STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MIKA KOWALUK,

Petitioner,

vs. Case No. 20-2502

ASHLEY FURNITURE HOMESTORE,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on January 20, 2021, via Zoom teleconference, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge ("ALJ") of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner: Mika Kowaluk, pro se
1700 Robb Street, Apartment 15-306
Lakewood, Colorado 80215

For Respondent: Stephanie C. Generotti, Esquire
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
100 North Tampa Street, Suite 3600
Tampa, Florida 33602

STATEMENT OF THE ISSUE

The issue is whether Respondent, Ashley Furniture Homestore ("Ashley Furniture"), subjected Petitioner, Mika Kowaluk ("Ms. Kowaluk" or "Petitioner"), to discrimination on the basis of her race, national origin, or

gender or on the basis of a sexually hostile work environment, in violation of section 760.10, Florida Statutes.[1]

PRELIMINARY STATEMENT

On November 2, 2018, Petitioner filed with the Florida Commission on Human Relations ("FCHR") an Employment Complaint of Discrimination against Ashley Furniture. The Employment Complaint of Discrimination stated as follows:

> I am a White female and of Polish descent. I was discriminated against for these reasons. I began my employment with Respondent on December 26, 2017 in Home Furnishing. I have endured constant harassment from my coworkers. Jonathan used vulgar language while talking to me. Jonathan also used the chalk from the board in a rubbing manner on his "privets" while in a meeting. Dominique shouted and talked down to me. In April 2018 Manager Lincoln presented inappropriate behavior with his sexual gestures with his hand around his "privets" while next to me. I have asked him numerous times to stop; however, shortly after I received disciplinary action. In May 2018 I was on my lunch break and was sitting by the desk in training room and eating. Susan stormed in and approached me with her angry voice, "This is my spot my food is there." She tried verbally force me out of place that I was already setting for some time having my lunch. I responded to her calmly that she wasn't there and sorry, but I like to finish my food. She replied "that's why nobody likes you, enjoy your lonely life." In June 2018, new manager [Luking] was behaving in a harassing way by licking his upper lip ostentatiously. Rohan, a salesperson was also presenting inappropriate behavior by holding his hand on his "privets."

[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.

> Luking was creating an abusive environment by talking down to me while holding his hands on his hips creating dominant posture. Luking told me as well that he is not going to do overriding for me and if I don't like it I can get another job.

The FCHR conducted an investigation of Ms. Kowaluk's allegations. On April 23, 2020, the FCHR issued a written determination finding that there was no reasonable cause to believe that the discriminatory and/or retaliatory acts had occurred.[2] The FCHR's determination stated as follows, in relevant part:

> Complainant is a white Polish female who was employed with Respondent as a Retail Sales Associate. Complainant alleges Respondent harassed her and discriminated against her based on her race, on her sex, and on her national origin.
>
> Complainant claims her supervisors and co-workers engaged in behaviors that included, placing their hands on or near their own clothed genital areas, licking their own lips, and using abusive and vulgar language toward Complainant. Respondent submitted documents that reflect Respondent terminated Complainant's employment after Complainant repeatedly breached Respondent's workplace rules and policies.
>
> Regarding the claim of disparate treatment, to establish a prima facie case, Complainant must

[2] The finding of no reasonable cause was made well after the statutory 180-day deadline for the FCHR's making such determinations. § 760.11(3), Fla. Stat. Under the scheme established by section 760.11, the FCHR should have provided Ms. Kowaluk with a notice of its failure to reach a finding of probable cause within 180 days after the filing of the complaint. The notice should have informed Ms. Kowaluk of her right to proceed with either a civil action in any court of competent jurisdiction or an administrative hearing at DOAH. § 760.11(8), Fla. Stat. However, the FCHR's failure to notify Ms. Kowaluk of her rights does not appear to be jurisdictional under the applicable case law. Once the 180 days passed, Ms. Kowaluk's rights under section 760.11(8) became operative regardless of the FCHR's providing or failing to provide notice. She had the right to bring a civil action whether or not the FCHR notified her of her right to do so. *See Woodham v. Blue Cross and Blue Shield of Fla., Inc.*, 829 So. 2d 891 (Fla. 2002). For purposes of this Recommended Order, Ms. Kowaluk is presumed to have elected to proceed in the administrative forum pursuant to section 760.11(4), as referenced in section 760.11(8).

> show: (1) that she belongs to a protected class; (2) that she is qualified for the position she held with Respondent; (3) that Complainant was subjected to an adverse employment action; and (4) that Respondent treated a similarly situated person outside Complainant's protected classes more favorably. In the present case, the Commission's investigation did not reveal sufficient evidence that showed Respondent treated a similarly situated person outside Complainant's protected classes more favorably. Even assuming the establishment of a prima facie case, Respondent stated a legitimate, non-discriminatory reason for terminating Complainant's employment, and the Commission's investigation did not reveal sufficient evidence that the stated reason is pretext for discrimination. Therefore, the claim of disparate treatment must fail.
>
> Regarding the claim that Respondent subjected Complainant to unlawful, discriminatory harassment, Complainant must show: (1) that she belongs to a protected class; (2) that she was subject to unwelcome harassment; (3) that the harassment was based on a protected characteristic; (4) that the harassment was sufficiently severe or pervasive to alter terms and conditions of employment and create a discriminatorily abusive working environment; and (5) that Respondent is responsible for such environment under a theory of vicarious or direct liability. In the present case, the Commission's investigation did not reveal sufficient evidence that Respondent subjected Complainant to unwelcome harassment. Therefore, the claim of harassment must also fail.

