish that her actions were based on, influenced by, or motivated by his race.[6/] On the contrary, Walmart presented a credible and persuasive explanation for Ms. Revelia's gesture, and Petitioner did not show that this explanation was a "pretext" for race discrimination.

52. Petitioner essentially argues that Walmart (by suspecting that he might not pay for his items) treated him in such a poor and hostile manner, that the store effectively denied him the right to access a "place of public accommodation." However, a Walmart employee's efforts to watch for, and minimize, incidents of shoplifting, even if that customer is a minority (and even if the employee is mistaken as to the customer's guilt or innocence), is a legitimate, nondiscriminatory reason to "keep an eye on" a customer. Consequently, Petitioner failed to meet

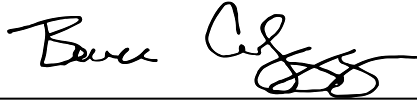
his ultimate burden of proving that Walmart prevented his "full and equal enjoyment" of its goods and services based on racial animus.

53. For the reasons set forth herein, the evidence on record does not support Petitioner's claim that Walmart refused to provide him its goods and services because of his race. The more persuasive evidence establishes that Walmart did not commit the action which Petitioner found offensive (pointing at him as if he intended to steal from the store). Further, even if Ms. Revelia did instruct Ms. Vora to "keep an eye on" Petitioner because she suspected that he might not pay for the goods he was carrying, such reason constitutes a legitimate, nondiscriminatory reason for her conduct. Consequently, Petitioner failed to meet his burden of proving that Walmart discriminated against him in violation of the FCRA.

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 Respondent, Walmart, is not a "place of public accommodation" under the facts of this case; and, even if it were, that Respondent did not unlawfully discriminate against Petitioner's race. Petitioner's Petition for Relief should be dismissed.

DONE AND ENTERED this 10th day of July, 2018, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of July, 2018.

ENDNOTES

[1/] Unless otherwise stated, all statutory references are to the 2016 codification of the Florida Statutes.

[2/] In his Petition for Relief, Petitioner complained that Walmart discriminated against him based on his national origin, color, and disability. At the final hearing, however, Petitioner's allegations essentially focused on discrimination against his race (Hispanic). (In his Discrimination Statement in his Petition for Relief, Petitioner identified himself as a "disabled Hispanic male" and complained that a Walmart employee pointed at him because he was "a Hispanic male.") Accordingly, the undersigned evaluated Petitioner's claim as discrimination based on his race. (Although, the undersigned notes that the legal analysis is the same for all alleged bases.)

[3/] By requesting a deadline for filing post-hearing submissions beyond ten days after the final hearing, the 30-day time period for filing the Recommended Order was waived. See Fla. Admin. Code R. 28-106.216(2).

[4/] The language of 42 U.S.C. § 2000a(a) states:

> Equal access. All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, race, or national origin.

[5/] Some federal courts have applied a modified test for the fourth element of the prima facie case allowing a complainant to prove that either (a) the services were made available to similarly situated persons outside the complainant's protected class, or (b) the complainant "received services in a markedly hostile manner and in a manner in which a reasonable person would find objectively discriminatory." Christian v. Wal-Mart Stores, Inc., 252 F.3d 862, 872 (6th Cir. 2001)). The Eleventh Circuit, however, "has not concretely explicated the elements of a public accommodation discrimination claim," or issued binding precedent adopting a modified prima facie case for public accommodation discrimination. West v. LQ Mgmt., LLC, 156 F. Supp. 3d 1361, 1366 (S.D. Fla. 2015). (Although West notes that the Eleventh Circuit has cited the Christian test without disapproval.) In this case, the undersigned concludes that Petitioner fails to state a prima facie case under either test.

[6/] See Reeves, 594 F.3d at 809, which stated that it is well-established that Title VII "does not prohibit harassment alone, however severe and pervasive. Instead, Title VII prohibits discrimination, including harassment that discriminates based on a protected category. . . ."; see also Baldwin v. Blue Cross/Blue Shield of Ala., 480 F.3d 1287, 1301-02 (11th Cir. 2007) ("Title VII . . . does not prohibit harassment alone, however severe and pervasive. Instead, Title VII prohibits discrimination, including harassment that discriminates based on a protected category.").

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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.