STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

VANESSA MCKEVER,

Petitioner,

vs. Case No. 20-4561

WAL-MART STORES EAST, LP,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted on March 11, 2021, via Zoom before Garnett W. Chisenhall, a duly designated Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner: Vanessa Yvette McKever, pro se
9268 Hawkeye Drive
Jacksonville, Florida 32221

For Respondent: Nicole B. Dunlap, Esquire
Littler Mendelson, PC
111 North Orange Avenue
Orlando, Florida 32801

STATEMENT OF THE ISSUE

The issue is whether Wal-Mart Stores East, LP ("Respondent" or "Wal-Mart"), committed an unlawful employment practice by discriminating against Vanessa McKever based on her disability.

PRELIMINARY STATEMENT

Ms. McKever filed an Employment Complaint of Discrimination on September 30, 2019, with the Florida Commission on Human Relations ("the

Commission") alleging that Wal-Mart subjected her to an unlawful employment practice. Specifically, Ms. McKever alleged that she requested part-time status after she suffered a severe asthma attack at work. However, as described in the following statement from her Employment Complaint of Discrimination, Ms. McKever received far less than the 32 hours a week she expected:

> [Ms. McKever] began her employment with Respondent on 09/15/2005. [She] was subjected to disparate treatment [and] different terms and conditions of [employment] because of her disability. [Ms. McKever] performed the duties and responsibilities of her position in a satisfactory manner and was not the subject of any disciplinary issues. In 10/2017 [Ms. McKever] had an incident at work that's related to her disability and was rushed to the hospital. Subsequently, [she] decided to reduce her hours from 5 days of work [per week] to 4 days [per week], on an 8hr shift. This change would mean that [Ms. McKever] would go from full-time to part-time. [Ms. McKever]'s physician agreed with her decision. [She] continued to have issues with her disability but could still work her 4 days. In 11/2017, [Ms. McKever] noticed that her schedule had been reduced and [she] was only being schedule[d] 2 days a week. [She] had a discussion with both Manager Maria Echevarria and Store Manager Daryl Rieli regarding the reduction of her hours. Mr. Rieli granted [Ms. McKever] her 4 day a week schedule, but that only lasted a month. Shortly, in mid-01/2018, [her] hours were reduced again this time gradually. Mr. Rieli informed [Ms. McKever] that due to [her] accommodation request he consider[ed] her schedule to be closed and would provide her with hours left over from other employees. [Ms. McKever] believes that her reduction in hours is in retaliation for requesting an accommodation for her disability. [She] states that due to the reduction in hours she has lost her health insurance, her ability to qualify for FMLA, has had

> to pawn some of her personal belongings, move in with her father and has [lost] her only means of transportation.

The Commission issued a Notice on October 2, 2020, concluding there was no reasonable cause to conclude that an unlawful employment practice occurred. Ms. McKever responded by filing a Petition for Relief, and the Commission referred this matter to DOAH on October 15, 2020, for a formal administrative hearing.

After two continuances, the final hearing was convened on March 11, 2021. Petitioner presented testimony from herself, Martha Davis, and Eva Green. Petitioner's Exhibits 1 through 6 were accepted into evidence over Respondent's relevancy objections. Wal-Mart presented testimony from Daryl Rieli and Maria Echevarria. Respondent's Exhibits 1 through 3, 5 through 7, 9, 10, and 15 through 17 were accepted into evidence.

The two-volume final hearing Transcript was filed on April 8, 2021. Both parties filed timely proposed recommended orders that were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Based on the oral and documentary evidence adduced at the final hearing, the entire record of this proceeding, and matters subject to official recognition, the following Findings of Fact are made:

1. Ms. McKever began working part-time for Wal-Mart[1] on September 15, 2005, as an overnight stocker in the store's general merchandise section. She was responsible for restocking shelves with merchandise that had been

[1] The store at issue is denominated as "# 1083" and is located in Jacksonville, Florida.

offloaded from trucks and placed on pallets. She held that position during her entire tenure at Wal-Mart and usually worked the shift beginning at 10:00 p.m. and ending the next morning at 7:00 a.m. Approximately one year after she began working at Wal-Mart, Ms. McKever accepted an offer to become a full-time stocker.[2] At that point, she was working the 10:00 p.m. to 7:00 a.m. shift Sunday through Thursday.

2. Ms. McKever has suffered from asthma since birth. Her asthma attacks occur with little warning and can be triggered by numerous environmental factors such as hot and cold temperatures, dust, pollen, insect bites, strong odors, cologne, perfume, cleaning products, and seafood. She typically experiences three to five asthma attacks a month. An asthma attack can leave Ms. McKever in a depleted state, and it can take a few days for her strength to return.

3. Wal-Mart was aware of Ms. McKever's condition. When she was initially hired, Ms. McKever notified the hiring manager that her condition might occasionally prevent her from coming to work. Wal-Mart requires employees who are unable to work for a certain number of consecutive days to take FMLA leave,[3] and Ms. McKever's asthma had led to her requesting FMLA leave multiple times during her employment with Wal-Mart.

4. Ms. McKever was performing her stocking duties one night in October of 2017 and began feeling hot. She sat down for a few minutes, drank some water, and then returned to work. While folding some shirts, her breathing became progressively lighter. Ms. McKever used her inhaler, but it brought

[2] Wal-Mart considers employees who work at least 34 hours a week to be full-time employees. A part-time employee works less than 34 hours a week.

[3] "Among the substantive rights granted by the [Family and Medical Leave Act] to eligible employees are the right to '12 workweeks of leave during any 12-month period . . . [b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee,' 29 U.S.C. § 2612(a)(1), and the right following leave 'to be restored by the employer to the position of employment held by the employee when the leave commenced' or to an equivalent position, 29 U.S.C. § 2614(a)(1)." *Drago v. Jenne*, 453 F.3d 1301, 1305 (11th Cir. 2006).

no relief. Ms. McKever was ultimately transported by ambulance to a hospital where she received treatment and recovered.

5. Ms. McKever returned to work a few days later but suffered another asthma attack while she was at home. When Ms. McKever returned from a subsequent FMLA leave, she requested part-time status and explained that her request was due to her asthmatic condition.[4]

6. In support of her request, Ms. McKever completed a form detailing which days she was available and unavailable to work. She indicated she was available to work Monday, Tuesday, Wednesday, and Thursday nights from 10:00 p.m. to 7:00 a.m. the next morning. Ms. McKever noted that she was unavailable to work on Friday, Saturday, and Sunday nights.

7. The store manager approved Ms. McKever's request for part-time status.

8. Ms. McKever was expecting to work four 8-hour shifts every week. However, she began receiving substantially less than 32 hours of work per week soon after she requested part-time status, and those reduced hours led to Ms. McKever being unable to pay her bills.

9. During the time relevant to the instant case, Daryl Rieli managed the store where Ms. McKever worked. That store was open 24 hours a day, seven days a week and employed approximately 350 people. About 40 percent of those employees were part-time.

10. An automated system was largely responsible for creating work schedules, and Mr. Rieli described how the system allocates work hours among the store employees:

> Q: Now can you explain to me how the schedule is – your understanding of how the schedule is populated? Like, how are the hours scheduled?

[4] Ms. McKever treats with a pulmonary specialist who agreed with her decision to seek reduced work hours.

> A: Basically there'll be so many hours for each day of the week, depending on workload, depending on sales volume, depending on different factors like that. And there'll be, say, 70 hours on Monday. And there'll be 90 hours on Saturday. So the system pulls people into those schedules by their availability and by their full time, part time status. And that's how the schedule will populate.
>
> Q: When you say full time part time schedule – status, can you explain how – what your understanding is of how that works?
>
> A: The fact that the full time associates get placed first on the schedule. And then part time [associates] will then fill in the gaps where needed.

11. Mr. Rieli explained that part-time employees willing to work weekends are more likely to receive their desired number of hours:

> Q: Are there certain days of the week that are busier than others?
>
> A: Yes. Due to the fact that it being retail, obviously weekends. Evenings and weekends. So, for overnight shift[s] it would be weekends.
>
> * * *
>
> Q: So there [were] more hours that had to be worked and more employees would be scheduled to fill the shifts on Friday night, Saturday night and Sunday night. Am I understanding that correctly.
>
> A: Absolutely.
>
> Q: Okay. So on the flip side of that, in your experience, do most people actually want to work on weekend shifts?
>
> A: No. They definitely don't.

> Q: So does that mean that an associate's more likely to get scheduled if they're available to work on the weekends?
>
> A: Absolutely.

12. As this circumstance persisted, Ms. McKever brought her displeasure to succeeding levels of store management and eventually reached Mr. Rieli in late November or early December of 2017. Mr. Rieli explained to her that part-time employees are not guaranteed to receive 32 hours of work per week. He also explained that part-time employees willing to work weekends are more likely to get their desired number of hours:

> Q: Can you tell me what you recall about the first conversation you had with her?
>
> A: Basically she questioned the fact that she wasn't getting the hours, wasn't getting her four day shifts. And I explained to her that – that just because you put your availability to that doesn't mean you're going to get those hours. And that if she opened up her availability, she's be able to get the hours. But, with her not able to work the weekends, [there] most likely weren't going to be the hours there for her to get her hours every week.
>
> Q: Okay, and did you explain to her that full time associates' hours were awarded first?
>
> A: I believe so. Because she asked why she used to get her hours and she doesn't any more.
>
> * * *
>
> Q: Did you explain to her how the schedules were generated and that you don't have any – that you're not the person doing that?
>
> A: Yes, we did. Or yes, I did.

> Q: Okay. Did you explain to her that the busiest days are over the weekend [and] that's why associates are going to get scheduled more likely on that time period?
>
> A: Absolutely.
>
> Q: Okay. Did you explain to her that she could be a part-time associate without limiting the number of days she was willing to work?
>
> A: Yes.
>
> Q: Okay. And did you suggest to her that if she wanted to work more hours, she should open up that availability and be – and be available to work more?
>
> A: Absolutely.

13. Ms. McKever asserts that this meeting resulted in her receiving her desired level of work for the next two to four weeks. However, she soon resumed receiving substantially less than 32 hours of work per week.

14. Ms. McKever resigned from Wal-Mart in January of 2020 and is now receiving social security disability benefits.

15. The greater weight of the evidence does not establish that Ms. McKever received less than her desired number of work hours because she requested part-time status. Instead, the greater weight of the evidence demonstrates that Ms. McKever received less than 32 hours of work per week primarily because she made herself unavailable to work weekends. Also, the greater weight of the evidence does not demonstrate that Wal-Mart treated nondisabled employees more favorably than disabled employees.

CONCLUSIONS OF LAW

16. DOAH has jurisdiction over the parties and the subject matter of this proceeding pursuant to sections 120.569 and 120.57, Florida Statutes (2020),[5] and Florida Administrative Code Rule 60Y-4.016(1).

17. The State of Florida, under the legislative scheme contained in sections 760.01 through 760.11, Florida Statutes, known as the Florida Civil Rights Act of 1992 ("the FCRA"), incorporates and adopts the legal principles and precedents established in the federal anti-discrimination laws specifically set forth under Title VII of the Civil Rights Act of 1964, as amended. 42 U.S.C. § 2000e, *et. seq*.

18. Section 760.10 prohibits discrimination "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." § 760.10(1)(a), Fla. Stat.

19. Florida courts and the Commission have determined that federal discrimination law should be used as guidance when construing the FCRA. *See Valenzuela v. GlobeGround N. Am., LLC*, 18 So. 3d 17, 21 (Fla. 3d DCA 2009); *Brand v. Fla. Power Corp.*, 633 So. 2d 504, 509 (Fla. 1st DCA 1994).

20. With regard to the instant case, Ms. McKever has the burden of proving by a preponderance of the evidence that Wal-Mart committed an unlawful employment practice. *See EEOC v. Joe's Stone Crabs, Inc.*, 296 F.3d 1265, 1273 (11th Cir. 2002)(noting that a claimant bears the ultimate burden of persuading the trier of fact that the employer intentionally discriminated against the employees); § 120.57(1)(j), Fla. Stat.

