STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

IDA LUPINO COOPER,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 09-3021
	)	
OKALOOSA COUNTY SUPERVISOR OF ELECTIONS,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to Notice, a final hearing was conducted in this case before Diane Cleavinger, Administrative Law Judge with the Division of Administrative Hearings on December 3, 2009, in Shalimar, Florida.

APPEARANCES

For Petitioner: Carolyn Cummings, Esquire
Cummings & Hobbs, P.A.
462 West Brevard Street
Tallahassee, Florida 32301

For Respondent: Michael K. Grogan, Esquire
T. Kort Parde, Esquire
Allen, Norton & Blue, P.A.
800 West Monroe Street
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STATEMENT OF THE ISSUE

Whether Petitioner was discriminated against by Respondent, based upon her race, in violation of Section 760.10, Florida Statutes.

PRELIMINARY STATEMENT

On December 18, 2008, Petitioner, Ida Lupino Cooper, (Petitioner), filed an Employment Complaint of Discrimination with the Florida Commission on Human Relations (FCHR). The Complaint alleged that Respondent, Okaloosa County Supervisor of Elections (Respondent), discriminated against her on the basis of race in violation of Section 760.10, Florida Statutes. Specifically, the Complaint alleged that Petitioner was discriminated against when she suffered an adverse employment action on September 19, 2008, when Respondent terminated her employment. FCHR investigated Petitioner's Complaint. On April 30, 2009, FCHR issued a: No Cause Determination and notified Petitioner of her right to file a Petition for Relief.

Thereafter, Petitioner filed a Petition for Relief with FCHR on June 1, 2009. The Petition was based on the same allegations as the earlier Complaint. FCHR forwarded the matter to the Division of Administrative Hearings.

Prior to the hearing, the parties entered into a Joint Prehearing Stipulation. Those stipulations have been utilized in this Recommended Order.

At the hearing and contrary to clearly established law, FCHR did not make arrangements to preserve the testimony at the final hearing, either by sending a court reporter or a recording device with someone to operate it. See § 120.57(1)(g), Fla.

Stat. (2009); Fla. Admin. Code R. 28-106.214; North Dade Security Ltd. Corp. v. Dept. of State, 530 So. 2d 1040 (Fla. 1st DCA 1988) and Poirer v. Dept. of Health & Rehab. Servs., 351 So. 2d 50 (Fla. 1st DCA 1977). The parties were informed of the agency's policy to not provide an official means of preserving the testimony at the final hearing. Neither party hired a court reporter to preserve the hearing. All parties elected to proceed with the hearing without preservation of the record. Therefore, there is no record of the final hearing, except for exhibits, if any, received into evidence and this Recommended Order.

During the hearing, Petitioner testified in her own behalf and presented the testimony of Tiffany Lovett. Petitioner also offered six exhibits into evidence. Five of those exhibits were admitted into evidence. Respondent presented the testimony of six witnesses, Patricia Hollarn, the former Okaloosa County Supervisor of Elections, Shirley Young, Louise McGirr, Brenda Ball, and Jimmie Giles. Respondent offered six exhibits into evidence. Additionally, both parties entered three joint exhibits into evidence.

FINDINGS OF FACT

1. The Respondent, the Okaloosa County Supervisor of Elections, is an employer within the meaning of the Florida Civil Rights Act of 1992, as amended. It is an equal

opportunity employer. During the time relevant to this matter, the Supervisor of Elections had 16 or 17 full-time employees, 5 of whom were black. The employees worked out of three separate locations that were approximately 25 miles apart. All employees were and continue to be at-will employees.

2. The Supervisor of Elections is a constitutionally-elected office. The office's primary functions are to conduct all county elections, to handle voter registration, process candidate qualification, and conduct voter education.

3. At the time relevant to this proceeding, Patricia Hollarn was elected to serve as the Supervisor of Elections in Okaloosa County from January 1989 until January 2009. During her tenure, she had the authority to hire and fire her staff, pursuant to Section 129.202, Florida Statutes. Under that statute and the constitution, the Supervisor of Elections office is separate and independent from the County or the State and is not subject to County or State personnel rules. However, under Patricia Hollarn's tenure, the Respondent utilized some of the Human Resources of the Okaloosa County Board of County Commissioners for directions in some personnel policies for the termination of employees.

