STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SHEILA ANNETTE CUNNINGHAM,

Petitioner,

vs. Case No. 14-5350

FLORIDA CREDIT UNION,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, this case was heard on March 12, 2015, in Gainesville, Florida, before E. Gary Early, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Sheila A. Cunningham, pro se
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Ocala, Florida 34475

For Respondent: R. Michelle Tatum, Esquire
John E. Duvall, Esquire
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STATEMENT OF THE ISSUE

Whether the Petitioner, Sheila A. Cunningham, was subject to an unlawful employment practice by Respondent, Florida Credit Union, on account of her race or due to retaliation for her

opposition to an unlawful employment practice in violation of section 760.10, Florida Statutes.

PRELIMINARY STATEMENT

On May 15, 2014, Petitioner filed a complaint of discrimination with the Florida Commission on Human Relations (FCHR) which alleged that Respondent violated section 760.10, by discriminating against her on the basis of her race or as retaliation.

On October 6, 2014, the FCHR issued a Determination: No Cause and a Notice of Determination: No Cause, by which the FCHR determined that reasonable cause did not exist to believe that an unlawful employment practice occurred. On November 10, 2014, Petitioner filed a Petition for Relief with the FCHR. The Petition was transmitted to the Division of Administrative Hearings to conduct a final hearing.

The final hearing was scheduled for January 12, 2015. The hearing was continued, and reset for hearing by video teleconference in Tallahassee, Florida, and Gainesville, Florida, on February 19, 2015, and was convened as scheduled. Due to a scheduling problem at the Gainesville location, the hearing had to be adjourned before any substantive issues could be taken up. As a result, the hearing was rescheduled for March 12, 2015, in Gainesville, Florida, and was held on that date as scheduled.

At the final hearing, Petitioner testified on her own behalf, and presented the testimony of Courtney Gerard Cunningham, her son; and Cynthia Lucille Littles Reaves, an employee of Service Master. Petitioner offered no exhibits in evidence. Respondent presented the testimony of Wesley Garrett Colson, its Vice-President of Risk Management. Respondent's Exhibits 1, 4-15, 15a, and 16-19 were received into evidence.

A one-volume Transcript was filed on April 16, 2015. Twenty days from the date of the filing of the Transcript was established as the time for filing post-hearing submittals. On March 18, 2015, Petitioner filed a document entitled "Copies of Petitioner's Rebuttal" that consisted of a cover letter and 15 pages of correspondence submitted to the FCHR investigator. The evidentiary record of this proceeding having closed at the conclusion of the final hearing, the undersigned cannot consider that additional correspondence. On March 27, 2015, Petitioner filed a Proposed Recommended Order Summary that included, along with three non-consecutive pages of summation and requests for relief, 17 pages of additional exhibits. The evidentiary record of this proceeding having closed at the conclusion of the final hearing, the undersigned cannot consider those additional exhibits. Respondent filed its Proposed Recommended Order on April 17, 2015. On April 27, 2015, Petitioner filed a Final Proposed Recommended Order that included 4 pages of additional

exhibits. The evidentiary record of this proceeding having closed at the conclusion of the final hearing, the undersigned cannot consider those additional exhibits. The post-hearing submittals of the parties, exclusive of additional correspondence and exhibits, have been considered in the preparation of this Recommended Order.

References to statutes are to Florida Statutes (2014) unless otherwise noted.

FINDINGS OF FACT

1. Petitioner, who was at all times relevant to this matter an employee of Respondent, is African-American.

2. There was no direct testimony as to the number of persons employed by Respondent. However, given the testimony describing a large financial institution with multiple departments, including a data scanning department and a call center, there is sufficient competent, substantial evidence to establish an inference that Respondent employs more than 15 full-time employees at any given time.

3. Petitioner was first hired by Respondent on November 20, 2007. On February 2, 2008, she was transferred to the position of Courtesy Pay Credit Advisor (CPCA), a position held until her termination on March 21, 2014.

4. From 2012 through the time of her termination, Jennifer Perez was Petitioner's direct supervisor. Ms. Perez reported to Mr. Colson, who supervised the credit advisor department.

5. Over the years, Petitioner received a number of certificates and awards for good performance in her position.

6. CPCAs are responsible for collections on delinquent accounts of members by bringing the account to a positive balance within 60 days of delinquency.

7. If a credit union member's account is delinquent for more than 60 days, it must be written off, resulting in a loss to Respondent. Failure to timely write-off a negative account can subject Respondent to fines and negative audit ratings.

8. A common way of bringing an account current is to arrange a loan with Respondent to pay the delinquent balance. Loan types include a "bounce-free" loan and a "work-out loan." Both are designed to allow for payment of the negative account in installment payments. The bounce-free loan has only the negative account balance involved, while the work-out loan combines the negative balance with another existing loan. CPCAs receive additional compensation for such loans, known as "incentives," of $10 to $15, though the record suggests that a dispute over an incentive of $40 was a triggering cause of the adverse employment action in this case.

9. CPCAs are also responsible for "packing" loans, which includes taking the loan paperwork to the optical department to input and image the documents into Respondent's system. The optical department periodically provides reports on loans for which documentation has not been submitted for input and imaging. Petitioner testified credibly that the optical department would occasionally neglect to scan loans that were submitted. However, there was no evidence to suggest that to be a frequent or pervasive problem.

