STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARY ANN DE MATAS,

Petitioner,

vs. Case No. 15-1892

H AND R BLOCK ENTERPRISES,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, this case was heard on June 23, 2015, by video teleconference at sites in Tallahassee and Gainesville, Florida, and on June 24, 2015, in Gainesville, Florida before E. Gary Early, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Mary Ann De Matas, pro se
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Gainesville, Florida 32608

For Respondent: Erin L. Malone, Esquire
Dennis M. McClelland, Esquire
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STATEMENT OF THE ISSUE

Whether the Petitioner was subject to an unlawful employment practice by Respondent, H and R Block Enterprises, on

account of her race, color, or sex; as a result of Respondent's maintenance of a sexually-hostile work environment; or as retaliation to her opposition to an unlawful employment practice, in violation of section 760.10, Florida Statutes.

PRELIMINARY STATEMENT

On July 30, 2014, Petitioner, Mary Ann De Matas (Petitioner), filed an Employment Complaint of Discrimination with the Florida Commission on Human Relations (FCHR) in which she alleged that Respondent, H and R Block Enterprises (H&R Block or Respondent), violated section 760.10, by discriminating against her on the basis of her race, color, and sex, or due to retaliation for her opposition to an unlawful employment practice, in violation of section 760.10.

On March 12, 2015, 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 April 8, 2015, 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 originally set for June 9, 2015. It was continued, re-set for June 23-24, 2015, and held as scheduled.

At the commencement of the final hearing, the parties advised that they were in general agreement with a draft of a joint stipulation of facts. A short recess was taken, during which the parties finalized their Joint Stipulation of Facts. That document was offered, accepted, and received in evidence as Joint Exhibit 1. The stipulated facts have been used in the preparation of this Recommended Order, either verbatim or with changes for style or continuity.

At the final hearing, Petitioner testified on her own behalf. Petitioner's Exhibits 6-7, 12-13, 15, 18-25, 27-28, 30-40, 42-47, 50-63, 65-69, 71-99, 101-102, 104-114, 120-124, 127-133, 136-138, and 152-169 were received in evidence.

Respondent presented the testimony of Amber Howell, Respondent's District General Manager; Tammie Craft, Respondent's District Operations Coordinator; Suzetta Heflin, a former Client Service Professional and current Client Service Leader for Respondent; and Stacy Vobach, Respondent's Associate Relations Center Manager and records custodian. Respondent's Exhibits 1 through 20 were received in evidence.

A three-volume Transcript of the hearing was filed, with the final volume being filed on September 15, 2015. The parties timely filed post-hearing Proposed Recommended Orders, which 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 an African-American female.

2. H&R Block is a tax preparation company that provides tax preparation services to individuals and businesses. H&R Block has retail offices throughout the United States, including the Steeplechase tax office in Gainesville, Florida. Respondent employs more than 15 full-time employees at any given time.

3. H&R Block is an equal opportunity employer. Its equal employment opportunity policy applies -- without regard to an employee's race, color, or sex, or any legally-protected status -- to all aspects of employment, including but not limited to hiring, placement, promotion, termination, layoff, transfer, scheduling, leaves of absence, compensation, and training. H&R Block also has a written anti-discrimination and anti-harassment policy that strictly prohibits unlawful discrimination and harassment in the workplace, and prohibits retaliation. H&R Block's policies are published to all employees.

4. H&R Block employees who believe they are subject to impermissible employment discrimination or harassment are encouraged to bring their issues to the attention of their

supervisor (if practical) or the human resources department, to call H&R Block's toll-free hotline, or to send an email to ethics@hrblock.com.

5. In late fall of each year, H&R Block hires seasonal employees to work in its retail offices to provide tax preparation services during the tax season, which generally runs from the end of December through April 15th of each year.

6. Each tax office employs seasonal tax preparers, known as Client Service Professionals (CSP), and is managed by a Client Service Leader (CSL or Office Manager). The CSL reports to a District General Manager (District Manager) who oversees numerous tax offices.

7. H&R Block employed Petitioner as a seasonal CSP for the 2009 through 2013 tax seasons.

8. In mid-2013, Ms. Howell was hired by Respondent as a District General Manager to manage 20 tax offices throughout the North Central Florida District.

9. Due to the seasonal nature of the job, it was not unusual for there to be a high rate of CSL turnover, particularly in the 14 seasonal offices that were not open year-round. The Steeplechase tax office is a seasonal office.

10. Among Ms. Howell's first acts as District Manager was hiring a new CSL for the Steeplechase office. Being new to the

company, she had no specific knowledge of, or experience with, existing H&R Block employees.

