

**STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS**

DAVID C. MONTAGUE,

Petitioner,

vs.

Case No. 21-0923

TRACTOR SUPPLY CO.,

Respondent.

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RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted on June 21, 2021, via Zoom before Garnett W. Chisenhall, a duly designated Administrative Law Judge of the Division of Administrative Hearings (“DOAH”).

APPEARANCES

For Petitioner: David C. Montague, pro se  
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For Respondent: Lara J. Peppard, Esquire  
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### STATEMENT OF THE ISSUE

Whether Respondent (“Tractor Supply”) committed an unlawful employment practice by subjecting Petitioner (“David C. Montague”) to a hostile work environment.

### PRELIMINARY STATEMENT

Mr. Montague filed an Employment Complaint of Discrimination with the Florida Commission on Human Relations (“the Commission”) on August 14, 2020, setting forth the following allegations:

I am an African American male. I was discriminated against because of my race and sex. I began my employment with [Tractor Supply] on May 10, 2020, as a Team Member. On June 30, 2020, my co-worker (Daryl Whitehead) and I were called to the manager’s office [for] what seemed to [be an] urgent [matter]. We were presented with what appeared to be a life size African American penis. A few minutes later, the store manager walked out of his office and looked at me, seemingly awaiting a response from me. We asked if that was the reason we were called to the office. My coworker called the Regional Manager as well as law enforcement who said they would not come and advised him to contact Human Resources. Our hours were drastically reduced and given the fact that we live approximately 50 miles from where we worked, and at the time of this writing I have not returned to work because I do not feel safe working there and it would create an economic hardship due to the distance after our hours were cut.

The Commission issued a Notice on February 5, 2021, announcing its determination “that there is no reasonable cause to believe that an unlawful practice occurred.” Mr. Montague responded by filing a Petition for Relief, and the Commission referred this matter to DOAH on March 11, 2021, for a formal administrative hearing.

The final hearing was convened on June 21, 2021. Petitioner testified on his own behalf and did not attempt to move any exhibits into evidence. Tractor Supply presented testimony from Steve Todor, Alexandra Lounsbury, Michael Davis, and Audrey Reese. Respondent's Exhibits 4, 9 through 17,<sup>1</sup> 19 through 24, and 39 through 42 were accepted into evidence.

The two-volume final hearing Transcript was filed on July 29, 2021. Mr. Montague filed a single-page, post-hearing submittal on August 6, 2021. Tractor Supply filed a Motion on August 12, 2021, requesting that the due date for the parties' proposed recommended orders be extended to September 9, 2021. The undersigned issued an Order on August 13, 2021, granting that Motion. Tractor Supply ultimately filed a timely Proposed Recommended Order. Both post-hearing submittals 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. Tractor Supply is a retail store chain that sells a wide variety of products geared toward agricultural uses.
2. Mr. Montague is a 41-year-old African American male. He has a GED and an associate's degree in psychology. At the time of the final hearing in this matter, he was five classes short of obtaining a bachelor's degree in industrial psychology.
3. Since leaving high school, Mr. Montague has worked in a variety of fields such as retail, construction, farming, and landscaping.

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<sup>1</sup> The undersigned deferred ruling on the admissibility of Respondent's Exhibit 13 because it was a hearsay statement provided by an employee of Tractor Supply. After further review, the undersigned accepts Respondent's Exhibit 13 into evidence because it supplements and/or corroborates testimony given during the final hearing.

4. Mr. Montague began working at a Tractor Supply store in Chiefland, Florida in April or May of 2020. His duties at Tractor Supply included handling 50-pound bags of feed, arranging those bags on the store shelves, assisting customers with transporting their purchases to their vehicles, and maintaining the store's parking lot. Mr. Montague worked 40 hours a week with occasional overtime.

5. Mr. Montague and his friend, Darryl Whitehead, shared rides to and from work at the Chiefland store. They were two of the three African Americans working there.

6. Mr. Montague, Mr. Whitehead, and Steven Todor often worked together handling inventory. Mr. Todor is Caucasian. They frequently made off-color comments about each other and fellow co-workers. Those comments were often related to male genitalia and were inappropriate for a workplace. Mr. Todor was counseled on at least one occasion after a customer overheard the three men engaging in their usual, off-color banter. Mr. Montague had been counseled at least once about inappropriate comments and jokes.

