STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RACHEL LYNN BIVINS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 11-4540
	)	
WEST FLORIDA HOSPITAL,	)	AMENDED AS TO
	)	COPIES FURNISHED
Respondent.	)	
_____	)	

RECOMMENDED ORDER ON REMAND

An administrative hearing was conducted in this case on June 20, 2012, in Pensacola, Florida, before James H. Peterson, III, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Rachel Lynn Bivins, pro se
11237 Genova Terrace
Hampton, Georgia 30228

For Respondent: Thomas M. Findley, Esquire
Messer, Caparello & Self, P.A.
Post Office Box 15579
Tallahassee, Florida 32317

STATEMENT OF THE ISSUE

Whether Respondent, West Florida Hospital (Respondent or the Hospital), violated the Florida Civil Rights Act of 1992, as amended, sections 760.01–760.11 and 509.092, Florida Statutes,[1/] by discriminating against Petitioner, Rachel Lynn Bivins

(Petitioner), in her employment with the Hospital based upon Petitioner's race.

PRELIMINARY STATEMENT

On March 15, 2011, Petitioner filed a charge of discrimination (Charge of Discrimination) with the Florida Commission on Human Relations (Commission). After investigating Petitioner's allegations, the Commission's executive director issued a Determination of No Cause on August 11, 2011, finding that "no reasonable cause exists to believe that an unlawful employment discrimination practice occurred . . . ." An accompanying Notice of Determination notified Petitioner of her right to file a Petition for Relief for an administrative proceeding within 35 days of the Notice.

On September 8, 2011, Petitioner timely filed a Petition for Relief and, on September 9, 2011, the Commission forwarded the petition to the Division of Administrative Hearings for the assignment of an administrative law judge to conduct an administrative hearing. On November 1, 2011, an Order Granting Respondent's Motion to Bifurcate Hearing Regarding Liability Issues and Remedy Issues was granted. Following a number of continuances, the final hearing on liability was held on June 20, 2012.

During the administrative hearing, Petitioner called one witness, testified on her own behalf, and introduced two

exhibits which were received into evidence as Exhibits P1 and P2. Respondent called three witnesses and offered 17 exhibits which were received into evidence as Exhibits R1 through R17.

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 one-volume Transcript of the hearing was filed on July 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. Respondent is a hospital in Pensacola, Florida.

2. Petitioner worked for the Hospital as a Housekeeper in the Environmental Services (EVS) Department from October 6, 2009, until her termination on January 3, 2011. Petitioner is black.

3. The following typed statement appears in the "Particulars" section of the Charge of Discrimination form which Petitioner filed with the Commission after her termination:

> I worked for the Respondent as a Housekeeper since October 2009. From August 2010 through December 2011, Charles Randolph (White, Housekeeping Supervisor) denied my request for paid time off nine out of eleven times. On January 2011, I called out sick and on January 03, 2011 Randolph and Jeff Lantot [sic] (White, Director of Housekeeping) terminated my employment. I

> believe I was retaliated and discriminated against because of my race, Black.
>
> In November 2010, I requested paid time off before Charlene Lewis (White, Housekeeper), but Randolph denied my request and granted her one week off. On January 3, 2011, I attempted to provide a copy of my doctor's excuse to Randolph and Lantot [sic]; however, they said that they already had a copy. In 2010, Chrystal Simpkins (White, Housekeeper) and Maria Alacon (White, Housekeeper) called out at least seven times each and were not terminated.
>
> I believe I was discriminated against in violation of Title VII of the Civil Rights Act of 1964, as amended.

4. On the same Charge of Discrimination form, out of the ten boxes provided to designate the bases for the alleged discrimination, Petitioner checked only the box indicating "RACE" as the basis for her claim.

5. Petitioner was hired by the Hospital after her interview with the Hospital's EVS Department director, Jeff Lanctot. Mr. Lanctot, who is white, made the decision to hire Petitioner. The interview worksheet prepared by Mr. Lanctot contains positive written remarks regarding Petitioner's interview.

6. Petitioner began working for the Hospital on October 6, 2009, on an as-needed (PRN) basis. She worked the evening shift. The "team lead" for Petitioner's shift was Michael Johnson. Michael Johnson is black.

