STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RAMON SANTIAGO LOPEZ,

Petitioner,

vs. Case No. 18-0297

WAL-MART STORES EAST, LP,

Respondent.
_____/

RECOMMENDED ORDER

A formal hearing was conducted in this case on June 26, 2018, in Jacksonville, Florida, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge with the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner: Ramon Santiago Lopez, pro se
10404 Lawson Road
Jacksonville, Florida 32246

For Respondent: Alva Cross Crawford, Esquire
Littler Mendleson, P.C.
2301 McGee Street, Suite 800
Kansas City, Missouri 64108

STATEMENT OF THE ISSUE

The issue is whether Respondent, Wal-Mart Stores East, LP ("Walmart"), discriminated against Petitioner, Ramon Santiago Lopez ("Petitioner"), based upon his national origin or age, and/or terminated his employment in retaliation for engaging in

protected activity, in violation of section 760.10, Florida Statutes (2016).[1/]

PRELIMINARY STATEMENT

On or about January 9, 2017, Petitioner filed with the Florida Commission on Human Relations ("FCHR") a Technical Assistance Questionnaire for Employment Complaints against Walmart. Petitioner alleged Walmart discriminated against him because of his age (over 40) and national origin (Hispanic/Cuban). He also alleged that Walmart terminated his employment on January 14, 2016, in retaliation for engaging in protected activity. At some point subsequent to January 9, 2017, Petitioner filed with FCHR an Employment Charge of Discrimination[2/] against, Walmart expressing the same allegations as the Technical Assistance Questionnaire.

The FCHR conducted an investigation of Petitioner's allegations. On December 15, 2017, the FCHR issued a written determination that there was no reasonable cause to believe that an unlawful practice occurred. The FCHR's determination stated as follows, in relevant part:

> The Complainant in this matter filed a charge of discrimination against the Respondent alleging that he was subjected to different terms and conditions of employment and discharged because of his age and national origin. The facts and evidence as set forth in the Investigative Memorandum do not support the Complainant's allegation. The evidence in this matter reveals that the

> Complainant was terminated because he did not comply with the Respondent's policy regarding honesty and integrity when he misappropriated property that belonged to a customer of the Respondent. The Complainant was not terminated due to his age and national origin and he did not provide any credible evidence to prove otherwise. Likewise, the Complainant did not provide any credible evidence to prove that he was subjected to different terms and conditions of employment.

On January 16, 2018, Petitioner timely filed a Petition for Relief with the FCHR. On January 17, 2018, the FCHR referred the case to DOAH. The case was scheduled for hearing on March 28, 2018. The hearing was continued twice, once because Respondent lost its lead counsel on the eve of the final hearing, and once because Petitioner missed a scheduled deposition due to illness. The hearing was ultimately scheduled for June 26, 2018, on which date it was convened and completed.

At the hearing, Luis Nunez acted as the Spanish language interpreter for Petitioner.

Petitioner testified on his own behalf and entered Petitioner's composite Exhibit 1 into evidence. Petitioner's Exhibit 2 was accepted for demonstrative purposes. Respondent presented the testimony of former Asset Protection Manager Joshua Cregut, former Assistant Store Manager April Johnson, and Store Manager Scott Mallatt. Respondent's Exhibits 7, 8, and 10 through 19 were entered into evidence.

The one-volume Transcript of the hearing was filed at DOAH on July 23, 2018. On August 7, 2018, Respondent filed a motion to extend the time for submitting proposed recommended orders, which was granted by Order dated August 14, 2018. In accordance with the Order granting extension, Petitioner timely filed his proposed recommended order on August 21, 2018, and Respondent timely filed its proposed recommended order on August 22, 2018.

FINDINGS OF FACT

1. Walmart is an employer as that term is defined in section 760.02(7). Walmart is a national retailer.

2. Petitioner is a Cuban (Hispanic) male. He was 62 years old when he was hired by Walmart in November 2005 and was 72 years old at the time of his dismissal.

3. Petitioner was initially hired to work at a store in Jacksonville, but transferred to Tampa. In June 2010, Petitioner requested a transfer back to Jacksonville and was assigned to Store 4444 on Shops Lane, just off Philips Highway and I-95 in Jacksonville.

4. The store manager at Store 4444 was Scott Mallatt. Mr. Mallatt approved Petitioner's transfer request and testified that he "very much" got along with Petitioner. Petitioner confirmed that he never had a problem with Mr. Mallatt.