On May 28, 2020, Ms. Kowaluk timely filed a Petition for Relief with the FCHR. On May 29, 2020, 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 August 26, 2020. Two continuances were granted.

The hearing was rescheduled for January 20, 2021, on which date it was convened and completed.

At the hearing, Ms. Kowaluk testified on her own behalf. Ms. Kowaluk offered no exhibits directly into evidence. However, Respondent's Exhibits 41 through 52 were entered into evidence at the request of Ms. Kowaluk, who had provided these documents to Respondent.

Respondent presented the testimony of Store Manager Craig Hanson and of its former Human Resources ("HR") Manager Gladys Lopez. Respondent's Exhibits 1, 3, 7, 9, 13, 14, 21, 25, 27, 31, 36, 38, and 41 through 52 were entered into evidence.

On January 23, 2021, Petitioner sent an email to the undersigned, with a copy to counsel for Respondent. The email was essentially Ms. Kowaluk's attempt to supplement her testimony with written commentary on several of Respondent's exhibits. On January 27, 2021, Respondent filed a motion to strike the email from the record, based on the prejudicial effect of Petitioner's submitting additional testimony without giving Respondent an opportunity to cross-examine or otherwise test the veracity of Petitioner's statements. Respondent's motion is hereby GRANTED. Petitioner's email of January 23, 2021, has not been considered in the composition of this Recommended Order. Respondent's motion for attorney's fees and costs associated with filing its motion to strike is DENIED.

The two-volume Transcript of the final hearing was filed with DOAH on March 8, 2021. Respondent's Motion for an Extension of the Time for Filing Proposed Recommended Orders was granted by Order dated March 17, 2021. In keeping with the Order granting extension, Respondent timely filed its

Proposed Recommended Order on March 30, 2021. 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 in Altamonte Springs, Florida.

2. Ms. Kowaluk is a white female who was born in Poland.

3. Ms. Kowaluk began working as a Retail Sales Associate ("RSA") on or about December 26, 2017, at Ashley Furniture's Altamonte Springs retail store. Petitioner worked at the Altamonte Springs store until her resignation on July 16, 2018.

4. The chronology of events in this case is complicated because there were two simultaneous tracks of complaints coming in to Ashley Furniture's HR department. Starting in February 2018 and continuing until her resignation, Ms. Kowaluk filed a steady stream of complaints regarding incidents with fellow employees and supervisors. At the same time, several other Ashley Furniture employees were filing their own stream of complaints with HR regarding Ms. Kowaluk. HR Manager Gladys Lopez testified that her office was often conducting more than one investigation either initiated or provoked by Ms. Kowaluk.

5. On February 1, 2018, Ms. Kowaluk filed with HR a written complaint that a male employee was singing near her as she completed some paperwork. She shushed him. He then began a conversation with a nearby female employee that included the "F-word." Ms. Kowaluk admonished him for his language and both of the other employees laughed at her. Referencing Ms. Kowaluk's paperwork, the male employee told Ms. Kowaluk to "take your

junk" and work elsewhere. Ms. Kowaluk took offense because she believed the word "junk" to be vulgar.

6. Ms. Kowaluk testified that she believed this incident and her complaint to HR about it were the reason she was never accepted by the other employees in the Altamonte Springs store. She testified that from that point forward, management would ignore her complaints about improper language or behavior by fellow employees. Instead, management would turn the situation on its head and impose discipline on her because she had the temerity to speak out.

7. In March 2018, Craig Hanson, an experienced manager with Ashley Furniture, came to the Altamonte Springs store as Store Manager. He described Ms. Kowaluk as confrontational, argumentative, and "kind of rude." She was disruptive in morning meetings and did not take feedback well in terms of complying with Ashley Furniture policy.

8. On March 16, 2018, Ms. Kowaluk came to Mr. Hanson to complain about a customer "being inappropriate and touching himself." Ms. Kowaluk stated that when she asked the customer about it, he said, "What are you talking about?" and acted as if he had done nothing wrong.

9. Mr. Hanson testified that no other employee corroborated Ms. Kowaluk's account of the customer's inappropriate behavior. Mr. Hanson also stated that no other employee at the Altamonte Springs store ever made a similar complaint about a customer but that Ms. Kowaluk did so more than once.

10. Ms. Kowaluk also raised with Mr. Hanson an issue she had with fellow RSA Dominique Jaime. Ms. Kowaluk had reported Ms. Jaime to Assistant Manager Lincoln Rivera on February 18, 2018, and would continue to complain about Ms. Jaime throughout her employment with Ashley Furniture. Ms. Kowaluk's allegations were always variations of the complaint that Ms. Jaime was loud, that she yelled at Ms. Kowaluk, and that she was

overly aggressive in taking the "point" position, i.e., the RSA first in line to greet customers entering the store.

