STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JERUSCHA M. TOUSSAINT,

Petitioner,

vs. Case No. 20-3439

WALMART,

Respondent.
_____/

RECOMMENDED ORDER

Administrative Law Judge ("ALJ") Brittany O. Finkbeiner conducted the final hearing in this case for the Division of Administrative Hearings ("DOAH") on November 13, 2020, by Zoom conference.

APPEARANCES

For Petitioner: Jeruscha Toussaint, pro se
5835 Northwest Lomb Court
Port St. Lucie, Florida 34986

For Respondent: Nancy A. Johnson, Esquire
Littler Mendelson, P.C.
111 North Orange Avenue, Suite 1750
Orlando, Florida 32801

STATEMENT OF THE ISSUES

The issues in this case are whether Respondent committed the unlawful employment practice alleged in the Employment Complaint of Discrimination filed with the Florida Commission on Human Relations ("FCHR"), and, if so, what relief should be granted.

PRELIMINARY STATEMENT

Petitioner, Jeruscha M. Toussaint ("Petitioner"), filed an Employment Complaint of Discrimination ("Complaint") with FCHR, on February 17, 2020. The Complaint alleged that Petitioner was discriminated against and retaliated against by her former employer, Walmart ("Respondent"), in that she was subject to "disparate treatment, retaliation, different terms and conditions of her employment" because of her race and sex. Petitioner further alleged that she was paid less than a white male with less experience, and that she was "terminated for her inquiring about her pay on 10/26/2019." After investigating the allegations raised in Petitioner's Complaint, on June 24, 2020, FCHR rendered a "Determination: No Reasonable Cause," finding that there was no reasonable cause to support her claims that she was discriminated against because of her race or sex, or that she was retaliated against for engaging in activity protected by the Florida Civil Rights Act.

Petitioner elected to pursue administrative remedies, timely filing her Petition for Relief ("Petition") with FCHR. On July 31, 2020, FCHR received a copy of the Petition, which alleged that: 1) Respondent violated the Equal Pay Act; 2) Petitioner was discriminated against because of her race during a meeting with the store manager and HR; 3) Petitioner was fired for also being a whistleblower and retaliation; 4) Petitioner was treated differently for her race and age; and 5) Petitioner was discriminated against due to a handicap when she did not get breaks when needed.

Respondent filed a Partial Motion to Dismiss Claims of Age Discrimination and Handicap Discrimination ("Motion") on November 11, 2020. Additionally, the Motion urged the dismissal of Petitioner's allegations that Respondent violated the Equal Pay Act and the Florida Whistleblower Act on the basis that these allegations are not within the jurisdiction of

FCHR, or the undersigned. During the final hearing, the undersigned granted the Motion because these claims were not raised in Petitioner's initial Complaint and therefore were not investigated by FCHR, rendering them outside the jurisdiction of the undersigned's statutory authority.

At the final hearing, Petitioner testified on her own behalf, and did not call any other witnesses. Respondent offered the testimony of People Lead Hollie Durocher ("Ms. Durocher") and offered Exhibits 1 through 4 and 6 through 12, which were all admitted into evidence.

The one-volume Transcript was filed with DOAH on December 7, 2020. Both parties filed proposed recommended orders, which were considered in the drafting of this Recommended Order.

Unless otherwise indicated, references to the Florida Statutes are to the 2019 version.

FINDINGS OF FACT

1. Petitioner is an African-American female.

2. Petitioner began working for Respondent as a part-time Self-Checkout Host on February 1, 2017. Upon hiring, her initial rate of pay was $9.00 per hour.

3. After three months of employment, Petitioner's pay was increased to $10.00 per hour in May of 2017. Subsequently, Petitioner received pay increases raising her hourly rate to $11.00, and then $11.50.

4. In April of 2018, Petitioner was promoted to the full-time position of Customer Service Manager ("CSM"). Along with the promotion, Petitioner also received a raise, bringing her rate of pay to $13.65 per hour.

5. In April of 2019, Respondent gave Petitioner another raise, resulting in hourly pay of $13.90.

6. Respondent maintained a Statement of Ethics, of which Petitioner was aware. The Statement of Ethics explained that Respondent's overall operations were guided by four core Beliefs, which were: Respect for the Individual; Service to our Customers; Striving for Excellence; and Act with Integrity.

7. Based on what she heard from her coworkers, Petitioner believed that she was entitled to a market-adjustment pay increase in April of 2019. She sought information about the pay increase from her store manager and others.

8. Petitioner reported her belief that she was entitled to a pay increase, which she had not received, to Respondent's Associate Relations Department ("Department"). After what was described as a thorough review of Petitioner's concerns, the Department closed the matter.

9. Petitioner testified that a white male named Chance was making more money than she, based on conversations between Petitioner and Chance.

10. Chance worked as a Money Manager Associate, a position that Petitioner never held during her employment with Respondent.

11. Ms. Durocher testified that Chance was not paid more than Petitioner.

12. In 2019, there were ten individuals who held the position of CSM at the store where Petitioner worked. In addition to Petitioner, those who worked in CSM positions included multiple African-American females and one African-American male.

13. Petitioner did not present any evidence to suggest or establish that any male, or non-African-American, employee was paid more than she was for performing similar work.

14. On October 26, 2019, Petitioner discussed the problem she perceived with her rate of pay with Ms. Durocher. During their conversation, Petitioner raised her voice and the interaction escalated to the point that another employee went to enlist the assistance of the Store Manager. When the Store

Manager arrived, he joined the conversation with Petitioner and Ms. Durocher.