21. Ms. McKever alleges that Wal-Mart retaliated against her by not assigning her 32 hours of work per week once she became part-time, and/or subjected her to disparate treatment because other part-time employees

[5] Unless stated otherwise, all statutory references shall be to the 2020 version of the Florida Statutes.

received 32 hours of work per week. Each claim will be separately analyzed below.[6]

The Greater Weight of the Evidence Does Not Establish that Wal-Mart Retaliated Against Ms. McKever or Subjected Her to Disparate Treatment.

22. An employee can establish that she suffered retaliation under the FCRA by proving that: (1) she engaged in an activity protected by the FCRA[7]; (2) she suffered an adverse employment action; and that (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); *Russell v. KSL Hotel Corp.*, 887 So. 2d 372, 379 (Fla. 3d DCA 2004).

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[6] Wal-Mart argued for the first time in its Proposed Recommended Order that Ms. McKever's claim was untimely and should thus be dismissed because her complaints to management about her hours ended in late 2017 and her Complaint of Discrimination was filed on September 30, 2019. *See* § 760.11(1), Fla. Stat. (providing that "[a]ny person aggrieved by a violation of ss. 760.01-760.10 may file a complaint with [the Commission] within 365 days of the alleged violation . . ."). In support thereof, Wal-Mart asserts that Ms. McKever's "two requests to increase her hours are discrete instances of discrimination, not a continuing violation." The undersigned finds that Ms. McKever's claim was timely. The testimony presented during the final hearing indicated that the hours assigned to Wal-Mart employees vary weekly based on several different factors assessed by the automated system. Accordingly, assigning Ms. McKever less than 32 hours a week was a repeated and continuing act rather than a one-time decision. *See generally Calloway v. Partners Nat'l Health Plans*, 986 F.2d 446, 448 (11th Cir. 1993)(explaining that "[i]n determining whether a discriminatory employment practice constitutes a continuing violation, this Circuit distinguishes between 'the present consequence of a one-time violation, which does not extend the limitations period, and the continuation of the violation into the present, which does.'").

[7] With regard to the first criterion, a protected activity includes requesting a reasonable accommodation provided that the employee was actually handicapped or had a good faith, objectively reasonable belief that she was handicapped. *See Tabatchnik v. Cont'l Airlines*, 262 Fed. Appx. 674, 677 (5th Cir. 2008)(stating that "[b]ecause Tabatchnik has not shown that he had a good faith belief that he was disabled or perceived as disabled, his request for an accommodation cannot be considered protected by the ADA."); *Williams v. Philadelphia Hous. Auth. Police Dep't*, 380 F.3d 751, 759 (3d Cir. 2004)(stating that "[u]nlike a claim for discrimination under the ADA, an ADA retaliation claim based upon an employee having requested an accommodation does not require that a plaintiff show that he or she is 'disabled' within the meaning of the ADA . . . Thus, as opposed to showing disability, a plaintiff need only show that she had a reasonable, good faith belief that she was entitled to request the reasonable accommodation she requested.")(citation omitted).

23. In order to establish a prima facie case for discrimination based on disparate treatment, Petitioner must show that (a) she belongs to a protected class; (b) she was subjected to an adverse employment action; (c) her employer treated similarly-situated employees outside her protected class more favorably; and (d) she was qualified to do the job. *See Holifield v. Reno*, 115 F.3d 1555, 1562 (11th Cir. 1997).

24. There appears to be no dispute that Ms. McKever engaged in a protected activity by requesting part-time status and that she belongs to a protected class due to her asthma. Even if it were assumed that her assigned hours amounted to an adverse employment action, the greater weight of the evidence does not establish that: (a) there was a causal connection between her request for part-time status and the number of hours she was assigned; or that (b) Wal-Mart treated nondisabled employees more favorably. Instead, the greater weight of the evidence demonstrated that Ms. McKever's unavailability for weekend work was the primary reason she was not being assigned 32 hours of work per week.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations issue a final order dismissing Vanessa McKever's Petition for Relief from an unlawful employment practice.

DONE AND ENTERED this 8th day of June, 2021, in Tallahassee, Leon County, Florida.

Garnett Chisenhall

G. W. CHISENHALL
Administrative Law Judge
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Filed with the Clerk of the
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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.