STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEREK A. ROBINSON,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 09-6377
	)	
GULF COAST COMMUNITY COLLEGE,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

An administrative hearing was conducted in this case on March 30, August 18, and August 19, 2011, in Panama City, Florida, before James H. Peterson, III, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Cecile M. Scoon, Esquire
Peters & Scoon
25 East Eighth Street
Panama City, Florida 32401

For Respondent: Robert E. Larkin, III, Esquire
Jason Vail, Esquire
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Tallahassee, Florida 32303

STATEMENT OF THE ISSUE

Whether Respondent Gulf Coast Community College (Respondent or the College) violated the Florida Civil Rights Act of 1992, sections 760.01-760.11 and 509.092, Florida Statutes, by subjecting Petitioner Derek A. Robinson (Petitioner) to

discrimination in employment or by subjecting Petitioner to adverse employment actions in retaliation of Petitioner's opposition to the College's alleged discriminatory employment practices.

PRELIMINARY STATEMENT

On April 22, 2009, Petitioner filed a charge of discrimination with the Florida Commission on Human Relations (the Commission), which was assigned Charge No. 200901683 (Charge of Discrimination). In the Charge of Discrimination, it is alleged that the College discriminated against Petitioner in employment by subjecting him to a hostile work environment and treating him unfairly based upon Petitioner's race and that, when Petitioner complained, the College retaliated by changing Petitioner's work schedule and eventually firing Petitioner. After investigating Petitioner's allegations, the Commission's executive director issued a Determination of No Cause on October 12, 2009, finding that "no reasonable cause exists to believe that an unlawful employment discrimination practice occurred . . . ." An accompanying Notice of Determination notified Petitioner of his right to file a Petition for Relief for an administrative proceeding within 35 days of the Notice. On November 16, 2009, Petitioner timely filed a Petition for Relief and, on November 19, 2009, the Commission forwarded the petition to the Division of Administrative Hearings for the

assignment of an administrative law judge to conduct an administrative hearing. The case was originally assigned to Administrative Law Judge Diane Cleavinger, but was subsequently transferred to the undersigned to conduct the administrative hearing. Following a number of continuances, the final hearing was eventually held in March and August 2011.

During the administrative hearing held in this case, Petitioner testified, called 14 witnesses, and introduced 19 exhibits that were admitted into evidence as Exhibits P-1 through P-16, and P-18 through P-20 (Exhibit P-4 was part of P-20). Respondent presented the testimony of four witnesses and introduced 17 exhibits into evidence as Exhibits R-1 through R-17 (Exhibits R-16 and R-17 were part of Exhibit P-20).

The proceedings were recorded and a Transcript was ordered. The parties were given 30 days from the filing of the Transcript within which to submit their respective Proposed Recommended Orders. The last volume of the three-volume Transcript of the hearing was filed on September 13, 2011. Thereafter, the parties timely filed their Proposed Recommended Orders which were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is an African-American male.

2. The College is a public institution of higher education located in Panama City, Florida.

3. In 1998, Petitioner was hired by the College to work in its custodial department as a custodian. Petitioner held that position until his termination on February 11, 2009.

4. The College's custodial department is part of the College's maintenance and operations division (collectively, "Maintenance Division") managed by the campus superintendent. The two other departments within the Maintenance Division are the maintenance and grounds departments.

5. During the relevant time period, there were approximately 40 to 50 employees in the Maintenance Division. Of those, there were approximately 21 to 28 custodians in the custodial department.

6. Most of the custodians were African-Americans and there were only three Caucasian custodians. The Caucasian custodians were Tom Krampota, Josephine Riley, and Tommy Gillespie.

7. Custodial staff typically work shifts beginning at 2:00 p.m. and ending at 10:00 p.m., Monday through Friday. They are generally assigned housekeeping duties for a specific building.

8. In addition to Monday through Friday, the College is also open on most weekends. Prior to 2001, the College began designating one employee to work a non-rotating weekend shift. Unlike other custodians, the designated weekend custodian worked from 10:00 a.m. to 10:30 p.m. on Fridays and 6:00 a.m. to 6:30

p.m. on Saturdays and Sundays. The weekend custodian was not assigned to a particular building, but rather worked in various buildings as needed and was to be available to open doors to campus buildings during weekend hours.

9. Petitioner was the designated weekend custodian from 2001 until his duties were changed in September 2008.

10. Dr. John Holdnak, who worked for the College for 26 years in various capacities, including four years as Director of Human Resources, was the one who established the position of designated weekend custodian. Dr. Holdnak served as the College's Vice-President for Administration Services for his last eight years of employment with the College until leaving in July, 2008. As vice-president, Dr. Holdnak reported directly to the president of the College, Dr. James Kerley.

11. Sometime prior to 2008, Dr. Holdnak observed that the departments in the Maintenance Division were underperforming, not adequately supervised, and failing to meet expectations. Dr. Holdnak observed that the Maintenance Division employees took excessive breaks and showed lack of effort in their work. For example, mold was found in some of the classrooms, an open window with a bird's nest was found in another, maintenance orders were backlogged, and Dr. Holdnak received a number of complaints from faculty and College employees regarding the Maintenance Division's level of service.

12. As a result of Dr. Holdnak's observations, the College removed the campus superintendent from his position because of the superintendent's inability to manage line supervisors, provide leadership, or supervise personnel.

13. After that, Dr. Holdnak personally supervised the Maintenance Division for a time in order to assess and develop a solution to the problem. Based upon Dr. Holdnak's assessment, the College sought applications for a new campus superintendent who could change and clean-up the culture of the Maintenance Division. At the time, the three department supervisors within the Maintenance Division were: Carlos "Butch" Whitehead for maintenance, Dan Doherty for custodial, and Ronny Watson for grounds. All three supervisors were Caucasian.

