

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

JACQUELINE SMITH,

Petitioner,

vs.

Case No. 21-0103

CELLULAR SALES SERVICES GROUP, LLC,

Respondent.

RECOMMENDED ORDER

Pursuant to notice, an evidentiary hearing was held before Administrative Law Judge (ALJ) Yolonda Y. Green of the Division of Administrative Hearings (DOAH), on October 5 through 7, 2021.¹

APPEARANCES

For Petitioner: James Moten Thompson, Esquire
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Tampa, Florida 33602

For Respondent²: Robert L. Bowman, Esquire
Bryce E. Fitzgerald, Esquire
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Suite 2500
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Knoxville, Tennessee 37929

¹ The hearing was conducted in person. However, the court reporter and one witness (Peggy Vissicchio) attended by Zoom conference.

² The Respondent was represented by Robert L. Bowman and Bryce E Fitzgerald who were accepted as qualified representatives in this matter.

STATEMENT OF THE ISSUE

Whether Respondent discriminated against Petitioner based upon sex, race, or disability and/or retaliated against her for engaging in a protected activity.

PRELIMINARY STATEMENT

On July 6, 2020, Ms. Smith filed an employment discrimination complaint with the Florida Commission on Human Relations (FCHR), alleging that Respondent, Cellular Sales Services Group, LLC (Cellular Sales) discriminated against her based upon sex, national origin, or disability and/or retaliated against her for engaging in a protected activity. Ms. Smith's complaint alleged:

I worked as a sales representative for Cellular Services. In May 2020, I informed my supervisor about my disability and about the fact that I would require intermittent medical leave as an accommodation. Soon thereafter my supervisor wrote me up for not meeting my call quota for a week. It was a week that I missed two days for doctor's appointments for my disability. The supervisor knew the reason for the missed days and my need for accommodations but wrote me up anyway. During the next month I went through the process of putting in for intermittent FMLA. Two days after submitting my FMLA information, I was fired for pretextual reasons and in violation of Cellular Services progressive discipline. My supervisor, who is of Arabic origin also treats the non-Arabic and female employees worse in terms and conditions of employment and in terms of discipline. I have complained of this disparate treatment.

On December 21, 2020, FCHR issued a "Notice of Determination of No Cause," and a "Determination (No Cause)" finding that there was no reasonable cause to establish that Respondent committed a discriminatory employment practice against Ms. Smith.

On January 11, 2021, Ms. Smith filed a Petition for Relief from a discriminatory employment practice with FCHR, maintaining her allegations that Respondent discriminated against her. On January 12, 2021, FCHR transmitted the case to DOAH, for assignment to an Administrative Law Judge for a final evidentiary hearing. This matter was initially assigned to ALJ Jodi-Ann V. Livingstone. The case was then transferred to ALJ Brian A. Newman. On March 10, 2021, this matter was transferred to the undersigned.

Before being assigned to the undersigned, this case was scheduled for hearing on April 7 through 9, 2021. After two continuances, the case was rescheduled for hearing on October 5 through 7, 2021.

The parties offered joint witnesses (all Cellular Sales employees) as follows: Cheyenne Jenkins (Regional Director for Cellular Sales); Eric Walkover (Area General Manager for Cellular Sales); Eric Brown (General Manager for Cellular Sales); Hazim Abujbara (General Manager for Cellular Sales); Peggy Vissicchio (Operations Manager for Cellular Sales); Billy Holloway (Employee Relations Ambassador for Cellular Sales); and Abdul Alabed (Sales Representative for Cellular Sales). The parties also offered Joint Exhibits 1 through 53. Respondent objected to Exhibits 50 through 53.

Petitioner testified on her own behalf and presented the testimony of John Barrett.

A partial portion of the transcript was filed with the DOAH on October 27, 2021. Subsequently, on November 2, 2021, the remaining volumes of the transcript were filed. Thus, the five-volume Transcript of the final hearing was filed with DOAH on November 2, 2021. The deadline for filing proposed recommended orders (“PROs”) was November 12, 2021. Both parties timely

filed PROs, which have been considered by the undersigned in preparation of this Recommended Order.

Unless otherwise indicated, all statutory references are to the codification of the Florida Statutes (2019) in effect at the time of the alleged discriminatory acts.

FINDINGS OF FACT

Based on the testimony and exhibits admitted at the final hearing, the following Findings of Fact are made.

Petitioner's Background

1. At all times material to this matter, Petitioner identified as a Caucasian woman. In February of 2020, Ms. Smith was diagnosed with Hashimoto's disease.³ Ms. Smith's Hashimoto's disease, when active, causes her to experience debilitating fatigue, gastric problems, muscle aches, headaches, and hair loss. Her condition, when active, substantially limited several of Ms. Smith's major life activities, including the ability to function on even a basic level.