7. On June 30, 2020, a nondescript, unmarked white box, addressed to Mr. Todor, arrived at the Chiefland store. There was no indication who had sent the package, and it was taken to the store's breakroom. The breakroom is adjacent to another room that serves as the store manager's office.

8. Alexandra Lounsbury, who was the acting manager of the Chiefland store at the time, paged Mr. Todor over the store's intercom system and announced that he had a package in the breakroom. When Mr. Todor arrived at the breakroom, Ms. Lounsbury, Madison Douglas, the acting assistant store manager, and Ashley Peterson, a team leader, were in the office area but could see the breakroom through an open door.

9. Mr. Todor arrived in the breakroom, opened the package, and immediately recognized it as a gag gift. He saw what he described as a "chocolate candy phallic object" inside the package, and the bottom of the package's lid had a message that read, "eat a dick."

10. Mr. Todor was amused by the package, and asked the three ladies present if one of them were responsible for sending him the package. They were also amused by the package but denied being responsible. Mr. Todor then suspected that Mr. Montague and Mr. Whitehead were the culprits and asked Ms. Lounsbury to summon them to the break room:

A: And, you know, me trying to be a logical person, one and one together, I received a chocolate phallic object in the mail addressed to me, so I go to the next logical, for me anyways [sic] person to ask, and I asked Alex if she could – because I didn't have a phone on me – if she could intercom Darryl and David to the office in a hasty manner.

Because this is, like, around 10 or 11. So I'm in there – I was getting a water anyways, and so when they made their way over, Darryl was the first one in. And I sat there in front of the door, you know, looking like an idiot, holding the box open like so (gestures) with the lettering that says eat a dick, more or less as a joke.

And the first thing I said is, did you send this, when Darryl walked in. Darryl didn't answer me. He said something along the lines of, like, what the F is this and walked past me and sat down behind me, smiled and shook his head.

David was not far behind Darryl. He opened the door, saw me looking like an idiot with, you know, a box in my hand, mumbled something along the lines of, I can't believe this shit . . . Mumbled something along those lines, turned around and walked away, closed the door. Didn't come into the break room. And I don't really remember much after that. I think that we went on, continued doing a normal day.

I think I did inevitably try that chocolate and it wasn't very good chocolate. I kept the box in the freezer and then threw it away when I left or after I

got written up, should I say. Because we did get reprimanded for this situation.

Q: Okay. Okay. So who else did you show this to?

A: Throughout the day I think everyone saw it. At the end of the day everyone saw it. I'm pretty -- I don't think I walked around on the floor with it. I wasn't going to go to that extreme, but I think throughout the day whoever was working that day did in fact see that object.

Q: Did anybody admit to having sent it?

A: To this say I have no idea. I don't know, Personally, I do not know.

11. Mr. Montague was appalled by Mr. Todor's actions and felt disrespected. He finished his shift and reported the incident via text message the next morning to Mike Davis, the regional manager who oversaw the Chiefland store. Mr. Davis requested that Mr. Montague transmit a statement about the incident via facsimile or electronic mail, but he failed to do so.

12. Mr. Davis told Mr. Montague that he would be at the Chiefland store the next day and asked to meet with him. However, Mr. Montague did not report for work at the Chiefland store on July 1 or 2, 2020. Mr. Davis attempted to contact him via telephone, but Mr. Montague did not return the call.

13. Mr. Davis collected statements about the incident from Ms. Lounsbury, Ms. Peterson, Ms. Douglas, and Mr. Todor. Because Ms. Peterson and Ms. Douglas were new to the supervisory roles they were filling, Mr. Davis had a coaching session with them regarding the June 30, 2020, incident. However, Ms. Lounsbury and Mr. Todor received written final

warnings stating that similar conduct in the future would result in termination.<sup>2</sup>

14. Mr. Montague never returned to the Chiefland store. He felt that the incident on June 30, 2020, rendered working at the Chiefland store “intolerable.” He never notified the Chiefland store that he was resigning his position, and Tractor Supply ultimately fired Mr. Montague on July 8, 2020, for not reporting to work.

15. Mr. Montague has failed to demonstrate that Tractor Supply should be held responsible for the June 30, 2020, incident. Once Mr. Davis became aware of the incident, he promptly initiated an investigation that resulted in particular employees being disciplined in a manner commensurate with their involvement with the incident. Moreover, Tractor Supply’s response was reasonably likely to prevent similar misconduct from happening again.