10. Respondent routinely employs one or two CPCAs at any given time. The CPCAs are assigned a "queue," which is an alphabetical assignment of member accounts. The evidence suggests that Petitioner served as the CPCA for all delinquent member accounts for a period of almost one year, a practice that ended when Vikki Martello was hired as a CPCA on February 27, 2012. Upon her hiring, Ms. Martello was assigned the accounts of members with last names beginning with the letters A through K, and Petitioner was assigned the accounts of members with last names beginning with the letters L through Z. Ms. Martello was transferred to another position on July 11, 2013. Jennifer Munyan was hired as a CPCA on May 20, 2013, and was assigned the A through K queue. Since Petitioner's termination, Ms. Munyan has handled all delinquent accounts.

11. Petitioner mentioned several incidents over the course of her employment that she believed to be evidence of her poor treatment by Respondent. These incidents appear to have occurred more than one year before Petitioner filed her employment complaint of discrimination. They are cited here for purposes of background.

12. Petitioner testified that starting in 2010 or 2011, Respondent began to hire younger credit advisors on the basis of their friendship with management. The new employees engaged in childish activities such as throwing paper clips and blowing bubbles. Petitioner indicated that they were "written up" for those activities. There was no suggestion that either the hiring or the write-ups were based on race.

13. For a period of time, Petitioner was assigned what she believed to be a disproportionate share of holiday weekend shifts. Mr. Colson "corrected that and then that was okay." There was no suggestion that the issues with scheduling were based on race.

14. Shortly after Ms. Martello was hired on February 27, 2012, she was asked to accompany Mr. Colson and Ms. Perez to a branch office to train employees. Petitioner felt "that was not right," and that she was being excluded from performing certain job tasks. She testified that Respondent's assignment of training and other duties to persons other than herself led to a

sympathetic nick-name of "invisible credit advisor." Petitioner admitted that, in her opinion, Ms. Martello was an excellent employee. Mr. Colson testified credibly that Petitioner was not asked to assist in the new hire training since she was already behind on managing her accounts, and that "[t]here's no compensation or award or anything for training another employee, it's just additional work." There was no suggestion that the decision to have Ms. Martello assist with training was based on race.

15. Petitioner alleged that despite her requests, she was not allowed to shadow other employees, particularly in the call center, so that she could learn the responsibilities of the member service representative position. She testified that in response to her requests, Ms. Perez would say "okay, we'll see about it, but nothing never happened. And I asked like three or four times and it was always we'll see about it." Petitioner did not claim in her testimony that she was denied these opportunities because of her race.

16. Petitioner generally claimed she was denied promotional opportunities because she was not allowed to train as a back-up. However, she failed to present any evidence of an open and available position for which she had applied, or for which she was denied. Furthermore, there was no suggestion that race played a role in any such denial.

17. Respondent's employees are informed of work performance issues in several ways, including informal discussions, e-mail communication, individual or group meetings, coaching reports, and annual evaluations.

18. On March 19, 2012, Petitioner received her annual performance review. Although Respondent was complementary of Petitioner's improvements in her work, and spoke favorably of her interpersonal relationships and work ethic, the review noted a number of "improvement opportunities and development areas" to be implemented over the course of the following year. Deficiencies in job performance included Petitioner's practice of making initial contact with a delinquent member by letter, rather than the more effective practice of a phone call; the failure to provide sufficiently descriptive account notations; the failure to "charge off" loans correctly resulting in errors for others to correct; the failure to close checking accounts after workout options or loans were complete resulting in further delinquencies; and the failure to set up loan distributions correctly, resulting in unwarranted loan delinquencies and resultant customer complaints. The performance review also cited issues with Petitioner's negative accounts extending beyond the required time frame, which was noted in Respondent's quarterly audit report. The deficiencies

noted in the performance review resulted in higher than normal charge-offs, and losses to Respondent.

19. Petitioner improved her performance in some areas, but only for short periods of time. Mr. Colson did not issue Petitioner any coaching reports in 2012 because he believed that Petitioner's mistakes were not intentional, that she had a positive attitude, that she had no attendance issues, and that "she seemed to like her job a lot." It was Mr. Colson's belief that with additional training and a cooperative approach, Petitioner's performance issues could be corrected.

20. On February 27, 2013, Petitioner received her next annual performance review. Petitioner was again complemented on her interaction with members, her teamwork, and her general positive work ethic. It was noted that Petitioner had responded well to coaching such that she rarely made mistakes in setting up automatic loan payments. The review noted, however, a number of areas for improvement, including some that had not been resolved from the previous year's review. Of particular concern was the high number of missing loan packets, some of which were months past due; the failure to meet consecutive deadlines for submitting completed work; and the failure to begin work on accounts in an appropriate and timely manner. Petitioner was again instructed to make initial contact with delinquent members by phone or email, rather than by letter; and was advised of

several of her accounts that were charged-off after missing the 60-day deadline. Finally, Petitioner was provided with a printout of the 142 overdrawn checking accounts in her queue, only 40 of which (28 percent), had been worked in the previous 60 days. Although some early-stage overdraft accounts carried a "high self-cure rate," the low number of accounts worked was deemed unacceptably low.

21. After receiving her 2013 performance review, Petitioner improved in some areas of her performance, but again only for a short period of time.