2. Ms. Smith testified that she requires treatment from a doctor to manage and minimize the most debilitating aspects of her condition.

3. Ms. Smith was hired by Cellular Sales in 2016, as a sales representative. In October 2018, Ms. Smith moved to Florida and was transferred to a Cellular Sales location in Florida. In December 2019, Ms. Smith was transferred to the Cellular Sales location in the Brandon Town Center Mall (Brandon Mall) in Brandon, Florida. Ms. Smith was then promoted to assistant store manager at that location.

4. As a sales representative, Ms. Smith was responsible for sales, client services, and developing sales leads. She had the same responsibilities as a store lead.

³ Hashimoto's disease is a condition that causes one's immune system to attack one's thyroid.

5. During Ms. Smith's employment with Cellular Sales, she never received disciplinary action.

Cellular Sales Policies and Procedures

6. Respondent, Cellular Sales, sells Verizon Wireless products, services, and accessories.

7. The Cellular Sales Employee Handbook contains a Pyramid of Ethics, which prohibits employees from "discriminating, offensive, abusive, or harassing behavior and/or language" against another employee and prohibits "retaliation against those who report suspected violations of law or Company policy." Cellular Sales also maintains an open-door policy, which directs employees to notify a supervisor, contact the corporate human resources department, or submit a complaint via the Report It Hotline, if they have any concerns about their employment or policy violations.

8. Cellular Sales also maintains an Equal Employment Opportunity policy which prohibits discrimination based, among other characteristics, on sex, national origin, disability. The Individuals With Disabilities policy directs employees to notify both their supervisor and the corporate human resources department of any reasonable accommodation requests so that they can be addressed by the human resources department.

9. Ms. Smith received and signed for a copy of the Employee Handbook when she began working for Cellular Sales in 2016 and received an updated copy of the handbook in 2017. She also received annual training on the company's policies, including those related to the prevention of discrimination. All managers that were involved in this matter also received annual training on Cellular Sale's policies.

Brandon Mall Managers

10. Mr. Abujbara identifies as a male of Arab national origin. Prior to working at the Brandon Mall, Ms. Smith worked with Mr. Abujbara at a Cellular Sales location in the Central Florida market. Mr. Abujbara became the store lead at the Brandon Mall store at the end of 2019. When Mr. Abujbara became the Brandon Mall Store Manager, he selected the sales representatives that he wanted on his team, which included Ms. Smith, an African-American female, and another Caucasian female. Mr. Abujbara also promoted Ms. Smith to be the assistant team lead. Mr. Abujbara did not select a male of Arab origin for the position. Mr. Abujbara was later promoted to store manager at the Brandon Mall. During Mr. Abujbara's tenure as store manager, Ms. Smith received scheduling privileges as a result of her position as store lead.

11. In June 2020, Mr. Abujbara was promoted to general manager. As a result of Mr. Abujbara's promotion, Mr. Alabed became interim store lead for the last two weeks of June 2020.

Business Practice for Cellular Sales During COVID-19

12. At some point, the Brandon Mall store closed for a period of time due to the COVID-19 pandemic. Employees were given the option to accept COVID-19 leave pay during that time. Ms. Smith accepted the paid leave.

13. Mr. Walkover testified that the pandemic changed the Cellular Sales business, especially at the Brandon Mall location, because it could not depend on traffic walking in the door. It required Cellular Sales to be creative in the way it drove traffic to its locations.

14. Cellular Sales implemented new performance standards, including a goal for sales representatives to make a minimum number of weekly phone calls. Mr. Crutcher, the regional director, e-mailed the Central Florida market about the new sales calls standards. He instructed sales representatives that "[e]very sales rep will be responsible to make at least 10

calls each week – this will be tracked and credited weekly to keep our leads list from running dry.” The new performance standard was effective starting May 1, 2020. Ms. Smith acknowledged that she received the email. Notably, the email did not indicate which day would mark the end of the week.

15. All sales representatives were required to make the calls through a program called RingCentral, a voiceover IP phone application that allows Cellular Sales to track and monitor calls. The sales representatives could use RingCentral to make calls outside the store as well.

16. RingCentral also has a built-in team chat allowing communications among the sales team. Mr. Abujbara’s used the RingCentral chat feature to communicate with his sales team at the Brandon Mall.

17. On May 16, 2020, Mr. Abujbara sent at least two specific messages to his sales team using RingCentral which stated:

First Message:

“[t]he market-wide standard for outbound phone calls through ring central from our leads app is 10 per week. These will be monitored weekly and write ups will be issued at the end of the week for all that do not meet this minimum expectation of 10 calls.”