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<sup>2</sup> Ms. Lounsbury’s written warning stated the following: “On June 30, 2020 a package was received at the Chiefland location of [Tractor Supply Company], addressed to the Receiver. The Receiver opened the package in the office, in the presence of the Interim Store Manager as well as the two other Team Members. After the Receiver opened the package it was found to be a sexually explicit piece of candy. Rather than throwing the candy away and acting in a professional manner by apologizing to the Receiver that it had happened, Alexandra admits to asking two additional Team Members to come to the office so the Receiver could confront them in front of others and ask if they sent the candy. It is the policy of Tractor Supply Company to promote a productive work environment and not accept any conduct by any Team Member that harasses, disrupts or interferes with work performance, or that creates an intimidating, offensive or hostile work environment.”

Mr. Todor’s written warning stated the following: “On June 30, 2020 a package was received at the Chiefland location of [Tractor Supply Company], addressed to Steven. After opening the package Steven realized that it was [a] sexually explicit piece of candy. Rather than throwing the candy away Steven asked if he could approach two additional Team Members to confront them and ask if they sent the candy. Those two Team Members denied that they had sent the candy and they were offended at what he showed them and that they were asked if they had sent it. While the concern noted above was being investigated, Steven admitted that he and the Team Members he confronted had been joking with each other inappropriately and he believed the package was connected to these inappropriate jokes. It is the policy of Tractor Supply Company to promote a productive work environment and not accept any conduct by any Team Member that harasses, disrupts or interferes with work performance, or that creates an intimidating, offensive or hostile work environment.”

## 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, and Florida Administrative Code Rule 60Y-4.016(1).

17. The legislative scheme contained in sections 760.01 through 760.11, Florida Statutes, is known as the Florida Civil Rights Act of 1992 (“the FCRA”).

18. Section 760.10(1)(a) 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.”

19. 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.*

20. Florida courts 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).

21. In the instant case, Mr. Montague has the burden of proving by a preponderance of the evidence that Tractor Supply 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 employee); § 120.57(1)(j), Fla. Stat.

22. Mr. Montague argues that he was subjected to a hostile work environment due to his race.

23. “Title VII is violated when the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an



abusive working environment.” *Coles v. Post Master Gen. United States Postal Serv.*, 711 Fed. Appx. 890, 897 (11th Cir. 2017).

24. In order to substantiate such a claim, a plaintiff must satisfy the following criteria: (a) he or she belongs to a protected group; (b) he or she has been subjected to unwelcome harassment; (c) the harassment was based on a protected characteristic of the employee; (d) the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment; and (e) the employer was responsible for the harassment under a theory of vicarious or direct liability. *See Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1275 (11th Cir. 2002).

25. In assessing whether the employer is responsible for harassment perpetrated by a co-worker under a theory of vicarious or direct liability, “an employer is directly liable for an employee’s unlawful harassment if the employer was negligent with respect to the offensive behavior.” *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2441, 186 L. Ed. 2d 565 (2013). A plaintiff must show that the employer knew or should have known of the harassing conduct, but failed to take prompt remedial action. *Baldwin v. Blue Cross/Blue Shield of Ala.*, 480 F.3d 1287 (11th Cir. 2007).

26. As for the sufficiency of an employer’s remedial action, there is no bright-line test. “Whether an employer’s response is sufficient depends on, among other things, the effectiveness of the steps taken, and whether it was reasonably likely to prevent the misconduct from recurring.” *Hollon v. DAS N.A., Inc.*, 2016 WL 4501646, at \*6 (M.D. Ala. 2016).

27. With regard to the instant case, there is no dispute that Mr. Montague belongs to a protected group. However, even if it were assumed that Mr. Montague was subjected to unwelcome harassment, that the harassment was based on a protected characteristic, and that the harassment was sufficiently severe or pervasive to alter the terms and conditions of his employment, Mr. Montague has failed to demonstrate that Tractor Supply was responsible for the harassment under a theory of vicarious or direct

liability. Once Mr. Davis became aware of the June 30, 2020, incident, he promptly initiated an investigation that resulted in two employees receiving coaching sessions and two others receiving written, final warnings that similar misconduct in the future would result in termination. Those actions were sufficient in that they were reasonably likely to prevent similar misconduct from happening again.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations enter a final order dismissing Mr. Montague's Petition for Relief.

DONE AND ENTERED this 27th day of September, 2021, in Tallahassee, Leon County, Florida.

*Garnett Chisenhall*

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G. W. CHISENHALL  
Administrative Law Judge  
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Filed with the Clerk of the  
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this 27th day of September, 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.