22. Beginning on July 15, 2013, Petitioner, Ms. Martello (until she completed her transfer from the collections department), and Ms. Munyan (upon her assignment to the collections department) were provided with periodic email updates from Ms. Perez on the number of loan packets for which each was responsible that had not been submitted to the optical department. The updates and related correspondence between Petitioner and Ms. Perez revealed the following:

July 15, 2013
Petitioner - 37 missing loan packets
Ms. Martello - 4 missing loan packets

July 19, 2013
Petitioner - 36 missing loan packets
Ms. Martello - 6 missing loan packets

July 30, 2013
Petitioner - 34 missing loan packets
Ms. Martello - 5 missing loan packets

August 5, 2013
Petitioner - 29 missing loan packets
Ms. Martello - 2 missing loan packets
Ms. Munyan - 1 missing loan packet

August 14, 2013
Petitioner - 31 missing loan packets
Ms. Munyan - 2 missing loan packets

August 19, 2013
Petitioner - 38 missing loan packets
Ms. Munyan - 5 missing loan packets

August 27, 2013
Petitioner - 42 missing loan packets
Ms. Munyan - 4 missing loan packets

September 3, 2013
Petitioner - 38 missing loan packets
Ms. Munyan - 5 missing loan packets

September 10, 2013
Petitioner - 42 missing loan packets
Ms. Munyan - 5 missing loan packets

September 16, 2013
Petitioner - 32 missing loan packets
Ms. Munyan - 4 missing loan packets

On September 18, 2013, Ms. Perez sent an email to Petitioner and Ms. Munyan advising them that credit union auditors were scheduled to arrive on September 30, 2013. Thus, Petitioner and Ms. Munyan were instructed to "[m]ake sure all of your loan packets are up to date, so that no one comes to us requesting something that cannot be located."

October 1, 2013 (for loan packets through September 27)
Petitioner - 38 missing loan packets
Ms. Munyan - 3 missing loan packets

The October 1, 2013, update further advised Petitioner and Ms. Munyan that "[t]he auditors are here for the next three weeks. If they review any of these loans, it will be a problem that we do not have them scanned yet and if we are missing documents. Please get these turned in this week!" On October 12, 2013, Petitioner sent Ms. Perez an email stating that "I worked on some loan packets on 10/12. Please don't send email until I turn my loan packets in on 10/16."

October 25, 2013
Petitioner - 20 missing loan packets
Ms. Munyan - 7 missing loan packets

November 4, 2013
Petitioner - 28 missing loan packets
Ms. Munyan - 4 missing loan packets

November 12, 2013
Petitioner - 33 missing loan packets
Ms. Munyan - 5 missing loan packets

On November 15, 2013, Petitioner sent Ms. Perez an email stating that "Optical have some loan packets that were turned in today, please don't send out list until after 11/18/13."

November 22, 2013
Petitioner - 35 missing loan packets
Ms. Munyan - 7 missing loan packets

December 11, 2013
Petitioner - 41 missing loan packets
Ms. Munyan - 1 missing loan packet

December 18, 2013
Petitioner - 32 missing loan packets
Ms. Munyan - 2 missing loan packets

23. On October 9, 2013, Mr. Colson met with Petitioner and Ms. Munyan to discuss the results of an attorney audit that was critical of several collections practices. In particular, too many accounts were not being worked until the later stage of delinquency; too much time was allowed to elapse between contacts with the members; and workflow notations were not properly completed. A spreadsheet provided during the October 9, 2013, meeting revealed that Petitioner had 92 accounts in her queue, 57 of which had never been worked. Ms. Munyan had 90 accounts in her queue, 25 of which had never been worked.

24. In November of 2013, Petitioner spoke with Ms. Perez regarding an incident in which Petitioner alleged that Ms. Munyan claimed one of her incentive credits. Ms. Perez advised Petitioner to come back to her if it occurred again.

25. Ms. Perez discussed the incentive issue with Mr. Colson. They determined that, due to a high volume of negative accounts anticipated over the upcoming holidays, and in recognition of the priority on not missing an opportunity to resolve negative accounts, a policy for incentives when a CPCA had to handle incoming calls and loan requests from members who were not in the CPCA's queue was warranted.

26. On November 19, 2013, Ms. Perez sent an e-mail to Petitioner and Ms. Munyan setting out the policy for handling

calls when the other CPCA was not available. Outgoing calls and loan initiation were limited to customers within the CPCA's queue. However, if a CPCA was not in the office or was unavailable to handle a customer request, the other CPCA was instructed to accept incoming calls from members not in their queue. The CPCA who first entered notes of a customer contact prior to a loan being booked was to receive the incentive.

27. On December 9, 2013, Ms. Munyan received a communication from a member with a negative account, entered the first notes of contact with the member into the workflow history, and sent loan paperwork for a bounce-free loan to the member.

28. On December 10, 2013, Petitioner spoke with the customer and took additional application information over the phone. Later that same day, Petitioner went to Mr. Colson to approve a refinance loan for the customer. Mr. Colson approved Petitioner to proceed with the refinance loan based on the customer's income, but did not know at the time that Ms. Munyan had already started the loan process.