5. Petitioner testified that when he first started at Store 4444, he had no problems. After about four months,

however, he began reporting to a supervisor he recalled only as "Lee." Petitioner described Lee as "kind of a maniac." Lee would harass Petitioner and give him impossible assignments to accomplish. Petitioner testified that he complained repeatedly to Mr. Mallatt about Lee's abuse, but that nothing was ever done about it. Eventually, Petitioner gave up complaining to Mr. Mallatt.

6. Mr. Mallatt testified that Petitioner never complained to him about being discriminated against because of his national origin or age. Petitioner apparently did complain about being overworked, but never tied these complaints to any discriminatory intent on the part of Lee. Petitioner testified that Lee no longer worked at Store 4444 in January 2016.

7. From 2010 to 2015, Petitioner worked from 1:00 p.m. to 10:00 p.m. in various departments, including Grocery, Dairy, Paper, Pet, and Chemical. In 2015, Petitioner spoke with Mr. Mallatt about working at least some day shifts rather than constant nights. Mr. Mallatt approved Petitioner's request. In August 2015, Petitioner was moved to the day shift in the Maintenance department. As a day associate, Petitioner typically worked from 8:30 a.m. to 5:30 p.m.

8. Assistant Store Manager April Johnson transferred to Store No. 4444 in October 2015. Petitioner reported directly to Ms. Johnson.

9. On January 14, 2016, Petitioner was scheduled to work from 8:30 a.m. until 5:30 p.m. He drove his van into the parking lot of Store No. 4444 at approximately 7:58 a.m. He parked in his usual spot, on the end of a row of spaces that faced a fence at the border of the lot. Petitioner liked this spot because the foliage near the fence offered shade to his vehicle.

10. Closed circuit television ("CCTV") footage, from a Walmart camera with a partial view of the parking lot, shows Petitioner exiting his vehicle at around 8:00 a.m. Petitioner testified that he could see something on the ground in the parking lot, 50 to 60 meters away from where his van was parked. The CCTV footage shows Petitioner walking across the parking lot, apparently toward the object on the ground.

11. Petitioner testified there were no cars around the item, which he described as a bucket of tools. Petitioner stated that the bucket contained a screwdriver, welding gloves, a welding face mask, and a hammer.

12. The CCTV footage does not show the bucket. Petitioner crosses the parking lot until he goes out of camera range.[3/] A few seconds later, Petitioner returns into camera range, walking back toward his car while carrying the bucket of tools.

13. When Petitioner reaches his van, he opens the rear door, places the bucket of tools inside, then closes the rear door.

14. Petitioner testified that after putting the tools in the back of his van, he went to the Customer Service Desk and informed two female African American customer service associates that he had found some tools and put them in his car. Petitioner conceded that he told no member of management about finding the tools.

15. Walmart has a written Standard Operating Procedure for dealing with items that customers have left behind on the premises. The associate who finds the item is required to take the item to the Customer Service Desk, which functions as the "lost and found" for the store. Mr. Mallatt and Ms. Johnson each testified that there are no exceptions to this policy.

16. Petitioner was aware of the Standard Operating Procedure. On prior occasions, he had taken found items to the Customer Service Desk. Petitioner conceded that it would have been quicker to take the bucket of tools to the Customer Service Desk than to his van. However, he testified that he believed that he could have been fired if he had taken the tools to the desk before he had clocked in for work. Petitioner cited a Walmart policy that made "working off the clock" a firing offense.

17. It transpired that the policy to which Petitioner referred was Walmart's Wage and Hour policy, which states in relevant part:

> It is a violation of law and Walmart policy for you to work without compensation or for a supervisor (hourly or salaried) to request you work without compensation. You should never perform any work for Walmart without compensation.

18. This language is plainly intended to prevent Walmart from requiring its employees to work without compensation. Petitioner, whose English language skills are quite limited, was adamant that this policy would have allowed Walmart to fire him if he performed the "work" of bringing the tools to the Customer Service Desk before he was officially clocked in for his shift. Therefore, he put the tools in his van for safekeeping and informed the Customer Service Desk of what he had done.

19. Petitioner was questioned as to why he believed it was acceptable for him to report the situation to the Customer Service Desk, but not acceptable for him to bring the tools to the desk. The distinction he appeared to make was that the act of carrying the tools from the parking lot to the desk would constitute "work" and therefore be forbidden, whereas just stopping by to speak to the Customer Service Desk associate was not "work."

