STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

QUANESHA L. THOMAS,

Petitioner,

vs. Case No. 21-1376

FAMILY DOLLAR,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, a final hearing in this cause was held in Tallahassee, Florida, via Zoom video conference on August 10, 2021, before Linzie F. Bogan, Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Quanesha LaGwen Thomas, pro se
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Lakeland, Florida 33801

For Respondent: J. Wes Gay, Esquire
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STATEMENT OF THE ISSUE

Whether Respondent violated the Florida Civil Rights Act of 1992, as alleged in the Employment Complaint of Discrimination filed by Petitioner on October 12, 2020.

PRELIMINARY STATEMENT

"The Pregnancy Discrimination Act [PDA] commands that pregnant women 'be treated the same … as other persons not so affected but similar in their ability or inability to work[.]' 42 U.S.C. § 2000e. [Six] years ago, in *Young v. United Parcel Service*, 575 U.S. 206, 135 S.Ct. 1338, 19 L.Ed.2d 279 (2015), the Supreme Court addressed anew the doctrine courts are to use to assess indirect evidence of intentional discrimination in violation of the PDA." *Durham v. Rural/Metro Corp.*, 955 F.3d 1279, 1280 (11th Cir. 2020).

Quanesha L. Thomas (Petitioner) filed an Employment Complaint of Discrimination with the Florida Commission on Human Relations (FCHR), and alleges therein that her former employer, Family Dollar (Respondent), violated section 760.10, Florida Statutes (2018), by discriminating against her on the basis of sex, which includes pregnancy, and retaliated against her for engaging in protected activity. Respondent terminated Petitioner's employment on or about December 28, 2019.

The allegations were investigated, and on April 5, 2021, FCHR issued its Determination: No Reasonable Cause. A Petition for Relief was filed by Petitioner on April 21, 2021. FCHR transmitted the case on April 22, 2021, to the Division of Administrative Hearings for assignment of an administrative law judge.

At the final hearing, Petitioner testified on her own behalf and did not offer the testimony of any other witnesses. Respondent offered the testimony of its only witness, Taunya S. Uzzle. Petitioner did not offer any exhibits into evidence. Respondent's Exhibits 1 through 21 were admitted into evidence.

A Transcript of the final hearing was filed with the Division of Administrative Hearings on August 31, 2021. On August 23, 2021, an Order

was entered granting Respondent's Consented Motion for Extension of Time to File Post-Hearing Submissions. Petitioner elected not to file a proposed recommended order. On September 13, 2021, Respondent filed a Proposed Recommended Order, and the same was considered by the undersigned.

FINDINGS OF FACT

1. On October 12, 2020, Petitioner filed a Complaint of Discrimination with FCHR and alleged therein that Respondent committed an unlawful employment practice by discriminating against her on the basis of sex, and retaliating against her for engaging in protected activity. Petitioner's Complaint of Discrimination states, in part, the following:

> Complainant (CP), an African American female, began her employment with Respondent on 03/24/2019, and held the position of Cashier. CP was subjected to different terms and conditions of employment because of her pregnancy. CP became pregnant and notified her Manager, Anderson Guzman. CP states during her pregnancy she worked long hours and did overtime. CP had to request a leave of absence earlier than expected due to going into labor early. CP states she left on 12/20/2019, and filled out the necessary paperwork but, it was denied twice. Respondent cited policy, stating CP had not worked for them long enough to qualify for a leave of absence. However, Mr. Guzman informed CP that he would give her 90-days to come back to work. CP understood this as still being employed, but someone would work in her stead until her return. Some time had lapsed, and CP was given the ok to return to work. CP notified Mr. Guzman and he informed her that she needed to fill out another application and wait; CP filled out the application on 05/04/2020. CP was eventually called and told that she failed the background check however, CP had worked for Respondent for almost a year prior to her leave. CP had a misdemeanor back in 2014, which has been closed. CP believes Mr. Guzman discriminated against her because of her pregnancy and or

> condition relating to pregnancy. CP states prior to her leave he had reduced her hours to just one day or half a day.

On the Employment Complaint of Discrimination form, Petitioner checked the boxes for "sex" and "retaliation" as grounds for her charge of unlawful discrimination.