29. Since Ms. Munyan made the first contact with the customer, the incentive was credited to Ms. Munyan. Petitioner proceeded to make several entries on the workflow history asserting her claim to the incentive. Petitioner apparently discussed the matter within the office, leading to her testimony

that "[t]he department was upset about it because I showed it to them."

30. In December 2013, having been made aware of the workflow history comments regarding the disputed incentive; having received complaints regarding Petitioner from the manager of Respondent's contact center; and having continuing issues with Petitioner's failure to submit loan documents to the optical department, Mr. Colson prepared a series of coaching reports to individually address the issues. It was decided to issue separate coaching reports for each issue of concern, rather than a single lengthy report, in order to keep the issues separate. Respondent has previously issued multiple coaching reports to employees under comparable circumstances.

31. On December 20, 2013, Petitioner was called into a meeting with Mr. Colson. She thought the meeting was to discuss the disputed incentive. Instead, she was presented with the coaching reports.

32. The first coaching report was issued for Petitioner's notations into the workflow system related to her intent to claim the disputed incentive credit.

33. Petitioner had previously received training on the information to be entered in the workflow system. During the training sessions, which were conducted periodically, and which included the distribution of printed materials, it was stressed

that the workflow notes should not be editorial or contain side comments.

34. Mr. Colson explained that, in the event of a legal dispute with a member regarding their account, the collection record, including the notations entered into the workflow system, would be made part of a court record. As applied to Petitioner's notations, Mr. Colson was concerned about having to testify about notations in the collection record regarding incentives or commissions for working on a work-out request.

35. Petitioner alleged that Ms. Martello and other unidentified credit advisors made similar notations in the workflow system without being written up, but provided no evidence to support her assertion. Mr. Colson knew of no other instance of a CPCA making notations in the workflow system related to an incentive dispute or other internal employee dispute.

36. Mr. Colson believed that the notations made by Petitioner regarding the incentive dispute were not pertinent to the collection record, thus violating Respondent's policy and warranting the issuance of the coaching report.

37. Petitioner signed the first coaching report, with the comment that "I thought that I was doing the right thing on this acct."

38. The second coaching report addressed Petitioner's act of taking a fee refund voucher to Respondent's contact center department for approval. The contact center has staff on duty beyond Respondent's normal 8:30 a.m. to 5:00 p.m. business hours. The fee refund had to be done on November 25, 2013, since that was the 60th day of the negative account, after which the account would have to be written off. The fee refund was for an amount that exceeded Petitioner's approval authority. Despite the time frame involved, Petitioner did not get the fee refund voucher approved by the clerk of the collections department, which would be the normal course, before the 5:00 p.m. close of business.

39. During the December 20, 2013, meeting, Mr. Colson discussed the practice of taking vouchers to the call center for processing after 5:00 p.m. Mr. Colson had been approached by the assistant vice president of the contact center regarding Petitioner's multiple visits after 5:00 p.m. to his department "to have transactions done, fees refunded, things of that nature on members' accounts." As a result, call center employees were being pulled away from their normal tasks to do transactions that were not a normal function of their job.

40. Petitioner alleged that other credit advisors went to the call center to have such transactions processed, including Ms. Martello, Melonice Lindsey, and Howard Miller, but provided

no evidence to support her assertion. Mr. Colson had no knowledge of other credit advisors who engaged in this activity, or any other improprieties regarding the processing of fee refunds.

41. The second coaching report addressed additional issues related to the November 25, 2013, fee refund transaction, including the fact that Petitioner did not work on the sixty-day negative account when she arrived to work that morning, and that she did not enter any notation in the workflow history regarding the fee refund.

42. Mr. Colson believed that the issues regarding the fee refund transaction warranted the issuance of the coaching report.

43. Petitioner signed the second coaching report, with the comment that "I didn't do this intentionally. I forgot to get voucher back from Katie to give to [Mr. Colson] to sign."

44. The third coaching report addressed the ongoing problem of Petitioner's failure to provide loan documentation to the optical department for input and scanning, the details of which are set forth in paragraph 22 above. Petitioner signed the report with the comment that "[s]ome of these loans have been turned into optical. I will review this matter."

45. Petitioner alleged that other employees had fallen behind on submitting paperwork, but were not written up or

terminated. Petitioner did not identify, by name or race, any of the allegedly comparable employees, or establish that they had a comparable history of failing to submit loan documentation. The only evidence adduced at the hearing established that Ms. Martello and Ms. Munyan were not comparable to Petitioner in the number or frequency of late-submitted loan packets.

46. Petitioner stated that she had previously advised Ms. Perez of her intent to work on Saturday, December 21, 2013, to catch up on her loan paperwork. Mr. Colson was not aware of Petitioner's intent to do so but, given the length of time that the problem continued to exist, would still have issued the coaching report to Petitioner.

47. At some point after January 2, 2014, during Mr. Colson's daily review of compliance reports, he noted an account that was over 60 days, requiring that it be written off. The account was assigned to Petitioner, and Mr. Colson saw from the workflow history that Petitioner did not begin work on the account until it was 58 days past due. Working her accounts earlier in the delinquency stage had been previously addressed with Petitioner.

48. On January 6, 2014, Petitioner was given a coaching report and placed on a 60-day probation for deficient work performance related to the written-off account.

49. Petitioner signed the January 6, 2014, coaching report with the comment that "voucher was paperclip to another voucher by mistake. I usually check these daily."

