STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARY S. RANDOLPH,

Petitioner,

vs. Case No. 14-3682

WALTON COUNTY BOARD OF COUNTY COMMISSIONERS,

Respondent.
_____/

RECOMMENDED ORDER

Administrative Law Judge Edward T. Bauer held a final hearing in this case in DeFuniak Springs, Florida, on October 14, 2014.

APPEARANCES

For Petitioner: Mary S. Randolph, pro se
623 Knox Hill Road
Ponce de Leon, Florida 32455

For Respondent: John Forth Dickinson, Esquire
Constangy, Brooks & Smith, LLP
200 West Forsyth Street, Suite 1700
Jacksonville, Florida 32202

STATEMENT OF THE ISSUES

Whether Respondent committed the unlawful employment practices alleged in the Charge of Discrimination filed with the Florida Commission on Human Relations ("FCHR") and, if so, what relief should Petitioner be granted.

PRELIMINARY STATEMENT

On January 14, 2014, Petitioner filed a Charge of Discrimination ("Complaint") with FCHR alleging that the Walton County Board of County Commissioners ("Respondent") terminated her from employment because of her race. Following its investigation of the Complaint, FCHR notified the parties that there was "no reasonable cause to believe that an unlawful employment practice occurred."

Petitioner elected to pursue administrative remedies, timely filing a Petition for Relief with FCHR on or about August 12, 2014. Subsequently, on August 13, 2014, FCHR referred the matter to the Division of Administrative Hearings ("DOAH") for further proceedings.

During the final hearing, Petitioner testified on her own behalf and introduced the following pages from her exhibit package: 1 through 63 and 66 through 75. Respondent presented the testimony of two witnesses (Tom Baker and Brady Bearden) and introduced 8 exhibits, numbered 1 through 8.

The final hearing Transcript was filed with DOAH on November 4, 2014. Both parties filed Proposed Recommended Orders, which the undersigned has considered in the preparation of this Recommended Order.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2013 codification.

FINDINGS OF FACT

1. At all times material to this proceeding, Petitioner, an African-American female, was employed by Respondent as a clerk coordinator in its Section 8 housing[1/] department.

2. As established during the final hearing, Petitioner's duties required her, among other things, to field inquiries concerning rental assistance, maintain records, receive applications, and, of particular importance here, conduct inspections of rental properties. As Petitioner was responsible for transporting herself to the inspection sites (at first in her personal automobile and, beginning in April 2012, in a county-issued vehicle), her written job description mandated that she hold a valid driver's license.

3. Petitioner's term of employment, which began in 1990, proceeded largely without incident until September 19, 2013. On that occasion, Tom Baker——Petitioner's supervisor and the head of Respondent's Section 8 department——was engaged in discussions with the DeFuniak Springs Housing Authority concerning the development of a memorandum of understanding between the two agencies. At one point during the talks, DeFuniak Springs' housing director suggested that Mr. Baker confirm the status of

his employees' driver's licenses. Finding the suggestion well taken, Mr. Baker immediately asked Brady Bearden, Respondent's loss control manager, to perform driver's license checks of the employees in the Section 8 department.

4. Later in the day on September 19, Mr. Bearden informed Mr. Baker that Petitioner's license was not valid (due to her failure to maintain liability insurance), and that Petitioner's driving privilege had been continuously suspended since January 2, 2013——a period of more than *eight months*, during which Petitioner had operated a county-owned vehicle on numerous occasions.

5. Although eager to address this issue with Petitioner, Mr. Baker was unable to do so until the morning of September 24, 2014, when Petitioner returned from a vacation. During the discussion that ensued, Petitioner erroneously insisted that she did, in fact, hold a valid driver's license. Upon being shown documentation that refuted her claim, Petitioner stated that she would clear up the matter with the clerk of court and return to work later in the day.

6. Over the course of the next few hours, Petitioner obtained liability insurance and took the necessary steps to reinstate her driver's license. Later that afternoon, Petitioner returned to work and explained that she had trusted

her daughter to secure automobile insurance for the both of them; that her daughter had failed to do so; and that she (Petitioner) had no knowledge of the suspension until Mr. Baker informed her as much.