15. Ms. Durocher expressed to Petitioner that she believed that Petitioner was being paid commensurate with her skills and duties; and that her rate of pay had been investigated and was determined to be appropriate.

16. Throughout the conversation, Ms. Durocher perceived Respondent's conduct to be disrespectful. Ms. Durocher and the Store Manager repeatedly encouraged Petitioner to calm down, but their attempts were unsuccessful. On the same day, Petitioner's employment was terminated by Respondent for violating the core Belief of Respect for the Individual.

CONCLUSIONS OF LAW

17. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes.

Petitioner's Claim of Discrimination Based on Race and Sex

18. The Florida Civil Rights Act of 1992 ("FCRA"), chapter 760, Florida Statutes, prohibits discrimination in the workplace. Among other things, the FCRA makes it unlawful for an employer:

> 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, pregnancy, national origin, age, handicap, or marital status.

§ 760.10(1)(a), Fla. Stat.

19. The FCRA, as amended, is patterned after Title VII of the Civil Rights Act of 1964 and 1991 ("Title VII"). Thus, federal decisional authority interpreting Title VII is applicable to cases arising under FCRA. *Johnson v.*

Great Expressions Dental Ctrs. of Fla., P.A., 132 So. 3d 1174, 1176 (Fla. 3d DCA 2014).

20. The burden of proof in this proceeding is on Petitioner. *See Dep't of Banking & Fin., Div. of Sec. & Investor Prot. v. Osborne Stern & Co.*, 670 So. 2d 932 (Fla. 1996). To prove a violation of FCRA, Petitioner must establish a *prima facie* case of discrimination by a preponderance of the evidence. *See Valenzuela v. GlobeGround N. Am., LLC*, 18 So. 3d 17, 22 (Fla. 3d DCA 2009). A preponderance of the evidence is defined as "the greater weight of the evidence," or evidence that "more likely than not" tends to prove a certain proposition. *S. Fla. Water Mgmt. Dist. v. RLI Live Oak, LLC*, 139 So. 3d 869, 872 (Fla. 2014).

21. A plaintiff can establish a *prima facie* case for discrimination either by direct or circumstantial evidence. Direct evidence requires actual proof that the employer acted with a discriminatory motive when making the employment decision in question. *Scholz v. RDV Sports, Inc.,* 710 So. 2d 618, 624 (Fla. 5th DCA 1998). Circumstantial evidence, on the other hand, requires a petitioner to satisfy the four-prong test established in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). Here, Petitioner's claim is based entirely on circumstantial evidence.

22. Based on the United States Supreme Court's analysis in *McDonnell Douglas*, in order to establish a *prima facie* case based on circumstantial evidence, Petitioner must show that she:

1) belongs to a protected class;
2) was qualified to do the job;
3) was subjected to an adverse employment action; and
4) the employer treated similarly situated employees outside the class more favorably.

Id. at 802-03.

23. If Petitioner were to satisfy all four prongs of the *McDonnell Douglas* framework, then the burden would shift to Respondent to produce evidence of a legitimate, non-discriminatory reason for his termination. *Id.*

24. Petitioner satisfied the first prong by establishing that she is part of a protected class within the meaning of FCRA, which prohibits discrimination, in pertinent part, based on "sex" and "race." Petitioner established that she is an African-American female.

25. The parties do not dispute that Petitioner meets the criteria for the second prong in that she was qualified to do the job of a CSM, for which she was employed by Respondent.

26. Petitioner also satisfied the third prong, as her termination from employment by Respondent is clearly an adverse employment action, which constitutes "a significant change in employment status, such as discharge..." *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 744 (1998).

27. Petitioner's claim fails as to the fourth prong, which requires a showing that Respondent treated similarly situated employees outside the class more favorably. The fourth prong requires an analysis of comparators to illustrate the employer's disparate treatment of employees. Comparators must be "similarly situated in all material respects." *Lewis v. City of Union City, Ga.*, 918 F.3d 1213, 1218 (11th Cir. 2019). The comparator that Petitioner presented, a white male, did not hold the same position as Petitioner, and therefore, he was not similarly situated in all material respects.

28. Failure to establish a prima facie case of discrimination ends the inquiry. *Kidd v. Mando Am. Corp.*, 731 F.3d 1196, 1202 (11th Cir. 2013). Petitioner has not made a *prima facie* case showing, by a preponderance of the evidence, that Respondent discriminated against her based on her race or sex.

Petitioner's Claim of Retaliation

29. Section 760.10(7), provides:

> 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.

30. An employee can establish that she suffered retaliation under FCRA by proving: (1) she engaged in an activity protected by FCRA; (2) she suffered an adverse employment action; and (3) there was a causal connection between the protected activity and the adverse employment action. *Pennington v. City of Huntsville*, 261 F.3d 1262, 1266 (11th Cir. 2001) (citing *Olmstead v. Taco Bell Corp*., 141 F.3d 1457, 1460 (11th Cir.1998)). In the present case, Petitioner failed to show a causal connection between any purported protected activity and Respondent's adverse employment action against her. The evidence established that, although Petitioner complained to Respondent about her pay, her termination was not motivated by such complaints. Rather, her termination was based on Respondent's reasonable determination that Petitioner's conduct violated Respondent's core Belief of Respect for the Individual.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that FCHR enter a final order dismissing the Petition for Relief.

DONE AND ENTERED this 12th day of February, 2021, in Tallahassee, Leon County, Florida.

BRITTANY O. FINKBEINER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of February, 2021.

COPIES FURNISHED:

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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.