11. Tammie Craft was Respondent's District Operations Coordinator, responsible for managing Respondent's physical facilities and electronics, supplying paperwork and forms for use by the District Manager and CSLs, ordering supplies, managing and distributing office keys and petty cash, keeping lists of contacts, and similar responsibilities. Ms. Craft was not charged with personnel matters.

12. Ms. Howell, having little personal knowledge of H&R Block employees, followed "best practice" and solicited input as to suitable candidates from Ms. Craft. Ms. Craft knew of Petitioner, who had worked as a CSP and who was enrolled in Respondent's Income Tax Course, and identified Petitioner "as having potential." Ms. Craft recommended Petitioner to Ms. Howell for the Steeplechase CSL.

13. In October 2013, Ms. Howell interviewed Petitioner in person and subsequently hired Petitioner for the 2014 tax season as the seasonal CSL position in the Steeplechase tax office. As a CSL, Petitioner was an hourly, non-exempt employee. The hiring of Petitioner to a supervisory CSL position was a promotion from her previous position as a CSP. In her new position, Petitioner reported to Ms. Howell.

14. The Steeplechase office is a small office on the outskirts of Gainesville. It had, immediately prior to the 2012 tax season, suffered the loss of its long-time CSL who, on his death, had about 400 clients in his portfolio. Some of those clients left for other tax preparers. As a result, the Steeplechase office had experienced declines in clients and revenues.

15. Petitioner was hired primarily to market H&R Block services in the community in order to increase clients and revenues. In addition to marketing, Petitioner was responsible for adhering to and enforcing company policies and procedures (including its anti-discrimination and anti-harassment policies), scheduling, monitoring office progress reports and employee reports, and attending manager meetings, among other managerial duties. In addition to her managerial duties, Petitioner prepared tax returns for clients.

16. Petitioner was responsible for managing four seasonal CSPs who staffed the Steeplechase office: Hillery Bassriel; Donna Bassriel; Suzetta Heflin; and Nicholas Tucker. Hillery and Donna Bassriel were husband and wife, and had been employees at Steeplechase since before 2008. Ms. Heflin joined H&R Block at Steeplechase in 2008. Mr. Tucker, who was a close friend of Ms. Heflin, joined in 2012. In addition, Petitioner managed two office receptionists.

17. The Steeplechase office CSPs, who had worked independently and autonomously over the years, did not respond well to Petitioner's management style.

18. It was not uncommon for the CSPs to be called to the office by their clients to work on tax returns. Ms. Heflin testified that the CSPs understood that their clients had jobs and schedules that might not be conducive to meetings during regular hours, and that customer service often demanded dropping everything to hurry to the office for a meeting. Many of the instances of off-schedule hours and non-compliance with dress code described herein were the result of hastily called off-hour and odd-hour requests from clients.

19. Mr. Bassriel, who had worked at the office for the longest period -- since before 2008 -- was aggressively territorial with his clients. CSPs are paid, in part, on commission. Thus, it is in their financial interests to get and keep as many clients as possible. Although the CSPs tried to evenly split up clients, Mr. Bassriel frequently intercepted new clients as they came in the door, changed appointments when he believed he was entitled to handle a client, and was generally protective of his clients.

20. Mr. Bassriel was somewhat lax about working a set schedule and conforming to the company dress code. He would occasionally fail to put in his time commitments and, though he

did not like to work on Saturdays, would occasionally show up for work on that day. He preferred working by himself, and would frequently work "off-the-clock" to catch up on work or make appointments. He would occasionally appear at work dressed in soccer shorts, tennis shoes and collarless shirts or sweatshirts, though he had a medical clearance for such dress. However, Mr. Bassriel was an effective and productive CSP, and those incidents of less-than-rigid compliance with company attendance and dress codes had been overlooked before Petitioner's employment.

21. Mr. Tucker was described, even by his close friend, Ms. Heflin, as having a bad temper. If left to himself, he was a productive worker. However, he chafed at management, which led to the incidents described herein, and to his eventual termination.

22. When Mr. Tucker first began work at H&R Block in 2012, he and Mr. Bassriel were frequently at odds, with the cause of their disputes being the distribution of clients, including those from Steeplechase's recently deceased CSL. During those disputes, Mr. Tucker was known to direct profanity at Mr. Bassriel. After a period of time, Mr. Tucker and Mr. Bassriel worked out their conflict, and they had no further disputes.