14. The vacancy for the campus superintendent position was advertised. Dr. Holdnak encouraged John Westcott to apply for the campus superintendent position because he had previously worked with Mr. Westcott on a College construction project and was impressed with his vigor and work ethic. Mr. Westcott, a Caucasian, applied. So did custodial department supervisor, Dan Doherty, and three other candidates.

15. Mr. Westcott disclosed on his application that he had been convicted of a felony twenty years prior to his application. Dr. Holdnak determined that Mr. Westcott's prior conviction would not impact his candidacy for the position.

16. The applicants were screened by a selection committee composed of a number of College employees from various divisions, including Petitioner. Of the five applicants who applied, the selection committee's first choice was John Westcott, who was qualified for the position.

17. Petitioner did not agree with the selection committee's first choice and was not impressed with Mr. Westcott during the screening process because Mr. Westcott referred to himself as the "terminator."

18. Based upon the selection committee's first choice and the conclusion that Mr. Westcott satisfied the necessary criteria to change the Maintenance Division's culture, Dr. Holdnak recommended that the College hire John Westcott as the new campus superintendent.

19. John Westcott was hired as campus superintendent in January 2008. Once Mr. Westcott was hired, Dr. Holdnak specifically directed him to take control of his departments, “clean up the mess” and hold his mid-level supervisors responsible for their subordinates' results. Dr. Holdnak instructed Mr. Westcott to take a hands-on approach, physically inspect and visit the buildings to ensure cleanliness, increase effectiveness, stop laziness, and decrease work order backlogs.

20. During his tenure, Mr. Westcott increased productivity and reduced backlogs. Mr. Westcott took more initiative than

previous superintendents with cleaning and maintenance, and he conducted weekly walkthroughs. While Mr. Westcott was campus superintendent, the backlog of 400 work orders he had inherited was reduced to zero.

21. During Mr. Westcott's first month as campus superintendent, he had an encounter with a Caucasian employee named Jamie Long. On January 31, 2008, Mr. Westcott issued a written memorandum to Mr. Long as a follow-up from a verbal reprimand that occurred on January 28, 2008. The reprimand was Mr. Westcott's first employee disciplinary action as campus superintendent. According to the memorandum, the reprimand was based upon Mr. Long's confrontation and argument with Mr. Westcott regarding the fact that Mr. Westcott had been "checking-up" on him. According to the memorandum, Mr. Westcott considered "the manner in which [Mr. Long] addressed [him as] totally inappropriate and could be considered insubordination."

22. Mr. Long disputed Mr. Westcott's version of the incident and later sent a letter to College President Dr. Kerley dated June 23, 2008, complaining about "the alleged incident of insubordination" and the "almost non-stop harassment by John Westcott." There was no mention or allegation in the letter that John Westcott was racist or had discriminated against anyone because of their race.

23. After Dr. Holdnak left the College in July 2008, John Mercer assumed his responsibilities. Mr. Mercer, like Dr. Holdnak, had the perception that custodial work was below par based on complaints and personal observations. He therefore continued to direct Mr. Westcott to address these deficiencies to improve the custodians' performance.

24. Petitioner was the designated weekend custodian when Mr. Westcott was hired.

25. In February 2008, Dr. Holdnak discovered a problem with the amount of paid-time-off Petitioner received as a result of his weekend schedule. The problem was that if a holiday fell on a weekend, Petitioner would take the entire weekend off, resulting in a windfall of 37.5 hours in additional paid-time-off for Petitioner over other employees because his work hours on the weekends were longer.

26. In order to correct the problem, in approximately March 2008, Petitioner was placed on a similar holiday pay schedule as all other employees. At the time, the then-director of the College's Department of Human Resources, Mosell Washington, who is an African American, explained the change to Petitioner. According to Mr. Washington, Petitioner was not happy about the change in his holiday pay schedule. Petitioner, however, does not blame Mr. Westcott for initiating the change.

27. Because of the change in his holiday pay schedule, Petitioner was required to work or use leave time for the additional working hours during the Fourth of July weekend in 2008. Petitioner called and asked to speak with Mr. Westcott regarding the issue. During the phone call, Petitioner used profanity.

28. After being cursed, Mr. Westcott hung up the phone and then advised Mr. Washington, who told Mr. Westcott to document the incident. The resulting written reprimand from Mr. Westcott to Petitioner was dated July 11, 2011, and was approved by Mr. Washington. When Mr. Washington presented Petitioner with the written reprimand, Petitioner refused to sign an acknowledgement of its receipt and abruptly left the meeting without any comment. Petitioner did not tell Mr. Washington that he believed he was being targeted or discriminated against because of his race.

29. In addition to setting forth Mr. Westcott's version of what occurred, the written reprimand advised Petitioner that the College had a grievance procedure, and also stated:

> I have an open door policy and will gladly address any concerns you may have whether personal or job related. If you have a grievance, tell me, but in the proper manner and in the proper place.

30. Petitioner did not take advantage of either the College's grievance procedure or Mr. Westcott's stated open door policy.

31. The College maintains an anti-discrimination policy and grievance policy disseminated to employees. The College's procedure for employee grievances provides several levels of review, starting with an immediate supervisor, then to a grievance committee, and then up to the College's president.

32. Under the College's anti-discrimination policy, discrimination and harassment based on race or other protected classes is prohibited. Employees who believe they are being discriminated against may report it to the Director of Human Resources. Likewise, harassment is prohibited and may be reported up the chain of command at any level.

33. Petitioner acknowledged receipt of the College handbook and policies on August 17, 2007.

34. In addition, both the College President, Dr. Kerley, and Vice President, John Mercer, maintain an "open door" policy.