11. On March 16, 2018, Mr. Hanson told Ms. Kowaluk that he was required to speak to all parties and get all of the facts before taking any disciplinary action. Ms. Kowaluk was unsatisfied. In his memo to Ms. Lopez, dated March 17, 2018, Mr. Hansen wrote that Ms. Kowaluk "asked me if I was uncomfortable with the conversation because of my mannerisms." Mr. Hanson responded that he was not uncomfortable and that Ms. Kowaluk should put her statement in writing.

12. Mr. Hanson characterized Ms. Kowaluk as "not a team player." She had a confrontation of some kind on every shift she worked. Other employees complained about her on a daily basis.

13. Mr. Hanson noted that Ms. Kowaluk was insubordinate and confrontational with management. She would openly disparage company policies and state her intention not to follow them. She would argue with her managers during morning staff meetings. Mr. Hanson testified that he would take Ms. Kowaluk aside and counsel her one-on-one after these incidents. However, he would contact HR when Ms. Kowaluk referenced sexual harassment, abuse, or someone being aggressive toward her.

14. HR came to the Altamonte Springs store to investigate every complaint made by or about Ms. Kowaluk. Ms. Lopez testified that as the regional HR Manager, she visited each of the 18 stores in her region about once every three weeks for at least four hours per visit.

15. Ms. Lopez testified that she received approximately four complaints from Ms. Kowaluk and about six complaints against Ms. Kowaluk in March and April of 2018 alone. She testified that she made about five extra trips to the Altamonte Springs store due to Ms. Kowaluk and that her subordinate HR staff was required to make trips to the store as well. In every case, Ms. Lopez found evidence to substantiate the allegations against Ms. Kowaluk in terms of her belligerence and aggressiveness. She could find

no evidence to support Ms. Kowaluk's claims that other RSAs were abusive and physically aggressive towards her.

16. Mr. Hanson testified as to a meeting with Ms. Kowaluk on April 12, 2018, that began normally but took an odd turn. Mr. Hanson's written statement to Ms. Lopez, confirmed by Mr. Hanson at the hearing, was as follows, in relevant part:

> Mika asked me to meet with her today at noon to speak about her growth as a person and with the company. It started off with her asking me about how she can get better and what the next steps towards management would be. I stated that first we should focus on getting her numbers up, focus on her process, and then go from there. I told her about my path and how I got to where I am at and it came from learning and growth at the role as I was at [sic]. This then turned into her talking about growth as a person. She then took it to why do customers "touch their privates" and is this acceptable in our culture. She then went on to speak about issues and conflict that she has had with the team and how is this still going on and isn't this supposed to be a professional environment?
>
> Eventually she started speaking about Lincoln and how he adjusts his pants from the front and not from the side and how she finds this to be "highly inappropriate." She went on speaking about his hand gestures and how he uses them when talking and how this was not professional. We spoke a bit more and she stated that she didn't know if how he adjusted his pants in front of her was intentional or just a habit. This concerns me because I feel she is implying that it could be on purpose just around her. Lincoln sent me a statement that I will forward to you stating his side of what happened….

17. Mr. Rivera's written statement to Mr. Hanson, sent on April 4, 2018, was as follows, in relevant part:

> At some point, we will need to sit down and discuss Mika once again because I feel I have to watch everything that is done in front of her. I just sat down at my desk at the end of the night to take care of some paperwork and she approached my desk. I adjusted my pants after sitting down because they were sliding down when I sat. I did not touch myself anywhere private, I simply grabbed my pants at the side and pulled them up. She asked me not to do that in front of her as this was inappropriate behavior. I told her that, at this point, I feel uncomfortable with her here at my desk and to please go to the back of the store in preparation to leave. I did ask Priya to stay until she leaves but this person is very difficult to work around. I don't know what to say or do at this point but wanted you to know the moment it happened.

18. Mr. Hanson testified that he never saw Mr. Rivera touch his genitals in front of anyone and that HR's investigation found no evidence to substantiate Ms. Kowaluk's allegation. The facts established that Mr. Rivera was making an everyday movement of adjusting his belt.

19. Ms. Kowaluk described a morning staff meeting with Mr. Rivera during which he "was constantly moving his hands close to his private parts or on his hips." She testified that Mr. Rivera was not simply adjusting his pants but would "[put his] hands in front of [his] privates and grab and adjust that way." This was "highly inappropriate" and "very bizarre." Ms. Kowaluk testified that Mr. Rivera repeated the gesture while standing next to her during a sale. She claimed to have developed a reaction akin to post traumatic stress disorder from witnessing Mr. Rivera adjust his pants.

20. Ms. Kowaluk testified that she asked Mr. Hanson about the behavior because it was so bizarre she could not understand it. She speculated that maybe it was a nervous tic, or some psychological residue from his time in the military.