2. On March 29, 2019, Petitioner was hired, for the second time, by Respondent to work as a regular status, part-time customer service representative.[1] Petitioner became pregnant soon after she began working for Respondent, and according to information provided by Petitioner, January 19, 2020, was the date on which it was expected that her child would be born. Petitioner notified her supervisor soon after she learned of her pregnancy.

3. Petitioner testified that about two weeks after being told by her doctor that "her six weeks were up," and being medically cleared to return to work following the birth of her child, she submitted to Respondent on March 31, 2020, an application for re-employment. In piecing together Petitioner's testimony, it appears that her child was born on or about February 15, 2020.

4. Respondent's Exhibit 1 is the June 2018 version of the Family Dollar Retail Stores Associate Handbook (Handbook), and it provides, in part, as follows:

> Employment is available to individuals at least 18 years of age on a regular or temporary basis. Full or part-time status is based on the number of hours worked per week, with full-time Associates regularly working 35 or more hours per week. Regular-status Associates are eligible for Company benefits based on criteria set forth in each plan.

[1] The Complaint references March 24, 2019, as Petitioner's date of hire. However, Petitioner's employment file indicates that March 29, 2019, was the date when she was actually hired by Respondent.

Petitioner's Work Hours

5. According to the Handbook, part-time associates, like Petitioner, "are regularly scheduled to work, on average, between five and 30 hours per week." The Handbook also provides that an associate's "work schedule is established based on projected needs of the business … [and] work schedules are not guaranteed."

6. According to Respondent's Exhibit 9, Petitioner worked a total of 944.44 hours between March 29, 2019, and December 20, 2019, for an average of approximately 25 hours per week. As more fully explained below, December 20, 2019, was the last date that Petitioner worked for Respondent, and December 28, 2019, is the employment terminus date used by Respondent. Petitioner was earning $9.15 per hour when her employment with Respondent ended.

7. Respondent's Exhibit 11 contains copies of Petitioner's pay statements, which reflect wages earned and hours worked between March and December 2019. The bi-weekly pay statements show fluctuations in the hours worked by Petitioner during the entirety of her employment, but there is no discernable pattern that supports Petitioner's claim that her hours were significantly reduced as she advanced with her pregnancy. Succinctly stated, the evidence does not support Petitioner's allegation that her work hours were reduced as a result of Respondent learning of her pregnancy.

Ways Family Dollar Accommodates Employees who are Unable to Work

8. The Handbook states that the company offers "[a]pproved leaves, such as Family and Medical Leave, Sick Leave, Disability Leave, work-related injury leave or any other approved paid or unpaid time off." According to page 18 of the Handbook:

> Dollar Tree provides leave under the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Family Medical Leave Act (FMLA) and applicable federal, state and local laws. Please see the poster and policy at the end of

> this handbook and go to dollartree.com/mytree for more specific detail regarding leave. Associates interested in taking leave should contact Human Resources.

Other than information contained in the Handbook, the record herein does not contain copies of policies that provide "more specific detail regarding leave."

9. According to the Handbook, "Sick leave is provided to full-time hourly-paid store managers … unless otherwise provided by state law." "Salaried Store Managers are eligible for up to six days of sick leave per each occurrence while hourly-paid Store Managers are eligible for up to 96 hours of sick leave annually." "Except as provided by law, sick leave benefits are available for use only in the case of an Associate's own personal illness or injury … [and] Associates who require more than three days' sick leave benefits for any single illness or injury must provide the Company with a satisfactory statement from a health care provider to qualify for sick leave benefits." The evidence suggests that Petitioner, as a part-time employee, was not eligible to earn sick leave.

10. Full-time associates and part-time assistant managers are eligible for "paid time off leave." Paid time off leave (PTO) "is intended to encourage Associates to take time off periodically to relax away from the job or handle personal matters." "Under certain of Dollar Tree's Leave Policies, Associates may be required to deplete all PTO at the beginning of a leave of absence." The evidence suggests, once again, that Petitioner, as a part-time employee, was not eligible to earn PTO.