35. After receiving the July 11, 2008, written reprimand, Petitioner spoke to both Dr. Kerley and Mr. Mercer, at least once, on July 15, 2008. Petitioner, however, did not tell them that he had been discriminated against because of his race. In fact, there is no credible evidence that a report of race

discrimination was ever made regarding the July 11, 2008, written reprimand prior to Petitioner's termination.

36. Petitioner, however, did not agree with the July 11, 2008 written reprimand. After speaking to Dr. Kerley and Mr. Mercer, Petitioner met with Jamie Long, the Caucasian who had earlier received a write-up from Mr. Westcott, for assistance in preparing a written response. The written response, dated August 4, 2008, and addressed to Mr. Washington, Mr. Westcott, and Mr. Mercer, stated:

> On July 25, 2008, I was called into Mosell Washington's office and was given a written letter of reprimand from John Westcott, the Campus Superintendent, which states that on July 3, 2008, I had used profanity in a phone conversation with him regarding my 4th of July work schedule.
>
> From the schedule that I received in February, from Mosell Washington, I believed I was off that weekend.
>
> I am writing this letter to dispute Mr. Westcott's version of our conversation and to protest the letter of written reprimand.
>
> Mr. Westcott says in the reprimand that I was insubordinate to him and had used profanity. I did not use profanity, and I do not believe that I was insubordinate in any manner to him during our brief conversation.
>
> I feel that my work record and my integrity speaks for itself. I have never been insubordinate, or been a problem to anyone until John Westcott, and had I known that I

was supposed to be on the job that weekend, I would have been there.

37. Mr. Washington, Mr. Westcott, and John Mercer all deny receiving the written response. In addition, contrary to the written response, at the final hearing, Petitioner admitted that he used profanity during the call and said "ass" to Mr. Westcott. Moreover, the written response does not complain of race discrimination, and Dr. Kerley, Mr. Mercer, Dr. Holdnak, Mr. Washington, and Mr. Westcott all deny that they ever received a complaint of race discrimination regarding the incident.

38. Evidence presented at the final hearing did not show that the written reprimand given to Petitioner dated July 11, 2008, was racially motivated, given in retaliation for Petitioner's statutorily-protected expression or conduct, or that a similarly-situated non-African-American who used profanity to a supervisor would not be subject to such a reprimand.

39. Mr. Westcott generally worked a more traditional Monday through Friday schedule and, because of Petitioner's weekend work schedule, had minimal contact with Petitioner. In fact, Mr. Westcott would not usually be on campus with Petitioner, except Fridays, and the two men rarely spoke until Petitioner's work schedule was changed in September 2008.

40. During the weekends that he worked at the College, Petitioner was on-call and expected to return communications to his pager or mobile phone, even during his lunch breaks, regardless of his location.

41. On Friday, August 22, 2008, after receiving a request from faculty member Rusty Garner, Petitioner's supervisor Dan Doherty asked Petitioner to clean the music room floor.

42. On Sunday afternoon, August 24, 2008, Mr. Mercer and Mr. Westcott were working when they received word from Mr. Garner that the music room floor had not been cleaned. After unsuccessful attempts to reach Petitioner by cell phone and pager, both Mr. Mercer and Mr. Westcott drove around the College campus to find him. They were unsuccessful.

43. The reason Petitioner could not be reached was because he had left campus and had left his telephone and pager behind. According to Petitioner, he was on lunch break.

44. Mr. Mercer and Mr. Westcott found another employee, Harold Brown, to help prepare the music room for Monday. Mr. Mercer was upset because he had to take time out from his own work to find someone to complete the job assigned to Petitioner.

45. That same afternoon, Mr. Mercer reported the incident by e-mail to Mr. Washington and requested that appropriate action be taken.

46. On August 27, 2008, Petitioner's supervisor, Dan Doherty, issued a written reprimand to Petitioner for the August 24th incident. No evidence was presented indicating that the written reprimand was racially motivated, or that a similarly situated non-African-American who could not be located during his or her shift would not be subject to such a reprimand.

47. In September 2008, Dr. Kerley unilaterally determined that no single employee should work his or her entire workweek in three days. He believed this schedule was unsafe, and not in the best interests of the college. He therefore directed Mr. Westcott and Mr. Mercer to implement a rotating schedule for the weekends.

48. Mr. Westcott was not in favor of the change because it meant additional scheduling work for him to accommodate new rotating shifts. No credible evidence was presented that the schedule change was because of Petitioner's race, or made in retaliation for Petitioner's statutorily-protected expressions or actions.

49. From August 27, 2008, through January 2009, there were no other disciplines issued to Petitioner or reported incidents between Petitioner and Mr. Westcott.

50. In December, 2008, a group composed of most of the custodial employees, including Petitioner, conducted a meeting

with the College's president, Dr. Kerley, and vice-president, Mr. Mercer. The group of custodians elected their new supervisor James Garcia, an Asian-Pacific Islander, as their spokesperson for the meeting.

51. The custodians' primary purpose for the meeting was to address complaints regarding Mr. Westcott's management style, his prior criminal conviction, and approach with employees. They felt that Mr. Westcott could not be pleased.

52. Various concerns about Mr. Westcott expressed by the employees were condensed into three typed pages (collectively, "Typed Document") consisting of two pages compiled by Jamie Long and his wife Susan Long which contained 12 numbered paragraphs, and a third page with six unnumbered paragraphs. Mr. Garcia did not transmit the Typed Document to the president or vice-president prior to the meeting. Neither Jamie Long nor his wife attended the meeting.

53. During the meeting, Mr. Garcia read several of the comments from the Typed Document and Dr. Kerley responded to each comment that was read. Mr. Garcia did not read through more than the first five of the 12 items listed on the Typed Document.