21. Mr. Hanson investigated the morning meeting. In a memo to Ms. Lopez dated May 25, 2018, Mr. Hanson wrote, in relevant part:

> Mika came to me today asking to go home and I asked why. She said the morning meeting and how she felt it was abusive and offensive. She stated that Lincolns [sic] hand gestures are around his crotch and she find this to be unacceptable and that he only does it around her. She feels as if she is being bullied and that anytime we conduct an investigation the stories get twisted. She states that she can't trust the team for this reason.
>
> Per our conversation I had one on one meetings with everyone who attended this morning meeting….

22. Mr. Hanson's interviews with the three other people at the meeting revealed that nothing untoward occurred. The witnesses uniformly described the meeting as "productive and helpful," "very beneficial," and "positive." Neither of the two other females present at the meeting noticed Mr. Rivera doing anything that could be deemed socially unacceptable or offensive.

23. Ms. Kowaluk also complained that another assistant manager, Luking Martinez, was "licking his upper lip sensually." She believed this to be a form of harassment and sabotage of her sales because Mr. Martinez only did it when he was near Ms. Kowaluk and her customers. Ms. Kowaluk testified that her problems with Mr. Martinez commenced when he placed his hand on her shoulder while helping her with a sale and she asked him not to touch her.

24. In a memo to Ms. Lopez, dated July 1, 2018, Ms. Kowaluk wrote as follows, in relevant part, verbatim:

> After your visit at the Altamonte Ashley Furniture on June 27, 2018, the situation at the store got worst. I have experienced more harassing behaviors from co-workers and managers at the store. In my opinion, I am not considering this as a coincidences but it feels like it's creating an intentional bullying situations by oppressors at this company. It is very unprofessional and harassing environment that I am working in.

> To be more specific: Homiera is creating hostile situations front of customer, as well as holding her hand intentionally with inappropriate gesture front of her privet parts. Saturday morning June 30, 2018, in store meeting I have observed that Rohan was [holding] his left hand inappropriately on his private parts. Another situation happened with Lorraine and she was holding her hand intentionally front of her privet part. I have experienced as well inappropriate behavior from David like sticking his tongue out randomly in front of me and making strange sounds.
>
> I have experienced this same harassing gestures from customers, man and woman's holding hand front of privet parts. There was one customer at the store and he was approaching me in inappropriate harassing way aggressively getting very close to me, invading my personal space! Tiffany the person works in office at the store told me that he is her friend. I had conversation with her about his highly invasive behavior. She suggest that I should talk about this with my managers. Well I have mention many times similar problems to managers but with out any problem solving solutions. Basically my words and concerns are not going anywhere and I have the impression that harassing culture is in favored instead of proper safe and pleasant environment for employ at Ashley Furniture in Altamonte….

25. HR investigated every allegation made by Ms. Kowaluk and could not substantiate any of them.

26. The multiple complaints made against Ms. Kowaluk led to disciplinary action against her. On April 18, 2018, a written warning was issued that described her conduct as follows:

> Mika Kowaluk is expected to act in accordance with our company values and code of conduct.
>
> You must conduct yourself in a professional manner and treat your peers and fellow employees with respect.

> Mika has had multiple instances of conflict with numerous members of the team, including conflict with management, failure to follow proper floor etiquette, and push back on certain behavioral initiative that drive sales numbers.
>
> Mika refuses to use appropriate meeting etiquette when speaking with management and peers. Mika focuses on individual mannerisms and verbal tone to the point that members of the team and management feel uncomfortable working with her.
>
> Ashley is proud of our diverse workforce and embrace [sic] those things that make us different. Mika must work together with her peers to maintain a professional work environment.
>
> Retaliation of any kind will not be accepted.
>
> Mika, your behaviors and actions have not demonstrated alignment with the expectations of the RSA and Company Care Values. This has shown up in your behaviors, communication style and interactions with your peers and management team within the store.

27. The written warning set forth the following corrective action plan:

> Mika is receiving a written warning due to her failure to abide by the Company code of conduct and values. Moving forward it is expected that Mika is in alignment with management and company initiatives. We will also cover our floor rules with Mika as well as any questions she may have on proper floor etiquette.
>
> Mika, it is expected from you to abide by the floor rules and etiquette moving forward. Engaging in any further unsatisfactory behavior could result in disciplinary action up to and including termination of employment.

28. Ms. Lopez testified that she discussed the written warning with Ms. Kowaluk at the time it was issued. Ms. Kowaluk refused to accept the

corrective action and continued to blame her actions on her peers. Ms. Lopez stated that Ms. Kowaluk's behavior did not change after the written warning was issued and that she continued to receive complaints from Ms. Kowaluk's coworkers as to her aggressiveness, insubordination, and lack of respect for her peers and managers. Ms. Kowaluk likewise continued to file harassment complaints.

29. On May 12, 2018, an incident occurred involving RSA Susan Woodbury, whom Ms. Kowaluk had already accused of "physical assault" after Ms. Woodbury bumped into her and neglected to apologize. On May 12, 2018, Ms. Woodbury had spread out her lunch on a table in the store's break room. She was about to sit down and eat when she was called to the sales floor. She covered her food and went out of the break room.