7. Petitioner’s direct supervisor was Charles Randolph, the operation manager for the EVS Department. Mr. Randolph was responsible for managing the evening crew of housekeepers at the Hospital, including Petitioner. Contrary to the statement in the Charge of Discrimination, Mr. Randolph is not white. He is black.

8. The Hospital has a number of policies, including, but not limited to, a "Meal Period Policy" and an "Attendance and Tardiness Policy."

9. The Hospital's Meal Period Policy requires that non-exempt employees, such as Petitioner, clock in and out for meal periods, and also requires that employees take at least 30 minutes for the meal period. This is to comply with federal wage and hour law, because meal periods of less than thirty minutes must be counted as working time and be paid.

10. Under the Hospital's Attendance and Tardiness Policy, an employee's unscheduled absence is considered an “occurrence,” without regard to whether or not the employee had a good excuse for being absent. Each time an employee is tardy or fails to work as scheduled is also considered an “occurrence.” Six “occurrences” within a 12-month rolling calendar year, or three “occurrences” within a 30-calendar-day period, is considered “excessive.”

11. The evidence indicated that the Hospital’s Meal Period Policy and its Attendance and Tardiness Policy are applied consistently, regardless of race. When hired, Petitioner went through an orientation process and was given an employee handbook which set forth the Hospital’s policies. As a result, Petitioner was aware of both the Hospital's Meal Period Policy and its Attendance and Tardiness Policy.

12. Shortly after starting her job at the Hospital, Petitioner began to receive discipline for her violations of the Hospital's policies.

13. On December 29, 2009, within three months of starting her job, Petitioner was given a written warning for violating the Hospital’s Meal Period Policy on December 6, 14, and 26, 2009. Petitioner admitted that she understood the Meal Period Policy, and also admitted that the written warning she received on December 29, 2009, was not racially motivated.

14. Just a few weeks later, on February 1, 2010, Petitioner again violated the Hospital’s Meal Period Policy. Petitioner was given a “Final/Last Chance Agreement” disciplinary action for repeating the same policy violation for which she had received the written warning on December 29, 2010.

15. Petitioner also violated the Hospital's Attendance and Tardiness Policy. On January 28, 2010, Mr. Randolph met with Petitioner to counsel her about her absences and tardiness.

Despite the verbal counseling, Petitioner continued to be late and absent from scheduled workdays.

16. On June 24, 2010, Mr. Randolph met with Petitioner and presented her with a written warning for violation of the Attendance and Tardiness Policy, because Petitioner was absent for eight workdays within a nine-month period, and had six tardies within the past 30 days. Recent absences noted on the written warning included absences on March 3, March 8, March 27 through April 5, April 26, and May 14, 2010.[2/]

17. At the final hearing, Petitioner offered the excuse of her absences noted in the June 24, 2010, written warning, by advising that she had severely injured her finger on March 27, 2010. The first two absences noted on the written warning, however, predated her injury, and the April 26 and May 14 absences occurred well after her injury. Also, Petitioner’s doctor’s note regarding her finger injury stated that she would be out of work for only two days, but she was out for more than a week. Moreover, under the Hospital's Attendance and Tardiness Policy, it did not matter that Petitioner's absences from March 27 through April 5 may have been excused because the policy is based on “unscheduled” absences, not “unexcused” absences. In addition, the Hospital only counted Petitioner's extended absence from March 27 through April 5, as only one "occurrence."

18. The evidence indicates that Petitioner's absences noted on the June 24, 2010, written warning were accurate. At the time the written warning was issued, Mr. Randolph again verbally counseled Petitioner regarding her absences.

19. On July 8, 2010, Mr. Randolph met with Petitioner and presented her with a “Final/Last Chance Agreement Documentation” disciplinary action because she had another unscheduled absence on July 1, 2010. At the time of her July 1, 2010, absence, Petitioner had already exceeded the number of unscheduled absences allowed by the Hospital’s Attendance and Tardiness Policy. Once again, Mr. Randolph counseled Petitioner regarding her absenteeism. Petitioner understood that a “Last Chance” disciplinary action meant that if there were any more occurrences, she would be terminated.