11. As for FMLA, the Handbook provides as follows:

> To qualify for FMLA leave, you must: (1) have worked for Dollar Tree for at least 12 months, though it need not be consecutive; (2) worked at least 1,250 hours in the last 12 months; and (3) be employed at a work site that has 50 or more Associates within 75 miles. You may take up to

> 12 weeks of unpaid FMLA leave in a 12-month period … for any of the following reasons:
> [T]he birth, adoption, or placement of a son or daughter and in order to care for such son or daughter (leave to be completed within one year of the child's birth); [or]
>
> * * *
>
> [T]o care for [the employee's] own serious health condition, which renders [the employee] unable to perform any of the essential functions of [the employee's] position.

Both pregnant and non-pregnant part-time employees that meet the qualifying conditions are eligible for FMLA leave.

12. As for "work-related injury leave," the Handbook provides that "[t]ransitional duty is a temporary reassignment or realignment of job duties to assist an Associate in recovery and return to normal work duties, [and] it may be offered to Associates who have work restrictions." There is no indication in the Handbook that part-time employees are ineligible for "work-related injury leave."

13. As for "disability leave," the Handbook provides that "Dollar Tree will provide a reasonable accommodation for sincerely held religious beliefs and for disabled applicants and associates if it would allow the individual to perform the essential functions of the job, unless doing so would create an undue hardship for the Company." There is no indication in the Handbook that part-time employees are ineligible for "disability leave."

14. The Handbook is silent on the eligibility requirements for "other types of approved paid or unpaid time off" leave. While Respondent offered the Handbook into evidence, no reason was provided for why the policies governing "other types of approved paid or unpaid time off" were omitted from the record.

Petitioner's Pregnancy

15. Sedgwick is the company hired by Respondent to provide support in the areas of human resources and personnel management.

16. On or about December 3, 2019, Petitioner contacted Sedgwick for the purpose of submitting a request for leave due to her pregnancy. Sedgwick offers automated services which allows an employee to answer a series of questions related to a request for leave, and while using the automated service, Petitioner provided the following information:

> How many hours of sick time would you like to use? Answer = 0
>
> How many hours of paid time off would you like to use? Answer = 30
>
> Would you like to use your paid time off or sick leave? Answer = YES
>
> First Day Missed from Work: Answer = 12/31/2019
>
> Employee's Due Date: Answer = 01/19/2020
>
> Return to Work Date: No answer provided

17. Based on the answers provided by Petitioner, Sedgwick, on December 3, 2019, prepared a "Leave Report" that, in part, provides as follows:

> **Client Information**
>
> Employer Notified Date: 12/03/2019
>
> **Employee Medical Leave Information**
>
> Medical Leave Reason: Pregnancy
> Employees Due Date: 01/19/2020
>
> **Employment Information**
>
> Hire Date: 09/03/2015
> Is the Injury Work Related?: NO

Leave Information

Missed time is: CONTINUOUS
Leave Type: Employee Medical

18. On December 4, 2019, Sedgwick reviewed Petitioner's request for pregnancy leave and notified her that she was not eligible for FMLA leave because she had not worked the requisite number of hours. Also, on December 4, 2019, Sedgwick notified Respondent of its determination and stated therein the following:

> To: Family Dollar – Continuous – Leave Denial Notice
>
> Quanesha's Leave request has been denied under the Family and Medical Leave Act (FMLA), State and/or local law for the period beginning 12/31/2019 through 12/31/2019.
>
> Reason for denial:
> [X] Did not work the require number of hours to be eligible under the law(s).
>
> Please be aware that if Associate is eligible for paid time off or sick leave these benefits must be used at this time. If the Associate does not have these benefits, they are expected to return to work. If they do not do so, you are to administratively terminate their employment, with an eligible for rehire status. You may rehire this associate once released by a physician to return to work. If the Associate is rehired within 90 days, the associate will retain his/her original hire date with the company. If rehired with the same position he/she will retain the same rate of pay.
>
> If the reason for leave is due to a personal illness or a pregnancy with complications please email leaves@dollartree.com prior to the termination, no sooner than a week from the date of this email.

There is no indication that Sedgwick evaluated Petitioner's leave request for eligibility for non-FMLA unpaid time off, or for any other type of leave that was available to associates who were temporarily unable to work due to either a job-related or non-job-related injury. Furthermore, other than inquiry about using either paid time off or sick leave, the evidence indicates that Sedgwick's automated system, though recognizing that pregnancy was the basis for Petitioner's leave request, did not give Petitioner the option of requesting other types of leave available to associates who were temporarily unable to work due to either a job-related or non-job-related injury.