54. The Typed Document was not reviewed by the president or vice-president and they did not retain a copy.

55. Petitioner asserts the comment listed in paragraph 9 on the second page of the Typed Document constitutes a complaint or evidence of racial animus. Although not discussed at the meeting or reviewed by Dr. Kerley or Mr. Mercer, paragraph 9 states:

> During a recent candidate forum, Westcott used the term "black ass" in regard to School Superintendent James McCallister. This was heard by at least two witnesses.
> Q. Are such racial slurs and inappropriate, unprofessional behavior condoned and acceptable?

56. Mr. Westcott denies making the alleged statement referenced in paragraph 9 of the Typed Document. No evidence of other racial remarks allegedly made by Mr. Westcott was presented. There is no evidence that the College or its administration condoned the alleged statement.

57. President Kerley, Vice President Mercer, and Mr. Washington all gave credible testimony that they were not made aware of the statement and that, if the statement in paragraph 9 of the Typed Document or any alleged racial discrimination by Mr. Westcott had been brought to their attention, immediate action would have been taken.

58. As a result of custodial employees' complaints about Mr. Westcott's management style, Dr. Kerley and Mr. Mercer required Mr. Westcott to attend several sessions of management training. In addition, Dr. Kerley counseled Mr. Westcott

against using harsh tactics and rough language that may be acceptable on a construction site, but were not appropriate on a College campus.

59. On February 9, 2009, Mr. Westcott observed both Petitioner and a co-worker leaving their assigned buildings. He asked their supervisor, Mr. Garcia, to monitor their whereabouts because he thought that they appeared to not be doing their jobs. Mr. Westcott also told Mr. Garcia that, although the two workers may have had a legitimate reason for walking from their assigned buildings, he had not heard anything on the radio to indicate as much.

60. The next day, on February 10, 2009, Mr. Garcia told Petitioner that Mr. Westcott had wanted to know where they had been headed when they left the building the day before. Petitioner responded by saying that if Mr. Westcott wanted to know where he was, Mr. Westcott could ask him (Petitioner).

61. Later that day, Petitioner spoke to Mr. Washington on campus. Petitioner was very upset and said to Mr. Washington, "What's wrong with Westcott? He better leave me alone. He don't know who he's messing with."

62. Later that same afternoon, Petitioner had a confrontation with Mr. Westcott. According to a memorandum authored that same day by Mr. Westcott:

> I [John Westcott] had stopped outside the mailroom to talk with Beth Bennett. While talking with her I observed Derek [Petitioner] leave Student Union West. After seeing me, he returned to Student Union West and waited outside the door. Beth walked toward the Administration building and I headed through the breezeway. Derek approached me and said that he had heard that I wanted to ask him something. I asked him what he was talking about. He said that I wanted to ask him where he was going the evening before. I said ok, where were you going?
>
> Derek said that it was "none of my f_ _ _ ing business." I told him that since I was his supervisor, that it "was" my business.
>
> At this time, he stepped closer to me in a threatening manner and said "if you don't stop f_ _ _ ing with me, I'm going to f_ _ _ you up." I told him that if he would do his job, that he wouldn't have to worry about me. He replied "you heard what I said--- I'll f_ _ _ you up", as he walked back into SUW.
>
> I left the breezeway and went to John Mercer's office to report the incident.

63. Mr. Westcott's testimony at the final hearing regarding the incident was consistent with his memorandum.

64. While Petitioner's version of the confrontation is different than Mr. Westcott's, at the final hearing Petitioner admitted that Mr. Westcott had a legitimate question regarding his whereabouts and that he failed to answer the question. And, while he denied using the specific curse words that Mr. Westcott attributed to him, Petitioner testified that he told

Mr. Westcott to leave him the "hell" alone because he was doing his job.

65. While there is no finding as to the exact words utilized by Petitioner to Mr. Westcott, it is found, based upon the testimonial and documentary evidence, that on the afternoon of February 9, 2009, Petitioner was confrontational towards Mr. Westcott, that Petitioner refused to answer a legitimate question from Mr. Westcott, that Petitioner demanded that Mr. Westcott leave him alone even though Mr. Westcott had a legitimate right to talk to Petitioner about his job, and that Petitioner used words that threatened physical violence if Mr. Westcott did not heed his warning.

66. After Mr. Westcott reported the incident to Mr. Mercer, both Mr. Mercer and Mr. Westcott went to Dr. Kerley and advised him of the incident. Dr. Kerley believed the report of the incident and that Petitioner had threatened Mr. Westcott.

67. Mr. Washington was then informed of the incident. After reviewing Petitioner's employment history, including Petitioner's recent attitude problems, as well as Mr. Washington's own interaction the same day of the latest incident, Mr. Washington concluded that Petitioner should be terminated. Mr. Washington gave his recommendation that Petitioner be terminated to Dr. Kerley, who adopted the recommendation.

68. The following day, February 11, 2009, Mr. Washington called Petitioner into his office and gave him a memorandum memorializing Petitioner's termination from his employment with the College. The memorandum provided:

> This memorandum is written notification that because of a number of incidents which the administration of the college deems unprofessional, adversarial, and insubordinate, you are hereby terminated from employment at Gulf Coast Community College, effective immediately.

69. At the time that he presented Petitioner with the memorandum, Mr. Washington provided Petitioner with the opportunity to respond. Petitioner told Mr. Washington, "It is not over." Petitioner did not state at the time, however, that he believed that his termination, change of schedule, or any disciplinary action taken against him were because of racial discrimination or in retaliation for his protected expression or conduct.