50. Petitioner testified that other employees failed to timely charge-off accounts but were not counseled, but provided no evidence to support her assertion. The only comparator for whom evidence was received was Khrissy Adams, a Caucasian woman, who was given a coaching report and placed on a 30-day probation for failing to timely write-off an account. There was no evidence of Ms. Adams having received previous coaching reports so as to warrant a lengthier period of probation, as was given to Petitioner.

51. As part of the process established after the December 20, 2013, meeting and coaching reports, Petitioner was to submit her loan packets to either Ms. Perez or Mr. Colson for review before they were sent to be scanned. That review revealed that a large number of the loan packets contained significant errors in the consumer lending plan, which is the contract a member signs to obtain a loan. Many of the consumer lending plans had missing signatures, and some packets had no consumer lending plan at all. Furthermore, Petitioner indicated that some members elected to purchase loan insurance when the member had, in fact, declined insurance, resulting in unapproved charges to a member.

52. The errors noted by Respondent were serious, potentially resulting in the loan contracts being invalid and unenforceable. The errors could have been violative of Regulation Z, which governs fair lending practices and, if there were a sufficient number of instances, resulted in a class action lawsuit against Respondent, exposing it to considerable cost.

53. Due to the ongoing performance issues, as well as the severity of the issues related to Petitioner's completed loan packets, the decision was made that termination of Petitioner's employment was appropriate. Petitioner was thereafter terminated from employment on March 21, 2014.

54. Petitioner identified no instance of any racially-disparaging comments directed at herself or any other employee by anyone affiliated with Respondent.

55. There was no non-hearsay evidence of any employee outside of Petitioner's protected class who engaged in conduct similar to that of Petitioner, but without consequence, upon which to support a finding that the employee was treated more favorably.

56. Mr. Colson testified credibly that Petitioner's race had no bearing on the decision to terminate her employment. Rather, Mr. Colson testified convincingly that the decision was based solely on Petitioner's continuing and increasingly poor

job performance. Mr. Colson felt Petitioner's poor performance was not due to a lack of trying on Petitioner's part; it was simply the result of a lack of ability on her part.

57. Petitioner asserted that she was written up, placed on probation, and subsequently terminated from employment in retaliation for complaining that Ms. Munyan improperly claimed her incentive. In that regard, she testified that:

> I know that by me going to management . . . it really started all this, I think, because I'm thinking to myself, if I would have just kept my mouth shut, maybe I would have had my job, but other employees have went to Mr. Colson before with problems like that . . . . But my thing is, after I went to management I get written up out of retaliation. I got blind-sided. I didn't know that was going to happen. And, to me, that's retaliation.

58. Petitioner does not claim that she was denied the incentive credit because or her race.

59. Finally, Petitioner complained that some of her personal belonging were damaged or not returned to her after her employment was terminated, testifying that "[t]hey broke up all of my things and, to me, that was not right. To me, that was discriminative." Even if there were some evidence that Petitioner's belongings had been damaged on purpose -- which there was not -- there was no evidence that such damage was the result of racial animus.

60. A review of the entire record of this proceeding reveals not a shred of evidence that any of the employment actions of which Petitioner complains were the result of racial bias or discrimination. The only testimony that can be reasonably read as suggesting some racial bias behind the employment actions at issue are Petitioner's testimony as follows:

> I know that discrimination do exist. I do know that's a problem all across the board in America . . . [a]nd if I did not feel that I was discriminated against I would never have did all this . . . but my thing is I know there's favorites at that credit union. I know that certain people get away with things.

and

> To me, I was discriminated against, I'm gonna say for the record, because of my race, because if I think that I know within my heart if the tables were turned, if I was white and went to management, I would still had a job because to me it just got blown out of proportion by me going to management. And as everyone can clearly see, it all started from there, because if it wasn't started from there, why would I have gotten written up in first place for my work that happened prior to, you know, that -- you know, that year? So, that's what started that. So my point is, is that if I wouldn't have never said anything, I would have probably still been working there.

61. In the absence of some corroborative evidence, Petitioner's statements alone cannot provide the support to sustain a charge of racial discrimination.

Ultimate Findings of Fact

62. There was no competent, substantial evidence adduced at the hearing to support a finding that the decision to terminate Petitioner from employment was made due to Petitioner's race. Rather, the decision was based on Petitioner's performance in her job as reflected in the employee coaching reports. Furthermore, there was no competent, substantial evidence adduced at the hearing that persons who were not African-American were treated differently from Petitioner, or were subject to dissimilar personnel policies and practices.

63. There was no competent, substantial evidence adduced at the hearing to support a finding that the decision to terminate Petitioner from employment was made in retaliation for Petitioner's opposition to an unlawful employment practice. Rather, to the extent there was some retaliation involved, it was for bringing an internal employee complaint over a disputed incentive to management, a complaint that had no implication of race.

CONCLUSIONS OF LAW

64. Sections 120.569 and 120.57(1), Florida Statutes, grant the Division of Administrative Hearings jurisdiction over the subject matter of this proceeding and of the parties.

Discrimination

65. With regard to Petitioner's claim of discrimination on the basis of race, section 760.10(1) provides, in pertinent part:

> (1) It is an unlawful employment practice for an employer:
>
> (a) 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.