Second message:

“This week. Calls are due by Friday.”

18. On May 21, 2020, Mr. Abujbara sent a reminder message that stated: “Minimum expectations/n10 calls for the week due tomorrow/n Total of 40 by end of month due on 31st Any issues with leads or powerapp reach out to Mo Khalel and communicate with me.”

19. In addition to the messages, two other members of the Brandon Mall sales team testified that Mr. Abujbara also announced the Friday deadline in a meeting.

20. Ms. Smith testified that she did not receive the RingCentral messages that the calls were due on Fridays.

21. The undersigned finds that there is competent substantial evidence to demonstrate that Mr. Abujbara provided timely and sufficient notice, using the method of communication commonly used by his team, that the sales call deadline was Friday of each week.

Ms. Smith's Work Performance and Discipline History

22. Ms. Smith made 10 calls for the first, second, and fourth weeks of May 2020. In these weeks she worked two shifts, three shifts, and four shifts, respectively. However, she made seven calls the third week of May 2020. Thus, she failed to meet the minimum 10 calls goal by Friday for the third week of May 2020.

23. Ms. Smith testified that she missed work days the third week of May 2020 because she had "doctors' appointments." Ms. Smith testified that she had a chiropractor appointment that week and that she regularly gets blood work. The evidence offered at hearing was not sufficient to rebut her testimony and thus, it is credited. However, even if Ms. Smith had an appointment the third week of May, there was no credible evidence that anyone else at Cellular Sales had knowledge that she had an appointment the third week or that she missed her sales goals as a result of the appointment.

24. On May 23, 2020, Mr. Abujbara sent Ms. Smith an e-mail with a Disciplinary Action Form. The disciplinary action was for insubordination in a meeting and for failing to make the required minimum 10 calls the third week of May 2020.⁴ Ms. Smith was then placed on a performance plan which stated the following, "[g]oing forward we need to make sure that you are attaining minimum standard for phone calls on a weekly basis"

⁴ The third week in May 2020 ended on May 22, 2020.

25. After receiving the email containing the disciplinary action on May 23, Ms. Smith disputed the basis for the action. The text exchange between Ms. Smith and Mr. Abujbara was as follows:

Ms. Smith: Give me a call when you can. I have 9 completed calls for the week

Mr. Abujbara: Hey I'm out of the office until Monday for religious purposes. I will follow-up with you Monday when I return.

Ms. Smith: I will accept the write up for the calls. But I will be having extensive conversation with you, Eric Brown or Eric Walkover regarding what is happening at this store. So please get back to me when you can.

26. Ms. Smith then texted Mr. Brown on the same date. The text exchange in pertinent part was as follows:

Ms. Smith: Also, are calls due on Friday or By end of day Saturday? Since the week technically ends on Saturday.

Mr. Brown: Technically the original email was sent Friday. It should have been discussed at your draft as well that day so we have been running it Friday to Friday.

Ms. Smith: Okay. I made 8 calls this weeks because we got slammed yesterday as I was finishing them. So to avoid a write up I was wondering if I could have today to complete them.

27. Ms. Smith never told Mr. Abujbara or Mr. Brown that the reason for missing the call goal was due to her medical condition or related appointments, discrimination, or retaliation.

28. Ms. Smith also disputed the disciplinary action with Mr. Walkover stating that she got her calls done by Saturday and should not have received the disciplinary action. Mr. Walkover told her that she missed the deadline, which was Friday. Like with Mr. Abujbara and Mr. Brown, Ms. Smith also

never told Mr. Walkover that she did not meet her sales call goal because she had a medical appointment, nor did she complain that the disciplinary action was based on discrimination.

29. Similar to the failure to make calls, Ms. Smith also contested the insubordination claim. Mr. Abujbara described her insubordination and unprofessional conduct that stemmed from her behavior during a team meeting where she expressed her disagreement⁵ with the new “chumming” policy. “Chumming” refers to the process of greeting and engaging clients in front of the store to attempt to bring them in for sales. Each sales representative working on that day would share in the commission for that sale.

30. The new chumming policy for the Brandon Mall store permitted a sales representative who brought in a customer and closed a sale to keep the commission for the sale. Thus, the other sales representatives would not share the commissions for that sale. Mr. Brown created the policy because the store’s numbers were struggling with sales and he wanted to incentivize the sales representatives to attract customers that otherwise would not shop in the store.

31. It was known amongst Ms. Smith’s coworkers that she did not like chumming and did not chum often. More importantly, she never requested an accommodation for chumming due to a disability or medical condition.

Reading Book While at Work

32. In June 2020, Mr. Abujbara was promoted to general manager and Mr. Alabed became the interim store lead at the Brandon Mall store. Ms. Smith wanted Mr. Alabed to be the store manager of the Brandon Mall store. Mr. Alabed testified that during the time he was the interim store lead, he had no knowledge that Ms. Smith had an autoimmune disease.