20. Petitioner admitted that her absence on July 1 was unrelated to her finger injury. She also admitted that she had no evidence that the July 8 “Final/Last Chance” disciplinary action was motivated by her race.

21. Mr. Randolph's counseling sessions with Petitioner on January 28, 2010, June 24, 2010, and July 8, 2010, were, in effect, a form of progressive discipline, conducted with the hope that Petitioner might improve her attendance and punctuality.

22. Notwithstanding the prior Written Warning on June 24, and the “Last Chance” disciplinary action on July 8, as well as the fact that Petitioner had already exceeded the allowable number of unscheduled absences, Petitioner continued to violate the Hospital’s Attendance and Tardiness Policy.

23. Petitioner had two more unscheduled absences, one on November 12, 2010, and another on January 1, 2011. Petitioner admitted that she had no evidence to show she worked on November 12, 2010, and acknowledged that she did not work on January 1, 2011.

24. Although Petitioner claimed that the January 1, 2011, absence was for a medical reason, she had not requested or obtained advance approval from EVS Management to be out of work on that date, thus, under the Hospital's policy, her absence constituted another “unscheduled” absence.

25. Petitioner was aware that if she had six occurrences of unscheduled absences within a rolling 12-month period, she could be terminated.

26. Because Petitioner had a total of eight occurrences of unscheduled absences during the previous rolling 12-month period, and because she had received prior disciplinary actions for violation of the Hospital's Attendance and Tardiness Policy, Mr. Lanctot decided to terminate Petitioner’s employment.

27. Before actually terminating Petitioner, Mr. Lanctot had his clerical staff confirm that Petitioner had in fact been scheduled to work, and failed to work the number of times reflected on the prior disciplinary actions. His staff checked and confirmed the number of "occurrences." Mr. Lanctot also conferred with Karen Oliver, the Vice President of Human Resources for the Hospital. Ms. Oliver reviewed all of the documentation from a Human Resources perspective and concluded the termination was justified.

28. After conferring with Ms. Oliver, Mr. Lanctot met with Petitioner on January 3, 2011, to advise her of his decision to terminate her employment. During this termination conference, Mr. Lanctot explained to Petitioner that he was terminating her employment for violation of the Attendance and Tardiness Policy.

29. Petitioner was terminated that same day, January 3, 2012. At the time of her termination, she had worked for the Hospital for one year and three months.

30. EVS Department Director Jeff Lanctot made the decision to terminate Petitioner' employment. As he had explained to Petitioner, the basis for her termination was her violation of the Hospital's Attendance and Tardiness Policy.

31. At the final hearing, Petitioner acknowledged that, during her termination conference, Mr. Lanctot advised her that the reason he decided to terminate her employment was due to her

excessive unscheduled absences in violation of the Hospital's policy.

32. At no time prior to or during the termination conference did Petitioner make any complaint of race discrimination.

33. At the final hearing, while suggesting that her promotion to full-time employment was inconsistent with the Hospital's assertions that she was excessively absent, Petitioner admitted that she had no evidence that her disciplinary actions or termination were based on racial prejudice.

34. Petitioner also failed to demonstrate that a non-minority employee, with a substantially similar employment situation and disciplinary record as her own, was treated more favorably. Although Petitioner claimed that a non-minority employee named Crystal Simpkins received preferential treatment, Petitioner did not introduce admissible, non-hearsay, evidence to show the dates or time periods of Ms. Simpkins' alleged unscheduled absences and tardiness.

35. Petitioner admitted that she had never looked at Ms. Simpkins' employment file. Petitioner also admitted that Ms. Simpkins worked a different shift than Petitioner and that Ms. Simpkins had a different supervisor than Petitioner.

36. According to team lead Daisy Machuca, who was called as a witness by Petitioner, Petitioner was “missing a lot” of workdays and the Hospital applied its Attendance and Tardiness policy consistently to all its employees. Ms. Machuca's testimony in that regard is credited.