7. Predictably, this explanation did not sit well with Mr. Baker, who was troubled by Petitioner's acute lack of diligence in maintaining a valid driver's license——as noted above, a prerequisite of her position as a housing clerk coordinator. Shortly thereafter, Mr. Baker recommended to Respondent's human resources department that Petitioner's employment be terminated for violations of policies 31.4(A), 31.4(C), and 31.5(A), which provide:

> 31.4 POLICY
>
> A. Any employee who loses the use of his/her driving privileges, whether knowingly or unknowingly, for any reason other than a temporary medical/disability condition, will be subject to disciplinary action, or transfer to another job classification, if available, for failing to meet the minimum qualifications of the job description.
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> * * *
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> C. Driving a County vehicle . . . without an appropriate valid driver's license . . . or failure to report the loss or use of a valid license, whether by suspension, revocation, or cancellation is subject to disciplinary action up to and including termination.

> 31.5 POLICY
>
> A. Any employee who loses the use of his/her license shall report that fact to his/her immediate supervisor at the earliest possible time, and not later than the beginning of the next work shift. Failure to do so may result in disciplinary action.

(Emphasis added).

8. During the final hearing in this cause, Petitioner offered no direct evidence in support of her claim of race discrimination. Instead, Petitioner attempted to prove her case circumstantially by identifying two supposed comparators, Kendalleigh Marse and Jerry Tuggle, both of whom, according to Petitioner, were not terminated by Respondent despite their commission of similar misconduct.

9. This approach fails, for neither Ms. Marse nor Mr. Tuggle is a valid comparator for the purposes of establishing a prima facie case of race discrimination. First, the undersigned is not persuaded that the driving privileges of the purported comparators were ever actually suspended.[2/] Even assuming, however, that the record permits such a finding, it is evident that the suspensions were relatively brief, particularly when compared to Petitioner's.[3/] Moreover, again assuming that the driving privileges of Ms. Marse and Mr. Tuggle were suspended for *any* period of time, there has been no showing that either employee ever operated a county-owned vehicle without a

valid license. In any event, the record makes pellucid that, at the time of Petitioner's termination, no one in Respondent's employ was aware of any issues concerning the driver's licenses of Ms. Marse or Mr. Tuggle.[4/]

10. Even if the evidence were sufficient to raise an initial inference of impropriety, which it is not, Petitioner has failed to prove that Respondent's proffered reason for the firing——i.e., driving on a suspended license in a county-issued vehicle for more than eight months——is a mere pretext for race discrimination. On the contrary, the undersigned credits Mr. Baker's testimony that race placed no role whatsoever in Petitioner's termination.

CONCLUSIONS OF LAW

I. Jurisdiction

11. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to sections 120.569, and 120.57(1), Florida Statutes (2014).

II. The FCRA

12. The Florida Civil Rights Act of 1992 ("the FCRA"), chapter 760, Florida Statutes, prohibits discrimination in the workplace. Among other things, the FCRA makes it unlawful for an employer:

> To discharge or to fail or refuse to hire any individual, or otherwise to discriminate

> 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.

13. The FCRA, as amended, was patterned after Title VII of the Civil Rights Acts of 1964 and 1991 ("Title VII"), as well as the Age Discrimination in Employment Act ("the ADEA"). As such, federal decisional authority interpreting Title VII and the ADEA is applicable to cases arising under the FCRA. Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17, 21 (Fla. 3d DCA 2009); Fla. State Univ. v. Sondel, 685 So. 2d 923, 925 n.1 (Fla. 1st DCA 1996).

14. Complainants alleging unlawful discrimination may prove their case using direct evidence of discriminatory intent. Direct evidence is evidence that, if believed, would prove the existence of discriminatory intent without resort to inference or presumption. Denney v. City of Albany, 247 F.3d 1172, 1182 (11th Cir. 2001). "[O]nly the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of some impermissible factor constitute direct evidence of discrimination." Wilson v. B/E Aerospace, Inc., 376 F.3d 1079, 1086 (11th Cir. 2004)(internal quotation marks omitted).

15. When no direct proof of discrimination exists, the employee may attempt to establish a prima facie case circumstantially through the burden-shifting framework articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973). Failure to establish a prima facie case of discrimination ends the inquiry. See Kidd v. Mando Am. Corp., 731 F.3d 1196, 1202 (11th Cir. 2013). If, however, the employee succeeds in making a prima facie case, the burden then shifts to the employer to articulate a legitimate, non-discriminatory reason for its complained-of conduct. Id. This intermediate burden of production, not persuasion, is "exceedingly light." Vessels v. Atlanta Indep. Sch. Sys., 408 F.3d 763, 769-70 (11th Cir. 2005). Should the employer meet this burden, the employee must then establish that the proffered reason was not the true reason for the employment decision, but rather a pretext for discrimination. Kidd, 731 F.3d at 1202. Notwithstanding these shifts in the burden of production, the ultimate burden of persuasion remains at all times with the employee. Id.