20. The evidence established that Petitioner would not have violated any Walmart policy by bringing the tools to the Customer Service Desk before he clocked in. He could have been compensated for the time he spent bringing in the tools by making a "time adjustment" on his time card. Mr. Mallatt testified that time adjustments are done on a daily basis when associates perform work prior to clocking in or after clocking out. Petitioner merely had to advise a member of management that he needed to make the time adjustment. Mr. Mallatt was confident that the adjustment would have been granted under the circumstances presented in this case.

21. Petitioner did not go out to retrieve the tools after he clocked in. Mr. Mallatt stated that employees frequently go out to their cars to fetch items they have forgotten, and that Petitioner absolutely would have been allowed to go get the tools and turn them in to the Customer Service Desk.

22. Later on January 14, 2016, Ms. Johnson was contacted by a customer who said tools were stolen off of his truck.[4/] Ms. Johnson had not heard anything about lost tools. She looked around the Customer Service Desk, but found no tools there. Ms. Johnson also called out on the store radio to ask if anyone had turned in tools.

23. Finally, the customer service manager at the Customer Service Desk told Ms. Johnson that Petitioner had said something

about tools earlier that morning. Ms. Johnson called Petitioner to the front of the store and asked him about the missing tools. Petitioner admitted he had found some tools in the parking lot and had placed them in his vehicle.

24. Ms. Johnson asked Petitioner why he put the tools in his vehicle. Petitioner told her that he was keeping the tools in his car until the owner came to claim them. Ms. Johnson testified that Petitioner offered no other explanation at that time. He just said that he made a "mistake." Ms. Johnson explained to Petitioner that putting the tools in his vehicle was not the right thing to do and that he should have turned them in to "lost and found," i.e., the Customer Service Desk. Petitioner was sent to his van to bring in the tools.

25. After this initial conversation with Petitioner, Ms. Johnson spoke with Mr. Mallatt and Mr. Cregut to decide how to treat the incident. Mr. Cregut obtained approval from his manager to conduct a full investigation and to interview Petitioner. Mr. Cregut reviewed the CCTV footage described above and confirmed that Petitioner did not bring the tools to the Customer Service Desk.

26. Ms. Johnson and Mr. Cregut spoke with Petitioner for approximately an hour to get his side of the story. Petitioner also completed a written statement in which he admitted finding some tools and putting them in his car.

27. Mr. Cregut described Petitioner as "very tense and argumentative" during the interview. As the interview continued, Mr. Cregut testified that Petitioner's reaction to the questions was getting "a little bit more hostile [and] aggressive." Mr. Cregut decided to try to build rapport with Petitioner by asking him general questions about himself. This tactic backfired. Petitioner volunteered that he was a Cuban exile and had been arrested several times for his opposition to the Castro regime. Petitioner then claimed that Mr. Cregut discriminated against him by asking about his personal life and prejudged him because of his activism.

28. Mr. Cregut credibly testified that he did not judge or discriminate against Petitioner based on the information Petitioner disclosed and that he only asked the personal questions to de-escalate the situation. Mr. Cregut's only role in the case was as an investigative factfinder. His report was not colored by any personal information disclosed by Petitioner.

29. At the conclusion of the investigation, Mr. Mallatt made the decision to terminate Petitioner's employment. The specific ground for termination was "Gross Misconduct – Integrity Issues," related to Petitioner's failure to follow Walmart policy by bringing the tools to the Customer Service Desk. Mr. Mallatt testified that his concern was that Petitioner intended to keep the bucket of tools if no owner

appeared to claim them. Mr. Mallatt credibly testified that had Petitioner simply taken the tools to the Customer Service Desk, rather than putting them in his vehicle, he would have remained employed by Walmart.

30. Walmart has a "Coaching for Improvement" policy setting forth guidelines for progressive discipline. While the progressive discipline process is used for minor and/or correctable infractions, such as tardiness, "serious" misconduct constitutes a ground for immediate termination. The coaching policy explicitly sets forth "theft" and "intentional failure to follow a Walmart policy" as examples of serious misconduct meriting termination.

31. Petitioner conceded that no one at Walmart overtly discriminated against him because of his age or national origin. He testified that he could feel the hostility toward Hispanics at Store 4444, but he could point to no particular person or incident to bolster his intuition.

32. Petitioner claimed that his dismissal was in part an act of retaliation by Ms. Johnson for his frequent complaints that his Maintenance counterparts on the night shift were not adequately doing their jobs, leaving messes for the morning crew to clean up. Ms. Johnson credibly testified that Petitioner's complaints did not affect her treatment of him or make her want

to fire him. In any event, Ms. Johnson played no role in the decision to terminate Petitioner's employment.