30. When Ms. Woodbury returned to the break room a few minutes later, Ms. Kowaluk was sitting and eating her own lunch in the space that Ms. Woodbury had set for herself. Ms. Woodbury asked Ms. Kowaluk to move. Ms. Kowaluk refused. When Ms. Woodbury insisted that she had been there first, Ms. Kowaluk said words to the effect of, "What are you going to do? Fight me?" Ms. Woodbury gathered her lunch things. On her way out of the break room, Ms. Woodbury stated, "This is why no one likes you."

31. Ms. Kowaluk testified that she sat down at the table in the break room. She saw Ms. Woodbury's plates on the table but sat down and began to eat her own lunch. Ms. Woodbury then entered the room and "abusively approached" Ms. Kowaluk. In a "threatening" manner, she demanded that Ms. Kowaluk vacate the table. Ms. Kowaluk denied that she taunted Ms. Woodbury with the "what are you going to do?" statement but confirmed that she refused to move and told Ms. Woodbury to find someplace else to sit.

32. In keeping with Ashley Furniture's progressive discipline policy, Ms. Kowaluk was issued a final written warning on May 16, 2018. As the name indicates, a final written warning is the last step before termination of

employment. The final written warning described Ms. Kowaluk's conduct as follows:

> Mika Kowaluk is expected to act in accordance with our company values and code of conduct. You must conduct yourself in a professional manner and treat your peers and fellow employees with respect. Mika has continuing conflict with members of the team, including conflict with management. Mika continues to refuse to use appropriate meeting etiquette when speaking with management and peers.
>
> Mika had an incident with another manager, Luking Martinez, on May 4th. Mika was on a phone call, and after calling you two times, Luking moved you to the bottom of the list. He informed you that you were moved to the bottom of the list because you were not ready to take point. At this point you felt as if he was raising his voice at you and he stated he was not raising his voice. He then said that you need to be more respectful to the team and to management. You followed this statement with, "this is America and we are all equals."
>
> On 5/12/18 Mika had another incident with Susan that was a confrontation in the break room. Mika sat in a spot that Susan had recently vacated in which she asked her to move and she refused. This is not against policy. You also implied what is she going to do about it? Fight you? These are confrontational words and is [sic] not accepted at Ashley.
>
> Mika, your behaviors and actions have not demonstrated alignment with the expectations of the RSA and Company Care Values. This has shown up in your behaviors, communication style and interactions with your peers and management team within the store.
>
> As a result, Mika Kowaluk is receiving a Final Warning effective today.

33. The final written warning set forth the following corrective action plan:

> Mika is receiving a Final Warning due to her failure to abide by the Company code of conduct and values. Moving forward it is expected that Mika is in alignment with management and company initiatives. We will also cover our floor rules with Mika as well as any questions she may have on proper floor etiquette.
>
> Mika, it will be expected from you to abide by the floor rules and etiquette moving forward. Engaging in any further unsatisfactory behavior could result in disciplinary action up to and including termination of employment.

34. Ms. Kowaluk signed the final written warning to acknowledge her receipt of it, but also wrote the following beneath the signature lines: "I don't agree with this statement. The statements from Luking and Susan is not what actually happened."

35. The event that finally precipitated Ms. Kowaluk's separation from employment at Ashley Furniture occurred on June 30, 2018. The most credible version of the event is that of Mr. Hanson, who wrote the following account in a memo to Ms. Lopez on June 30, 2018:

> Today Mika had a guest that spoke primarily Spanish. She called Luz over the intercom, but I guess Luz was not available or didn't respond for some reason. Mika then called Luking over. Luking was speaking with the customer, and called me over because he noticed that the situation was getting uncomfortable. I came over and Luking was speaking to the guest in Spanish. He states that they would prefer to work with someone who speaks Spanish, so he called Lorraine, an RSA who speaks Spanish. At this point Mika got very upset and started talking about how she doesn't appreciate this and this is not okay in front of the guest. She also said that the guest did not ask for someone who spoke Spanish. Luking said that they

did, but during the conversation with Luking, they were both speaking Spanish. When asked if she understood Spanish, Mika said no. At this point, I advised Mika that it was best to not assume Luking was lying and allow him to turn the sale over. She then stated that she doesn't believe anything Luking says and that he was lying and they did not want someone who spoke Spanish. I advised her that I was trying to help her understand how to handle this situation, but we cannot cause a [scene] in the middle of the showroom. She stated that I was abusing and harassing her and was no help at all. I then said that for the past two days more so than usual, she has had an attitude, been disruptive, and negative, impacting the building [in] a very bad way. I told her that this is not acceptable and she will need to change her attitude. She then stated that she is frustrated and that is why. She then continued to go on about how this is unfair, she was abused, harassed, and nothing is being done. I tried to explain to her that investigations have been done and was trying to help her understand. She would not take this for an answer and continued being rude and disrespectful. At this point I asked her to leave the building and told her I would call her when she can come back. She continued to talk about her pay, and fight back being rude and disrespectful [sic]. I asked her to leave again. Same result. I then asked her to leave one more time and she walked away.