⁵ Petitioner’s former coworker, Mr. Sanchez confirmed that she was disrespectful to Mr. Abujbara in the meeting by interrupting him and complaining about the rule.

33. On June 19, 2020, Mr. Alabed observed Ms. Smith reading a book on the sales floor while she was on duty. Instead of sending her home, Mr. Alabed directed her to put the book away and to begin “chumming.” Ms. Smith went into the mall area to chum but then, returned to reading her book. Given Ms. Smith’s failure to follow Mr. Alabed’s instructions, Mr. Alabed then took a picture of Ms. Smith reading, sent it to Mr. Brown, and notified him of Ms. Smith’s actions.

34. The following day, on June 20, 2020, for the second time, Mr. Alabed observed Ms. Smith reading a book on the sales floor while on duty. On this day, customers were in the store. Mr. Alabed took a picture of Ms. Smith reading on that day and sent it to Mr. Brown.

35. Mr. Brown called Mr. Walkover, both times he learned of Ms. Smith’s behavior, to inform him that Ms. Smith was reading a book on the sales floor and was not participating in team activities. Mr. Brown also sent the pictures of Ms. Smith reading a book to Mr. Walkover.

36. Mr. Walkover contacted Mr. Jenkins to seek further advice regarding Ms. Smith’s actions. Mr. Jenkins testified that Mr. Walkover related to him that a sales representative was observed reading a book two days in a row on the sales floor, and that she was on a performance plan for not meeting phone call requirements. Mr. Walkover also sent the pictures to Mr. Jenkins that he received from Mr. Alabed.

37. Mr. Walkover was concerned that Ms. Smith was not working while sitting at the desk reading a book. He believed her reading a book was also distracting to the rest of the team. He was also concerned that she had previously missed the minimum phone call expectations, for which she was on a performance plan. Mr. Jenkins told Mr. Walkover he would investigate Ms. Smith’s actions. Mr. Jenkins confirmed that Ms. Smith had been written up less than 30 days earlier for not making her minimum phone calls and that a security video showed her reading a book on the sales floor with customers in the store. Mr. Jenkins showed Mr. Walkover the security video.

The video, from June 20, 2020, clearly shows Ms. Smith reading a book at her desk, while customers were in the store and other employees were working.

38. After his investigation, Mr. Jenkins determined that Ms. Smith's actions warranted termination. To ensure he was making the appropriate decision, Mr. Jenkins decided to speak with the corporate human resources department. Mr. Jenkins and Mr. Walkover called Ms. Calvert and explained the facts related to Ms. Smith, i.e., the employee was on a performance plan, reading a book twice while on duty and had a medical condition. Ms. Calvert affirmed Mr. Jenkin's decision to terminate Ms. Smith because the decision was related to her work performance and behavior and not related to her medical condition.

39. Mr. Jenkins shared his decision with Mr. Walkover and ultimately, Mr. Brown was directed to meet with Ms. Smith to terminate her. On June 24, 2020, Mr. Brown met with Ms. Smith to notify her that she was terminated and presented her with paperwork outlining the reasons for her termination.

40. Ms. Smith opposed her termination on the basis that other employees engaged in non-work-related activities on the sales floor. She testified that other employees played games on their phones or watched movies.

41. Mr. Walkover testified that sales representatives are expected to either be selling phones or gathering sales leads while at work. If they do not have a client in front of them, their job is to do what they can to try to draw in a client. Sales representatives were not permitted to watch movies, read books, or play games. He did note, however, that on occasion, employees were permitted to use their phones to direct business to the store.

42. Ms. Smith admits that she openly read a book to learn more about her medical condition while at work on two separate days.

Ms. Smith's Disability

43. The record is not clear regarding when Ms. Smith was first diagnosed with a thyroid condition. However, her medical records reflect a doctor's visit of April 16, 2020, in which Ms. Smith was diagnosed with a thyroid condition. Ms. Smith testified that she notified her supervisors about her medical condition and about her periodic need to go to doctors' appointments in order to keep her medical condition under control. Mr. Alabed testified that he was not aware of Ms. Smith's condition.

44. Ms. Smith testified that she was diagnosed with Hashimoto's disease, and, a few months later, with Lupus. Throughout her employment, Mr. Abujbara gave Ms. Smith time off for medical appointments and other reasons, including for a car accident. At some point, Ms. Smith informed Mr. Abujbara that she thought she had Lupus and may need some time for doctors' appointments. Mr. Abujbara asked if Ms. Smith needed shifts off, said he would help her get them covered, and to let him know of anything else he could do.