III. The Charge

16. With this framework in place, the undersigned turns to the charge of discrimination pleaded in the Complaint——namely, that Respondent terminated Petitioner because of her race.

17. As detailed previously, the record is devoid of any direct evidence of race discrimination. Accordingly, Petitioner's claim is analyzed pursuant to the McDonnell Douglas burden-shifting framework. In this context, Petitioner can establish a prima facie case of race discrimination upon proof of four elements: 1) that she was a member of a protected class; 2) that she was qualified for the position; 3) that she was subjected to an adverse employment action; and 4) that her employer treated similarly-situated employees outside of her protected class more favorably than she was treated. Burke-Fowler v. Orange Cnty., 447 F.3d 1319, 1323 (11th Cir. 2006).[5/]

18. The first three elements of the foregoing test are obviously satisfied, as the evidence demonstrates that Petitioner is a member of a protected class; that she was qualified for the position,[6/] see Gregory v. Daly, 243 F.3d 687, 696 (2d Cir. 2001)(holding that a plaintiff "need only make the minimal showing that she possesses the basic skills necessary for the performance of [the] job" to satisfy the requirement that the plaintiff was qualified); and that she was subjected to an adverse action——here, termination.

19. As for the fourth element, however, Petitioner has failed to prove that the supposed comparators, Ms. Marse and Mr. Tuggle, were "similarly situated [to her] in all relevant

respects." Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997). As detailed previously, Ms. Marse and Mr. Tuggle's driving privileges were suspended, if at all, for durations far shorter than Petitioner's, and there is no evidence that either of the potential comparators ever operated a county-owned vehicle while their licenses were invalid.[7/] On these facts, it cannot be said that the "individuals with whom [Petitioner] seeks to compare [her] treatment . . . have engaged in the same misconduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it." Younis v. Pinnacle Airlines, Inc., 610 F.3d 359, 364 (6th Cir. 2010)(quoting Mitchell v. Toledo Hosp., 964 F.2d 577, 583 (6th Cir. 1992)); Maniccia v. Brown, 171 F.3d 1364, 1368 (11th Cir. 1999)("We require that the quantity and quality of the comparator's misconduct be nearly identical to prevent courts from second-guessing employers' reasonable decisions and confusing apples with oranges.").

20. In any event, Ms. Marse and Mr. Tuggle's driver's license issues are irrelevant here, as neither Mr. Baker nor any other decisionmaker knew of their suspensions at the time of Petitioner's termination. See Landry v. Lincare, Inc., 2014 U.S. App. LEXIS 16651 (11th Cir. Aug. 28, 2014)("Even if a

similarly situated comparator exists, the comparator's actions are relevant only if the plaintiff shows that the decisionmaker knew of the comparator's prior similar acts"); Jones v. Gerwens, 874 F.2d 1534, 1542 (11th Cir. 1989)(holding that a comparator's actions are relevant only if the plaintiff shows that the decisionmaker was aware of the comparator's prior similar conduct).

21. Finally, even assuming arguendo that Petitioner has established a prima facie case of race discrimination, Respondent has provided legitimate, nondiscriminatory reasons for the termination (Petitioner's lengthy driver's license suspension, and the fact that she operated a county-owned vehicle during that span), and Petitioner has failed to prove that Respondent's explanations were mere pretext for discrimination. See Kidd v. Mando Am. Corp., 731 F.3d 1196, 1202 (11th Cir. 2013)("Because the burden of persuasion remains with the employee, she must then show that the seemingly legitimate reason the employer gave was pretextual -- i.e., the proffered reason was not the true reason for the employment decision.")(internal quotation marks omitted).

22. For the reasons elucidated above, Petitioner's charge of race discrimination must be dismissed.

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 adopting the Findings of Fact and Conclusions of Law contained in this Recommended Order. Further, it is RECOMMENDED that the final order dismiss the Petition for Relief.

DONE AND ENTERED this 1st day of December, 2014, in Tallahassee, Leon County, Florida.

Edward T. Bauer
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 1st day of December, 2014.

ENDNOTES

[1/] Section 8 of the Housing Act of 1937, known colloquially as "Section 8," authorizes the payment of rental housing assistance to private landlords on behalf of low-income households.

[2/] Pursuant to section 318.15(1)(a), Florida Statutes, the failure to pay a traffic fine by the prescribed deadline does not immediately result in the suspension of the motorist's

driving privileges. Instead, the clerk of court transmits a "D6" suspension notice to the Department of Highway Safety and Motor Vehicles ("DHSMV"), at which point DHSMV "immediately" issues an "order suspending the driver license and privilege to drive of such person effective 20 days after the order of suspension is mailed." Id. (emphasis added).