4. Petitioner, Ida Lupino Cooper, is a black female. As such, she is a member of a protected class.

5. Ms. Cooper was hired by Respondent on July 31, 2007, as an Elections Specialist I and was assigned to work out of the Fort Walton Beach office. Essential job functions included the computerized data entry of voter registration information and information related to applicants who registered for elected offices in Okaloosa County, as well as assisting with elections and primaries. Other essential job functions included responding to concerns over voter-related matters and performing administrative support, answering the telephone, sorting and dispersing the mail and any other assigned duties related to the Supervisor of Elections' offices. Important to job performance was the ability to tactfully and effectively interact with the public and with co-workers. Although there are consistent day-to-day functions in preparing for each election, critical workload increases around the day elections are held. Workload was particularly heavy during the 2008 primary and general elections due to large increases in voter registration and turnout.

6. The Fort Walton Beach office employed two Election Specialists. Kimberly Williams, who is white, was the other Election Specialist at the Fort Walton Beach office. Ms. Williams was the only employee Petitioner alleged was similarly situated to her.

7. The Petitioner's and Ms. Williams’immediate supervisor was Louise McGirr. She held the position of Voter Registration Coordinator. Ms. McGirr supervised all employees who had data entry responsibilities. She worked one day a week at the Fort Walton Beach office.

8. A goal of the Supervisor of Elections was to have and maintain a reputation of accuracy in the data collected by the Supervisor’s office. To achieve that goal, Ms. Hollarn created a position to oversee the accuracy of the data entry and editing process. Brenda Ball was the Quality Control Editor who oversaw the data entry and editing process for the Supervisor of Elections. Ms. Ball was sometimes assisted in her quality control responsibilities by Martha Hall from the warehouse. She was not a direct supervisor of Petitioner or any of the Elections Specialists.

9. In order to oversee quality control, Ms. Ball received hard copies of data contained in Verification Reports that had been entered by the employees in the office with data entry responsibilities. The data primarily consisted of names, addresses and other information relevant to a voter’s right to vote. Each report also reflected the person who had entered the data. From the Verification Reports, Ms. Ball and sometimes Ms. Hall edited and corrected errors and omissions in the data that had been entered. She and Martha Hall generally reviewed

and corrected all of the data entries made by the Election Specialists on a daily basis.

10. The Verification Reports reflected that all of the Elections Specialists made repetitive mistakes in their data entry. The most commonly-found errors were capitalizations in the wrong place, misspelling the name of voters, incorrect and missing mailing addresses, missing apartment numbers and missing zip codes, as well as faulty formatting. Ms. Ball did not tally or keep a record of the errors, but would routinely advise all employees about consistent types of errors she was noticing and to be accurate. However, there was no definitive measurement or standard regarding the number of errors that were acceptable or unacceptable.

11. In Petitioner's Probationary Employee Performance Appraisal of January 9, 2008, Ms. Cooper received all 2s on a rating scale of 0 to 5. A score of 2 indicated that the employee "meets expectations." One of the categories reviewed was for accuracy. In that category, Petitioner received a 2, reflecting the criteria that her work was "normally correct and timely." Additionally, from the comments of Petitioner's supervisors, including Ms. Hollarn, Petitioner clearly needed to learn more, but her employer was satisfied with her performance. Petitioner's overall performance was scaled as 30 points out of a potential 60 points. The score made her eligible to receive a

3 percent performance pay increase which she received. The available options were no increase or a 3 percent performance pay increase. She signed the evaluation and testified that she was happy with it.