23. As with Mr. Bassriel, Mr. Tucker would come to work late, would work without clocking-in, and would appear at off-scheduled hours to meet with clients. On any given day, Mr. Tucker might wear jeans and a collared shirt, or the sanctioned attire of a shirt and tie. Depending on the circumstances, he was known to come in to meet clients wearing shorts and a tee-shirt. He would frequently eat at his desk, rather than in the office break room. However, Respondent's clients were happy with Mr. Tucker and so, as with Mr. Bassriel, his non-compliance with attendance, dress code, and office policies had been overlooked before Petitioner's employment.

24. During the 2014 tax season, Petitioner frequently reported her complaints about Mr. Bassriel's and Mr. Tucker's attendance and attire to Ms. Howell and H&R Block's human resources department.

25. On multiple occasions, Petitioner and Mr. Tucker were at odds with each other and did not get along, but at other times, they joked around with each other. Petitioner even joked about Mr. Tucker in some texts messages that she sent to Ms. Howell.

26. During and after the tax season, Ms. Howell received complaints from the Steeplechase CSPs about Petitioner's management style and behavior.

27. As a result of the ongoing complaints from both Petitioner and the CSPs, Ms. Howell repeatedly counseled Petitioner on how to effectively manage her employees, and suggested different management approaches. Moreover, Ms. Howell conducted manager meetings in Ocala for the 20 CSLs under her supervision, which Petitioner regularly attended. During these meetings, Howell taught leadership skills and discussed different management techniques.

28. Ms. Heflin testified that conflicts between Petitioner and Mr. Tucker were commonplace. When Mr. Tucker came to work late, failed to clock-in, or violated dress code, Petitioner would generally greet him with hostility. In those instances when Mr. Tucker reacted negatively, which was not uncommon, Petitioner would frequently laugh at him, an act that "set him off," thus escalating the situation. Ms. Heflin testified, credibly, that neither Petitioner nor Mr. Tucker acted in a professional manner.

29. Ms. Heflin testified that the conflicts would often result in Mr. Tucker directing profanity towards Petitioner, including calling her a bitch, and saying things like he "wished she'd get hit by a car," or he "hoped she'd die." However, Mr. Tucker's language was not motivated by animus based on race or gender. Rather, he just did not like Petitioner or her style of management. More to the point, except for the three

incidents described below, Petitioner did not report any of the arguments or profanity to Ms. Howell, to Respondent's human resources department, or to any other person or office having responsibility for human resource issues.

30. In January 2014, Petitioner contacted Ms. Howell and the human resources department to report that Mr. Tucker reported to work 27 minutes late and wearing jeans on January 6, and reported to work 17 minutes late on January 7.

31. On January 9, 2014, an Alachua County Code Enforcement officer visited the tax office to discuss H&R Block outdoor marketing signage that allegedly violated a county ordinance. The officer was an older Caucasian man. Mr. Tucker confronted the county employee and used "obscene language" towards him.

32. Petitioner emailed Ms. Howell to report Mr. Tucker's behavior towards the Code Enforcement officer. Petitioner reported that she counseled Mr. Tucker about his unprofessional behavior, as well as his attendance and attire. According to Petitioner, Mr. Tucker "started accusing me of being annoying, because I bur[p] when I eat in the back when I'm on my lunch break." Petitioner countered by telling Mr. Tucker that he needed to take breaks in the breakroom, instead of at his desk, and he needed to pick up his garbage. According to Petitioner, Mr. Tucker used "profanity" and called her an "idiot," and said that she was set up to be a failure. Petitioner did not specify

in the email the type of "profanity" used by Mr. Tucker. None of the insults described reflect any racial or gender animus.

33. Petitioner concluded her January 9, 2014, email to Ms. Howell by noting that Mr. Tucker "had absolutely no respect for anyone that walked in today." Thus, the evidence is persuasive that Mr. Tucker's foul mood and attitude was visited equally on anyone who crossed his path, regardless of their race or gender. Mr. Tucker received a verbal warning for the January 9, 2015, incident.

34. On January 22, 2014, Mr. Bassriel and Mr. Tucker both appeared at the office in varying stages of non-compliance with office policy.

35. Mr. Bassriel came to the office to prepare a tax return with a client. He was wearing soccer shorts, a "hoodie," and tennis shoes. There was no indication that the client objected to his attire. Petitioner took a picture of Mr. Bassriel and the client and sent it to Ms. Howell. There was no evidence of any reaction by Mr. Bassriel.

36. Mr. Tucker arrived just before 7:00 p.m. on the evening of January 22, at the request of a client who asked that they meet to prepare the client's tax return. As indicated previously, such requests were not uncommon. Petitioner sent a text message to Ms. Howell complaining that Mr. Tucker came in "literally 20 mins ago . . . not in appointment manager."