19. After learning that her initial leave request was denied, Petitioner, on December 9, 2019, submitted a second request for leave related to her pregnancy. For this leave request, Petitioner modified her answers, in material part, as follows:

> Would you like to use your paid time off or sick leave? Answer = NO
>
> Return to Work Date: Answer = 03/09/2020

20. On December 10, 2019, Sedgwick again denied Petitioner's pregnancy leave request due to her failure to meet FMLA eligibility requirements and notified Respondent of its determination. As with Petitioner's previous leave request, Sedgwick did not evaluate Petitioner's leave request for eligibility for non-FMLA unpaid time off, or for any other type of leave that was available to associates who were temporarily unable to work due to either a job-related or non-job-related injury.

21. According to the case notes generated by Sedgwick, the start date for Petitioner's pregnancy leave "was changed from 12/31/2019 to 12/10/19," and the end date for Petitioner's leave "was changed from 03/08/2020 to 12/10/2019." The changing of these dates to December 10, 2019, indicates that Petitioner's leave request was considered "denied," and that no further action would be taken by Respondent with respect to the same.

22. Petitioner testified that on or about December 10, 2019, her supervisor informed her that her second request for pregnancy leave was also denied. Following the second denial, Petitioner credibly testified that she met with her supervisor and "showed him [her] doctor's paperwork that [she] was going in early labor," and, at the insistence of her supervisor, she submitted to him a statement explaining that she was "likely going into early labor." According to Petitioner's unrebutted and unimpeached testimony, her supervisor advised that he would "take the papers from [her] doctor and … make sure that [the owners of] Family Dollar would get [the papers] so they could understand why [she] was leaving early." Petitioner's former supervisor did not testify, and neither Petitioner nor Respondent offered into evidence a copy of the "doctor's paperwork" or the written statement that Petitioner gave to her supervisor.

23. Petitioner's actions of submitting an initial pregnancy-related leave request on December 3, 2019, then submitting a modified pregnancy leave request on December 9, 2019, followed by giving her supervisor a note from her doctor along with a personal written statement explaining the circumstances surrounding her pregnancy, demonstrate that Petitioner was actively searching for a solution while Respondent, in rebuffing Petitioner's efforts, simply rested on Petitioner's lack of eligibility for FMLA leave.

24. December 20, 2019, was the last day Petitioner worked for Respondent. Petitioner testified as follows as to why she ceased working on this date:

> When I left December 20th because I was going to leave in January but the doctors told me that the way I was looking that I was going to go in early labor and they didn't know when I was going to have her. (Tr. 20, lines 11-15).

25. Respondent contends that Petitioner voluntarily quit her job when she failed to return to work subsequent to December 20, 2019. The evidence, however, establishes that Petitioner stopped working due to complications

related to her pregnancy, and because of this, her employment, as a practical matter, was "administratively terminated" by Respondent. Petitioner did not voluntarily quit her job. Because Petitioner was unlawfully terminated, she should not have had to reapply for employment once she was cleared to return to work by her physician. Furthermore, Petitioner testified that she found another job after her employment with Respondent ended, but she did not provide a date for when the subsequent employment commenced.

Background Check

26. On December 29, 2014, Petitioner was convicted of a domestic violence misdemeanor which resulted in the imposition of a $720.00 fine. Petitioner has no other history of criminal activity.

27. Nine months after her misdemeanor conviction, Petitioner, on or about September 3, 2015, was hired by Family Dollar to work part-time as a sales associate. According to the "employee status history," Petitioner ended her employment with Family Dollar on or about October 11, 2015.

28. On March 29, 2019, Petitioner, more than four years after her misdemeanor conviction, was again hired by Family Dollar as a part-time associate. Petitioner worked for Respondent until her employment was terminated by the company on December 28, 2019.

29. As previously noted, Petitioner, on or about March 31, 2020, submitted an employment application to Respondent and requested therein that she be rehired to her previous position as a customer service representative. According to the "rehire eligibility form" generated as part of the application process, Petitioner was initially deemed eligible for rehire since she did not commit any offenses during her previous employment that disqualified her from rehire eligibility (e.g. violation of the drug and alcohol testing policy).

30. Respondent's application process required Petitioner to submit to a criminal background screening. On or about May 7, 2020, Respondent informed Petitioner that she was disqualified from future employment with the company because of her December 2014 misdemeanor battery conviction.