12. Kimberly Williams received her Probationary Employee Performance Appraisal on March 17, 2008. Like Petitioner, she received all 2's and a scaled score of 30 out of 60 points. It was noted in her evaluation that she normally arrived early to work. Like Petitioner, Ms. Williams' supervisors, including Ms. Hollarn, were satisfied with her performance and she received a 3 percent performance pay increase. There was no evidence presented that Petitioner was treated less favorably or subjected to more scrutiny than Ms. Williams

13. Over the next several months and in an attempt to address Petitioner's job performance, Ms. Hollarn, met with Petitioner on several occasions providing verbal counseling to her regarding her job performance. These "meetings" were not formal and were more like friendly conversations geared towards helping an employee. This type of employee counseling was in line with Ms. Hollarn's style of supervising. Additionally, Louise McGirr, Petitioner's supervisor, sent written counseling to her staff reminding the Petitioner and other Election Specialists about consistent types of data entry errors and the need for accuracy. Contrary to the allegations contained in her

FCHR complaint and Petition, Petitioner admitted that she had received such counseling from her supervisors.

14. During these meetings with Petitioner, Ms. Hollarn noted that Petitioner often tried to compare her work to other employees instead of focusing on her work and how to improve her performance. Ms. Hollarn did like this trait of Petitioner and felt she should pay attention to improving her own work. Such an opinion is not uncommon among supervisors, and there was no evidence that demonstrated Ms. Hollarn's opinion was based on race.

15. On July 10, 2008, Petitioner received her Annual Employee Performance Appraisal. She again received all 2's on a rating scale of 0 to 5, including the category of "accuracy." Her overall performance again was 30 points out of a potential 60 points. Thirty points was the lowest-scaled score in the "meets expectations" category. The next category down was "needs improvement." The scaled score made her eligible to receive a 1 percent performance pay increase, which she received. The Appraisal noted that she frequently detailed other employee's flaws, rather than focus on her responsibilities. The Appraisal also noted that she had a lot to learn, but dealt with the public well. In short, the Appraisal reflects that Petitioner was perceived as an average employee after one year, especially since Petitioner did not

volunteer for non-mandatory overtime and did not arrive or begin work early. Petitioner refused to sign her Employee Performance Appraisal because she thought it should be higher so that she could qualify for a higher pay increase.

16. Contemporaneous to Petitioner's Annual Employee Performance Appraisal, she was verbally counseled by her supervisor, Louise McGirr on July 10, 2008. Ms. McGirr warned Petitioner that her attention to detail and work performance were unsatisfactory and she needed to improve.

17. Kimberly Williams received her Annual Employee Performance Appraisal on November 18, 2008. She received mostly 2's and several 3's on a rating scale from 0 to 5. She received a 2 in the category of "accuracy." However, she received 3's in reliability, attendance, productivity, follow through and initiative. Ms. Williams received a scaled score of 35 out of 60 points. The scaled score made her eligible to receive a 1 percent performance pay increase. For unknown reasons, Ms. Williams was not recommended for the pay increase by the Supervisor of Elections and, unlike Petitioner, did not receive the pay increase. However, the Appraisal indicated that her supervisors and Ms. Hollarn were impressed with Ms. Williams' drive, self-starting ability and initiative which she demonstrated during the 2008 election which was record-setting in the number of voter registrations and turnout. The testimony

revealed that Ms. Williams was perceived as more than an average employee, especially since she arrived and began work early and volunteered for overtime even though it was not required. Again there was no evidence that Petitioner received more scrutiny in her job performance than Ms. Williams

18. Sometime in late summer of 2008, Ms. Hollarn was involved in an automobile accident that resulted in very serious injuries to her, and caused her to be hospitalized and homebound for several weeks. During the period of the first election primary in August, Ms. Hollarn conducted meetings from her hospital room and placed Shirley Young and Louise McGirr in charge during the election primary.