Subsequent text messages indicate that Petitioner was upset that Mr. Tucker did not let her know of the unscheduled appointment ahead of time, stating that H&R Block is "'open by appointment' we are . . . :-p I said sure if you let me know ahead of time."[1/] Petitioner then advised Ms. Howell that Mr. Tucker "just called me a pain in his ass . . . I am literally laughing." She then indicated that she was going home, and would "do an exception" the next day.

37. On January 23, 2014, Petitioner contacted Respondent's human resources department to report Mr. Tucker's actions of the previous evening. She reported that Tucker had "cursed" at her when she questioned him about scheduling a client, and specifically stated that Tucker told her, "you better not fuck with my time" and "you need to go back to being a CSP." There was no explanation as to why Petitioner's description of the language used by Mr. Tucker changed from that provided in her initial report to Ms. Howell. Nonetheless, though Mr. Tucker's alleged response, as reported the day after the incident, was stronger than the initially reported statement that Petitioner was "a pain in his ass," neither statement provides evidence of any conduct or statement directed towards Petitioner's race or sex.

38. On January 23, 2014, Ms. Howell visited the Steeplechase tax office to individually meet with Petitioner and

Mr. Tucker to discuss the January 22 incident, to coach Mr. Tucker on his attendance and dress code compliance, and to explore with Petitioner ways to improve office morale. Ms. Howell testified credibly that Petitioner provided no additional examples of the profanity allegedly uttered by Mr. Tucker, and that there was no report of any comment based on sex or race. Ms. Howell gave both Petitioner and Mr. Tucker the option to transfer to another H&R Block office but, since a transfer could affect clients and compensation, neither "wanted to take the hit." Mr. Tucker received a written corrective action notice.

39. Petitioner testified -- relying on her own after-the-fact alterations to her emails to Ms. Howell to support her testimony -- that Mr. Tucker used considerably more vile and inflammatory statements on January 22 than those reported in writing to Ms. Howell and the human resources department, or discussed on January 23 with Ms. Howell. Specifically, Petitioner's altered emails provide that Mr. Tucker "[c]alled me bitch, slut, whore," and that "Tucker told De Matas to shut the fuck up when she told him hello, Tucker called De Matas a 'fucking cunt', 'learn how to do a tax return you stupid slut.'" Those more inflammatory statements were allegedly made in the presence of Ms. Heflin, who had no recollection of the statements, despite the words being ones that would reasonably

stick in one's memory. Furthermore, Petitioner testified at the hearing that she did not tell anyone affiliated with Respondent that Mr. Tucker called her a "bitch" or a "slut," and never told anyone in H&R Block human relations that she was subject to sexual harassment or race discrimination. She did not tell Ms. Howell. Petitioner's altered emails and testimony were unsupported by any contemporaneous writings. Whether the more inflammatory statements were made or not, since they were not reported to H&R Block, they lack effect.

40. Between January 23 and March 27, 2014, Petitioner and Mr. Tucker appeared to have "patched things up." The only incident regarding Mr. Tucker reported to Ms. Howell occurred on February 21, 2014, when Petitioner sent a text message to Ms. Howell in which she complained that "[Mr. Tucker] is eating at his desk watching a movie online but he did clock out. soooo??" Ms. Howell provided guidance on how Petitioner might gently resolve the matter.

41. Petitioner again provided after-the-fact editorial commentary to her February 21, 2014, text message to Ms. Howell, asserting that "Nicholas Tucker once again cussed me out using vulgar and threatening language." If that occurred, why Petitioner would not have reported it to Ms. Howell at the time is a mystery. Nonetheless, it was not reported.

42. During the period from January 23 to March 27, 2014, Petitioner's attention was primarily directed to Mr. Bassriel. Petitioner complained that Mr. Bassriel, when busy, asked clients to leave and return at a later time; was "fucking up returns"; or was "milking the clock." On two occasions, Mr. Bassriel closed the office during business hours. Ms. Heflin testified that those incidents occurred when Mr. Bassriel's scheduled quitting time came without Petitioner arriving at her scheduled time. Many of Petitioner's complaints regarding Mr. Bassriel were made in casual texts and emails between Petitioner and her subordinate, Ms. Heflin. None of the complaints had anything to do with Petitioner's race or sex.