After she walked away, I saw her walking back towards me and knew it was going to be confrontational. I asked Janine [to] attend the conversation. At this point, she came up to me and told me she wanted a meeting with Steve King.[3] I told her that she had the right to request a meeting with whomever she wanted, but should do it through HR. I then politely and calmly asked her to leave the premises. She then got attitude and was confrontational talking about how she was being harassed and abused. I asked her calmly to leave

[3] The record does not otherwise identify Steve King. From the context, it is presumed that Mr. King was an executive with Ashley Furniture.

> again, and same result. I asked her one [more] time to leave and she finally left the premises.
>
> I personally believe she is creating a hostile work environment and would suggest not having her come back to the store until this is resolved.
>
> After all this was done, I went to the customer that was in question, and apologized. I then politely asked if they were having a good experience since the issue. They said yes and that they were working with Lorraine. I then asked if they did prefer to work with someone who spoke Spanish and [they] gestured yes, as [they] did not speak very much English at all.
> .

36. Mr. Hanson's testimony was consistent with his statement. The customers spoke little English and Ms. Kowaluk spoke no Spanish. Mr. Hanson stated that it is Ashley Furniture's policy to provide Spanish speaking customers with an RSA who can communicate with them. Ms. Kowaluk was upset and argumentative and finally had to be asked to leave the store.

37. In her testimony, Ms. Kowaluk denied that the customers needed assistance from a Spanish speaking RSA, but she nevertheless put out a call for a Spanish speaking RSA named Luz. Ms. Kowaluk testified that she and Luz had worked well together in the past. Ms. Kowaluk stated that she had a good history with Luz. Ms. Kowaluk had no fear that Luz would steal the sale rather than follow Ashley Furniture's protocol and share the commission with Ms. Kowaluk as the RSA who first assisted the customers.

38. Ms. Kowaluk testified that when Luz did not appear, she asked Mr. Martinez if he knew her whereabouts. She said that Mr. Martinez and the RSA identified as Lorraine "stormed to me." Mr. Martinez began speaking in Spanish to the customers and took over the sale. Mr. Martinez stood, "putting his hands on his waist" and repeatedly asking Ms. Kowaluk if she spoke Spanish. Mr. Martinez "molested" her and made her "highly

uncomfortable." She was not given an opportunity to explain to Mr. Hanson what had actually happened because Mr. Martinez "bullied the whole situation."

39. Ms. Kowaluk adamantly held that the customers spoke English and did not need or ask for assistance from a Spanish speaking RSA. She wanted to involve Luz in the sale to return a favor from a prior sale and because she knew Luz would work well with these customers.

40. Ms. Kowaluk was suspended pending HR's investigation of the incident. In the July 1, 2018, memo quoted in Finding of Fact 24, *supra*, Ms. Kowaluk told Ms. Lopez her version of the events of June 30, 2018:

> … It was another situation created when on Saturday I have customer looking for furniture and they asked me to give them a space and if they need something they will approach me with any questions. After some time they got back with me asking for particular table in dark finishing. I have show some to them and I was in process of searching for more when I decided to TEO this customer to Luz.[4] This customer was speaking English and Spanish but [I] had this feeling that Luz could have a better connection with them. I called her over radio but [didn't have] a clear answer do to unacceptably bad radio quality's (we have constantly problem with radio at store and the communication is horrible unsatisfactory and unclear).
>
> I have called Luking that was walking next to Lincoln desk at the time to help me with the customer and my intention was as well to introducing the customer to manage, He started to approach me and Lorraine for some reason was walking with Luking (I have not asked her for help or like to have her near me or my customer. She is presenting aggressive and not pleasant attitude for most part when interacting with me, and I don't feel comfortable around her).

[4] The term "TEO" was not explained at the hearing.

> I told her: thank you Lorraine but I don't need your help and that I have called Luz. I was starting to introducing the customer needs to Luking but he interrupted me rudely starting talking in Spanish, and then told Lorraine to help the customer because that's what they requested. It was not really what the customer intention was. Luking and Lorraine in my opinion created this situation intentionally. Then Luking stared to talking to me with intimidating voice and body gesture like puling his jacket up and touching belt in way to created abusive body posture. Interrogating me with this same question few times if I speak Spanish, to create terrorizing and bully atmosphere.
>
> Craig asked me then to go to training room to talk about this instead of in show room. I have refused because I don't really feel comfortable in his present and Priya. I have experienced unappropriated body behavior from Craig as well all the conversations are more like interrogations and trying to putting me down rather then to understand and recognize the severe problem of harassment. Actually all the conversations in the training room that I had with management it felt to me like harassment and threats: verbally or body gestures, rather [than] friendly, compassionate and understanding with intention to solve the problem.
>
> Craig is accusing me of been aggressive which is not the case. I was frustrated with this in my opinion intentionally created situation to effect me in negative way so the manager can accumulate a fake reason to send me home again and effect my earnings, but I have not present any aggressive behavior….
>
> I do apologies for any grammatically or spelling errors, English is not my [first] language and I appreciate your understanding….