19. The August 26, 2008, primary was an unusually busy time at all the Supervisors' offices and was a period when tensions ran high and time was of the essence because election results were being counted. As indicated, Shirley Young was acting on behalf of the Supervisor of Elections at the time due to Patricia Hollarn's continued incapacitation from her car accident. Ms. Young was trying to determine whether or not a specific precinct's voting machine uploaded critical election results from the Fort Walton Beach office to the Crestview office. The difficulty with the machine was causing a delay in the election results which the media and public were waiting on and which the Chairman of the Canvassing Board, a county judge,

was becoming impatient over the delay. Ms. Young called the Fort Walton Beach office to inquire about the delay and asked to speak to Pam McCelvey, who had knowledge about the information she was seeking. Petitioner answered the telephone and placed Ms. Young on hold after asking her "if she could wait a minute." Petitioner placed Shirley Young on hold, for a period of time, estimated to be from 10 seconds to 5 minutes. Petitioner or someone else hung up the phone on Ms. Young, requiring Ms. Young to call back a second time. Ms. Young believed it was Petitioner who hung up on her, but irrespective of who hung up, Ms. Young felt that she should not have been placed on hold and made to wait for critical election information. Ms. Young was “shocked” and embarrassed at Petitioner’s actions and felt very strongly that Petitioner did not show tact or effective interaction with her at a very critical time during the election.

20. Ms. Young conveyed the above events of the election night to Patricia Hollarn. At the time, neither Ms. Hollarn nor Ms. Young discussed the telephone incident on election night with the Petitioner, and Petitioner was not disciplined for placing Ms. Young on hold or hanging up on her. From her demeanor at the hearing, Ms. Hollarn was very displeased and somewhat embarrassed about the telephone incident and felt Petitioner had acted very inappropriately, did not fit in the

office and, more than anything else, precipitated Ms. Hollarn's decision to terminate Petitioner. Even though the facts may be in dispute as to exactly what happened during the August primary, there was no evidence that Ms. Hollarn's perception of the incident was illegitimate or related to Petitioner's race.

21. Shortly after the telephone incident and when she was physically able to address the matter, Ms. Hollarn began looking for a reason to terminate Petitioner. Ms. Hollarn asked Brenda Ball about Petitioner's data entry accuracy. She did not ask Ms. Ball about any other employee's data entry accuracy. However, at hearing, Ms. Ball's impression was that Kimberly Williams made as many errors and similar errors as Petitioner.

22. Although the evidence was not clear on what information was reviewed, Ms. Ball reviewed some information on Petitioner's errors since her last evaluation on July 10, 2008. The information included the Verification Reports she received. In an email dated September 17, 2008, Ms. Ball responded to the Supervisor of Elections' inquiry. Ms. Ball stated that there had been some improvement in Petitioner's data entry performance since her last performance evaluation of July 10, 2008, but that Petitioner's performance had slowly declined since then. She also described the type of consistent errors Petitioner made while entering data. Ms. Hollarn did not discuss the fact that she intended to terminate Petitioner with Ms. Ball. At the time

of Ms. Hollarn’s inquiry, Ms. Ball did not know Petitioner would be terminated and she did not recommend her termination.

23. During her testimony, Ms. Ball reviewed Verification Reports from the data that had been entered by Petitioner and by Kimberly Williams, her white comparator. The review during the trial covered data entered during August 2008 and part of September 2008 until the day of Petitioner's termination. The evidence did not demonstrate that these were the same reports that Ms. Ball had reviewed for her response to Ms. Hollarn’s earlier inquiry regarding Petitioner. A very rough tally of the errors that were counted during the hearing indicated that for 30 days in August 2008, Petitioner made 79 demonstrated errors while her white counterpart, Kimberly Williams, made 37 errors during a 10-day period in August. For ten days in September 2008, Williams had 92 demonstrated errors, while Petitioner made 88 errors for 11 days in September. Indeed, Ms. Ball's review of both Petitioner and Williams’ data entry during the hearing, while not scientific or precise, clearly indicated that they both made the same type of repetitive errors. However, the Verification Reports presented at the hearing did not demonstrate whether the number of errors made by Petitioner and Ms. Williams were significantly comparable or different because the reports did not cover the same periods of time, account for variability in office duties and were not analyzed statistically

in any scientific manner. No expert witness or independent objective analysis of the numbers was offered at the hearing.