33. Petitioner's stated reason for failing to follow Walmart policy regarding found items would not merit a moment's consideration but for Petitioner's limited proficiency in the English language. It is at least conceivable that someone struggling with the language might read the Walmart Wage and Hour policy as Petitioner did.

34. Even so, Petitioner was familiar with the found items policy, and common sense would tell an employee that he would not be fired for turning in customer property that he found in the parking lot. At the time of his dismissal, Petitioner had been working at Walmart for over 10 years. It is difficult to credit that he was completely unfamiliar with the concept of time adjustment and truly believed that he could be fired for lifting a finger to work when off the clock.

35. Walmart showed that in 2016 it terminated three other employees from Store 4444 based on "Gross Misconduct – Integrity Issues." All three were under 40 years of age at the time their employment was terminated. Two of the employees were African American; the third was Caucasian. Petitioner offered no evidence that any other employee charged with gross misconduct has been treated differently than Petitioner.

36. At the hearing, Petitioner's chief concern did not appear to be the alleged discrimination, but the implication that he was a thief, which he found mortally offensive. It could be argued that Mr. Mallatt might have overreacted in firing Petitioner and that some form of progressive discipline might have been more appropriate given all the circumstances, including Petitioner's poor English and his unyielding insistence that he never intended to keep the tools.

37. However, whether Petitioner's dismissal was fair is not at issue in this proceeding. The issue is whether Walmart has shown a legitimate, non-discriminatory reason for terminating Petitioner's employment. At the time of his dismissal, Petitioner offered no reasonable explanation for his failure to follow Walmart policy. Mr. Mallatt's suspicion regarding Petitioner's intentions as to the tools was not unfounded and was not based on any discriminatory motive.

38. Petitioner offered no credible evidence disputing the legitimate, non-discriminatory reasons given by Walmart for his termination.

39. Petitioner offered no credible evidence that Walmart's stated reasons for his termination were a pretext for discrimination based on Petitioner's age or national origin.

40. Petitioner offered no credible evidence that his termination was in retaliation for his engaging in protected

activity. The employee who was allegedly retaliating against Petitioner played no role in the decision to terminate his employment.

41. Petitioner offered no credible evidence that Walmart discriminated against him because of his age or national origin in violation of section 760.10.

CONCLUSIONS OF LAW

42. 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.

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

44. 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.

45. Walmart 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.

46. 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.[5/] 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).

47. 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).

48. 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) Walmart 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).

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

50. Petitioner established that he is a member of a protected group, in that he is over 40 years of age and is Hispanic (Cuban). Petitioner established that he was subject to an adverse employment action, in that he was dismissed from his position as a day associate after holding the same basic job for

more than 10 years. Petitioner was qualified for the job and had performed it at a level that met Walmart's expectations up to the point he was dismissed.

51. However, no evidence supports an inference that Petitioner was discriminated against based upon his age or national origin. Petitioner offered no persuasive evidence to establish that any similarly situated employee was treated differently by Walmart.[6/]

52. Walmart presented adequate evidence of legitimate, non-discriminatory reasons for Petitioner's termination. Petitioner's failure to follow a clear policy regarding the handling of found property was itself a firing offense under Walmart's "Coaching for Improvement" policy. Petitioner was aware of the policy, having followed the correct procedure for the handling of found items on at least one previous occasion. Further, the manner in which Petitioner chose to handle the bucket of tools he found in the parking lot raised reasonable suspicions that he intended to keep the items in the event the rightful owner did not appear to claim them.

53. A court's role is not to sit as a "super-personnel department that reexamines an entity's business decisions." Denney v. City of Albany, 247 F.3d 1172, 1188 (11th Cir. 2001) (quoting Elrod v. Sears, Roebuck & Co., 939 F.2d 1466, 1470 (11th Cir. 1991)). While the undersigned might have stopped

short of firing Petitioner, it is not this tribunal's function to second-guess Mr. Mallatt's personnel decision. Petitioner offered no evidence that his dismissal was because of his age or national origin, or for any reason other than that asserted by Walmart.

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

> (7) It is an unlawful employment practice for an employer, an employment agency, a joint labor-management committee, or a labor organization to discriminate against any person because that person has opposed any practice which is an unlawful employment practice under this section, or because that person has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section.

55. Because the McDonnell analysis also applies in employment retaliation cases, Petitioner has the burden of establishing by a preponderance of evidence a prima facie case of unlawful retaliation. See, e.g., Burlington N. & Santa Fe v. White, 548 U.S. 53 (2006).

56. In order to prove a prima facie case of unlawful employment retaliation under chapter 760, Petitioner must establish that: (1) he engaged in protected activity; (2) he suffered an adverse employment action; and (3) there was a causal relationship between (1) and (2). See Pennington v. City of Huntsville, 261 F.3d 1262, 1266 (11th Cir. 2001).[7/] To establish this causal relationship, Petitioner must prove "that

the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer." Univ. of Tex. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2533 (2013). This standard has also been called "but-for causation." See, e.g., Frazier-White v. Gee, 818 F.3d 1249, 1258 (11th Cir. 2016)

57. Petitioner at least arguably established that he engaged in protected activity by complaining to his immediate supervisor about the working conditions at Store 4444.

58. Petitioner established that he suffered an adverse employment action by having his employment at Walmart terminated.

59. Petitioner has failed to establish the element of causation. Petitioner's theory is that his complaints to his supervisor, Ms. Johnson, angered her and led to his firing. The facts at hearing demonstrated that Ms. Johnson was not bothered by Petitioner's complaints, and that in any event, Ms. Johnson was not involved in the decision to terminate Petitioner's employment.

60. The termination decision was made by Mr. Mallatt, with whom Petitioner had a congenial relationship up to January 14, 2016. There was no evidence that Mr. Mallatt was aware of Petitioner's complaints to Ms. Johnson at the time Petitioner was fired. The courts recognize a "common sense" requirement that "[a] decision maker cannot have been motivated to retaliate

by something unknown to him." Brungart v. BellSouth Telecomms., Inc., 231 F.3d 791, 799 (11th Cir. 2000).[8/]

61. In summary, Petitioner failed to establish that Walmart's reason for terminating his employment was based on his age or national origin. Petitioner likewise failed to establish that Walmart's adverse employment action was in retaliation for his having engaged in protected activities.

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 Wal-Mart Stores East, LP, did not commit any unlawful employment practices and dismissing the Petition for Relief filed in this case.

DONE AND ENTERED this 25th day of October, 2018, in Tallahassee, Leon County, Florida.

Lawrence P. Stevenson

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 25th day of October, 2018.

ENDNOTES

[1/] 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.

[2/] The Employment Charge of Discrimination document was not part of the record.

[3/] Asset Protection Manager Joshua Cregut testified that the outdoor cameras were locked into a fixed position and there was an unfortunate blind spot in the view of the parking lot. Petitioner insisted that the cameras were not fixed and that Walmart was withholding exculpatory video footage. Mr. Cregut's testimony on this point is credited. Petitioner was very concerned with an allegation (not made by Walmart but by the owner of the bucket of tools) that he had stolen the tools off the back of the owner's truck. Petitioner's testimony that he found the tools on the ground is credited. There is no need for video footage to confirm Petitioner's testimony on this point.

[4/] Petitioner denied that the bucket of tools was on a truck. He steadfastly testified that the bucket was on the ground in the parking lot, with no cars nearby. The undersigned credits Petitioner's testimony on this point. Most likely, the customer took the bucket out of the truck while loading his purchases, then forgot and drove off without it. When he later discovered the bucket was missing, the customer decided it had been stolen. For Walmart's purposes, the important factor was that Petitioner knew the tools belonged to someone else, but did not follow the proper procedure for turning them in.

[5/] "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.

[6/] 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.

[7/] Florida courts have articulated an identical standard:

> To establish a prima facie case of retaliation under section 760.10(7), a plaintiff must demonstrate: (1) that he or she engaged in statutorily protected activity; (2) that he or she suffered adverse employment action and (3) that the adverse employment action was causally related to the protected activity. See Harper v. Blockbuster Entm't Corp., 139 F.3d 1385, 1388 (11th Cir.), cert. denied 525 U.S. 1000, 119 S.Ct. 509, 142 L.Ed.2d 422 (1998). Once the plaintiff makes a prima facie showing, the burden shifts and the defendant must articulate a legitimate, nondiscriminatory reason for the adverse employment action. Wells v. Colorado Dep't of Transp., 325 F.3d 1205, 1212 (10th Cir. 2003). The plaintiff must then respond by demonstrating that defendant's asserted reasons for the adverse action are pretextual. Id.

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

[8/] Brungart was decided under the Family and Medical Leave Act, but its reasoning as to the element of retaliation has been repeatedly applied in cases involving Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. See, e.g., Mitchell v. Mercedes-Benz U.S. Int'l, Inc., 637 Fed. Appx. 535,

539 (11th Cir. 2015); and Willis v. Publix Super Mkts., Inc., 619 Fed. Appx. 960, 962 (11th Cir. 2015).

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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.