41. Ms. Lopez testified as to HR's investigation of this incident. Ms. Kowaluk was suspended and therefore had to be interviewed by

telephone. Ms. Lopez visited the store and interviewed all of the employees who witnessed the incident. Ms. Lopez stated that she was able to establish that Ms. Kowaluk was the aggressor in the incident but was not able to establish Ms. Kowaluk's allegation of harassment.

42. Ms. Lopez testified that she never had a chance to discuss the results of the investigation with Ms. Kowaluk because Ms. Kowaluk submitted her resignation by email on July 16, 2018, stating that she had accepted a job offer from another company.

43. Ms. Lopez and Mr. Hanson testified that while an employee at Ashley Furniture, Ms. Kowaluk never alleged that she was being discriminated against because of her sex, race, or national origin.

44. Ms. Kowaluk herself testified that she never complained to HR that she was being discriminated against because of her sex, race, or national origin and conceded that no one at Ashley Furniture was discriminating against her because she was white, female, or Polish. She stated that she was discriminated against because she stood up for herself and was not friends with her coworkers.

45. Ms. Kowaluk testified that she has held eight jobs since she resigned from Ashley Furniture on July 16, 2018, and has been terminated from six of those jobs. She resigned from the other two. Ms. Kowaluk testified that she was mistreated at all of these jobs.

46. The fact that so many people Ms. Kowaluk encountered at Ashley Furniture—employees and customers, male and female—appeared to engage in odd crotch-grabbing or suggestive adjustment of their pants fatally undermines the credibility of her testimony on this point. Ms. Kowaluk either fantasized these behaviors or is hypersensitive to casual actions that other people simply do not notice. Ms. Kowaluk's allegations of sexual harassment and/or a sexually hostile workplace based on what she saw as the lewd gestures of multiple Ashley Furniture employees, including her immediate supervisors, were not supported by credible evidence.

47. The only action alleged by Ms. Kowaluk that might rise to the level of sexual harassment was Mr. Martinez's placing his hand on her shoulder. Ms. Kowaluk testified that Mr. Martinez never touched her in an intimate area and never proposed a sexual relationship with her. She stated that Mr. Martinez touched her shoulder more than once. She did not state that he persisted in touching her once she told him to stop. The weight of the evidence established that Ms. Kowaluk is extremely sensitive to infringement of her personal space. It is clear that Mr. Martinez's actions were unwelcome. However, it cannot be found that his actions constituted sexual harassment or the creation of a sexually hostile work environment under any objective view of the evidence.

48. The evidence established that Ms. Kowaluk was consistently aggressive, obstreperous, and insubordinate in the workplace. Mr. Hanson's statement that she was not a "team player" was a gross understatement. With the exception of the RSA identified in the record only as "Luz," Ms. Kowaluk had an adversarial relationship with every one of her peers and supervisors. She functioned chiefly as a distraction and a detriment to the sales force at Ashley Furniture.

49. The evidence produced at hearing establishes that Ashley Furniture took Ms. Kowaluk's accusations seriously, even when they were outlandish on their face. In each instance, Ms. Lopez and her staff came to the Altamonte Springs store and interviewed every employee who could possibly have any relevant information. In each instance, Ms. Lopez ultimately concluded that she could not sustain Ms. Kowaluk's allegations due to a lack of corroborating evidence. Ms. Lopez also concluded, in each instance, that the complaints made by other employees against Ms. Kowaluk were corroborated and sustainable.

50. Ms. Kowaluk's Petition made no allegation of retaliation as such but Ms. Kowaluk raised the issue of retaliation at the hearing. Even if it were found that she should be allowed to pursue a retaliation claim, the evidence

convincingly established that Ms. Kowaluk was not subjected to unlawful retaliation. She alleged that she was forced to work in a hostile atmosphere but the evidence established that the hostile atmosphere was largely of her own making. She offered no specific instances of Ashley Furniture acting against her for reasons unrelated to her performance as an RSA or her own poor behavior as established by the thorough investigations undertaken by Ms. Lopez and her staff.

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

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

53. In summary, Petitioner offered no credible evidence that she was discriminated against based on her race, sex, or national origin. 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.

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

55. 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, race, or national origin or a pretext for unlawful retaliation.

CONCLUSIONS OF LAW

56. 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.

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

58. 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.

59. 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.

60. 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).

61. "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.

62. Under the *McDonnell* analysis, in employment discrimination cases that rely on circumstantial evidence, 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).

63. In order to prove a prima facie case of unlawful employment discrimination under chapter 760, Petitioner must establish that: (1) she is a member of the protected group; (2) she was subject to adverse employment action; (3) Ashley Furniture treated similarly situated employees outside of her protected classifications more favorably; and (4) Petitioner was qualified to do the job and/or was performing her 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 Cty*, 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 Servs. 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).

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

65. Petitioner is a white female of Polish descent and is therefore a member of a protected group.

66. Petitioner was suspended from her position with Ashley Furniture and was therefore subject to an adverse employment action.