45. Mr. Abujbara then contacted Mr. Jenkins to inform him they had a sales representative who was diagnosed with Lupus and needed guidance with how to assist her.

46. Mr. Jenkins instructed Mr. Abujbara to contact Mr. Holloway, a sales representative who also serves as the Employee Relations Ambassador. He is responsible for talking to employees about their well-being and helping them get counseling services or Family Medical Leave Act (FMLA). Mr. Abujbara reached out to Mr. Holloway to inform him that Ms. Smith had some health conditions and may need assistance with FMLA. Mr. Holloway told Mr. Abujbara to provide Ms. Smith with his (Mr. Holloway's) contact information to reach out to him so they could start the process for FMLA.

47. The record contains extensive testimony about referring Ms. Smith for FMLA assistance. However, there is no mention about assistance for Ms. Smith regarding a request for a reasonable accommodation. Ms. Smith

testified that she did not request FMLA; she was seeking a reasonable accommodation due to her disability. The undersigned finds Ms. Smith requested a reasonable accommodation in the form of intermittent leave for doctors' appointments to treat her condition.

48. Mr. Holloway e-mailed Ms. Vissicchio, who assists with FMLA requests. On June 19, 2021, Ms. Vissicchio e-mailed Ms. Smith, requesting information for her leave. Ms. Smith responded, "I do not currently need days."

49. On June 22, 2021, Ms. Vissicchio followed up with an email as follows:

"I didn't file anything yet since you said you currently do not need days off. Once I file they will require a dr evaluation and note and the paperwork filled out. Please let me know when that is all done and then I can put you in for intermittent FMLA in case future days are needed."

50. Ms. Smith replied to Ms. Vissicchio as follows:

"The days off most likely will not be in bulk. This is more of a long term condition. Will be seeing the doctors again these next two weeks. I can have them fill out the paper work. The days I need off this month have been covered."

51. Ms. Vissicchio testified that she did not file anything at that point because Ms. Smith was not requesting time off and the Cellular Sales' third-party administrator that processes FMLA requests would deny a request without receiving supporting paperwork within 15 days of submitting the request.

52. Ms. Smith did not complain to Ms. Vissicchio, who works in human resources, about discrimination based on her race, sex, or disability.

Proposed Comparators

53. At the hearing, Ms. Smith offered Ameer Salti and Mohammed Zarour as comparators to establish that she was treated differently than other employees.

54. Mr. Salti was a sales representative with Cellular Sales. He received disciplinary action for insubordination because he refused to assist a client. He was instructed to go home for the remainder of his shift, on December 30, 2019. On March 17, 2020, Mr. Salti was disciplined a second time for making a client wait on an appointment, leaving his work station messy, and coming to work in flip flops. He was suspended for two weeks. On November 18, 2020, Mr. Salti was terminated for a failed drug screen. Cellular Sales maintains a drug-free workplace policy that subjects an employee to immediate termination for violation of the policy.

55. Mr. Zarour, also a sales representative, was disciplined and terminated as well. He was disciplined on June 6, 2020, for failing to make 40 calls in May 2020. The evidence established that Mr. Zarour made 18 calls the third week of May. However, he failed to meet the required 40 calls per month. The simple math establishes that at least on one week, Mr. Zarour failed to meet the 10 calls minimum. However, the competent substantial evidence did not establish whether he failed to meet the minimum the fourth week (at the end of the month) or a different week. Thus, the evidence is not sufficient to establish that he was not disciplined for his failure to meet the minimum weekly call goals. However, the evidence did establish that he was disciplined for failing to meet required minimum sales calls. On July 27, 2020, Mr. Zarour was terminated by Eric Brown and Eric Walkover for policy violations, not dropping cash, not dropping trades, and failure to meet minimum call goals.

56. Similar to Ms. Smith, Mr. Zarour was disciplined for failing to meet the minimum sales calls. However, there were no other similarities in

behavior as Ms. Smith. In fact, neither of the offered comparators was observed reading a book two days in a row on the sales floor.

57. There was discussion in Petitioner's PRO pertaining to progressive discipline. While progressive discipline was not a Cellular Sales policy, Mr. Jenkins testified that Ms. Smith's behavior warranted termination.

Ultimate Findings of Fact

58. Ms. Smith admitted she never complained about discrimination or retaliation to the human resources department or the Report It Hotline. She also admitted that she did not complain to anyone at Cellular Sales regarding discrimination or retaliation, or that a male of Arab national origin, or a non-disabled employee received better treatment.

59. Ms. Smith admitted that she was reading a book on the sales floor on two separate, consecutive days.

60. The evidence offered does not support a finding that Cellular Sales treated Ms. Smith differently than males of Arab national origin, or disabled employees.