With this framework in mind, Petitioner's exhibits, which include case progress notes from the Walton County Clerk of Court, fail to demonstrate conclusively that the driver's licenses of Ms. Marse or Mr. Tuggle were ever suspended. While it is true that a "D6" notice was issued on April 12, 2012, when Ms. Marse failed to pay a traffic citation by the deadline, the situation was fully resolved on or before May 9, 2012 (27 days later). As the record is silent as to when DHSMV mailed the order of suspension——the event that would trigger the 20-day timeline pursuant to section 318.15(1)(a)——it is entirely possible that Ms. Marse satisfied the fine before the suspension took effect.

As for Mr. Tuggle, the case progress notes indicate that, with respect to two separate traffic citations, "D6" notices were issued on December 18, 2008, and June 23, 2009; the first was satisfied within 25 days (January 12, 2009), while the second was resolved within 28 days (June 23, 2009). Again, though, the record does not reflect when DHSMV mailed its suspension orders, which makes it impossible to determine if the 20-day periods expired before Mr. Tuggle paid the citations.

[3/] Assuming for argument's sake that DHSMV mailed its 20-day suspension orders on the earliest possible occasions——i.e., on the same dates it received the "D6" notices——Ms. Marse's license would have been suspended for not more than seven days, while Mr. Tuggle's driving privilege would have been suspended for a total of 13 days (five days in connection with the first citation, and eight days for the second). It need hardly be said that these totals pale in comparison to Petitioner's eight-month license suspension.

[4/] Hr'g Tr. 47-49; Resp't Ex. 2.

[5/] Alternatively, Petitioner could have established the fourth prong of her prima facie case with proof that she was replaced by a person outside her protected class. Cuddeback v. Fla. Bd. of Educ., 381 F.3d 1230, 1235 (11th Cir. 2004). However, the

record is devoid of evidence concerning who, if anyone, filled Petitioner's position. See Giles v. Daytona State Coll., Inc., 542 Fed. Appx. 869, 872-73 (11th Cir. 2013)(holding that plaintiff failed to establish a prima facie case of race discrimination where she failed to identify her replacement).

[6/] Although it is undisputed that Petitioner reinstated her driver's license shortly before her termination, Respondent nevertheless argues that the length of the suspension rendered Petitioner unqualified for her position. This argument misses the mark, for the relevant inquiry is whether Petitioner possessed the basic job qualifications at the time the adverse action was taken. See Risk v. Burgettstown Borough, 364 Fed. Appx. 725, 729 (3d Cir. 2010)(explaining that to satisfy the "qualified for the position" prong of the McDonnell Douglas framework, the employee must demonstrate that she was qualified "at the time of the adverse action."). Further, this contention improperly conflates the qualification prong with Respondent's legitimate, non-discriminatory reason for the adverse action. See Slattery v. Swiss Reinsurance Am. Corp., 248 F.3d 87, 92 (2d Cir. 2001)("The qualification prong must not, however, be interpreted in such a way as to shift onto the plaintiff an obligation to anticipate and disprove, in his prima facie case, the employer's proffer of a legitimate, non-discriminatory basis for its decision. As we have repeatedly held, the qualification necessary to shift the burden to defendant for an explanation of the adverse job action is minimal"); Hawn v. Exec. Jet Mgmt., 546 F. Supp. 2d 703, 717 (D. Ariz. 2008)("Defendant argues that the misconduct itself renders the Plaintiffs unqualified for the positions. The court does not however come to the same conclusion . . . . [U]nder such a regime, the remainder of the McDonnell Douglas framework, and the prima facie case for that matter, would be rendered superfluous.").

[7/] To be sure, Mr. Tuggle's tenure as a truck driver with Respondent was hardly enviable. Indeed, the record contains a memorandum dated September 8, 2010, wherein Mr. Tuggle's supervisor chides him for "a number of unsafe acts and inattentiveness while operating [his] assigned County vehicle." Pet'r Ex. p. 50. It also appears that, following several other mishaps, Mr. Tuggle was demoted to the position of laborer. Nevertheless, it cannot be said, at least on this record, that Mr. Tuggle ever operated a county-owned vehicle without a valid driver's license. Such a distinction is sufficient alone to render Mr. Tuggle an invalid comparator.

COPIES FURNISHED:

Mary S. Randolph
623 Knox Hill Road
Ponce de Leon, Florida 32455

John Forth Dickinson, Esquire
Constangy, Brooks & Smith, LLP
200 West Forsyth Street, Suite 1700
Jacksonville, Florida 32202
(eServed)

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

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.