31. Taunya Uzzle works for Respondent as an associate relations specialist, and her job duties include overseeing background checks and "working with the human resources business partners in the field to ensure that policies are being upheld."

32. On cross-examination by Petitioner, Ms. Uzzle testified as follows:

> Q: And then the other question is, my background. Y'all hired me the first time, but the second time y'all wouldn't hire me because it said something about my criminal record. But on the -- on the background it says my case is closed. So I don't understand that. Can you explain that to me a little more?
>
> A: Sure. So, whether the case is closed or not, the record still remains.
>
> Q: Uh-huh.
>
> A: And that's what we make that decision off of. Prior to the -- Sterling being our third party vendor for background checks, we did use another -- vendor. So that might be the reason why it didn't pull the first time. But as it did pull the second time, that's why you weren't -- would have been disqualified. (Tr. 64-65).

The import of Ms. Uzzle's testimony is that Respondent has no explanation for why Petitioner's misdemeanor criminal history was previously missed, but Petitioner is nevertheless disqualified from future employment because the new company hired by Respondent to conduct background checks was able to locate the previously unknown information.

CONCLUSIONS OF LAW

33. The Division of Administrative Hearings has jurisdiction over the parties and subject matter in this case. §§ 120.569, 120.57, and 760.11, Fla. Stat. (2021).[2]

34. Section 760.10(1) states that it is an unlawful employment practice for an employer to discharge or otherwise discriminate against an individual on the basis of race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status.

35. FCHR and Florida courts have determined that federal discrimination law should be used as guidance when construing provisions of section 760.10. *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).

36. The Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k), "makes clear that Title VII's prohibition against sex discrimination applies to discrimination based on pregnancy [and it directs] that employers must treat 'women affected by pregnancy … the same for all employment-related purposes … as other persons not so affected but similar in their ability or inability work.'" *Young v. United Parcel Serv., Inc.*, 575 U.S. 206, 135 S.Ct. 1338, 1343 (2015). The PDA "requires courts to consider the extent to which an employer's policy treats pregnant workers less favorably than it treats nonpregnant workers similar in their ability or inability to work." *Id.* at 1344.

37. Petitioner's asserted claim of discrimination is one of disparate treatment. The United States Supreme Court has noted that "[d]isparate treatment ... is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of

[2] All subsequent references to Florida Statutes will be to the 2021 version, unless otherwise indicated.

their race, color, religion, sex, or national origin." *Teamsters v. U.S.,* 431 U.S. 324, 335 n.15 (1977).

38. Liability in a disparate treatment case "depends on whether the protected trait … actually motivated the employer's decision." *Hazen Paper Co. v. Biggins,* 507 U.S. 604, 610 (1993). "The ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination." *Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133, 153 (2000).

39. 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).

40. "Direct evidence is composed of 'only the most blatant remarks, whose intent could be nothing other than to discriminate' on the basis of some impermissible factor." *Schoenfeld v. Babbitt*, 168 F.3d at 1266. Petitioner presented no direct evidence of sex-based discrimination.

41. "[D]irect evidence of intent is often unavailable." *Shealy v. City of Albany*, 89 F.3d 804, 806 (11th Cir. 1996). For this reason, those who claim to be victims of intentional discrimination "are permitted to establish their cases through inferential and circumstantial proof." *Kline v. Tenn. Valley Auth.*, 128 F.3d 337, 348 (6th Cir. 1997).

42. Where a complainant attempts to prove intentional discrimination using circumstantial evidence, the shifting burden analysis established by the U.S. Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), is applied. Under this well-established model of proof, the charging party bears the initial burden of establishing a prima facie case of discrimination.

43. As it specifically relates to a charge of discrimination based on pregnancy, the U.S. Supreme Court in *Young* "established a modified *McDonnell Douglas* analysis which focuses on 'whether the nature of the employer's policy and the way in which it burdens pregnant women shows that the employer has engaged in intentional discrimination.'" *Legg v. Ulster Cty*., 820 F.3d 67, 73 (2d Cir. 2016). Under the modified framework, a petitioner may make out a prima facie case of discrimination by showing that: "(1) she is a member of the protected class; (2) she requested accommodation; (3) the employer refused her request; and (4) the employer nonetheless accommodated others 'similar in their ability or inability to work.'" *Durham v. Rural/Metro Corp*., 955 F.3d 1279, 1285 (11th Cir. 2020) (quoting *Young,* 575 U.S. at 229).

44. In explaining the prima facie case's fourth prong, the court in *Durham* noted that the "fourth prong means that, in contrast to Title VII's more general comparator analysis, 'the comparator analysis under the PDA focuses on a single criterion – one's ability to do the job.'" *Id.* at 1286, (quoting *Lewis v. City of Union City, Ga*., 918 F.3d 1213, 1228 n. 14 (11th Cir. 2019) (en banc)). In *Lewis*, the Court noted that "the plain text of the Pregnancy Discrimination Act … requires employers to treat 'women affected by pregnancy … the same for all employment-related purposes … as other persons not so affected but similar in their ability or inability to work.'" *Id.* "The prima-facie-case burden the Petitioner bears is not an onerous one." *Young,* 575 U.S. at 228.

45. "After a [Petitioner] satisfies her prima facie burden, the employer may come forward with 'legitimate, nondiscriminatory reasons' for denying the plaintiff's requested accommodation." *Durham,* 955 F.3d at 1285.

46. "If the employer presents an ostensible 'legitimate, nondiscriminatory' reason for what it has done, the [Petitioner] then has the opportunity to attempt to demonstrate that the employer's stated reason is in fact pretextual." *Id*. The employee must satisfy this burden of demonstrating

pretext by directly showing that a discriminatory reason more likely than not motivated the decision or indirectly by showing that the proffered reason for the employment decision is not worthy of belief. *Dep't of Corr. v. Chandler*, 582 So. 2d 1183, 1186 (Fla. 1st DCA 1991); *Alexander v. Fulton Cty.*, 207 F.3d 1303 (11th Cir. 2000).

47. "Although the intermediate burdens of production shift back and forth, the ultimate burden of persuading the trier of fact that the employer intentionally discriminated against the [Petitioner] remains at all times with the [Petitioner]." *EEOC v. Joe's Stone Crabs, Inc.*, 296 F.3d 1265, 1273 (11th Cir. 2002); *see also Byrd v. RT Foods, Inc.*, 948 So. 2d 921, 927 (Fla. 4th DCA 2007) ("The ultimate burden of proving intentional discrimination against the plaintiff remains with the plaintiff at all times.").

48. Once the matter has, as in the instant case, been fully tried, "it is no longer relevant whether the plaintiff actually established a prima facie case [and] … the only relevant inquiry is the ultimate, factual issue of intentional discrimination." *Green v. Sch. Bd. of Hillsborough Cty.*, 25 F.3d 974, 978 (11th Cir. 1994) (citing *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714-15 (1983)). However, the issue of whether a Petitioner "actually established a prima facie case is relevant … in the sense that a prima facie case constitutes some circumstantial evidence of intentional discrimination." *Green*, 25 F.3d at 978.

49. Petitioner, as a pregnant woman, satisfies the first prong of the *Young* prima facie test, given that she was part of the class protected by the PDA when the alleged discriminatory act occurred.

50. Petitioner satisfies the second prong of the *Young* prima facie test, since the evidence establishes that on December 3, 2019, she first sought an accommodation by requesting to use either PTO or sick leave, and after her initial request was denied, she again requested, on December 9, 2019, an accommodation by asking for what was essentially "unpaid time off" leave. As for the third prong of the *Young* prima facie test, it is undisputed that

Respondent denied Petitioner's requests for accommodation and therefore this prong has also been met.

51. Under the fourth prong of the *Young* prima facie test, Petitioner must demonstrate that Respondent accommodated others who were not pregnant, yet were similar in their ability or inability to work. Between December 21, 2019, and March 31, 2020, Petitioner, for reasons related to pregnancy and childbirth, was temporarily disabled from work.

52. It is well settled "that the PDA and Title VII are violated when pregnant employees are denied privileges afforded non-pregnant temporarily disabled employees." *Byrd v. Lakeshore Hosp.*, 30 F.3d 1380, 1382 (11th Cir. 1994) (citing *Int'l Union UAW v. Johnson Controls*, 499 U.S. 187, 197 (1991)).

53. As noted in the Findings of Fact, Respondent offered into evidence a copy of its employee Handbook which references "disability leave" and "unpaid time off," but did not tender its policies related thereto. It is likely that the policies set forth the eligibility requirements for these types of leaves. However, in the absence of the policies, the undersigned is unable to evaluate how these policies might impact Petitioner's claim. The record is sufficient, however, to compare Petitioner's plight with that of a non-pregnant, part-time worker seeking temporary leave pursuant to Respondent's "work-related injury leave" policy.[3] *See Ensley-Gaines v. Runyon*, 100 F.3d 1220, 1226 (6th Cir. 1996) (the Pregnancy Discrimination Act does not concern itself with whether an employee was injured on the job or off, but, for comparison purposes, "requires only that the employee be similar in his or her ability or inability to work.").

54. As noted in the Findings of Fact, Sedgwick indicated that neither of Petitioner's leave requests were due to her having suffered a "work-related"

[3] Since Respondent's Handbook limits the leave types that part-time workers are eligible to receive, Petitioner's claim is considered in light of this limitation. *See Byrd,* 30 F.3d at 1382 ("women disabled due to pregnancy, childbirth or other related medical conditions [must] be provided the same benefits as those provided other disabled workers [such as] temporary and long-term disability insurance, sick leave, and other forms of employee benefit programs.").

injury. The significance of this evidence is found in the fact that for employees who suffer a work-related injury, Respondent's policy allows for the assignment of "transitional duty" which "is a temporary reassignment or realignment of job duties to assist an Associate in recovery and return to normal work duties." It is reasonable to infer that this policy allows for "recovery" from a period of time during which the employee is temporarily unable to work as result of the work-related injury. While a non-pregnant, part-time worker who suffers a work-related injury that renders them temporarily unable to work is allowed a period of "recovery" under Respondent's policy, a pregnant worker who suffers from a temporary inability to work for reasons related to her pregnancy is not allowed a similar period of "recovery." Since neither employee is able to work, they are similar in their "inability to work" during their respective periods of temporary disability.

55. Petitioner has satisfied the fourth prong of the *Young* prima facie test, and has therefore established a prima facie case of discrimination under the PDA and Title VII.

56. Since Petitioner has established a prima facie case of intentional discrimination, it is now Respondent's burden to articulate a legitimate, nondiscriminatory reason for its decision to deny Petitioner's request for pregnancy leave. The evidence establishes that Petitioner did not meet the eligibility requirements for FMLA, and that this was the only reason expressed by Respondent when denying Petitioner's request for pregnancy leave. There is a complete absence of evidence that Respondent, or its agent Sedgwick, considered Petitioner's eligibility for pregnancy leave under any of the company's other leave policies available to part-time, non-pregnant employees. While Respondent's reliance on Petitioner's ineligibility for FMLA leave constitutes "a legitimate, nondiscriminatory reason" for denying Petitioner's request for pregnancy leave, this reliance on FMLA, standing alone, is not sufficient to meet its burden because Respondent completely

failed to articulate any reason for why Petitioner was treated differently from part-time, non-pregnant workers who are eligible for temporary leave pursuant to Respondent's "transitional duty" policy.

57. In *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993), the U.S. Supreme Court explained that "[t]he factfinder's disbelief of the reasons put forward by the defendant … may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination, and … no additional proof of discrimination is required." Because Respondent failed to meet its burden, and Petitioner successfully established the elements of her prima facie case, it is determined that Petitioner has demonstrated that she was the victim of unlawful intentional discrimination by Respondent.

Retaliation

58. Under Title VII, there are two distinct clauses that provide protection against retaliatory conduct by a covered employer. The "participation clause" offers protection to an employee when the employee "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]." *See Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1185 (11th Cir. 1997). The "opposition clause" offers protection against retaliation to an employee when the employee "has opposed any practice made an unlawful employment practice by [Title VII]." *Id.*

59. To make out a prima facie case of retaliation, Petitioner must show: (1) that she engaged in an activity protected under Title VII; (2) she suffered a materially adverse action; and (3) there was a causal connection between the protected activity and the adverse action. *Chapter 7 Tr. v. Gate Gourmet, Inc.*, 683 F.3d 1249, 1258 (11th Cir. 2012). Ultimately, as to the required causal link in retaliation cases, a petitioner must show that the adverse action would not have occurred but for the protected activity. *Univ. of Tex. S.W. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013).