67. As to the question of disparate treatment, the historic standard for the Eleventh Circuit was set forth in *Maniccia v. Brown*, 171 F.3d 1364, 1368-69 (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).

68. However, in *Lewis v. City of Union City, Georgia*, 918 F.3d 1213, 1224-26 (11th Cir. 2019)(en banc), the court abrogated *Maniccia* and set forth a slightly more relaxed standard:

> We hold, instead [of the positions urged by the parties, including reaffirmation of the *Maniccia* standard]—without trying to force an artificial gloss—that a plaintiff must show that she and her comparators are "similarly situated in all material respects." That standard, we think, best and most fairly implements federal statutory prohibitions on "discrimination," properly balances the need to protect employees from invidious discrimination with the deference owed to employers' rational business judgments, and sensibly serves considerations of sound judicial administration by making summary judgment available in appropriate (but by no means all) cases.
>
> * * *
>
> Although we have employed [the *Maniccia* standard] for some time now–albeit inconsistently–the nearly-identical standard gives off the wrong "vibe." Despite the adverb "nearly"–and our repeated reassurances that "comparators need not be the plaintiff's doppelgangers," *Flowers v. Troup County, Georgia, School District*, 803 F.3d 1327,

> 1340 (11th Cir. 2015), and, even more explicitly, that "'[n]early identical' ... does not mean 'exactly identical,'" *McCann v. Tillman*, 526 F.3d 1370, 1374 n.4 (11th Cir. 2008)–there is a risk that litigants, commentators, and (worst of all) courts have come to believe that it requires something akin to doppelganger-like sameness. Although we must take care not to venture too far from the form—"apples should be compared to apples"—we must also remember that "[e]xact correlation is neither likely nor necessary." *Dartmouth Review v. Dartmouth Coll.*, 889 F.2d 13, 19 (1st Cir. 1989), *overruled on other grounds by Educadores Puertorriqueños en Acción v. Hernandez*, 367 F.3d 61 (1st Cir. 2004). And we are not willing to take the risk that the nearly-identical test is causing courts reflexively to dismiss potentially valid antidiscrimination cases.

69. Petitioner offered no evidence as to disparate treatment of similarly situated employees outside of her protected classification, under the standard enunciated in *City of Union City*.

70. The evidence demonstrated that Petitioner was not performing her job at a level that met her employer's legitimate expectations. Ms. Kowaluk was a constant disruptive force in the workplace. Her own supervisors did not want to be alone with her for fear that she would file a complaint with HR. She made lurid allegations against coworkers for innocent actions. In a sales environment where cooperation is paramount, Ms. Kowaluk was a demoralizing and distracting nuisance.

71. 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).

72. "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).

73. 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 Systems, 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).

74. Petitioner has failed to prove a prima facie case of sexual harassment or sexually hostile workplace.

75. Petitioner offered no credible evidence beyond her own questionable testimony to prove that she was subjected to unlawful harassment based upon her sex. Her allegations regarding pervasive lewd and suggestive behaviors on the part of her peers, managers, and even customers were dubious on their face and not supported by credible evidence.

76. 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. The one credible allegation made by Petitioner amounted to no more than Mr. Martinez touching her shoulder, perhaps more than once, as he helped her with a sale. Ms. Kowaluk did not like being touched and told Mr. Martinez to stop. There was no evidence that he ignored her admonition. There was nothing about this episode so "severe or pervasive" as to meet the standard established by the cases cited above.

77. Petitioner did not explicitly make a retaliation claim in her Petition, but did make arguments at the hearing that Ashley Furniture took retaliatory actions against her. However, even if it were found that her retaliation claim was timely and viable, Petitioner failed to prove that Ashley Furniture in fact retaliated against her.

78. The court in *Blizzard v. Appliance Direct, Inc.*, 16 So. 3d 922, 926 (Fla. 5th DCA 2009), described the elements of a retaliation 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.*

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

80. Petitioner established that she engaged in a statutorily protected activity, in that she made repeated complaints to Ashley Furniture's HR department about her conflicts with fellow employees, some of which included allegations of actions that could be interpreted as sexual harassment.

81. Petitioner established that she suffered adverse employment action, in that she was sent home from work and suspended on June 30, 2018.

82. 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 incident with a supervisor and another RSA on the sales floor, in full view of the customers she was supposed to be assisting. When her Store Manager intervened to calm the situation, Petitioner was directly insubordinate to him and repeatedly ignored his instruction that she leave the store until further notice.

83. 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)).

84. 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.

85. Petitioner failed to establish that her employment was involuntarily terminated. Petitioner's own testimony and the documentary evidence established that she resigned from Ashley Furniture.

86. 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).

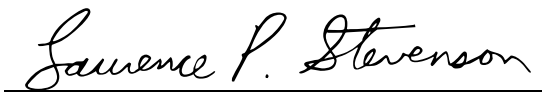
87. Petitioner offered no credible evidence to establish that her working conditions met the legal standard necessary to establish constructive discharge. She was justifiably sent home for her unprofessional behavior in the workplace and then submitted her resignation to Ashley Furniture.

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 6th day of May, 2021, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 6th day of May, 2021.

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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.