66. With regard to Petitioner's claim of retaliation, section 760.10(7) provides, in pertinent part:

> (7) It is an unlawful employment practice for an employer . . . to discriminate against any person because that person has opposed any practice which is an unlawful employment practice under this section, or because that person has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section. (emphasis added).

Thus, the alleged retaliation must be for a reason that is subject to protection under the Act, i.e., race, color, religion, sex, national origin, age, handicap, or marital status.

67. Section 760.11(1) provides, in pertinent part, that "[a]ny person aggrieved by a violation of ss. 760.01-760.10 may

file a complaint with the [FCHR] within 365 days of the alleged violation." Petitioner timely filed her complaint.

68. Section 760.11(7) provides that upon a determination by the FCHR that there is no probable cause to believe that a violation of the Florida Civil Rights Act of 1992 has occurred, "[t]he aggrieved person may request an administrative hearing under ss. 120.569 and 120.57, but any such request must be made within 35 days of the date of determination of reasonable cause." Following the FCHR determination of no cause, Petitioner filed her Petition for Relief requesting this hearing.

Construction of the Civil Rights Act

69. Chapter 760, Part I, is patterned after Title VII of the Civil Rights Act of 1964, as amended. When "a Florida statute is modeled after a federal law on the same subject, the Florida statute will take on the same constructions as placed on its federal prototype." Brand v. Fla. Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994); see also Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17 (Fla. 3rd DCA 2009); Fla. State Univ. v. Sondel, 685 So. 2d 923 (Fla. 1st DCA 1996); Fla. Dep't of Cmty. Aff. v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991).

70. Petitioner has the burden of proving by a preponderance of the evidence that Respondent committed an unlawful employment practice. See St. Louis v. Fla. Int'l

Univ., 60 So. 3d 455 (Fla. 3rd DCA 2011); Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981).

Means of Proving Discrimination

71. Employees may prove discrimination on the basis of race or as a result of retaliation by direct, statistical, or circumstantial evidence. Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d at 22.

72. 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); Holifield v. Reno, 115 F.3d 1555, 1561 (11th Cir. 1997). Courts have held that "'only the most blatant remarks, whose intent could be nothing other than to discriminate . . .' will constitute direct evidence of discrimination." Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d 1354, 1358-59 (11th Cir. 1999)(citations omitted).

73. In the absence of any direct or statistical evidence of discriminatory intent, Petitioner must rely on circumstantial evidence of such intent. In McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973), and as refined in Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) and St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993), the United States Supreme Court established the procedure for determining whether employment discrimination has occurred when

employees rely upon circumstantial evidence of discriminatory intent.

74. Under the three-part test, Petitioner has the initial burden of establishing a prima facie case of unlawful retaliation resulting from her opposition to discrimination prohibited under the Florida Civil Rights Act. McDonnell Douglas Corp. v. Green, at 802; Texas Dep't of Cmty. Aff. v. Burdine, 450 U.S. at 252-253; Burke-Fowler v. Orange Cnty., Fla., 447 F.3d 1319, 1323 (11th Cir. 2006); Valenzuela v GlobeGround N. Am., LLC, 18 So. 3d at 22. "The elements of a prima facie case are flexible and should be tailored, on a case-by-case basis, to differing factual circumstances." Boykin v. Bank of America Corp., 162 Fed. Appx. 837, 838-839 (11th Cir. 2005)(citing Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1123 (11th Cir. 1993)).

75. If Petitioner is able to prove her prima facie case by a preponderance of the evidence, the burden shifts to Respondent to articulate a legitimate, non-discriminatory reason for its employment decision. Tex. Dep't of Cmty. Aff. v. Burdine, 450 U.S. at 255; Dep't of Corr. v. Chandler, 582 So. 2d 1183 (Fla. 1st DCA 1991). An employer has the burden of production, not persuasion, to demonstrate to the finder of fact that the decision was non-discriminatory. Dep't of Corr. v. Chandler, supra. This burden of production is "exceedingly light."

Holifield v. Reno, 115 F.3d at 1564; Turnes v. Amsouth Bank, N.A., 36 F.3d 1057, 1061 (11th Cir. 1994).

76. If the employer produces evidence that the decision was non-discriminatory, then the complainant must establish that the proffered reason was not the true reason but merely a pretext for discrimination. St. Mary's Honor Ctr. v. Hicks, 509 U.S. at 516-518. In order to satisfy this final step of the process, Petitioner must "show[] directly that a discriminatory reason more likely than not motivated the decision, or indirectly by showing that the proffered reason for the employment decision is not worthy of belief." Dep't of Corr. v. Chandler, 582 So. 2d at 1186 (citing Tex. Dep't of Cmty. Aff. v. Burdine, 450 U.S. at 252-256). Petitioner would have to prove not only that the employer's stated reason for the employment decision was false, but also that discrimination was the real reason for the decision. Jiminez v. Mary Washington Coll., 57 F.3d 369, 378 (4th Cir. 1995). The demonstration of pretext "merges with the plaintiff's ultimate burden of showing that the defendant intentionally discriminated against the plaintiff." Holifield v. Reno, 115 F.3d at 1565.