43. On March 3, 2014, after having complied with a client's request to meet at the office on a Saturday, and after receiving an e-mail from Petitioner admonishing him for his failure to provide 48-hour notice before a schedule change, the more reserved Mr. Bassriel had finally had enough. On that date, he emailed Petitioner to state that "I did not want to work on Saturday's [sic] only to help my clients who request a Saturday appointment and when my schedule allows it I would be able to help out the office!" Mr. Bassriel also commented that he had received complaints from six of his returning clients regarding Petitioner's "rude and threatening behavior."[2/]

44. Mr. Bassriel closed his email by asking Petitioner to "stop micro-managing us and let us take care of our clients, to do what we do best and that is to provide the best Tax Professional service we have provided our clients for many years!" The email, though providing substantial evidence of Mr. Bassriel's frustration, provides no evidence of any conduct or statement directed towards Petitioner's race or sex.

45. Other than the March 3, 2014, incident in which Mr. Bassriel's frustration boiled over, there was no evidence that Mr. Bassriel ever reacted negatively towards Petitioner, by word or deed, when she admonished him for violating office policy.

46. In response to Petitioner's frequent complaints regarding Mr. Tucker and Mr. Bassriel, both Ms. Howell and Ms. Craft communicated with the two of them, in person and by email, to remind them of H&R Block policies regarding dress and attendance.

47. On March 6, 2014, Petitioner received her mid-season CSL performance review. The review contained positive statements, though areas for improvement were noted, directed at "building a collaborative and client-focused team environment." In general, Ms. Howell determined that Petitioner "inconsistently meets expectations." However, Petitioner was seen as having positive attributes, and was encouraged to apply

to work for Respondent during the off-season. Petitioner submitted an application to do so.

48. Since Mr. Tucker's unscheduled, but client-requested, office visit of January 22, 2014, Petitioner and Mr. Tucker had gotten past their differences such that there were no overt instances of animosity. However, in late February or early March, Mr. Tucker became aware that Petitioner continued to report his dress code and attendance violations. According to Ms. Heflin, Mr. Tucker viewed that as a breach of their friendship, which made him angry and unable to trust Petitioner. That sense of distrust appears to have set the stage for the events of late-March 2014.

49. On March 27, 2014, Petitioner contacted Ms. Howell late in the day to report that Mr. Tucker had "cursed her out." According to Petitioner, the incident was precipitated when she "remind[ed] him to put in his exception for today b/c he didn't clock in." Petitioner reported that Mr. Tucker "called me a whore, slut, asked me whose dick did I suck to get this job," and that he was "wishing me dead." Ms. Heflin witnessed part of the incident, which she described as heated, but could not recall the specific words used by Mr. Tucker.

50. Ms. Howell told Petitioner that she should not report to work until instructed to do so by Ms. Howell, and that

Ms. Howell would go to the tax office the next morning to discuss the incident with Mr. Tucker.

51. On the morning of March 28, 2014, Ms. Howell reported the incident of the previous day to H&R Block's human resources department. That same morning, Ms. Howell arrived at the tax office to confront Mr. Tucker about his behavior. Ms. Howell informed Mr. Tucker that he was on administrative leave, pending further investigation, and that he was not to report to work until further instruction from Ms. Howell. Ms. Howell relieved Mr. Tucker of his office key and allowed him to pack up his personal belongings before leaving.

52. On Saturday, March 29, 2014, Ms. Heflin was working alone at the Steeplechase office. Mr. Tucker came to the office to talk to her about the incident. Being a close friend of Ms. Heflin, he apologized for letting her down. It was just those two in the office. While there, he used the computer to look something up on the internet. He did not call clients or engage in work-related activities.

53. Before he could leave the office, Petitioner arrived. She told Mr. Tucker that he was not allowed in the office and should leave. Mr. Tucker got angry and -- as usual -- cursed at Petitioner. He stated that he was there to visit his friend and refused to leave. Petitioner reported the incident to Ms. Howell by text message.

54. Ms. Howell did not have her telephone with her at the time but, after seeing the message about an hour later, she called the office. Mr. Tucker answered the telephone. Ms. Howell reiterated the terms of his suspension, and then went to the office. Upon her arrival, she observed Mr. Tucker sitting in his car in the parking lot. She approached him, whereupon Mr. Tucker stated that Petitioner was a whore, that he wished Petitioner would die, and closed with the vaguely threatening and unsettling statement that Ms. Howell would "regret this decision." Mr. Tucker then left the premises.

55. On the morning of March 31, 2014, Ms. Howell spoke with the human resources department about the events of the weekend, including Mr. Tucker's violation of his suspension. The decision was made to terminate Mr. Tucker from employment with H&R Block. On that same day, Mr. Tucker was informed that his employment was terminated. The human resources department contacted the Alachua County Sheriff's Office about Mr. Tucker's termination, which sent a deputy to monitor the parking lot for the day. How Respondent could have acted more swiftly or decisively in its termination of Mr. Tucker is hard to imagine.