70. Further, at the final hearing, Petitioner did not present evidence indicating that similarly-situated non-African-American employees would have been treated more favorably than was Petitioner for threatening a supervisor. Further, the evidence presented by Petitioner did not show that the decision to terminate him was based on race or in retaliation for protected expression or behavior, or that the facts behind the reason that Petitioner was fired were fabricated.

71. Following his termination, Petitioner met with both Dr. Kerley and Mr. Mercer and apologized for acting wrongly.

72. The empirical record evidence of discipline against College employees in the Maintenance Division during Mr. Westcott's tenure does not demonstrate a tendency by Mr. Westcott or the College to discriminate against African-American employees. The majority of disciplines and the first discipline taken against Mr. Long by Mr. Westcott were administered to Caucasians.

73. In total, Mr. Westcott only reprimanded five employees. Of these, three were Caucasian -- Mr. Long, Mr. Whitehead, and Mr. Doherty. Despite the fact that the majority of the custodians were African-American, only two African-Americans were disciplined -- Petitioner and Harold Brown.

74. During Mr. Westcott's employment, the only two employees who were terminated were Petitioner and a white employee, Mark Ruggieri.

75. Excluding Petitioner, all African-American witnesses testified that Mr. Westcott treated them equally and not one, except for Petitioner, testified that they were treated differently because of their race. The testimony of Petitioner's African-American co-workers is credited over Petitioner's testimony of alleged discrimination.

76. Harold Brown's discipline was based upon the fact that he gave the College's master keys to an outside third-party contractor. Although Mr. Brown disagreed with the level of punishment he received, in his testimony, he agreed that he had made a mistake. Mr. Brown further testified that he did not believe African-Americans were targeted. According to Mr. Brown, Mr. Westcott did not discriminate against him because of his race, and "Westcott was an equal opportunist as far as his behavior" and "seemed agitated towards everybody when he was in his moods."

77. Mr. Garcia was the lead custodian when Petitioner was terminated and is currently the College's custodial department supervisor. While several employees told Mr. Garcia that they did not like Mr. Westcott's management style, Mr. Garcia never heard a racist comment and testified that Mr. Westcott was strict and threatened the entire custodial and maintenance staff.

78. Butch Whitehead believes that Mr. Westcott attempted to get him and his maintenance crew "in trouble." He had no personal knowledge of the manner in which Mr. Westcott treated Petitioner. Mr. Whitehead's testimony does not otherwise support a finding that Mr. Westcott was a racist or that the College discriminated against Petitioner because of his race.

79. Tom Krampota, a Caucasian and longtime employee and former supervisor, agreed that Mr. Westcott was firm with all custodians and complained about everybody, but was not a racist.

80. Lee Givens, an African-American, testified that his custodial work was monitored because Mr. Westcott took issue with dust and cleanliness, but that if he did his job Mr. Westcott did not bother him. Mr. Givens did not testify that he felt discriminated against because of his race, but rather stated that Mr. Westcott made the job hard for "all the custodians."

81. Horace McClinton, an African-American custodian for the College, provided a credible assessment of Mr. Westcott in his testimony which summarized how Mr. Westcott treated all of his subordinates:

> There were certain things that he wanted us to do that we should have been doing already, and he was just there to enforce it . . . he did not think anybody was doing their job . . . . He was put there to make sure we were doing our job . . . . I don't think he was a racist.

82. Mr. McClinton further testified that all Maintenance Division employees, including Caucasian supervisors, were afraid of Westcott because it was "his way or the highway."

83. Latoya "Red" McNair testified that he was being monitored like the other custodians but did not believe it was because of race.

84. Just as Petitioner's co-workers' testimony does not support a finding that Mr. Westcott was a racist, Dan Doherty's deposition testimony does not support a finding that Mr. Westcott's actions against Petitioner were because of race.

85. A review of Mr. Doherty's deposition reflects that Mr. Doherty has no first-hand knowledge of actual discrimination. Mr. Doherty stated, "I don't know" when asked how he knew Westcott was motivated by race. Nevertheless, according to Mr. Doherty, five African-Americans were singled out, including Petitioner, Mr. McClinton, Mr. Givens, Mr. McNair, and Mr. Brown. Two of these alleged "victims" outright denied that Mr. Westcott treated them unfairly because of race. The others did not testify that they believed Mr. Westcott treated them differently because of race.

86. Mr. Doherty testified that besides the five identified, the remaining African-Americans were not criticized or targeted. Mr. Doherty also conceded that it was possible that Mr. Westcott just did not like the five custodians.

87. Further, despite the fact that Mr. Doherty was written up by Mr. Westcott more than any other employee, including Petitioner, Mr. Doherty never reported Mr. Westcott for discrimination and did not state in his exit interview from the College that Mr. Westcott was a racist or complain that race was an issue.

88. Rather than supporting a finding that Mr. Westcott was motivated by race, Mr. Doherty's testimony demonstrated that the problems he had with Mr. Westcott were similar with those pointed out by others—namely, that Mr. Westcott had a prior criminal conviction, had a harsh management style, and closely scrutinized all workers.

89. While Petitioner and Mr. Long contend that they raised the issue of discrimination with the College's management, the College's president, vice-president, director of human resources, former vice-president, and superintendent all deny receiving a report of discrimination or that any employment action was based on race or in retaliation.

90. Mr. Long's testimony that he complained of race is not substantiated because he did not witness any discrimination first hand. He also never documented his alleged concerns about racial discrimination prior to Petitioner's termination. In addition, in his testimony, Mr. Long admitted that he never heard Mr. Westcott use a racially discriminatory term. Likewise, Petitioner never documented alleged discrimination until after being terminated.