77. In a proceeding under the Civil Rights Act, "[w]e are not in the business of adjudging whether employment decisions are prudent or fair. Instead, our sole concern is whether unlawful discriminatory animus motivates a challenged employment

decision." Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d at 1361. As set forth by the Eleventh Circuit Court of Appeals, "[t]he employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason." Nix v. WLCY Radio/Rahall Commc'ns, 738 F.2d 1181, 1187 (11th Cir. 1984). Moreover, "[t]he employer's stated legitimate reason . . . does not have to be a reason that the judge or jurors would act on or approve." Dep't of Corr. v. Chandler, 582 So. 2d at 1187.

Racial Discrimination

Prima Facie Case

78. The record of this proceeding contains no direct evidence of any racial animus or bias on the part of Respondent at any level.

79. Petitioner presented no statistical evidence of discrimination by Respondent in its personnel decisions affecting Petitioner.

80. To establish a prima facie case of racial discrimination under McDonnell Douglas, Petitioner must demonstrate by a preponderance of the evidence that 1) she is a member of a protected class; 2) she was qualified for the position; 3) she was subjected to an adverse employment action; and 4) 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 at 1323.

81. When determining whether similarly-situated employees have been treated differently in cases of discriminatory discipline, an evaluation must be made that the employees engaged in similar conduct but were disciplined in different ways. In making that determination, "the quantity and quality of the comparator's misconduct [must] be nearly identical to prevent courts from second-guessing employers' reasonable decisions and confusing apples with oranges." Burke-Fowler v. Orange Cnty., 447 F.3d at 1323 (citing Maniccia v. Brown, 171 F.3d 1364, 1368 (11th Cir. 1999)). As established by the Fifth District Court of Appeal:

> "[I]t is necessary to consider whether the employees are involved in or accused of the same or similar conduct and are disciplined in different ways." The employee must show that she and the employees outside her protected class are similarly situated "in all relevant respects." Thus, "the quantity and quality of the comparator's misconduct [must] be nearly identical to prevent courts from second-guessing employers' reasonable decisions and confusing apples with oranges."
>
> Similarly situated employees "must have reported to the same supervisor as the plaintiff, must have been subject to the same standards governing performance evaluation and discipline, and must have engaged in conduct similar to the plaintiff's, without such differentiating conduct that would distinguish their conduct

> or the appropriate discipline for it." If a plaintiff fails to present sufficient evidence that a non-protected, similarly situated employee was treated more favorably by the employer, the defendant is entitled to summary judgment. (citations omitted).

Valenzuela v. GlobeGround N. Am., LLC., 18 So. 3d at 22-23.

82. Petitioner demonstrated that she is a member of a protected class, that she was qualified to hold her position with Respondent, and that she was subjected to an adverse employment action, i.e., termination from employment.

83. Where Petitioner has failed in the establishment of her prima facie case is her failure to demonstrate that other persons outside of her protected racial classification were subject to personnel decisions that differed from those applied to her.

84. The only evidence of a similarly-situated employee comparator produced by Petitioner was the allegation that Ms. Adams was disciplined less severely for failing to timely provide her loan packets to the optical department, receiving a probation of thirty days instead of Petitioner's sixty days. However, the comparison was undermined by a lack of evidence of previous coaching reports issued to Ms. Adams for violations of Respondent's policies or mismanagement of workload, such as those issued to Petitioner.

85. In short, Petitioner failed to prove that Respondent's decision to terminate her was the result of any consideration of or discriminatory intent based on race, or that her treatment as an employee differed in any material way from the treatment afforded other employees, regardless of their race. Therefore, Petitioner failed to prove a prima facie case of discrimination, and her petition for relief should be dismissed.

Legitimate, Non-discriminatory Reason

86. Assuming -- for the sake of argument -- that Petitioner made a prima facie showing, the burden would shift to Respondent to proffer a legitimate non-discriminatory reason for its action.

87. Respondent met its burden by producing substantial credible evidence that Petitioner was terminated solely for deficiencies in her job performance, as detailed herein, and for no other reason.

Pretext

88. Assuming -- again, for the sake of argument -- that Petitioner made a prima facie showing, then upon Respondent's production of evidence of a legitimate non-discriminatory reason for its action, the burden shifted back to Petitioner to prove by a preponderance of the evidence that Respondent's stated reasons were not its true reasons, but were a pretext for discrimination.

89. The record of this proceeding does not support a finding or a conclusion that Respondent's proffered explanation for its personnel decisions was false or not worthy of credence, nor does it support an inference that the explanation was pretextual.

Retaliation

90. "Section 760.10(7), Florida Statutes, is virtually identical to its Federal Title VII counterpart, 42 U.S.C. § 2000e-3(a). The FCRA [Florida Civil Rights Act] is patterned after Title VII; federal case law on Title VII applies to FCRA claims." Hinton v. Supervision Int'l, Inc., 942 So. 2d 986, 989 (Fla. 5th DCA 2006)(citing Guess v. City of Miramar, 889 So. 2d 840, 846, n.2 (Fla. 4th DCA 2005)).

91. In construing 42 U.S.C. § 2000e-3(a), the Eleventh Circuit has held that:

> [t]he statute's participation clause "protects proceedings and activities which occur in conjunction with or after the filing of a formal charge with the EEOC." . . . The opposition clause, on the other hand, protects activity that occurs before the filing of a formal charge with the EEOC, such as submitting an internal complaint of discrimination to an employer, or informally complaining of discrimination to a supervisor. (citations omitted).