56. After his termination, there were no further incidents involving Mr. Tucker.[3/]

57. On April 4, 2014, Ms. Howell met with Petitioner for her end-of-the-season discussion, a meeting that Ms. Howell

conducted with all her managers. During that meeting, Ms. Howell and Petitioner discussed employment opportunities for the next tax season. Based on Petitioner's representations that she did not want to return as a manager, Ms. Howell suggested that Petitioner consider other employment opportunities with H&R Block for the next tax season.

58. The Steeplechase office met its revenue projections for 2014, and it was thought that Petitioner had qualities that could benefit the company. Though Petitioner had difficulties at Steeplechase, Ms. Howell believed that she could be trained for management duties in a different office environment with different employees. Petitioner submitted an application for off-season employment and Respondent approved her hiring. The evidence demonstrated that, although any seasonal employee could apply for off-season employment, only a relative few were accepted. However, Petitioner withdrew her application shortly after Mr. Tucker was terminated.

59. On April 18, 2014, following the April 15 tax return filing deadline, and pursuant to terms of her employment agreement, Petitioner's seasonal employment came to an end, as did that of all H&R Block's other seasonal employees. As of April 18, 2014, H&R Block no longer employed Petitioner.

60. At no time during her period of employment with H&R Block was Petitioner subject to discipline. She was hired at

her agreed-upon rate of pay, and received no reduction in pay during the 2014 tax season. She was not required to change her work hours, nor was she required to relocate. When she reported the sexually charged statements of Mr. Tucker on March 27, 2014, he was suspended within hours, and terminated the first business day from the date of his suspension. Petitioner served out the contractual term of her employment without further incident.

61. After the 2014 tax season, Ms. Howell received several unsolicited reports from former H&R Block managers who shared examples of Petitioner's unprofessional behavior towards clients and tax professionals as a CSP in years past. Further, Ms. Heflin sent Ms. Howell an unsolicited email that placed responsibility on Petitioner for the issues in the Steeplechase tax office during the 2014 tax season. H&R Block took no action on those reports, nor could it, since Petitioner was no longer an employee.

62. On May 22, 2014, Petitioner entered an H&R Block tax office to access her H&R Block email account, and emailed H&R Block's human resources department to request the company's disciplinary files for Tucker. The company denied Petitioner's request, as she was an inactive employee during the off-season and, therefore, was not entitled to such information.

63. On May 28, 2014, Petitioner entered another H&R Block tax office and requested to use the copy machine. Petitioner

was denied access to the copy machine, because she was an inactive employee, and, therefore, was not entitled to use the company's equipment for personal use.

64. Petitioner did not reapply for employment for the 2015 tax season.

65. Ms. Heflin, who is an African-American female, was hired by Respondent to replace Petitioner as the CSL for the Steeplechase tax office for the 2015 tax season.

Ultimate Findings of Fact

66. At no time prior to March 27, 2014, did Petitioner contact her supervisor or Respondent's human resources department, file a complaint, discuss with co-workers or management, or otherwise claim that she had been the subject of discrimination because of her race or sex, or make any assertion that Mr. Tucker, Mr. Bassriel, or any other employee of H&R Block acted in a sexually inappropriate way towards her.

67. When Petitioner reported the first incident of gender-specific profanity directed towards her by Mr. Tucker on March 27, 2014, Mr. Tucker was immediately terminated.

68. There was no competent, substantial evidence adduced at the hearing to support a finding that Petitioner was subject to any adverse employment action, either as a result of the facts set forth herein, or for any other reason. Rather,

Petitioner served out her contractual term of employment, and was subsequently offered off-season employment with Respondent.

69. There was no competent, substantial evidence adduced at the hearing that any persons who were not members of the Petitioner's protected classes, i.e., African-American and female, were treated differently from Petitioner, or were not subject to similar personnel policies and practices. In fact, Petitioner was succeeded as the Steeplechase CSL by an African-American female, Ms. Heflin.

CONCLUSIONS OF LAW

70. Sections 120.569 and 120.57(1), Florida Statutes (2015), grant the Division of Administrative Hearings jurisdiction over the subject matter of this proceeding and of the parties.

Standards and Procedure

71. Section 760.10 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.

72. Petitioner maintains that Respondent discriminated against her on account of her race and as a pattern of sexual

behavior and harassment that resulted in a sexually-abusive work environment.

73. Section 760.11(1) provides 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.

74. 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 timely filed her Petition for Relief requesting this hearing.