24. Petitioner offered the testimony of Tiffany Lovett, the Candidate Coordinator for the Supervisor of Elections Office, who was responsible for maintaining information on voter petitions and absentee ballots. She testified that she had previously had problems with data entry performed on her work by Kimberly Williams substantial enough that she complained to Louise McGirr and to Pat Hollarn about Williams' inaccuracy. The evidence was not clear whether Petitioner entered data for Ms. Lovett or, if she did, the time period that Petitioner entered such data. However, Ms. Lovett also testified that all employees made errors in data entry and made such errors especially during the 2008 primary period.

25. Patricia Hollarn formalized her decision to terminate Petitioner's employment on September 19, 2008. On that date, Ms. Hollarn came to the Fort Walton office in a wheel chair. She was still recovering from her automobile accident. She requested that Petitioner meet with her and Shirley Young. During the meeting, Ms. Hollarn gave Petitioner a letter of termination, effective that day. The letter specifically stated:

> On July 10, 2008, you were counseled by your supervisor, Louise McGirr, regarding your work performance and attention to detail in

> your office duties. Although a slight improvement did occur for a short amount of time, a consistent, significant improvement has not been seen.
>
> . . . therefore, as of today your current employment is terminated (per 129.202(2) FS and Okaloosa County Human Resources Policy Manual Chapter XX, Section B 4k "Incompetence and inefficiency in the performance of assigned duties"). . . .

During the meeting, Ms. Hollarn also told Petitioner that she was not a good fit in the office which the evidence showed was more indicative of the real reason for Petitioner's termination.

26. Ms. Hollarn admitted that she had not personally reviewed Petitioner's work performance, work product or alleged work errors, but relied on information and input she received from Jimmie Giles, Brenda Ball, Louise McGirr and Shirley Young about Petitioner's job deficiencies. However, Jimmie Giles testified that she did not give any information to Ms. Hollarn about Petitioner's job performance. Ms. Giles made it clear that her job duties were data entry, she did not supervise any employees, and she certainly did not recommend that Petitioner be fired from her job. On the other hand, Ms. McGirr and Ms. Young both provided negative input about Petitioner's job performance. In particular, Ms. McGirr reported that Petitioner did not volunteer to work overtime, despite the need created by the upcoming elections.

27. Petitioner's lack of focus on solving her performance issues and focus on other employee's performance and her unwillingness to "volunteer" for overtime all contributed to Ms. Hollarn's negative view of Petitioner. Added to this negative view was the telephone incident that was reported to her by Ms. Young and was embarrassing to her office. None of these reasons were based on Petitioner's race. Given these facts, the fact that the termination letter did not state the real or all the reasons for Petitioner's termination does not demonstrate that Respondent's motives for terminating Petitioner were based on Petitioner's race. Petitioner was terminated for her poor work performance, less than self-motivated conduct and the telephone incident. There was no evidence that Respondent's reason for termination was a pretext to cover discrimination.

28. Moreover, Petitioner's termination was not solely based on data entry errors. Differences between the work of Petitioner and Ms. Williams, brought out at the hearing, pertained to their overall performance. Although Ms. Williams and Petitioner received identical scores of 30 on their Probationary Employee Performance appraisals, Ms. Williams received a higher score on her first Annual Employee Performance Appraisal. Despite the five-point higher score than Petitioner, Ms. Williams received no pay increase, while Petitioner received a 1 percent pay increase. Finally, Petitioner was replaced by

Latoya Knox, who is black, had previously worked in the office and who Ms. Hollarn wanted to hire back. Given these facts, Petitioner did not establish by a preponderance of the evidence that she was treated differently than comparable non-minority co-workers, her termination was based on her race or that the reasons given for her termination were a pretext for discrimination. Therefore, the Petition for Relief should be dismissed.

CONCLUSIONS OF LAW

29. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. See §§ 120.569 and 120.57(1), Fla. Stat (2009).

30. Section 760.10, Florida Statutes, provides that it is an unlawful employment practice for an employer

> [t]o discharge or to fail to refuse to hire any individual, or otherwise, discriminate against any individual with respect to compensations, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, national origin, age, handicap or marital status.