60. As noted in the Findings of Fact, Petitioner "checked the box" for "retaliation" on the FCHR charge form. A review of the "discrimination statement" portion of the form fails to reveal any specific allegations of retaliatory conduct allegedly committed by Respondent. Nevertheless, Petitioner, based on her testimony, suggests that because she requested leave for reasons related to pregnancy, Respondent, in turn, retaliated against her by rejecting her application for reemployment. As it relates to her claim of retaliation, there is no evidence indicating the Petitioner engaged in "protected activity," and even if there was such evidence, there is no connection between any such activity and Respondent's decision to not rehire Petitioner. Succinctly stated, Petitioner's application for reemployment was rejected because Respondent learned of Petitioner's criminal history as part of the employment vetting process.

Petitioner's Remedy

61. As Petitioner brought this action as an administrative proceeding pursuant to section 760.11(4)(b) as opposed to a civil action in court pursuant to section 760.11(4)(a), the relief under the Act to which she is entitled is authorized in section 760.11(6), which provides in pertinent part:

> If the administrative law judge, after the hearing, finds that a violation of the Florida Civil Rights Act of 1992 has occurred, the administrative law judge shall issue an appropriate recommended order in accordance with chapter 120 prohibiting the practice and providing affirmative relief from the effects of the practice, including back pay ….

62. In accordance with section 760.11(6) and federal case law, Petitioner is "presumptively entitled to back pay." *Weaver v. Casa Gallardo, Inc*., 922 F.2d 1515, 1526 (11th Cir. 1991) (superseded by statute on other grounds).

63. As noted in the Findings of Fact, Petitioner, at the time of her unlawful discharge, was earning $9.15 per hour and worked an average of approximately 25 hours per week for an average weekly wage of $228.75.

Petitioner, on March 31, 2020, submitted her application for reemployment and advised therein that she was available to return to work. Petitioner also testified that she found another job after she was notified by Respondent that she would not be reemployed by the company.[4] Petitioner did not provide a date for when she began other employment, but the evidence is clear that by correspondence dated May 14, 2020, Respondent informed Petitioner that she was disqualified from reemployment. Petitioner is entitled to back pay in the amount of $1,372.50 for the six-week period from March 31, 2020, through May 14, 2020 (6 x $228.75).

64. In addition, as the evidence showed that Petitioner was wrongfully terminated because of reasons related to her pregnancy, she should be entitled to reinstatement. *See* § 760.11(6), Fla. Stat.; *cf. O'Loughlin v. Pinchback*, 579 So. 2d 788, 795 (Fla. 1st DCA 1991) ("prevailing plaintiff in a wrongful discharge case is entitled to reinstatement absent unusual circumstances") (citations omitted). Therefore, Family Dollar should offer to reinstate Petitioner in a position equivalent to her previous position with the same potential for earnings that she held on December 20, 2019.

RECOMMENDATIONS

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:

1. Finding that Family Dollar subjected Quanesha Thomas to unlawful discrimination in violation of the Florida Civil Rights Act of 1992 by treating

[4] *See Smith v. American Serv. Co.*, 611 F.Supp. 321 (N.D. Ga. 1985) (back-pay period for an unlawfully rejected applicant ended when she accepted subsequent comparable employment), *aff'd in relevant part*, 796 F.2d 1430 (11th Cir. 1986).

her, as a pregnant worker, less favorably than it treated non-pregnant workers similar in their ability or inability to work;

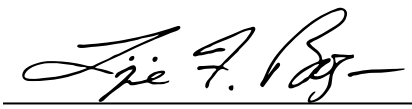
2. Prohibiting any future acts of discrimination by Family Dollar;

3. Ordering Family Dollar to pay Petitioner $1,372.50 in back pay, with interest accruing on this amount at the applicable statutory rate from the date of the Commission's Final Order;

4. Ordering Family Dollar to offer Petitioner reinstatement to her former or an equivalent position with the same potential earnings as the position that she held on December 20, 2019; and

5. Dismissing as unfounded Petitioner's claim against Family Dollar for unlawful retaliatory conduct.

DONE AND ENTERED this 7th day of October, 2021, in Tallahassee, Leon County, Florida.



LINZIE F. BOGAN
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Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of October, 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.