Applicability of Federal Precedent

75. 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).

Burden of Proof

76. 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).

77. Employees may prove discrimination by direct, statistical, or circumstantial evidence. Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d at 22.

78. 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).

79. 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), 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.

80. 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. Texas 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; Walker v. NationsBank of Fla., N.A., 53 F.3d 1548 (11th Cir. 1995). This burden of production is "exceedingly light." Holifield v. Reno, 115 F.3d 1555, 1564 (11th Cir. 1997); Turnes v. Amsouth Bank, N.A., 36 F.3d 1057, 1061 (11th Cir. 1994).

81. 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). The demonstration of pretext "merges with the plaintiff's ultimate burden of showing that the defendant intentionally discriminated against the plaintiff." (citations omitted) Holifield v. Reno, 115 F.3d at 1565.

82. The law is not concerned with whether an employment decision is fair or reasonable, but only with whether it was motivated by unlawful discriminatory intent. 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.

Discrimination on the Basis of Race

83. The record of this proceeding contains not a scintilla of direct evidence of any racial bias on the part of Respondent at any level.

84. Petitioner presented no statistical evidence of racial discrimination by Respondent in its personnel decisions, either those affecting Petitioner or otherwise.

85. In order to demonstrate by circumstantial evidence that a disciplinary decision was motivated by racial discrimination, Petitioner must establish the prima facie case that she "(1) belongs to a protected class; (2) was qualified to do the job; (3) was subjected to an adverse employment action; and (4) the employer treated similarly situated employees outside the class more favorably." Johnson v. Great Expressions Dental Ctrs. of Fla., P.A., 132 So. 3d 1174, 1176 (Fla. 3d DCA 2014) (citing McDonnell Douglas Corp. v. Green, 411 U.S. at 802); see also Cazeau v. Wells Fargo Bank, N.A., ___ F.3d ___, 2015 U.S. App. LEXIS 9657 (11th Cir. June 10, 2015).

86. The first two elements of Petitioner's prima facie case have been met. Petitioner proved that, as an African-American, she is a member of a protected class. She further proved that she was qualified to hold the position of Respondent's CSL in the Steeplechase office.

87. Petitioner completely failed to meet her burden to demonstrate that she was subjected to any adverse employment action by Respondent. She was not reprimanded, suspended, demoted, terminated, or transferred. She suffered no reduction in compensation. She was stripped of no duties. She simply served in the position for which she was hired until her contractual term of employment expired and, even then,

Respondent discussed continued employment with her, an opportunity she declined.

88. Petitioner also failed to establish that other comparably-situated employees were subject to personnel decisions that differed from those applied to her. Petitioner provided no evidence that Respondent acted inconsistently with the manner in which any employee, regardless of race, would have been subject to its investigations and responses to Petitioner's legion of complaints about the attendance and attire of the Steeplechase CSPs, or that Respondent acted inconsistently with the manner in which any employee, regardless of race, would have been subject to work performance expectations and reviews.

89. Furthermore, Petitioner was replaced as the Steeplechase CSL by Ms. Heflin, a person of the same race, color, and sex as Petitioner.

90. In short, Petitioner failed to prove that she was subject to any adverse employment decision, or that her treatment as an employee of Respondent 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.

Discrimination on the Basis of Sex

91. Florida's Civil Rights Act prohibits sex-based discrimination in two ways: by a tangible adverse employment action; or by creation of a hostile workplace environment caused by sexual harassment that is so severe or pervasive as to alter the terms and conditions of work. Blizzard v. Appliance Direct, Inc., 16 So. 3d 922, 926 (Fla. 5th DCA 2009)(citing Baldwin v. Blue Cross/Blue Shield of Alabama, 480 F.3d 1287 (11th Cir. 2007); and Thornton v. Flavor House Products, Inc., 105 Fair Empl. Prac. Cas. (BNA) 336 (M.D. Ala. 2008)).

92. In an action based on sexual harassment "a plaintiff may establish a violation of Title VII by proving that the harassment either was directly linked to the grant or denial of an economic *quid pro quo* or created a hostile work environment." Farley v. Am. Cast Iron Pipe Co., 115 F.3d 1548, 1551-1552 (11th Cir. 1997)(citing Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986)).