91. Considering the evidence presented in this case, and the failure of Petitioner and Mr. Long to document alleged complaints when an opportunity was presented, it is found that

the allegations of reported complaints of discrimination by Mr. Long and Petitioner are not credible.

92. Further, the testimony from Petitioner's co-workers and supervisors, which indicates that Mr. Westcott was harsh with all employees but not racially discriminatory, is credited.

93. It is found that Petitioner did not show that any employment action by the College or Mr. Westcott against him was based on race. Rather, the evidence presented in this case demonstrates that Petitioner was not targeted or treated differently from any other employees based upon race. The evidence also failed to show that Petitioner was retaliated against because of his protected expression or conduct.

94. In sum, the evidence did not show that Petitioner was subject to racial discrimination or wrongful retaliation, and Respondent proved that Petitioner was terminated for engaging in a pattern of unprofessional, adversarial, and insubordinate behavior, including a threat to his supervisor's supervisor, John Westcott.

CONCLUSIONS OF LAW

95. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding pursuant to section 120.569 and subsection 120.57(1), Florida Statutes (2011),[1/] and Florida Administrative Code Rule 60Y-4.016(1).

96. The State of Florida, under the legislative scheme contained in sections 760.01–760.11 and 509.092, Florida Statutes, known as the Florida Civil Rights Act of 1992 (the Act), 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.

97. The Florida law prohibiting unlawful employment practices is found in section 760.10. This section prohibits discrimination "against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status." § 760.10(1)(a), Fla. Stat.

98. Pursuant to subsection 760.10(1), it is an unlawful employment practice for an employer to discharge or otherwise discriminate against an individual on the basis of race. Pursuant to subsection 760.10(7), it is an unlawful employment practice for an employer to discriminate against a person because that person has, "opposed any practice which is an unlawful employment practice" or because that person "has made a charge...under this subsection."

99. Florida courts have held that because the Act is patterned after Title VII of the Civil Rights Act of 1964, as

amended, federal case law dealing with Title VII is applicable. See, e.g., Fla. Dep't of Cmty. Aff. v. Bryant, 586 So. 2d 1205, 1209 (Fla. 1st DCA 1991).

100. As developed in federal cases, a prima facie case of discrimination under Title VII may be established by statistical proof of a pattern of discrimination, or on the basis of direct evidence which, if believed, would prove the existence of discrimination without inference or presumption.[2/] Usually, however, direct evidence is lacking and one seeking to prove discrimination must rely on circumstantial evidence of discriminatory intent, using the shifting burden of proof pattern established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). See Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997).

101. Under the shifting burden pattern developed in McDonnell Douglas:

> First, [Petitioner] has the burden of proving a prima facie case of discrimination by a preponderance of the evidence. Second, if [Petitioner] sufficiently establishes a prima facie case, the burden shifts to [Respondent] to "articulate some legitimate, nondiscriminatory reason" for its action. Third, if [Respondent] satisfies this burden, [Petitioner] has the opportunity to prove by a preponderance that the legitimate reasons asserted by [Respondent] are in fact mere pretext.

U.S. Dep't of Hous. and Urban Dev. v. Blackwell, 908 F.2d 864, 870 (11th Cir. 1990)(housing discrimination claim); accord Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17, 22 (Fla. 3d DCA 2009)(gender discrimination claim)("Under the McDonnell Douglas framework, a plaintiff must first establish, by a preponderance of the evidence, a prima facie case of discrimination.").

102. Therefore, in order to prevail in his claim against the College, Petitioner must first establish a prima facie case by a preponderance of the evidence. Id.; § 120.57(1)(j), Fla. Stat. ("Findings of fact shall be based upon a preponderance of the evidence, except in penal or licensure proceedings or except as otherwise provided by statute and shall be based exclusively on the evidence of record and on matters officially recognized.").

103. "Demonstrating a prima facie case is not onerous; it requires only that the plaintiff establish facts adequate to permit an inference of discrimination." Holifield, 115 F.3d at 1562; cf., Gross v. Lyons, 763 So. 2d 276, 280 n.1 (Fla. 2000)("A preponderance of the evidence is 'the greater weight of the evidence,' [citation omitted] or evidence that 'more likely than not' tends to prove a certain proposition.").

104. Petitioner's Charge of Discrimination against the College alleges that Petitioner was subjected to a hostile work

environment and disparate treatment because of his race and that, when he complained, he was subjected to unlawful retaliation. Petitioner, however, failed to prove his allegations.

PETITIONER FAILED TO ESTABLISH RACIAL DISCRIMINATION BASED UPON A HOSTILE WORK ENVIRONMENT

105. A hostile work environment claim is established upon proof that "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." Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1275 (11th Cir. 2002) (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1998)).

106. In order to establish a prima facie case under the hostile work environment theory, Petitioner must show: (1) that he belongs to a protected group; (2) that he has been subject to unwelcome harassment; (3) that the harassment must have been based on a protected characteristic of the employee, such as race; (4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and (5) that the employer is responsible for such environment under a theory of vicarious or of direct liability. Id.

107. Petitioner failed to establish the third, fourth or fifth elements required to establish a prima facie case. Petitioner did not establish the third element because he failed to present credible evidence to show that the conduct that he considered harassment was based upon his race. Rather, Petitioner speculates that he was disciplined and terminated because of his race. Petitioner's speculation as to the motives of the College standing alone, however, is insufficient to establish a prima facie case of discrimination. See, e.g., Lizardo v. Denny's, Inc., 270 F.3d 94, 104 (2d Cir. 2001) (Plaintiff's 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.").

108. Petitioner did not meet the fourth element because he failed to show that the alleged harassment was sufficiently severe or pervasive. Factors relevant in determining whether conduct is sufficiently severe and pervasive to show a hostile work environment include, among others: (a) the frequency of the conduct, (b) the severity of the conduct, (c) whether the conduct is physically threatening or humiliating, or a mere offensive utterance, and (d) whether the conduct unreasonably interferes with the employee's job performance. Miller, 277 F.3d at 1276.

109. As the evidence was insufficient to establish harassment based on race, Petitioner could not present evidence of the frequency of any harassment based upon race. In fact, because Petitioner and Mr. Westcott's schedules had limited overlap until after the two written reprimands, the evidence suggests lack of opportunity for frequency.

110. As far as the severity of the alleged hostile conduct toward Petitioner, the change in his schedule was explained and the reprimands he received were the result of facts admitted by Petitioner. There were only two reported incidents between Petitioner and Mr. Westcott prior to the incident that led to Petitioner's termination.

111. There was no indication that the alleged hostile conduct was physically threatening or humiliating, and the only evidence of an offensive utterance was the alleged "black ass" comment which was not directed at Petitioner and Mr. Westcott denies. Moreover, Petitioner failed to present evidence that any the alleged conduct or utterance interfered with his job performance.

112. Petitioner also failed to establish the fifth element by failing to present sufficient evidence to show that the College should be responsible for a hostile work environment under a theory of vicarious or direct liability. As noted in the Findings of Fact, above, the evidence was insufficient to

show that College management was even aware of the alleged racial discrimination until after Petitioner was terminated.

113. Given the lack of corroborative statements in documents prepared by Mr. Long or on behalf of Petitioner in response to discipline, Petitioner's and Mr. Long's testimony asserting that they gave contemporary notice to College management of their alleged complaints about racial discrimination is not credible. This conclusion is bolstered in light of the collective denials from College management that such complaints were ever made.

114. The only evidence of harassment appears to be Mr. Westcott's monitoring of Petitioner and his co-workers, schedule changes, and three disciplinary actions (including Petitioner's termination). As summarized in the Findings of Fact, above, the co-worker testimony was insufficient to show that there was a hostile work environment based upon race. Instead, the evidence indicates that Mr. Westcott treated all of his subordinates, including Petitioner's non-African-American co-workers and supervisors, in an equally harsh manner.

115. Therefore to the extent Petitioner's claim is based upon an alleged hostile work environment, it must fail. See, e.g., Vore v. Ind. Bell Tel. Co., 32 F.3d 1161, 1162 (7th Cir. 1994)("Without racial animus, there is no Title VII claim [based on an alleged racially hostile workplace]"); cf. Dattolia v.

Principi, 332 F.3d 505 (8th Cir. 2003) (gender-based discrimination claim alleging hostile work environment failed where evidence showed that alleged harasser "had problems with everyone, men and women alike").

PETITIONER FAILED TO PROVE
DISCRIMINATION BASED ON DISPARATE TREATMENT

116. Petitioner did not present any statistical or direct evidence of discrimination, and otherwise failed to present a prima facie case of discrimination based on disparate treatment.

117. In order to establish a prima facie case of race discrimination based on disparate treatment, a petitioner must show that: (1) he belongs to a racial minority; (2) he was subjected to adverse job action; (3) his employer treated similarly situated employees outside his classification more favorably; and (4) he was qualified to do the job. Holifield, 115 F.3d at 1562.

118. To demonstrate that he was treated less favorably than a similarly-situated individual outside his protected class, Petitioner must show that a “comparative” employee was “similarly situated in all relevant respects,” meaning that an employee outside of Petitioner's protected class was "involved in or accused of the same or similar conduct" and treated in a more favorable way. Id.

119. As far as the written reprimands that Petitioner received prior to his termination, Petitioner failed to present evidence that similarly-situated non-African American employees would have been treated any differently for engaging in the behavior for which he was reprimanded on July 11 and August 27, 2008.

120. Petitioner also failed to present sufficient evidence to show disparate treatment resulting in his discharge by failing to identify another non-minority employee accused of threatening a supervisor who was not terminated, as was Petitioner.

121. Therefore, Petitioner did not establish a prima facie case of discriminatory discipline or discharge based on disparate treatment.

122. When a Petitioner fails to present a prima facie case the inquiry ends and the case should be dismissed. Ratliff v. State, 666 So. 2d 1008, 1013 n.6 (Fla. 1st DCA 1996).

123. Even if Petitioner had established a prima facie case of discriminatory treatment or discharge, Respondent met its burden of demonstrating that it had a legitimate, nondiscriminatory reason for disciplining and then ultimately discharging Petitioner.

124. The College demonstrated that the first two disciplinary actions were legitimate and based on facts admitted

by Petitioner. The College also presented evidence that the Petitioner engaged in confrontational behavior and threatened Mr. Westcott. Mr. Westcott immediately reported the credible threat and Mr. Washington recommended termination to the College president who adopted the recommendation.

125. The evidence demonstrated that the College acted on the threat without regard to race or in retaliation, and demonstrated that it had legitimate, non-discriminatory reasons for taking the actions that it did in disciplining and terminating Petitioner.[3/]

126. Petitioner offered no proof that the College's proffered reasons for disciplining or discharging him were pretexts for unlawful discrimination based on Petitioner's race. In proving that an employer's asserted reason is merely a pretext:

> A plaintiff is not allowed to recast an employer's proffered nondiscriminatory reasons or substitute his business judgment for that of the employer. Provided that the proffered reason is one that might motivate a reasonable employer, an employee must meet that reason head on and rebut it, and the employee cannot succeed by simply quarreling with the wisdom of that reason.

Chapman v. AI Transport, 229 F.3d 1012, 1030 (11th Cir. 2000).