37. There is no evidence that Mr. Randolph, who is black, or Mr. Lanctot, who hired Petitioner in the first place, or anyone else at the Hospital, ever said anything to Petitioner that was racially discriminatory.

38. Petitioner failed to introduce any evidence to indicate that, following her termination, she had been replaced by a non-minority or someone who was not black.

39. There was no credible evidence adduced at the final hearing showing that the Hospital has not applied its policies consistently to all of its employees, regardless of race. And, the Petitioner failed to show that the Hospital terminated her employment because of her race. Rather, the evidence shows that the Hospital terminated Petitioner based on her violation of the Hospital’s Attendance and Tardiness Policy.

40. In addition to her claim that she was terminated because of her race, Petitioner claims that the Hospital discriminated against her with regard to its "Paid Time Off" policy. The Hospital's Paid Time Off (PTO) policy provides guidelines for requesting advance approval for all scheduled

absences. The primary factors used by the Hospital in deciding whether to approve PTO requests are the operational needs of the department, scheduling needs, the order in which the requests are received, employee PTO usage, and the length of service if two or more requests are received at the same time.

41. In order to request PTO in the Environmental Services Department, where Petitioner worked, an employee on the evening shift was required to physically hand the PTO Request form to Mr. Randolph.

42. If Mr. Randolph denied the request, the employee could then bring the request to Mr. Lanctot and ask that he review Mr. Randolph's denial of the request.

43. The Hospital maintains PTO request forms as part of its personnel records for its employees. The Hospital's records show that Petitioner submitted four requests for paid time off, and she was approved for three of her four requests.

44. According to Hospital records, Petitioner submitted her first request on May 18, 2010, to be off on June 11 and 12. That PTO request was approved by Mr. Randolph. Petitioner submitted a second request on August 19, 2010, to be off August 27 through August 29. Mr. Randolph initially disapproved this PTO request. However, Petitioner spoke to Mr. Lanctot about it, and Mr. Lanctot decided to approve the request. Petitioner admitted this PTO request was ultimately approved.

45. Petitioner submitted a third PTO request, which was undated, to be off from December 4 through December 8, 2010. Mr. Randolph denied this PTO request because two other housekeepers had already requested and been granted time off during that time. Mr. Randolph explained his reasoning to Petitioner at the time of his denial of her request.

46. Petitioner suggests that denial of her third, undated PTO request was improper because another employee received the time off but her PTO request was denied. While suggesting that the other employee received preferential treatment, Petitioner did not personally review the PTO Requests in the Hospital's files, and thus had not seen the actual PTO request submitted by the other employee. Review of the actual PTO file shows that the other employee's PTO request was not even for the same time frame as Petitioner's PTO request. Petitioner otherwise failed to show that her third PTO request was denied because of her race.

47. Petitioner submitted her fourth PTO request on November 29, 2010, requesting to be off December 12 and 13. Mr. Lanctot approved this PTO Request. In fact, Mr. Lanctot could not recall ever personally denying any of Petitioner's PTO requests. Both Mr. Randolph and Mr. Lanctot credibly testified that they did not destroy any PTO requests that were submitted to them by Petitioner.

48. Petitioner also claims that there were other PTO requests which she submitted that were denied. Those alleged requests, however, were not in the Hospital’s records. In support of her claims, Petitioner presented copies of PTO requests with her handwriting only, which were not from the Hospital’s records. Mr. Randolph denied that Petitioner had given any of these other requests to him, as required.

49. There are several inconsistencies on the copies of PTO requests that Petitioner alleges that she presented for approval but are not reflected in the Hospital's files. On some of Petitioner’s copies, there were requests for days off that predated the date of the purported PTO request. Another one of the copies included a request for leave on the same date as one of the four official PTO Request forms from Petitioner in the Hospital's files, but the signature and other writing on Petitioner's copy was starkly different than the Hospital’s official copy.

50. In addition, the only writing appearing on Petitioner’s copies is Petitioner’s own handwriting, and her copies contain no writing by any other Hospital employee. Further, the PTO request forms are required to be approved or denied in writing by a supervisor, before they become effective. Petitioner presented no records indicating the requests in her copies were ever approved or not.