§ 760.10(1)(a), Fla. Stat. (2009).

31. FCHR and the Florida courts have determined that federal discrimination law should be used as guidance when construing provisions of Section 760.10, Florida Statutes (2008). See Albra v. Advan, Inc., 490 F.3d 826 (11th Cir.

2007); Winn Dixie Stores v. Reddick, 954 So. 2d 723 (Fla. 1st DCA 2007); Brand vs. Florida Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994); Florida Dept. of Community Affairs v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991); and Scott v. Fla. Dept. of Children & Family Services, 19 Fla. L. Weekly Fed. D.268, 2005 U.S. Dist. LEXIS 19261 (N.D. Fla. 2005).

32. The Supreme Court of the United States established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), the analysis to be used in cases alleging discrimination under Title VII. This analysis was reiterated and refined in St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993). See also Zappa v. Wal-Mart Stores, Inc., 1 F. Supp. 2d 1354, 1356 (M.D. Fla. 1998); Standard v. A.B.E.L. Svcs., Inc., 161 F.3d 1318 (11th Cir. 1998); and Walker v. Prudential Property & Casualty Insurance, Co., 286 F.3d 1270 (11th Cir 2002).

33. Under McDonnell Douglas, Petitioner has the burden of establishing by a preponderance of the evidence a prima facie case of unlawful discrimination. If a prima facie case is established, Respondent must articulate some legitimate, non-discriminatory reason for the action taken against Petitioner. Once this non-discriminatory reason is offered by Respondent, the burden of production then shifts back to Petitioner to demonstrate that the offered reason is merely a pretext for

discrimination. As the Supreme Court stated in Hicks, before finding discrimination, “the fact finder must believe the plaintiff’s explanation of intentional discrimination.” Hicks, 509 U.S. at 519. Additionally, “Defendants burden . . . is exceedingly light” and “’is merely one of production, not proof’.” Perryman v. Johnson Products, Co., 698 F.2d 1138 (11th Cir. 1983).

34. In Hicks, the Court stressed that even if the fact-finder does not believe the proffered reason given by the employer, the burden remains with Petitioner to demonstrate a discriminatory motive for the adverse employment action. Id. See also Texas Dep’t of Community Affairs v. Burdine, 450 U.S. 248 (1981).

35. "Direct evidence is evidence that, if believed, would prove the existence of discriminatory intent without resort to inference or presumption." King v. La Playa-De Varadero Restaurant, No. 02-2502, 2003 WL 435084 (Fla. DOAH 2003)(Recommended Order).

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

Importantly, proof that, in essence, amounts to no more than mere speculation and self-serving belief on the part of the complainant concerning the motives of the Respondent is insufficient, standing alone, to establish a prima facie case of intentional discrimination. See Lizardo v. Denny's, Inc., 270 F.3d 94, 104 (2d Cir. 2001)("The record is barren of any direct evidence of racial animus. Of course, direct evidence of discrimination is not necessary. . . . However, a jury cannot infer discrimination from thin air. Plaintiffs have done little more than cite to their mistreatment and ask the court to conclude that it must have been related to their race. This is not sufficient.")(citations omitted.); Reyes v. Pacific Bell, 21 F.3d 1115 (Table), 1994 WL 107994 *4 n.1 (9th Cir. 1994)("The only such evidence [of discrimination] in the record is Reyes' own testimony that it is his belief that he was fired for discriminatory reasons. This subjective belief is insufficient to establish a prima facie case."); Little v. Republic Refining Co., Ltd., 924 F.2d 93, 96 (5th Cir. 1991)("Little points to his own subjective belief that age motivated Boyd. An age discrimination plaintiff's own good faith belief that his age motivated his employer's action is of little value."); Elliott v. Group Medical & Surgical Service, 714 F.2d 556, 567 (5th Cir. 1983)("We are not prepared to hold that a subjective belief of discrimination, however genuine, can be the basis of judicial