93. In order to establish a claim based on sexual harassment, Petitioner was required to show: (1) that she is a member of a protected group; (2) that she was subjected to unwelcome sexual harassment, such as sexual advances, requests for sexual favors, and other conduct of a sexual nature; (3) that the harassment was based on the sex of the employee; (4) that the harassment was sufficiently severe or pervasive to

alter the terms and conditions of employment and create a discriminatorily abusive working environment; and (5) that there is a basis for holding the employer liable. Blizzard v. Appliance Direct, Inc., 16 So. 3d at 927 (citing Mendoza v. Borden, Inc., 195 F.3d 1238 (11th Cir. 1999) and Speedway Superamerica, L.L.C. v. Dupont, 933 So. 2d 75 (Fla. 5th DCA 2006)); see also Cazeau v. Wells Fargo Bank, N.A., 2015 U.S. App. LEXIS 9657 at *3; Maldonado v. Publix Supermarkets, 939 So. 2d 290, 293-294 (Fla. 4th DCA 2006).

94. Petitioner, as a female, is a member of a protected class.

95. Petitioner failed to produce any persuasive evidence to support a prima facie case that she was subjected to unwelcome sexual advances or harassment by Mr. Tucker, Mr. Bassriel, or any other employee of Respondent. No co-workers observed any sexually-oriented language or conduct directed towards Petitioner or anyone else. Petitioner never mentioned or complained to co-workers or management about any sexually charged language or conduct -- except for Mr. Tucker's outburst that led to his immediate termination.

96. The requirement that the harassing conduct be severe or pervasive enough to alter the terms or conditions of employment contains both an objective and a subjective component. The behavior "must result in both an environment

that a reasonable person would find hostile or abusive and an environment that the victim subjectively perceives . . . to be abusive." Cazeau, 2015 WL 3605744, at *3 (citations omitted).

97. To determine whether alleged harassment is objectively offensive, courts review the totality of the circumstances, which "may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993).

98. "Title VII is not a general civility code; therefore, not all offensive conduct in the workplace is actionable as sexual harassment." Colon v. Envtl. Technologies, Inc., 184 F. Supp. 2d 1210, 1219 (M.D. Fla. 2001)(citing Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80-81 (1998)). The mere "utterance of an . . . epithet," "discourtesy or rudeness," or "'simple teasing,' offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'" Faragher v. City of Boca Raton, 524 U.S. 775, 787-788 (1998).

99. Petitioner failed to prove that Mr. Tucker's actions, which were directed at what he perceived to be Petitioner's overzealous enforcement of office rules, created office

conditions that were sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment. She did not resign her position, which might raise issues of constructive discharge. Rather, Petitioner willingly completed the term of her contract of employment with Respondent.

100. Finally, the evidence in this case demonstrates that Petitioner failed to avail herself of the protections afforded by H&R Block's written anti-discrimination and anti-harassment policy, and did not bring her allegations of sexually-inappropriate words on the part of Mr. Tucker to the attention of Ms. Howell, to H&R Block's human resources department, to the H&R Block toll-free hotline, or to ethics@hrblock.com.

101. The Supreme Court has recognized a defense to a charge of discrimination that is available to employers when the subject of the alleged discrimination has failed to comply with policies designed to provide redress for the discriminatory acts or conduct giving rise to the charge, holding that:

> When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective

> opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense. No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment. (internal citation omitted).

Faragher v. City of Boca Raton, 524 U.S. at 707-708.

102. Petitioner's failure to seek redress under the H&R Block policy, combined with the lack of any tangible adverse employment action, satisfies the elements necessary to trigger the affirmative defense described in Faragher.

103. There is not a shred of corroborative evidence to support Petitioner's after-the-fact claims of sexual harassment or creation of a sexually-hostile work environment. For the reasons set forth herein, Petitioner failed to meet her burden of proof that she was the subject of sex-based discrimination, and her petition for relief should be dismissed.

Retaliation

104. In her Employment Complaint of Discrimination, Petitioner checked the box for "retaliation." At the commencement of the final hearing, she indicated that she was maintaining her claim of retaliation. However, after having heard two days of testimony, and having received and reviewed hundreds of pages of documents in evidence, there remains such a complete lack of any evidence of retaliation in this case that the undersigned is unable to even determine what facts underlie Petitioner's claim. Nonetheless, in order to ensure that the issue has received fair consideration, an analysis of the applicable standards is warranted.

105. A claim of retaliation involves section 760.10(7), which provides that:

> 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.

106. "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)).

107. 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 at 925-926.

108. 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. 2d DCA 2008).

109. There has been no allegation or evidence of retaliatory acts committed by Respondent after Petitioner filed her claim of discrimination on July 30, 2014. By that time, her contract of employment had expired, and she was no longer an employee of H&R Block. Therefore, Petitioner's claim does not fall under the participation clause.

110. Claims under the opposition clause are subject to a different standard of protection from those brought under the participation clause.

> 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.

EEOC v. