

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DESIREE BROWN,

Petitioner,

vs.

Case No. 19-5685

ASHLEY FURNITURE HOMESTORE,

Respondent.

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on February 18, 2020, in Gainesville, Florida, and on August 27, 2020, via Zoom teleconference, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge (“ALJ”) of the Division of Administrative Hearings (“DOAH”).

APPEARANCES

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STATEMENT OF THE ISSUES

The issues are whether Respondent, Ashley Furniture Homestore, subjected Petitioner to unlawful sexual harassment and a hostile work environment based upon her sex, in violation of section 760.10, Florida Statutes,¹ and/or whether Respondent retaliated against Petitioner for the exercise of protected rights under section 760.10.

PRELIMINARY STATEMENT

On May 18, 2018, Petitioner, Desiree Brown (“Ms. Brown” or “Petitioner”), filed with the Florida Commission on Human Relations (“FCHR”) an Employment Complaint of Discrimination against Ashley Furniture Homestore (“Ashley Furniture”). Ms. Brown alleged that she had been discriminated against in violation of chapter 760 and Title VII of the Federal Civil Rights Act, based upon her sex, and that the Ashley Furniture had retaliated against her, resulting in the termination of her employment.

The FCHR conducted an investigation of Ms. Brown’s allegations. On November 13, 2018, the FCHR issued a written determination finding that there was reasonable cause to believe that the discriminatory and/or retaliatory acts had occurred. On December 27, 2018, the FCHR issued a written rescission of its finding of reasonable cause, stating that it had been “improperly issued.” The rescission notice stated that the FCHR “will now undertake a complete investigation of the allegations of discrimination, and upon completion of the investigation, the Commission will issue a new Determination.” On September 17, 2019, the FCHR issued a written determination that there was no reasonable cause to believe that an unlawful

¹ Citations shall be to Florida Statutes (2020) 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.

practice occurred. The FCHR's determination stated as follows, in relevant part:

Complainant worked for Respondent, a furniture store, as a sales associate. Complainant claimed that she was compelled to resign because her supervisor made unwanted sexual advances towards her and she was subjected to a hostile work environment after reporting her supervisor's behavior. Respondent stated that it investigated Complainant's complaints about her supervisor and found that Complainant was not subjected to any sexual advances. Respondent explained that Complainant was told to leave and suspend [sic.] because she was involved in an altercation with a coworker. Complainant was reprimanded for failing to meet her sales quotas, received a Final Written Warning when her sales did not improve, and then resigned. The investigation did not reveal other employees who engaged in similar conduct without being disciplined. Complainant alleged that she was subjected to disparate treatment based on her sex. Complainant fails to prove a prima facie case because the investigation did not reveal evidence of similarly situated comparators outside Complainant's protected class who were treated more favorably or any other evidence of discrimination. Also, Complainant alleged that she was harassed based on her sex. Complainant fails to prove a prima facie case because the evidence does not show that Complainant suffered any severe or pervasive conduct. In addition, Complainant alleged that Respondent retaliated against her. Assuming Complainant can prove a prima facie case, this claim still fails because Respondent articulated a legitimate nonretaliatory reason for disciplining Complainant and the investigation did not reveal evidence that this reason was a pretext for retaliation. Also, Complainant alleged that she was subjected to constructive termination. Complainant fails to prove a prima facie case because the evidence does not show, under an objective standard, that Respondent made working conditions so difficult

that a reasonable person in Complainant's position would have felt compelled to resign.

On October 21, 2019, Ms. Brown timely filed a Petition for Relief with the FCHR. On October 23, 2019, the FCHR referred the case to DOAH for the assignment of an ALJ and the conduct of a formal hearing. The final hearing was initially scheduled for December 9, 2019. A joint motion for continuance was granted by Order dated December 4, 2019. The hearing was rescheduled for February 18, 2020, on which date it was convened.

At the conclusion of the proceedings on February 18, 2020, Petitioner moved for a continuance so that two of her witnesses who failed to appear for the hearing could be heard. The undersigned granted the motion over Respondent's objection. The hearing was ultimately reconvened and concluded on August 27, 2020.

At the hearing, Ms. Brown testified on her own behalf and presented the testimony of: Ashley Furniture employee Angela DeSue; former Ashley Furniture General Manager Lawrence "Larry" Lamb; and former Ashley Furniture Customer Service Representative Aaron Ross. Petitioner offered her Exhibits 1 through 5 and 7 through 13, which were duplicative of exhibits offered by Respondent. The parties stipulated that only Respondent's numeration of the exhibits would be used to avoid confusion in the record.

Respondent presented the testimony of its former Human Resources Manager Gladys Lopez and General Manager Julie Houser. Respondent's Exhibits 3, 5, 7, 8, 10 through 14, 16, 21 through 23, 26 through 30, 34, 36, 37, 41 through 43, 45, 47, 50, 55, 59, and 62 through 65 were entered into evidence.

The first volume of the two-volume Transcript of the final hearing was filed with DOAH on March 11, 2020. The second volume was filed with DOAH on October 7, 2020. Respondent timely filed its Proposed Recommended Order on October 19, 2020. Petitioner did not file a proposed recommended order.

FINDINGS OF FACT

Based on the evidence adduced at hearing, and the record as a whole, the following Findings of Fact are made:

1. Ashley Furniture is an employer as that term is defined in section 760.02(7). Ashley Furniture is a furniture manufacturer with retail stores around the world, including Gainesville, Florida.
2. Ms. Brown is an African American female.
3. Ms. Brown began working as a Retail Sales Associate (“RSA”) on July 31, 2017, at Ashley Furniture’s Gainesville retail store. Petitioner worked at the Gainesville store until May 13, 2018.
4. At the time she was hired, Ms. Brown’s immediate supervisor was Sales Manager Leon Hildreth, a white male. Mr. Hildreth’s supervisor was Lawrence Lamb, the Store Manager.² Mr. Lamb is a white male.
5. Ms. Brown testified that her working relationship with Mr. Hildreth was “amazing” at first. Mr. Hildreth was always there to help and to encourage the employees. When Ms. Brown completed a sale, she would get a “high five” from Mr. Hildreth.
6. Ms. Brown testified that her relationship with Mr. Hildreth changed after about three months. Ms. Brown did not testify as to exact dates, but her Employment Complaint of Discrimination specified “mid-October 2017.” Mr. Hildreth hugged her in a way that made her uncomfortable. He would

² The Store Manager supervised two subordinate managers: the Sales Manager, who oversaw the RSAs; and the Office Manager, who ran the non-sales functions of the store.

make jokes about female breasts and whisper insinuating things in her ear. On three occasions in late 2017, Mr. Hildreth hugged her around her waist.

7. Ms. Brown testified that she complained to Mr. Lamb about Mr. Hildreth's hugging. Ms. Brown stated that Mr. Lamb told her that he had seen Mr. Hildreth hugging women inappropriately and that he intended to report Mr. Hildreth to Ashley Furniture's upper management. Ms. Brown testified that Mr. Lamb later told her that he had counseled Mr. Hildreth about the hugging and had made a report to Ashley Furniture's Human Resources ("HR") department.

8. Mr. Lamb testified that Mr. Hildreth was a "charismatic" and gregarious person, attributes that are generally desirable in a Sales Manager. Mr. Hildreth interacted well with customers and with most employees.

9. Mr. Lamb testified that he had "a couple of situations" with Mr. Hildreth. Mr. Hildreth liked what he called a "family atmosphere" in the store, which included what Mr. Lamb believed to be an unprofessional level of physical contact. Mr. Hildreth was fond of hugging his subordinate employees. Mr. Lamb spoke to Mr. Hildreth about the hugging and was "rebuffed." Mr. Hildreth simply stated, "That's how I manage."

10. Mr. Lamb again brought up the hugging issue during Mr. Hildreth's evaluation in December 2017. Mr. Hildreth gave him the same response and pointed to the improved sales figures in the store as evidence that his "family" approach was effective. Mr. Lamb documented his conversations with Mr. Hildreth in a Word document and placed the document in Mr. Hildreth's personnel file.

11. Mr. Lamb testified that, because he was getting nowhere with Mr. Hildreth, he spoke with Regional Manager Aaron Leroux about the problem. Mr. Leroux said that he would talk to Mr. Hildreth about it. Mr. Lamb left the employ of Ashley Furniture on January 4, 2018, a few

weeks after this conversation.³ Mr. Lamb testified that he did not believe Mr. Leroux ever followed through on his promise to address the issue with Mr. Hildreth.

12. While Mr. Lamb testified as to his observations about Mr. Hildreth's behavior, he did not expressly confirm having a conversation with Ms. Brown about Mr. Hildreth's specific actions toward her.⁴ Mr. Lamb also did not specify whether Mr. Hildreth's practice of hugging was confined to female associates or whether he hugged RSAs of both sexes to foster a "family atmosphere." Mr. Lamb testified that he had no knowledge of any events that occurred at Ashley Furniture after January 4, 2018.

13. Ms. Brown testified that things escalated after Mr. Lamb left and Mr. Hildreth was the only supervisor present during her shifts. She stated that other managers would come to the store, presumably to fill in until Mr. Lamb's replacement was hired, but that Mr. Hildreth was careful to approach her only when they were alone. He would approach her at the "sales point," i.e., the place where the RSA was stationed to greet customers, and "tell me things like he wants to perform oral on me."

14. Ms. Brown would tell Mr. Hildreth that such talk made her uncomfortable. She repeatedly told him that she did not come to work to fulfill his sexual desires. Mr. Hildreth would attempt to defuse the situation by pretending that he was joking. However, Ms. Brown stated that once it became clear that she would not accede to his sexual advances, Mr. Hildreth became increasingly hostile toward her.

15. Ms. Brown testified that Mr. Hildreth would no longer help her with sales. If she needed help or asked a question, Mr. Hildreth would berate her

³ Mr. Lamb's departure was not on good terms. He had accused the company of age discrimination and believed that it had retaliated against him, though he did not seek legal redress. Mr. Lamb had also been accused of sexual harassment by a subordinate employee, but an internal investigation was resolved in his favor.

⁴ The undersigned notes that neither party directly asked Mr. Lamb about his conversations with Ms. Brown.

in front of customers. Mr. Hildreth would ask if she was dumb or make snide remarks about “rocket scientists.”

16. Ms. Brown testified that Angela “Angie” DeSue, the housekeeper in the Gainesville store, witnessed Mr. Hildreth pull Ms. Brown’s hair in a joking but sexual way. Ms. Brown stated that Ms. DeSue was present in the break room when Mr. Hildreth was talking about Ms. Brown’s breasts, comparing them to chicken breasts because he liked them so much. Ms. Brown testified that Ms. DeSue also saw Mr. Hildreth attempt to bribe her by offering her his credit card to buy dinner.

17. Ms. Brown testified that she was afraid to say anything to HR for fear of losing her job. She stated that she spoke to Ashley Furniture Executive Vice President Steve King at a large employees’ meeting in February 2018. Mr. King asked her to email him the details of her complaint. Ms. Brown testified that she attempted to send Mr. King an email on March 3, 2020, but the email address he had given her was not correct.

18. On February 26, 2018, Julie Houser, the new Store Manager, began work full time in the Gainesville store. Ms. Houser had been one of the managers who filled the slot temporarily after Mr. Lamb resigned. Ms. Houser testified that when she started, Ms. Brown was notable for being a “low writer,” i.e., an employee who fails to meet sales expectations. Two days after she arrived, Ms. Houser gave Ms. Brown two written reprimands (“corrective action reports” or “CARs” in Ashley Furniture parlance) for failing to meet her expected sales goals. One of the CARs covered February 2018 and the other was for January 2018. Ms. Houser did not know why Ms. Brown had not been given the January 2018 CAR until the end of February. She only knew that upper management asked her to give Ms. Brown the CARs.

19. On March 6, 2018, Ms. Houser met with Ms. Brown to discuss her performance. Ms. Brown told Ms. Houser that she was under a lot of stress. Ms. Brown described an argument with her sister that culminated in a fist

fight and Ms. Brown ramming her sister's car several times. The police were called and Ms. Brown was charged with a felony. Ms. Brown stated that she was on "parole" and that the charges would be dropped if she maintained a clean record for three months.⁵ Ms. Brown told Ms. Houser that keeping her job was a condition of staying out of jail and that she was desperate not to be fired.

20. Ms. Houser testified that Ms. Brown also told her that Mr. Hildreth had made sexual advances, including inappropriate touching, and said sexual things to her. Ms. Houser recalled that Ms. Brown told her the touching had occurred "a few months ago" but that she had been afraid to report it. Ms. Houser could not recall whether Ms. Brown described specific episodes of Mr. Hildreth's behavior.

21. Ms. Houser assured Ms. Brown that any information she shared would be confidential and shared only with HR Manager Gladys Lopez and Mr. Leroux, the Regional Manager.

22. On March 6, 2018, Ms. Brown forwarded to Ms. Lopez the email she had attempted to send to Mr. King. The email provided as follows, in relevant part, verbatim:

Hello, my name is Desiree Brown and I am an employee at Ashley's furniture on Archer road blvd in Gainesville Fl. I am writing this letter to you because of the sexual harassment I've been dealing with for the past 3 months. I've been holding it in due to the fear of losing my job. And I don't want to lose my job because I love this job, and adore this job. This job has been the best job I ever had But I can't hold it in any longer I've been feeling very uncomfortable at work because starting 3 months ago he (my Manager) would tell me he want to be with me, and make me feel so uncomfortable. He would say thing like if he was my age I don't know what he would do to me, and he wish he was my

⁵ Given that she had not gone to trial on the charges, Ms. Brown could not have been on "parole." It is presumed that her continued employment was a condition of a pre-trial diversion program, completion of which would lead to dismissal of the felony charge.

age so he could make me his. And he kept repeating only if he was my age, he would try to take me out to dinner, he would ask me to always marry him, date him. He also ask to perform oral sex on me, tell me he will love to perform oral on me while at the job on the sales floor and even when I'm on point but as I kept turning him down he started getting angry yelling at me, threatening me, and telling an employee Ms. Angie that I'm not his favorite. Every time I try to get help from him he don't want to help me out or be full of frustration and anger and take it out on me when he have to come and do a over ride for sales or customer purposes. He handled a situation unprofessionally in front of my customers once also. Mr. West^[6] that came to visit are store to help out can vouch for it because they went up to him and told him how he handled the situation poorly and he yelled at me pointing his finger in my face on the sales floor in front of customers for no reason once and I was only trying to get help with a problem I was haveing. He also yells at me when I have a question and try to belittle me because I don't want to be apart of none of the sexual activity he wants me to be apart of. Or be with him. He would say things like my customers think I'm stupid or I act as if I'm stupid and Some times he would even pull my hair and then smile at me when he walk by me. That was two weeks ago on 02-28-2018. At the private event at work he called me in to the office and told me he wouldn't be able to start a meeting without ms. Julie because he have to have another manager in the room with him to sign my CAR sheet but he still started the meeting with out her and I don't think she knew anything about it because she never came in or into the meeting. he was asking me questions like you wouldn't say I was trying to touch on you, make you do anything that you don't want to do sexually, or say I yelled at you because you didn't want to do anything sexually. And I looked at him and said what?? And then I said no and that's when we he

⁶ Ms. Brown testified that she thought "Mr. West" was Mr. King's son. Mr. West was not otherwise identified in the record.

laughed and said oh ok you know how y'all females are and rubbed me on my shoulder and we had exit the office. I am sorry but I can no longer take this harassment and wrote this email with high hopes that someone will help me or reach out to me. And if this letter does not help according to the policies and guidelines at Ashley furniture sexual harassment is completely unacceptable. Although I do not want to go this route of getting an Lawyer involved I will if there is nothing done in regards to my cry out for help! I feel unsafe uncomfortable and very mistreated....

23. Ms. Lopez testified that Ms. Brown's written statement was her first notice of any problem between Mr. Hildreth and Ms. Brown. She stated that Mr. Lamb had not told her of Ms. Brown's allegations and that she was unaware that Mr. Lamb had placed a written memorandum in Mr. Hildreth's personnel file regarding his hugging of employees.

24. Ms. Lopez testified that on March 7, 2018, she spoke to Ms. Brown on the phone. Ms. Lopez stated that Ms. Brown was "all over the place" in describing events. Ms. Lopez understood that Ms. Brown's distress made it hard for her to give a coherent narrative, but Ms. Lopez also needed facts to begin an investigation. Ms. Lopez tried to ascertain when these incidents of harassment took place and who was present. Ms. Lopez recalled Ms. Brown describing Mr. Hildreth's pulling her hair, calling her stupid on the sales floor, and touching her shoulder. Ms. Lopez did not recall anything about chicken breasts. Ms. Brown was able to give her the names of some potential witnesses.

25. Ms. Lopez and Ms. Houser agreed that work schedules should be adjusted so that Ms. Brown was never working at a time when Mr. Hildreth was her sole supervisor. After March 6, 2018, Ms. Brown worked only when Ms. Houser was in the store. Ms. Brown made no further allegations against Mr. Hildreth after March 6, 2018.

26. Ms. Houser wrote a memorandum to Ms. Lopez on March 8, 2018. The memorandum described Ms. Houser's conversation with Ms. Brown on March 6, 2018, including the counseling as to Ms. Brown's poor job performance and a description of the incident between Ms. Brown and her sister. As to the allegations against Mr. Hildreth, Ms. Houser wrote:

Desiree told me that she has also been dealing with stress in the store and that Leon had touched her inappropriately and also stated that he had touched another employee named Angie inappropriately. She said she was too scared to tell anyone for fear of losing her job. I asked her when this happened and she said a few months ago.

Leon and I distributed quite a few CARS last week and 2 were given to Desiree. She is on her final for poor performance. I was in the room while Leon issued the CAR to Desiree and we all signed it.

27. On March 15, 2018, Ms. Lopez came to the Gainesville store to conduct witness interviews and take written statements. Ms. Lopez interviewed RSAs Roddrick Chandler, Shawon Shorter, Justin Terry, Travis Glenney, and Shoaeb Basa. She also interviewed Ms. Houser, Ms. DeSue, Mr. Hildreth, and Office Manager Amy O'Neill.

28. None of the RSAs corroborated Ms. Brown's allegations against Mr. Hildreth. Ms. Lopez noted that most of the RSAs were generally aware of Ms. Brown's allegations.⁷ They told Ms. Lopez that they learned about the allegations from Ms. Brown, though she had agreed with Ms. Lopez and Ms. Houser to keep the matter confidential pending Ms. Lopez's investigation.

29. Ms. DeSue testified at the hearing. She stated that on one occasion in the break room, an RSA expressed an interest in dating Ms. Brown.

⁷ The written statements of two RSAs, Shawon Shorter and Justin Terry, state that Ms. Brown told them that Mr. Hildreth was treating her differently since she turned down his dinner invitation. She apparently made no other allegations in her conversations with these RSAs.

Mr. Hildreth told the RSA that he couldn't have Ms. Brown because Mr. Hildreth was saving her for his son. Ms. DeSue testified that she once saw Mr. Hildreth give Ms. Brown his debit card and tell her to go out and buy lunch for them both.

30. Ms. DeSue stated that Mr. Hildreth had talked to her and to other employees besides Ms. Brown. In context, "talked" plainly meant that Mr. Hildreth had made romantic and/or sexual overtures. Ms. DeSue testified that Mr. Hildreth had once given her his debit card, and that he was dating two Ashley Furniture employees at one time.

31. Ms. DeSue testified that staff had Publix fried chicken for lunch one day. Mr. Hildreth said, "guess which piece I like out of the seven pieces.... I like the two breasts." Ms. DeSue did not testify that this statement was directed at anyone in particular.

32. Ms. DeSue testified that she saw everyone in the store treat Ms. Brown differently after her allegations against Mr. Hildreth became known. Ms. DeSue stated that she wanted to come forward in support of Ms. Brown, but was afraid because she feared retribution from Mr. Hildreth and being ostracized by her fellow employees.

33. On March 26, 2018, Ms. Lopez conducted her final interview with Mr. Hildreth, who denied all the allegations. Ms. Lopez stated that Mr. Hildreth seemed sad and disappointed when he learned of Ms. Brown's accusations. Ms. Lopez described him as being "kind of in shock" and "emotionally visibly charged" during the interview. Mr. Hildreth vehemently denied Ms. Brown's accusations and offered to take a polygraph test.

34. Neither party called Mr. Hildreth as a witness. An email written by Mr. Hildreth to Ms. Lopez following his interview on March 26, 2020, was admitted without objection as a hearsay document. The text of the email is consistent with Ms. Lopez's description of her interview with Mr. Hildreth. He denies all of Ms. Brown's accusations as well as Ms. DeSue's allegation that he dated Ashley Furniture employees. The email is accepted as

corroborative of Ms. Lopez's testimony that Mr. Hildreth denied the allegations. The email has been disregarded as to the truth of Mr. Hildreth's denial, as it does not supplement or explain other admissible evidence on that point.

35. As the investigation continued, it became apparent to Ms. Houser that Ms. Brown was speaking to potential witnesses about her allegations and trying to influence their statements to Ms. Lopez. On March 26, 2018, Beth-Anne McDeavitt of AcceptanceNOW⁸ approached Ms. Houser to complain that Ms. Brown was trying to induce her to make false statements. Ms. Houser also learned that Ms. Brown had typed her witness statement on the break room computer, purposely leaving it up on the screen for the other RSAs to read.

36. On March 25, 2018, RSA Roddrick Chandler reported to Ms. Houser that while lying down in the break room with a headache, he overheard Ms. Brown speaking to someone on the phone. In the words of Mr. Chandler's written statement, verbatim, Ms. Brown said "she was going to get leon and Julie fired and said that she was going to say leon sexual ask her favors Julie was stank bitch no good hoe and she was going to fram them to get them fired."

37. Ms. Houser reported Ms. Brown's actions to Ms. Lopez. Ms. Houser believed that Ms. Brown was creating a hostile work environment by spreading the substance of her allegations throughout the store. Her actions were creating animosity as employees took sides in the matter.

38. Ms. Houser told Ms. Lopez that she feared disciplining Ms. Brown for unrelated matters such as poor sales. Both Ms. Houser and Mr. Hildreth felt they were walking on eggshells because Ms. Brown would threaten a lawsuit whenever an issue arose as to her job performance.

⁸ AcceptanceNOW is a credit company that works in-house with retail companies such as Ashley Furniture to finance customer purchases.

39. After interviewing the employees in the Gainesville store and hearing from Ms. Houser about Ms. Brown's actions, Ms. Lopez spoke with Ms. Brown to remind her not to interfere in the investigation. Ms. Lopez testified that another reason for speaking with Ms. Brown was to calm her down. Ms. Brown was livid when she learned that Ms. Houser reported being present at the February 28 CAR meeting at which Ms. Brown claimed to have been alone with Mr. Hildreth.

40. Ms. Lopez concluded that she could not substantiate the allegations made by Ms. Brown. Despite this conclusion, Ms. Lopez and Ms. Houser continued the practice of having Ms. Brown work only when Ms. Houser was also present. Ms. Lopez believed this practice was necessary to prevent either Ms. Brown or Mr. Hildreth from feeling uncomfortable in the workplace. Transferring one or the other of the employees was not an option because Ashley Furniture did not have another store in the Gainesville area.

41. Ms. Lopez testified that the scheduling adjustment was probably unnecessary because Mr. Hildreth avoided Ms. Brown as much as he possibly could. Mr. Hildreth was uncomfortable in her presence.

42. Mr. Hildreth was not disciplined. He remained nominally Ms. Brown's manager, but he did not supervise her directly. He was not involved in her sales, and other managers would provide Ms. Brown with any supervisory assistance she needed.

43. Though her sales improved briefly after she reported her allegations against Mr. Hildreth on March 6, 2018, Ms. Brown soon resumed the problematic performance that on February 28, 2018, had led to an admonition that the next CAR for poor sales would be her last. As March 2018 progressed, Ms. Brown began coming in late or missing shifts altogether without calling management. On March 11, 2018, she was scheduled to begin work at 10:30 a.m. She did not arrive until 12:20 p.m., her only excuse being that she thought she was supposed to come in late. Ms. Houser and

Ms. O'Neill counseled her and Ms. Brown told them it would not happen again.

44. Ashley Furniture attendance records indicated that Ms. Brown called in sick on March 20, 2018, but failed to submit a physician's note to document her illness. She failed to appear for work on March 23, 2018, and left work early without permission on March 24, 2018. Ms. Brown later submitted a note stating that she had missed work because she was taking care of a situation involving her driver's license. Ms. Brown told Ms. Houser that a friend of hers had rented a car. The car had "bad tags." The friend had an accident in the car and handed the police officer Ms. Brown's identification. In a summary memorandum to Ms. Lopez, dated March 26, 2018, Ms. Houser wrote, "From what I can see, none of this makes sense."

45. In a memorandum to Ms. Lopez and Mr. Leroux sent the previous day, March 25, 2018, Ms. Houser had recounted her meeting with Ms. Brown about the incident with the car and wrote, "I explained to her that she is missing a lot of hours and this is a personal issue not medical. Also discussed her numbers for the month and she said, 'I can't do my job in this work atmosphere with the sexual harassment.' I have her on my schedule and have for the past 2 weeks."

46. Later on March 25, 2018, Ms. Houser sent a second memorandum to Ms. Lopez and Mr. Leroux that read as follows, verbatim:

Today I was trying to do a coaching session with Desiree discussing her numbers and how her volume was so low compared to the rest of the store.

Also that this was a 5 week month. She said it was probably because she had taken time off. I mentioned that it was only a few days that she had taken off, but she had called out quite a bit because of personal problems

She also said that it was difficult to work in this environment having been sexually harassed. I

mentioned to that I had changed the schedule to put her on my schedule the past couple of weeks and asked her if anything had happened in that time and she said no. I also asked her if there was anything I could do to help. She said it was hard to work in this atmosphere. When I asked her to write what she wanted in the RSA comments, she was reluctant as she said that it was due to sexual harassment by Leon. That since the time I first came here, when Leon was alone in the room with her giving her 2 Corrective Actions. I mentioned that I was in the room also, but had to get up to go and do and over ride but came back when he put the 2 sheets in front of her and told her what they were for (which was poor performance). She signed, Leon signed and I signed. She then went a little crazy and said that I was never in the room and how could I do this having 22 year old daughters myself? How would I like it if someone asked them for sexual favors and sexually harassed them? I told her that I remember that day. She then got really angry and turned a totally different person and said I can't believe this! I can't stay here. She left the room and I went to see where she went and she said that she was calling Gladys [Lopez]. She came back in a totally different person and came and asked me for an over ride like nothing had happened 5 minutes before.

Gladys and I spoke after that.

While I was typing this letter, Rod [Roddrick Chandler] came in to get me as he heard Desiree on her phone calling me some pretty nasty words to someone on her phone and talking about Leon and how she was going to make up stuff about us to get us fired. I called Gladys and handed Rod the phone to tell Gladys exactly what he heard in the breakroom....

47. Ms. Houser testified that on May 13, 2018, she witnessed an altercation at the customer service desk between Ms. Brown and RSA

Courtney Gillard. Ms. Brown snatched some sales paperwork from Mr. Gillard's hands and he yanked it back.

48. Under Ashley Furniture's sales floor protocol, RSAs who collaborate on a sale are expected to split the commission for the sale. If one RSA drops a customer, then another RSA can pick up that customer and keep all of the commission generated by any sales to that customer.

49. The altercation on May 13 came about because Mr. Gillard incorrectly believed that Ms. Brown had dropped a customer. Ms. Brown snatched the paperwork in an effort to see whether Mr. Gillard had split the sale with her.

50. Ms. Houser separated the two employees. She took Mr. Gillard aside to calm him down and make sure the sale was split. While this was occurring, Ms. Brown walked away with a customer. When she returned, she began yelling at Ms. Houser that Mr. Gillard had done the same thing the previous day. Ms. Brown refused to talk to Ms. Houser about the situation.

51. Ms. Houser phoned Ms. Lopez for advice. Ms. Lopez told her to call Ms. O'Neill, the Office Manager, and have her come in and speak to Ms. Brown. Ms. Houser noted that this was Mother's Day and Ms. O'Neill was not scheduled to work, but she called her in nonetheless.

52. When Ms. O'Neill arrived, she and Ms. Houser first talked to Mr. Gillard. They told him they were sending him home for the rest of the day because of his behavior on the sales floor. Mr. Gillard apologized and left without further incident.

53. Ms. O'Neill next approached Ms. Brown to give her the same reprimand and send her home. Ms. Brown refused to go home. Ms. Brown testified that an investigator with the City of Gainesville's Office of Equal Opportunity⁹ had told her that her employer could not make her go home if she had done nothing wrong. She claimed the investigator told her that

⁹ Ms. Brown had filed a complaint with this office on April 3, 2018.

sending her home would be an act of retaliation on the part of Ashley Furniture.

54. Ms. Brown denied having snatched the papers from Mr. Gillard's hands. She told Ms. O'Neill that RSAs Shawon Shorter and Aaron Ross were at the counter during her altercation with Mr. Gillard and could verify her version of events.

55. Ms. Houser recollected that Ms. Shorter said she didn't hear anything and that Mr. Ross saw the same thing that Ms. Houser did, i.e., a back-and-forth snatching of the paperwork. When he testified at the hearing, Mr. Ross could recall no details of the altercation between Ms. Brown and Mr. Gillard.

56. Ms. Houser and Ms. O'Neill reconnoitered on the phone with Ms. Lopez. The decision was made to suspend Ms. Brown pending an investigation of the incident and have the police escort her from the store.

57. On May 23, 2018, Mr. Gillard was issued a CAR for his unprofessional behavior on the sales floor on May 13, 2018.

58. Ms. Brown never returned to work at Ashley Furniture after May 13, 2018. On May 18, 2018, she filed with the FCHR her Employment Complaint of Discrimination against Ashley Furniture.

59. On May 25, 2018, Ms. O'Neill phoned Ms. Brown at the request of Ms. Houser and asked her to come in for a meeting with Mr. Leroux, the Regional Manager. Ms. Brown agreed to come in and exchanged a few pleasantries with Ms. O'Neill during their short conversation. Thirty minutes later, Ms. Brown called Ms. O'Neill back to inquire what the meeting was about. Ms. O'Neill responded that she was making the call at Ms. Houser's request and did not know the nature of the meeting. She told Ms. Brown she would find out and call her back.

60. Ms. O'Neill called Ms. Brown back and told her that the meeting was to discuss in-store issues, including her suspension. Ms. Brown stated that she was not coming in for such a meeting. She did not trust Mr. Leroux because, in her words, he and Mr. Hildreth were "besties."

61. Ms. Brown told Ms. O'Neill that she did not work for Ashley Furniture anymore. Ms. O'Neill asked what she meant by that. Ms. Brown stated that she quit. Ms. O'Neill asked her repeatedly if she meant what she was saying and would not be coming back to work. Ms. Brown confirmed that she would not be "lifting a finger" for Ashley Furniture and hung up on Ms. O'Neill.

62. Ms. Brown did not allege that her separation from employment with Ashley Furniture was anything other than a voluntary resignation.¹⁰ The Petition does allege that Ms. Brown's treatment in connection with the events of May 13, 2018, constituted retaliation by Ashley Furniture.

63. To the extent that her testimony is credible, Ms. DeSue corroborated Ms. Brown's testimony that Mr. Hildreth hugged her and gave her his debit card to buy lunch. Mr. Lamb corroborated that Mr. Hildreth was prone to hugging employees.

64. However, the more lurid accusations against Mr. Hildreth are supported only by Ms. Brown's testimony. Her testimony would be sufficient if she could be deemed a reliable witness, but there are at least two broad indications that Ms. Brown is not a credible witness.

65. First, the timing of her accusations was suspect. Though the alleged statements regarding oral sex and the inappropriate touching had occurred between October and December 2017, Ms. Brown did not make her accusations against Mr. Hildreth until after the February 28, 2018, meeting at which she learned her job was in jeopardy for poor performance. With a felony charge pending against her, Ms. Brown stood a chance of going to jail if she lost her job.

66. Ms. Brown claimed to have reported the incidents to Mr. Lamb during 2017. Mr. Lamb did not volunteer his recollection on that point and Ms. Brown's attorneys did not ask him about it. Given the circumstances of

¹⁰ It is noted that in her testimony, Ms. Brown twice used the odd formulation, "I resigned because I was fired." Ms. Brown did not elaborate and the undersigned declines to speculate as to what she had in mind.

Mr. Lamb's departure from Ashley Furniture, it seems unlikely that he would shade his testimony to protect the company.

67. When she finally made her allegations to Ms. Houser on March 6, 2018, Ms. Brown stated that she had not come forward earlier because she was afraid. However, she also stated that she *had* come forward to Mr. Lamb in 2017. Both versions of this story cannot be true.

68. Second, Ms. Brown repeatedly named "witnesses" who could not corroborate her stories. No employee other than Ms. DeSue reported first-hand knowledge of anything untoward. Two RSAs reported hearing from Ms. Brown only that she had declined a date with Mr. Hildreth. Ms. Brown interfered in the internal investigation of her allegations, attempting to promote false testimony and publicizing her witness statement to her co-workers. One employee even reported hearing Ms. Brown telling someone on the phone that her plan was to "frame" Mr. Hildreth and Ms. Houser to get them both fired.

69. Even Ms. DeSue did not corroborate the most serious allegations against Mr. Hildreth. She stated that she heard the "chicken breast" comment but did not testify that it was directed at Ms. Brown. Neither her witness statements nor her testimony mentioned anything about oral sex. The undersigned would not expect Ms. DeSue to have witnessed Mr. Hildreth making such statements, but would expect that Ms. Brown would have told her about them.

70. The evidence produced at hearing establishes that Ashley Furniture took Ms. Brown's accusations seriously. As soon as she reported them to Ms. Houser, she was separated from Mr. Hildreth. Ashley Furniture's HR Manager interviewed every employee who could possibly have any relevant information. Ms. Lopez ultimately concluded that she could not sustain the allegations due to a lack of corroborating evidence. Even after the company concluded that no adverse employment action should be taken against

Mr. Hildreth, it continued to adjust Ms. Brown's schedule so that she would never be alone under Mr. Hildreth's supervision.

71. The evidence convincingly established that Ms. Brown was not subjected to unlawful retaliation. She alleged that she was forced to work in a hostile atmosphere after she made her allegations against Mr. Hildreth, but she offered no specific instances of Ashley Furniture acting against her for reasons unrelated to her performance as an RSA.

72. The chief allegation regarding retaliation is that the events of May 13, 2018, resulting in Ms. Brown's suspension and police escort from the premises of the Gainesville store, were retaliatory. However, the evidence established that Mr. Gillard, the RSA with whom Ms. Brown had the altercation over splitting a commission, was also sent home, suspended for the remainder of his shift, and issued a CAR for unprofessional behavior. There is no reason to infer that Ms. Brown's discipline would have been any different if she had not chosen to escalate the conflict by refusing to comply with her supervisor's instruction to leave the store.

73. Ms. Brown offered no evidence that she was treated differently than any other similarly situated employee.

74. Ms. Brown offered no evidence that her separation from employment with Ashley Furniture was anything other than voluntary.

75. In summary, Petitioner offered insufficient credible evidence that she was subjected to a sexually hostile work environment or sexual harassment. Petitioner also offered no credible evidence that she was subjected to unlawful retaliation.

76. Petitioner offered no credible evidence disputing the legitimate, nondiscriminatory reason given by Ashley Furniture for sending her home and suspending her employment.

77. Petitioner offered no credible evidence that Ashley Furniture's stated reasons for sending Petitioner home and suspending her employment were a

pretext for discrimination based upon Petitioner's sex or a pretext for unlawful retaliation.

78. Petitioner offered no credible evidence that she was constructively discharged from her employment or that Ashley Furniture involuntarily terminated her employment.

CONCLUSIONS OF LAW

79. 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.

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

81. 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.

* * *

(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.

82. Ashley Furniture 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.

83. Florida courts have determined that federal case law applies to claims arising under the Florida Civil Rights Act, and as such, the United States Supreme Court's model for employment discrimination cases set forth in *McDonnell Douglas Corp. 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. 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).

84. "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 credible evidence that would satisfy the stringent standard of direct evidence of discrimination.

85. Under the *McDonnell Douglas* analysis for establishing discrimination through circumstantial evidence, in employment discrimination cases, Petitioner has the burden of establishing, by a preponderance of the 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 the 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). "The inquiry into pretext centers on the employer's beliefs, not the employee's beliefs...." *Alvarez v. Royal Atlantic Developers, Inc.*, 610 F.3d 1253, 1266 (11th Cir. 2010)(the issue is whether the employer was dissatisfied with the employee for a non-discriminatory reason, not whether that reason was unfair or mistaken).

86. In order to prove a prima facie case of a hostile work environment discrimination claim due to sexual harassment under chapter 760, Petitioner must establish that: (1) she belongs to a protected group; (2) she was subjected to unwelcome sexual harassment, such as sexual advances, requests for sexual favors, and other conduct of a sexual nature; (3) the harassment complained of was based upon her sex; (4) the harassment was sufficiently severe or pervasive to alter the conditions of employment and create a discriminatorily abusive working environment; and (5) there is a basis for holding Ashley Furniture liable. See *Miller v. Kenworth of Dothan*, 277 F.3d 1269, 1275 (11th Cir. 2002); *Johnson v. Booker T. Washington Broadcasting Serv., Inc.*, 234 F.3d 501, 509 (11th Cir. 2000); *Booth v. Pasco Cty.*, 829 F.Supp.2d 1180, 1188 (M.D. Fla.2011).

87. “Harassment is severe or pervasive for Title VII purposes only if it is both subjectively and objectively severe and pervasive.” *Booker T. Washington*, 234 F.3d at 509. The United States Supreme Court has stated: “We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations.” *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 80 (1998).

88. In assessing whether harassment is objectively severe or pervasive, courts typically look to: (1) the frequency of the conduct; (2) the severity of the conduct; (3) whether the conduct was physically threatening and humiliating or just a mere utterance; and (4) whether the conduct unreasonably interferes with the employee’s work performance. *See Hulsey v. Pride Restaurants, LLC*, 367 F.3d 1238, 1247-48 (11th Cir. 2004). This standard is very high and is designed to be “sufficiently demanding to ensure that Title VII does not become a ‘general civility code.’” *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998)(quoting *Oncale*, 523 U.S. at 80). To satisfy this standard, Petitioner must show that the workplace was “permeated with ‘discriminatory intimidation, ridicule, and insult.’” *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)(quoting *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986)). “[S]imple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the ‘terms or conditions of employment.’” *Faragher*, 524 U.S. at 788(quoting *Oncale*, 523 U.S. at 82).

89. Petitioner has failed to prove a prima facie case of sexual harassment.

90. Petitioner is an African American female and is therefore a member of a protected group.

91. Petitioner offered no credible evidence beyond her own testimony to prove that she was subjected to unlawful harassment based upon her sex. There were sufficient discrepancies in Petitioner’s testimony to render it unreliable as the sole basis for concluding that she was subjected to sexual

harassment. None of the witnesses presented at the hearing could substantiate Petitioner's allegations. Even Ms. DeSue, Petitioner's most supportive witness, corroborated only that Mr. Hildreth bought lunch with his debit card and once made a suggestive remark about chicken breasts that may or may not have been directed at Petitioner.

92. Petitioner failed to demonstrate that any harassment she suffered was sufficiently severe or pervasive to alter the conditions of her employment and create a discriminatorily abusive working environment. Even if Petitioner's allegations were accepted as proven, they amount to Mr. Hildreth's hugging Petitioner in a manner that made her uncomfortable and making grossly inappropriate sexual suggestions on a few occasions between October and December 2017. The question would obviously be closer had Petitioner proven these allegations, but would still likely fall short of being so "severe or pervasive" as to meet the standard established by the cases cited above.

93. Petitioner failed to demonstrate that there is a basis for holding Ashley Furniture liable, whatever the sins of Mr. Hildreth. When Petitioner reported sexual advances by Mr. Hildreth, Ashley Furniture immediately launched an investigation, which included interviewing every witness Petitioner named, plus additional employees, and obtaining written statements from the witnesses. Despite finding the evidence insufficient to substantiate Petitioner's allegations, Ashley Furniture changed the store's work schedule so that Petitioner would never work alone with Mr. Hildreth as the only manager in the store.

94. As to Petitioner's retaliation claim, the court in *Blizzard v. Appliance Direct, Inc.*, 16 So. 3d 922, 926 (Fla. 5th DCA 2009), described the elements of such a claim as follows:

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.*

95. Petitioner has failed to establish a prima facie case of retaliation.

96. Petitioner established that she engaged in a statutorily protected activity, in that she reported sexual advances to Ms. Houser on March 6, 2018, and to Ms. Lopez on March 8, 2018. She filed a Complaint of Discrimination with the City of Gainesville's Office of Equal Opportunity on April 3, 2018.

97. Petitioner established that she suffered adverse employment action, in that she was sent home from work and suspended on May 13, 2018.

98. Petitioner failed to prove that her adverse employment action was causally related to her statutorily protected activity. Even if she had proven the third element of the retaliation claim, Ashley Furniture articulated a legitimate, nondiscriminatory reason for the adverse employment action. Petitioner was involved in a disruptive imbroglio with another employee on the sales floor, in full view of customers. The other employee was also admonished and sent home for the rest of his shift.

99. Because Ashley Furniture articulated legitimate, non-retaliatory reasons for sending Petitioner home from work and suspending her employment, the burden shifts back to Petitioner to produce evidence that Ashley Furniture's stated reasons are a pretext for retaliation. To establish pretext, Petitioner must "cast sufficient doubt" on Ashley Furniture's proffered non-retaliatory reasons "to permit a reasonable factfinder to

conclude that the employer's proffered 'legitimate reasons were not what actually motivated its conduct.'" *Combs v. Plantation Patterns*, 106 F.3d 1519, 1538 (11th Cir. 1997)(quoting *Cooper-Houston v. Southern Ry. Co.*, 37 F.3d 603, 605 (11th Cir. 1994)).

100. Petitioner failed to produce any evidence to prove that Ashley Furniture's stated reasons for sending her home from work and suspending her employment were pretextual. To the contrary, the evidence established that Petitioner refused to leave the store after her supervisor instructed her to do so and her disruptive behavior forced management to call the police to escort Petitioner out of the store.

101. Petitioner's unsupported suspicions as to motive, standing alone, are insufficient to establish that Ms. Houser and Ms. Lopez's testimony regarding the reasons for sending Petitioner home from work and suspending her employment are false. In the absence of evidence that Ashley Furniture's actions were retaliatory, the undersigned is constrained to defer to the company's business decision.

102. Petitioner failed to establish that her employment was involuntarily terminated. Petitioner's own testimony, consistent with her Petition, was that she resigned from Ashley Furniture.

103. Constructive discharge qualifies as an adverse employment decision. *Poole v. Country Club of Columbus, Inc.*, 129 F.3d 551, 553, n.2 (11th Cir. 1997). Constructive discharge occurs when an employer deliberately makes an employee's working conditions intolerable and thereby forces the employee to quit his/her job. *Bryant v. Jones*, 575 F.3d 1281, 1298 (11th Cir. 2009). The bar to establish a case for constructive discharge is quite high: "[a] claim for constructive discharge requires the employee to demonstrate that the work environment and conditions of employment were so unbearable that a reasonable person in that person's position would be compelled to resign." *Virgo v. Riviera Beach Assoc.*, 30 F.3d 1350, 1363 (11th Cir. 1994). "The standard for proving constructive discharge is higher than the standard for

proving a hostile work environment.” *Hipp v. Liberty Nat. Life Ins. Co.*, 252 F.3d 1208, 1231 (11th Cir. 2001).

104. Petitioner offered insufficient credible evidence to establish that her working conditions met the legal standards necessary to establish constructive discharge. She was justifiably sent home for her unprofessional behavior in the workplace and then refused to return when contacted by Ashley Furniture.

RECOMMENDATION

Based upon 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 Ashley Furniture Homestore did not commit any unlawful employment practices and dismissing the Petition for Relief filed in this case.

DONE AND ENTERED this 9th day of November, 2020, in Tallahassee, Leon County, Florida.



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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.