51. Considering the evidence, it is found that the only PTO requests submitted by Petitioner are the four PTO requests introduced by the Hospital in Exhibit R10.

52. There is no evidence that any of Petitioner's PTO requests were denied because of Petitioner's race. The evidence presented by Petitioner was otherwise insufficient to show that the Hospital failed to apply its PTO policy, or any other policy, consistently to all of its employees, regardless of race.

53. The Hospital has an Equal Employment Opportunity (EEO) Policy that prohibits all unlawful forms of discrimination, harassment, and retaliation. The EEO policy provides four alternative ways to make a discrimination complaint: (i) report complaint to the immediate supervisor, (ii) report complaint to a member of management, (iii) report complaint to the Human Resources Department, or (iv) call a confidential 1-800 Ethics Line number.

54. Employees are notified of the Hospital’s EEO policy during orientation and during annual Code of Conduct trainings. The Hospital’s EEO Policy is also set forth in the Employee Handbook and posted on posters throughout the Hospital.

55. Petitioner was familiar with the Hospital’s EEO Policy. However, she never utilized the Hospital’s policy for making a complaint of race discrimination to anyone at the

Hospital at any time while she was employed by the Hospital. She also never called the Hospital's confidential 1-800 Ethics Hotline number displayed in the Employee Handbook and on posters throughout the Hospital. In fact, she never made any written complaint in any form to anyone about racial discrimination during her employment. And, at no time during her employment did Petitioner ever complain of race discrimination to Mr. Lanctot, Mr. Randolph, or the Hospital's Director of Human Resources, Karen Oliver.[3/]

56. The first time that Petitioner made any written complaint of race discrimination was after her termination, when she filed her Charge of Discrimination with the Commission.

57. Inasmuch as Petitioner never made any complaint of race discrimination prior to her termination of employment, it necessarily follows that Mr. Lanctot, who made the decision to terminate Petitioner's employment, had no knowledge of any such complaint at the time he made the decision to terminate her employment.

58. In sum, Petitioner failed to show that the Hospital discriminated against Petitioner by treating her differently or terminating her because of her race, and she also failed to show that the Hospital retaliated against her based on her filing a complaint of race discrimination, or because she engaged in any other protected activity.

CONCLUSIONS OF LAW

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

60. 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.

61. 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.

62. 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.

63. 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).

64. 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.[4/] 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).

65. 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. & 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.").

66. Therefore, in order to prevail in her claim against the Hospital, 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.").

67. "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.").

68. Petitioner's Charge of Discrimination against the Hospital, in essence, alleges that Petitioner was subjected to disparate treatment and terminated because of her race. Petitioner's Charge of Discrimination also mentions retaliation. Petitioner, however, failed to prove her allegations.

69. 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.

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

71. To demonstrate that similarly-situated employees outside her protected class were treated more favorably, 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.

72. As far as the verbal counseling, written warnings, and final/last chance disciplinary actions that Petitioner received

prior to her termination, Petitioner failed to present evidence that similarly-situated employees outside Petitioner's protected class were or would have been treated any differently.

73. Petitioner also failed to present sufficient evidence to show disparate treatment resulting in her discharge by failing to identify another non-minority employee accused of similar violations of the Hospital's Attendance and Tardiness Policy who was not terminated, as was Petitioner.

74. Petitioner's proof of her allegation that the Hospital unfairly denied her PTO requests was also lacking.

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

76. 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).

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

78. The Hospital demonstrated that the disciplinary actions taken against Petitioner, including her termination, were legitimate and based on Petitioner's violations of the

Hospital's policies. The Hospital also presented evidence showing that most of Petitioner's PTO requests were granted, and that the one denial was fair and in accordance with the Hospital's protocol.

79. The evidence demonstrated that the Hospital acted on the Petitioner's repeated violations of policy without regard to her race, and demonstrated that it had legitimate, non-discriminatory reasons for taking the actions that it did in disciplining and terminating Petitioner. The evidence also showed that the Hospital did not unfairly deny any of Petitioner's PTO requests, and had a legitimate reason for the one denial.

80. Petitioner offered no proof that the Hospital's proffered reasons for disciplining or discharging her, or for denying her PTO request, 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 [her] 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).