Muhammed v. Audio Visual Servs. Group, 380 Fed. Appx. 864, 872 (11th Cir. 2010). The division of 760.10(7) into the "opposition clause" and the "participation clause" is recognized

by Florida state courts. See Blizzard v. Appliance Direct, Inc., 16 So. 3d 922, 925-926 (Fla. 5th DCA, 2009). In explaining the difference between the two clauses, the Second District Court of Appeal has held that:

> FCRA's "opposition clause [protects] employees who have opposed unlawful [employment practices]." . . . However, opposition claims usually involve "activities such as 'making complaints to management, writing critical letters to customers, protesting against discrimination by industry or by society in general, and expressing support of coworkers who have filed formal charges.'" . . . Cases involving retaliatory acts committed after the employee has filed a charge with the relevant administrative agency usually arise under the participation clause.

Carter v. Health Mgmt. Assoc., 989 So. 2d 1258, 1263 (Fla. 2nd DCA 2008).

92. In order to establish a prima facie claim of retaliation under the participation clause, a petitioner must, "in addition to filing formal charges with the Equal Employment Opportunity Commission (EEOC) or its designated representative, she was required to demonstrate: (1) a statutorily protected expression; (2) an adverse employment action; and, (3) a causal connection between the participation in the protected expression and the adverse action." Hinton v. Supervision Int'l, Inc., 942 So. 2d at 990.

93. Respondent's alleged acts of retaliation occurred prior to Petitioner filing her Employment Claim of Discrimination with the Florida Commission on Human Relations. "The participation clause includes activity done in connection with proceedings conducted by the federal government and its agencies: an employee has invoked the jurisdiction of the federal government through its agency, the EEOC. And we have held that expansive protection is available for these adjudicative kinds of proceedings run by the government." EEOC v. Total Sys. Servs., 221 F.3d 1171, 1175-1176 (11th Cir. 2000). Therefore, Petitioner's claim does not fall under the participation clause.

94. Claims under the opposition clause are not subject to the same degree of "expansive protection" that comes about after a claim of discrimination is filed with the appropriate civil rights agency. Rather:

> Opposition clause acts, however, are taken outside of the context of a government review and, instead, are taken in the context of the ordinary business environment and involve employers and employees as employers and employees. As in this case, whether to fire an employee for lying to the employer in the course of the business's conduct of an important internal investigation is basically a business decision; this decision, as with most business decisions, is not for the courts to second-guess as a kind of super-personnel department.

EEOC v. Total Sys. Servs., 221 F.3d at 1176 (citing Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d at 1361).

95. The record of this proceeding contains no direct or statistical evidence of any retaliation on the part of Respondent as a result of Petitioner's opposition to acts of discrimination directed against others as a result of their race, color, religion, sex, national origin, age, handicap, or marital status.

96. In order to establish a prima facie case of retaliation under McDonnell Douglas, Petitioner must demonstrate by a preponderance of the evidence "(1) that [she] engaged in statutorily protected expression; (2) that [she] suffered an adverse employment action; and (3) there is some causal relationship between the two events." (citations omitted). Holifield v. Reno, 115 F.3d at 1566; see also Muhammed v. Audio Visual Servs. Group, 380 Fed. Appx. at 872; Tipton v. Canadian Imperial Bank, 872 F.2d 1491 (11th Cir. 1989).

97. Petitioner's claim of retaliation is directed exclusively to her allegation that she was retaliated against as a result of her going to management to complain about a co-worker's claim to an incentive to which Petitioner believed she was entitled. That is simply not statutorily-protected expression. Her allegations have nothing to do with whether the wrongful conduct was the result of her race, or as a result of

her opposition to acts of discrimination directed against others.

98. For the reasons set forth herein, Petitioner did not meet her burden to establish a prima facie case of discrimination by retaliation.

Conclusion

99. Respondent put forth persuasive evidence that Petitioner was terminated from employment as a result of her job performance, and not as a result of race or retaliation.

100. There was considerable evidence that Petitioner was a friendly, well-liked, conscientious, and hard-working employee. Respondent's members may have been ill-served as a result of Petitioner's termination. It may have been unfair and unjust for Respondent to fire Petitioner for bringing her concerns with the disputed incentive to management. However, none of those issues, even if true, suggest that Petitioner was fired due to her race or that she was the subject of retaliation as a result of her opposition to an unlawful employment practice as defined in section 760.10.

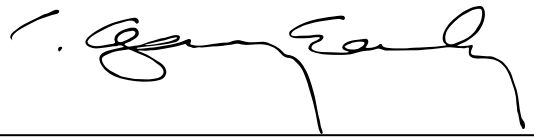
101. Section 760.10 is designed to eliminate workplace discrimination, but it is "not designed to strip employers of discretion when making legitimate, necessary personnel decisions." See Holland v. Washington Homes, Inc., 487 F.3d 208, 220 (11th Cir. 2007). Because Petitioner failed to put

forth sufficient evidence that Respondent had some discriminatory reason for its personnel decision, her petition 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 issue a final order finding that Respondent, Florida Credit Union, did not commit any unlawful employment practice as to Petitioner, Sheila A. Cunningham, and dismissing the Petition for Relief filed in FCHR No. 2014-00645.

DONE AND ENTERED this 6th day of May, 2015, in Tallahassee, Leon County, Florida.



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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.