61. The evidence offered at hearing did not support a finding that Cellular Sales retaliated against Ms. Smith for engaging in a protected employment action.

62. The evidence demonstrated that Ms. Smith was terminated for failing to meet workplace performance goals and reading a book on the sales floor on two days while on duty.

CONCLUSIONS OF LAW

63. DOAH has jurisdiction over the parties and subject matter in this case. §§ 120.569 and 120.57, Fla. Stat.

64. Section 760.10(1)(a) states that it is an unlawful employment practice for an employer to fail or refuse to hire or otherwise discriminate against an individual on the basis of handicap, sex, or race.

65. Section 760.10(7) prohibits retaliation against those who oppose unlawful discriminatory employment practices.

66. FCHR and Florida courts have determined that federal discrimination laws should be used as guidance when construing provisions of section 760.10. *See Valenzuela v. GlobeGround N. Am., LLC*, 18 So. 3d 17 (Fla. 3d DCA 2009); *Brand v. Fla. Power Corp.*, 633 So. 2d 504, 509 (Fla. 1st DCA 1994).

67. Discriminatory intent can be established through direct or circumstantial evidence. *Schoenfeld v. Babbitt*, 168 F.3d 1257, 1266 (11th Cir. 1999). Direct evidence of discrimination is evidence that, if believed, establishes the existence of discriminatory intent behind an employment decision without inference or presumption. *Maynard v. Bd. of Regents*, 342 F.3d 1281, 1289 (11th Cir. 2003).

68. As there is no direct evidence of discrimination in this case, Ms. Smith must rely on circumstantial evidence of discriminatory intent to prove her claims. The shifting burden of proof pattern established in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973), sets forth a three-part analysis: (1) First, Petitioner has the burden of proving a prima facie case of discrimination; (2) If Petitioner sufficiently establishes a prima facie case, the burden shifts to Respondent to "articulate some legitimate, nondiscriminatory reason" for its action; (3) If Respondent satisfies this burden, Petitioner has the opportunity to prove that the legitimate reasons asserted by Respondent are really a pretext. *See Valenzuela*, 18 So. 3d at 22 (gender discrimination claim).

69. Petitioner must establish a prima facie case by a preponderance of the evidence. *Holifield v. Reno*, 115 F.3d 1555, 1562 (11th Cir. 1997); *abrogated* on other grounds by, *Lewis v. City of Union City, Ga.*, 918 F.3d 1213, 1224 (11th Cir. 2019); *see also* § 120.57(1)(j), Fla. Stat. ("Findings of fact shall be based upon a preponderance of the evidence, except in penal or licensure proceedings or except as otherwise provided by statute and shall be based

exclusively on the evidence of record and on matters officially recognized."). This simply requires evidence that more likely than not tends to prove a certain proposition.

Establishing Discrimination

Disparate Treatment

70. Ms. Smith argues she was treated differently than other sales representatives. She claims she was terminated due to her race, sex, and disability. She further claims that non-disabled, male Arab sales representatives were not disciplined for failing to meet sales calls or for engaging in non-work-related activities while at work.

71. This "disparate treatment" claim is the most easily understood type of discrimination. *See Schultz v. Royal Caribbean Cruises, Ltd.*, 465 F. Supp. 3d 1232, 1268 (S.D. Fla 2020) (citations and quotations omitted). Disparate treatment occurs when an employer treats an employee less favorably than others because of his or her race, color, religion, sex, or national origin. *Id.*

72. To establish a prima facie case of disparate treatment, Ms. Smith must demonstrate she:

- (1) belongs to a protected class;
- (2) suffered an adverse employment action;
- (3) was qualified to do her job; and
- (4) was treated less favorably than similarly situated employees outside of the protected class.

Alvarez v. Lakeland Area Mass Transit Dist., 2020 WL 3473286, at *10 (M.D. Fla. June 25, 2020).

73. The U.S. Supreme Court reiterated the general meaning of gender discrimination and specifically addressed the standard for disparate treatment cases:

[T]he question becomes: What did "discriminate" mean in 1964? As it turns out, it meant then roughly what it means today: "To make a difference in treatment or favor (of one as compared with

others).” Webster's New International Dictionary 745 (2d ed. 1954). To “discriminate against” a person, then, would seem to mean treating that individual worse than others who are similarly situated. See *Burlington N. & S. F. R. Co. v. White*, 548 U.S. 53, 59, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006). In so-called "disparate treatment" cases like today's, this Court has also held that the difference in treatment based on sex must be intentional. See, e.g., *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988). So, taken together, an employer who intentionally treats a person worse because of sex— such as by firing the person for actions or attributes it would tolerate in an individual of another sex— discriminates against that person in violation of Title VII. (emphasis added).