81. Although Petitioner felt that the reasons for her discipline and termination must have been discriminatory, the evidence does not support her claim. Petitioner's speculation as to the motives of the Hospital, standing alone, 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) (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.").

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

83. Petitioner also failed to demonstrate that the Hospital unlawfully retaliated against her. 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 she was engaged in statutorily-protected expression or conduct; (2) that she suffered an adverse employment action; and (3) that there is some causal relationship between the two events. Holifield, 115 F.3d at 1566.

84. Petitioner failed to establish a causal link between any alleged protected conduct and the adverse employment actions.

85. As to whether Petitioner was engaged in statutorily-protected conduct or expression, Petitioner asserted at the final hearing, for the first time, that, prior to her termination, she complained about a sexual comment made by her supervisor. Her claim of retaliation, as set forth in her Charge of Discrimination, however, is based on race, not gender or sexual harassment. As noted in the Findings of Fact, above, there is no evidence that Petitioner, prior to her discharge, complained that she was being discriminated against because of her race.

86. Petitioner's assertion, for the first time at the final hearing, that her complaint about her supervisor's sexual comment somehow supports her claim for retaliation, is beyond the scope of her Charge of Discrimination. Therefore, her claim of retaliation on that basis is not cognizable in this proceeding. See Chambers v. American Trans Air, Inc., 17 F.3d 998, 1003 (7th Cir. 1994)("[T]o prevent circumvention of the [FCHR's] investigatory and conciliatory role, only those claims that are fairly encompassed within a [timely-filed complaint] can be the subject of [an administrative hearing conducted pursuant to Sections 120.569 and 120.57, Florida Statutes]").

87. Even if Petitioner had timely asserted her complaint about her supervisor's sexual comment in support of her claim of retaliation, the Hospital advanced legitimate, non-retaliatory reasons for Petitioner's disciplines and termination, as well as the manner in which Petitioner's PTO requests were handled.

88. Like the disparate treatment analysis, above, in claims asserting retaliation, 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 Hospital's alleged discriminatory motives is based upon Petitioner's unsupported opinion which, standing alone, is insufficient. See Lizardo, supra.

89. Petitioner did not carry her burden of persuasion necessary to state a prima facie case for her claims of discrimination or retaliation under any theory advanced by Petitioner. Even if she had, the Hospital 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.

90. Therefore, it is concluded, based upon the evidence, that the Hospital did not violate the Florida Civil Rights Act

of 1992, and is not liable to Petitioner for discrimination in employment or unlawful retaliation.

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 4th day of December, 2012, in Tallahassee, Leon County, Florida.

JAMES H. PETERSON, III
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 4th day of December, 2012.

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/] Even though Petitioner was having trouble following the Hospital's policies, Mr. Lanctot changed Petitioner's employment status from PRN to full-time with benefits, because Petitioner was working a lot of hours.

[3/] Although not mentioned in her Charge of Discrimination, at the final hearing, there was evidence that, prior to her termination, Petitioner complained to Ms. Oliver about her supervisor, Mr. Randolph. Petitioner recalled that it was in late November or early December, 2011. According to Petitioner, she complained because Mr. Randolph had asked Petitioner something about her sex life. Ms. Oliver recalled that Petitioner and a co-worker had met with her to complain about Mr. Randolph's management style; that he was overseeing them too diligently. Ms. Oliver could not recall the exact timing of the meeting, but estimated that it was several months before Petitioner's termination. Aside from being beyond the scope of Petitioner's Charge of Discrimination, the evidence adduced at the final hearing did not otherwise show that Petitioner's discipline, termination, or the way she was treated as an employee were in any way related to her complaint about Mr. Randolph.

[4/] 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)).

COPIES FURNISHED:

Rachel Lynn Bivins
11237 Genova Terrace
Hampton, Georgia 30228

Thomas M. Findley, Esquire
Messer, Caparello & Self, P.A.
Post Office Box 15579
Tallahassee, Florida 32317

Denise Crawford, Agency Clerk
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

Cheyanne Costilla, Interim General Counsel
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

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.