127. It cannot be said that the College's decisions to discipline or terminate Petitioner under the circumstances were not legitimate, non-discriminatory reactions to Petitioner's

actions. Cf. Anderson v. United Parcel Serv., Inc., 506 F. Supp. 2d 1215 (S.D. Fla. 2007)(summary judgment in favor of employer that discharged an employee who threatened his supervisor, finding that the reason (the threat) was not pretext for race discrimination).

128. For the foregoing reasons, it is concluded that Petitioner failed to establish his claim of discrimination under the theory of disparate treatment.

PETITIONER FAILED TO
PROVE UNLAWFUL RETALIATION

129. Petitioner presented no direct evidence of retaliation. Thus, under the same burden of proof analysis discussed above, Petitioner must first establish a prima facie case. In order to demonstrate a prima facie case of retaliation, Petitioner must show: (1) that he was engaged in statutorily protected expression or conduct; (2) that he suffered an adverse employment action; and (3) that there is some causal relationship between the two events. Holifield, 115 F.3d at 1566.

130. In order to establish a causal link between the conduct engaged in by Petitioner and the adverse employment action, Petitioner must at least establish that the employer was actually aware of the protected expression or conduct at the time the adverse decision was made. Id.

131. Petitioner failed to establish that the decision-makers for the College had any knowledge of any purported protected conduct engaged in by the Petitioner or that there was a causal relationship between any alleged protected conduct and the adverse employment actions.

132. As to whether Petitioner was engaged in statutorily protected conduct or expression, both Petitioner and Jamie Long allege that they complained of race discrimination. Neither Petitioner's or Mr. Long's testimony in that regard, however, are credited because both documented their complaints regarding Mr. Westcott but failed to state that "race" had anything to do with their issues. And there is no credible evidence that Petitioner otherwise complained of racial discrimination prior to his termination.

133. On the other hand, the College produced credible and persuasive evidence that none of the College's management, including Dr. Kerley, Mr. Washington, Mr. Mercer, Dr. Holdnak, and Mr. Westcott, had knowledge of any complaint from Petitioner or Mr. Long regarding race prior to the change in Petitioner's schedule, his reprimands, or termination. As a result, the evidence failed to demonstrate a causal connection between Petitioner's alleged complaint of discrimination and the adverse employment actions taken against him. Thus, Petitioner failed to establish a prima facie case of retaliation.

134. Even if Petitioner had established a prima facie case, the College advanced legitimate, non-retaliatory reasons for the change in Petitioner's schedule and Petitioner's disciplines and termination.

135. Like the disparate treatment analysis, above, once an employer offers a legitimate, non-discriminatory reason to explain the adverse employment action, a Petitioner must prove that the proffered reason was pretext for what actually amounted to discrimination. Id. Rather than supported by credible evidence, the only support Petitioner has for the College's alleged discriminatory motives is based upon Petitioner's unsupported opinion which, standing alone, is insufficient. See Lizardo, supra.

CONCLUSION

136. Petitioner did not carry his burden of persuasion necessary to state a prima facie case for his claims of discrimination under any theory advanced by Petitioner. Even if he had, the College proved legitimate, nondiscriminatory reasons for the discipline and termination of Petitioner's employment, which Petitioner failed to show were a mere pretext for unlawful discrimination.

137. In sum, Petitioner failed to prove his Charge of Discrimination and it is otherwise concluded, based upon the evidence, that the College did not violate the Florida Civil

Rights Act of 1992, and is not liable to Petitioner for discrimination in employment, or retaliatory discharge.

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 Petitioner's Charge of Discrimination and Petition for Relief consistent with the terms of this Recommended Order.

DONE AND ENTERED this 6th day of December, 2011, in Tallahassee, Leon County, Florida.

JAMES H. PETERSON, III
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 6th day of December, 2011.

ENDNOTES

[1/] Unless otherwise indicated, all references to the Florida Statutes, Florida Administrative Code, and federal laws are to the current versions which have not substantively changed since the time of the alleged discrimination.

[2/] For instance, an example of direct evidence in an age discrimination case would be the employer's memorandum stating, "Fire [petitioner] – he is too old," clearly and directly evincing that the plaintiff was terminated based on his age. See Early v. Champion Int'l Corp., 907 F.2d 1077, 1081 (11th Cir. 1990)).

[3/] Petitioner, in his Proposed Recommended Order (PRO), argues that the College failed to investigate Petitioner's threat as reported by Mr. Westcott prior to terminating Petitioner, and, in doing so, violated its own rules. According to Petitioner, the rule that the College violated was the College's "Manual of Policy Section 6.098." See Petitioner's PRO, p. 10 (citing Exh. R-13). Policy 6.098, however, is not about discipline. Rather, Policy 6.098 is the College's policy on "Discrimination, Harassment, and Sexual Misconduct." The other College policy that was entered into evidence was its policy 6.097, titled "Grievance Procedure." Exh. R-12. There is no credible evidence that Petitioner utilized either policy, or that the College violated those policies in terminating Petitioner.

Even if the College had not followed its internal procedures in investigating Petitioner's threat, Petitioner failed to rebut the College's reason for terminating Petitioner. Cf. Springer v. Convergys Customer Mgmt. Group Inc., 509 F.3d 1344, 1350 (11th Cir. 2007)(employer's failure to follow internal procedures does not necessarily suggest discrimination, especially where plaintiff failed to show that the employer's reason for its decision was pretext). Rather than raising an inference of discriminatory intent, the evidence showed that the College president considered prior disciplines, first-hand observations by Mr. Washington, as well as Mr. Westcott's eyewitness account of the threat made by Petitioner and Mr. Washington's recommendation, before making the decision to terminate Petitioner. Under the circumstances, Petitioner's argument that the College did not investigate or that the College's actions evince a discriminatory intent is without merit.

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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.