Bostock v. Clayton Cty., Ga., 140 S. Ct. 1731, 1740 (2020) (holding sexual identity discrimination is actionable under Title VII).

74. There is no dispute as to the first three elements. Regarding the first element, Ms. Smith is female. As to the second element, there is no question that termination for employment is an adverse employment action. Third, there was no dispute that she was qualified to perform her job.

75. The remaining question is whether she was treated less favorably than similarly-situated male employees.

76. To meet the fourth "comparator" element of a disparate treatment claim, Petitioner must show she is similarly situated in all relevant respects to the other sales representatives and that these comparators were given preferential treatment. *Woods v. Cent. Fellowship Christian Acad.*, 545 F. App'x 939, 945 (11th Cir. 2013).

77. As an initial matter, the Cellular Sales representatives with whom Ms. Smith compares herself are males of Arab national origin. However, there is insufficient evidence any sales representatives were given preferential treatment, including Arab males. Under Mr. Abujbara all sales

representatives were required to meet the 10 calls per week and 40 calls per month minimal standard. All employees were responsible for sales, client services, and developing sales leads. There was no evidence that the offered comparators, Mr. Salti or Mr. Zarour, refused to perform a required duty, but were not disciplined. Similar to Ms. Smith, Mr. Zauror was disciplined for failing to meet the minimal sales call performance standard. Mr. Salti was disciplined for insubordination because he refused to assist a client and was disciplined a second time for making a client wait on an appointment, leaving his work station messy, and coming to work in flip-flops. Mr. Salti was terminated for violating the drug-free workplace policy by testing positive on a drug test. Moreover, there was no evidence offered that either comparator engaged in reading a book in the store on two consecutive days. Therefore, Ms. Smith cannot establish that anyone else was treated better than she was treated.

78. Even if Ms. Smith could show Cellular Sales treated non-disabled, or males of Arab national origin better than her, she would still have to show the treatment was intentionally based on her gender, race, and/or disability. There is no evidence that Mr. Abujbara's or Mr. Walkover's decisions to discipline and, ultimately, terminate Ms. Smith was based on race, gender, or disability.

79. Because she cannot show that the proposed comparator sales representatives were given preferential treatment, Ms. Smith's disparate treatment claim fails.

Disability Discrimination

80. Disability discrimination claims under the Florida Civil Rights Act are analyzed under the same framework as federal ADA disability claims.

D'Angelo v. Conagra Foods, Inc., 422 F.3d 1220, 1224 n.2 (11th Cir. 2005).

81. "In order to demonstrate a prima facie case, under the ADA, [Petitioner] must show that: (1) [s]he has a disability; (2) [s]he is a "qualified" individual; and (3) defendant discriminated against [her] because of her

disability.” *Greenberg v. BellSouth Telecommunications, Inc.*, 498 F.3d 1258, 1263 (11th Cir. 2007); *Ellis v. England*, 432 F.3d 1321, 1326 (11th Cir. 2005).

82. The burden then shifts to Respondent to articulate a legitimate, non-discriminatory reason for petitioner’s termination. If Respondent is able to do so, the burden then returns to Petitioner, who must show that Respondent's reason is unworthy of credence and a mere pretext for discrimination. *See Cleveland v. Home Shopping Network, Inc.*, 369 F.3d 1189, 1193 (11th Cir. 2004).

83. In the instant case, Petitioner provided no direct evidence of any type of discrimination. Accordingly, the burden-shifting analysis is appropriate. Based on the evidence presented at hearing, Petitioner proved that she is an individual with a disability, i.e., Hashimoto’s disease and Lupus. Petitioner also proved that she is qualified for the job, and Respondent did not dispute this fact. However, Petitioner failed to demonstrate the third prong of the prima facie case, i.e., that she was discriminated against "because of" her disability.

84. Notably, Cellular Sales worked with Petitioner to provide a reasonable accommodation that would have allowed her the flexibility she needed to come to work as her medical condition allowed. However, the process had not been fully realized as she was terminated. Despite seeking an accommodation for intermittent FMLA leave, Petitioner failed to meet minimum performance goals and expectations of any reasonable employer, i.e., not reading a book in the presence of customers instead of developing sales.

Respondent’s Offered Legitimate Business Reason for Action

85. Assuming arguendo that Petitioner demonstrated all elements of the prima facie case, Cellular Sales offered a legitimate, non-discriminatory reason for Petitioner's termination. Petitioner's failure to meet her minimum sales calls goal and reading a book two consecutive days during work hours, while customers were present, was unacceptable.