relief."); Jackson v. Waguespack, No. 1-2972, 2002 U.S. Dist. Lexis 20864, 2002 WL 31427316 (E.D. La. 2002)("[T]he Plaintiff has no evidence to show Waguespack was motivated by racial animus. Speculation and belief are insufficient to create a fact issue as to pretext nor can pretext be established by mere conclusory statements of a Plaintiff that feels she has been discriminated against. The Plaintiff's evidence on this issue is entirely conclusory, she was the only black person seated there. The Plaintiff did not witness Defendant Waguespack make any racial remarks or racial epithets."); Coleman v. Exxon Chemical Corp., 162 F.Supp. 2d 593, 622 (S.D. Tex. 2001)("Plaintiff's conclusory, subjective belief that he has suffered discrimination by Cardinal is not probative of unlawful racial animus."); Cleveland-Goins v. City of New York, No. 99-Civ.1109, 1999 U.S. Dist. LEXIS 13255, 1999 WL 673343 (S.D. N.Y. 1999)("Plaintiff has failed to proffer any relevant evidence that her race was a factor in defendants' decision to terminate her. Plaintiff alleges nothing more than that she 'was the only African-American man [sic] to hold the position of administrative assistant/secretary at Manhattan Construction.' (Compl.¶ 9.) The Court finds that this single allegation, accompanied by unsupported and speculative statements as to defendants' discriminatory animus, is entirely insufficient to make out a prima facie case or to state a claim under Title

VII."); Umansky v. Masterpiece International Ltd., No. 96–Civ. 2367, 1998 U.S. Dist. LEXIS 11775, 1998 WL 433779 (S.D. N.Y. 1998)("Plaintiff proffers no support for her allegations of race and gender discrimination other than her own speculations and assumptions. The Court finds that plaintiff cannot demonstrate that she was discharged in circumstances giving rise to an inference of discrimination, and therefore has failed to make out a prima facie case of race or gender discrimination."); and Lo v. F.D.I.C., 846 F. Supp. 557, 563 (S.D. Tex. 1994)("Lo's subjective belief of race and national origin discrimination is legally insufficient to support his claims under Title VII.").

37. In order to establish a prima facie case of discrimination, Petitioner must demonstrate that:

a. Petitioner is a member of a protected class;

b. Petitioner is qualified for the position;

c. Petitioner was subject to an adverse employment decision; and,

d. Petitioner was treated less favorably than similarly situated persons outside the protected class.

Manniccia v. Brown, 171 F.3d 1364 (11th Cir. 1999); Canino v. EEOC, 707 F.2d 468 (11th Cir. 1983); Smith v. Georgia, 684 F.2d 729 (11th Cir. 1982); Lee v. Russell County School Board, 684 F.2d 769 (11th Cir. 1984); and Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir 1997).

38. In this case, Petitioner has alleged that Respondent unlawfully discriminated against her on the basis of her race. As a black female, Petitioner is a member of a protected class. Additionally, Petitioner was qualified for the position to which Respondent assigned her.

39. Petitioner identified Kimberly Williams as her only comparator. Ms. Williams is a white female and was an Elections Specialist I working in the same branch office as Petitioner. Other election staff performing the same work at the other offices, both black and white, were not offered by Petitioner as comparators.

40. As indicated, the burden of proof is on Petitioner to identify a similarly situated employee who was treated more favorably despite having engaged in similar misconduct and who is outside of Petitioner's protected class. Davis v. City of Panama City, Fla., 510 F. Supp. 2d 671, 686 (N.D. Fla. 2007). In making the comparison, the quality of the misconduct must rise to the level of being nearly identical. See Maniccia v. Brown, 171 F.3d 1364, 1368 (11th Cir. 1999) and Mayberry v. Vought Aircraft Co., 55 F.3d 1086 (5th Cir. 1995).

41. The evidence demonstrated that Ms. Williams was similarly situated to Petitioner in that they held the same position and worked at the same office. However, the evidence did not establish that Ms. Williams was treated more favorably

than Petitioner. Both received 2's in the area of accuracy. The evidence did not demonstrate that Ms. William's accuracy was less than that of Petitioner's. Here Petitioner's attempted statistical analysis of data entry errors between Petitioner and Ms. Williams are virtually meaningless. The tallies fail to show that Ms. Williams was treated more favorably than Petitioner. The testimony merely demonstrates that both Petitioner and Ms. Williams made errors during different time spans. Statistics without an analytical foundation are virtually meaningless.

42. On the other hand, Ms. Williams exceeded Petitioner's performance in other rated areas. The evidence demonstrated that Ms. Williams was ready, willing and able to assist her superiors and arrived at and began work early. Her signed annual evaluation had a score of 35, up from 30, and she received 3's in 5 areas, whereas Petitioner received all 2's. To the contrary, the evidence demonstrated that Petitioner did not volunteer for overtime even though there was a need and focused on other people's work instead of her own. None of these characteristics were based on race and all of these reasons justify the discrepancy in scoring between the two employees on their appraisals.

43. Added to the mix, the August 2008 primary election telephone incident with Shirley Young caused Petitioner's

employer's opinion of her work to be further reduced to the point where Ms. Hollarn decided to terminate Petitioner. No such conduct on the part of Ms. Williams was established by the evidence. To that extent, Petitioner and Ms. Williams were not similar and Petitioner failed to establish a prima facie case.

44. However, even assuming arguendo that Petitioner did establish a prima facie case, the evidence demonstrated that Petitioner's termination was based on more than data entry errors. Both her attitude about her work and her lack of volunteering for overtime contributed to her termination. However, the major reason Petitioner was terminated was the telephone incident that occurred on August 26, 2008. All of these reasons were valid reasons for terminating an at-will employee and are legitimate, non-discriminatory reasons for Petitioner's termination.

45. Therefore, the burden shifts back to Petitioner to demonstrate that the offered reason for termination is merely a pretext for discrimination. As the Supreme Court stated in Hicks, it is not pretext "unless it is shown both that the reason was false, and that [racial] discrimination was the real reason." Hicks, 509 U.S. at 515. Further, before finding discrimination, "the fact finder must believe the plaintiff's explanation of intentional discrimination." Hicks, 509 U.S. at 519.

46. In this case, even assuming arguendo, that Petitioner established a prima facie case and that Petitioner violated its performance and conduct policies, even if wrong, the evidence demonstrated that Petitioner's termination was based on non-discriminatory reasons. See Chapman v. Al Transport, 299 F.3d 1012, 1030-31 (11th Cir. 2000)(holding defendant may terminate an employee for good or bad reasons without violating federal law); Thomas v. Nicholson, 263 Fed.Appx. 814, 816 (11th Cir. 2008)("We have held that [t]he employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason'.").

47. Petitioner's lack of focus on solving her performance issues and focus on other employee's performance and her unwillingness to "volunteer" for overtime all contributed to Ms. Hollarn's negative view of Petitioner. Added to this negative view was the telephone incident that was reported to her by Ms. Young and was embarrassing to her office. None of these reasons were based on Petitioner's race. Given these facts, the fact that the termination letter did not state the real or all of the reasons for Petitioner's termination does not demonstrate that Respondent's motives for terminating Petitioner were based on Petitioner's race. Petitioner was terminated for her poor work performance, less than self-motivated conduct and

the telephone incident. There was no evidence that Respondent's reason for termination was a pretext to cover discrimination. Finally, Petitioner was replaced by Latoya Knox, who is black, had previously worked in the office and who Ms. Hollarn wanted to hire back. Given these facts, Petitioner did not establish by a preponderance of the evidence that she was treated differently than comparable non-minority co-workers, her termination was based on her race or that the reasons given for her termination were a pretext for discrimination. Therefore, the Petition for Relief should be dismissed.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations issue a Final Order dismissing the Petition for Relief with Prejudice.

DONE AND ENTERED this 30th day of March, 2010, in Tallahassee, Leon County, Florida.

DIANE CLEAVINGER
Administrative Law Judge
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this 30th day of March, 2010.

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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.