Pre-text

86. Petitioner claims this is a pretext for discrimination. However, Petitioner offered no persuasive evidence of this, and no specific information about the identity of any similarly-situated individual who failed to meet sales calls goals and read a book on two consecutive days while on duty, who were not disciplined. Petitioner's speculation and personal belief concerning the motives of Cellular Sales are not sufficient to establish intentional discrimination. *See Lizardo v. Denny's, Inc.*, 270 F.3d 94, 104 (2d Cir. 2001)(“[P]laintiffs have done little more than to cite to their mistreatment and ask the court to conclude it must have been related to their race. This is not sufficient.”). While she points to Mr. Salti as being similarly-situated, Mr. Salti’s behavior was different from Ms. Smith’s. Moreover, the decisions Petitioner alleges to be disparate were made by two different supervisors at different levels. Thus, she and Mr. Salti are not similarly situated. *See Mitchell v. Young*, 309 So. 3d 280, 285 (Fla. 1st DCA 2020)(alleged comparators invalid where they “had different supervisors ... or were of a different rank ... when they committed their misconduct.”). Even with respect to Petitioner’s complaints about other employees who engaged in activities that were unrelated to work, Respondent offered plausible and credible explanations for employees using their electronic devices on the sales floor for work-related matters. Ms. Smith admitted that she was reading a book about her condition. Petitioner openly reading her book on the sales floor while customers are present on two consecutive days for personal reasons is clearly not work-related.

87. Petitioner failed to demonstrate that she was discriminated on the basis of her disability, sex, or race with regard to her discipline or her termination.

Retaliation

88. Section 760.10(7) prohibits retaliation in employment as follows:

(7) It is an unlawful employment practice for an employer ... 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. (emphasis added).

89. The burden of proving retaliation follows the general rules enunciated for proving discrimination. *Reed v. A.W. Lawrence & Co.*, 95 F.3d 1170, 1178 (2d Cir. 1996). As discussed above, Petitioner can meet her burden of proof with either direct or circumstantial evidence.

90. Petitioner did not introduce direct evidence of retaliation in this case. Thus, Petitioner must prove her allegation of retaliation by circumstantial evidence. Circumstantial evidence of retaliation is subject to the burden shifting framework established in *McDonnell Douglas*.

91. To establish a prima facie case of retaliation, Petitioner must show: (1) that she was engaged in statutorily protected expression or conduct; (2) that she suffered an adverse employment action; and (3) that there is some causal relationship between the two events. *Holifield v. Reno*, 115 F.3d 1555, 1566 (11th Cir. 1997). The protected activity must be the "but for" cause of the adverse action. *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013). Petitioner must prove that the adverse action would not have occurred in the absence of the protected activity, which is the highest standard of causation.

92. Petitioner alleges she was retaliated against due to her request for intermittent time off for treatment appointments related to her disability, i.e., Hashimoto's disease and Lupus. As stated in the Findings of Fact herein, Petitioner's request is found to be a request for a reasonable accommodation for her disability, and, thus, the request constituted protected activity.

93. Clearly, Petitioner suffered "adverse action" by virtue of her discipline and discharge.

94. However, Petitioner failed to prove any causal connection between her request for an accommodation and her adverse action. The evidence presented shows that Petitioner's request for time off for treatment appointments for her condition was in the process of being addressed before she terminated. She was permitted to take time for appointments when requested. Ms. Vissicchio allowed Petitioner to provide additional information from her treating physician before taking the next step in the process for FMLA to avoid denial.

95. The evidence shows that Mr. Alabed became Petitioner's supervisor in mid-June 2020. He credibly testified that he was not aware of her health condition. During the few short weeks Mr. Alabed was her supervisor, she was observed reading a book, while customers were present and not engaging in team activities to generate sales. Interestingly, this conduct took place during the same time that she was seeking assistance related to her condition. However, there was no evidence offered that Ms. Smith reported any alleged discrimination related to her disability prior to her during that process or prior to her discharge.

96. Petitioner presented insufficient evidence that her disability was the "but for" cause of any perceived retaliation. Instead, there was sufficient evidence to establish that she failed to meet work performance measures, and was reading a book and not working while on duty.

97. Based upon the evidence and testimony offered at hearing, Petitioner failed to establish a prima facie case against Cellular Sales for either disability, sex, or race discrimination or retaliation for opposing an unlawful employment practice. Therefore, the employment discrimination charge should be dismissed, and none of the damages claimed by Petitioner should be awarded to her.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations issue a final order finding that Petitioner, Jaqueline Smith, did not prove that Respondent, Cellular Sales Services Group, LLC, committed an unlawful employment practice against her; and dismissing her Petition for Relief from an unlawful employment practice.

DONE AND ENTERED this 20th day of December, 2021, in Tallahassee, Leon County, Florida.



YOLONDA Y. GREEN
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Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of December, 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.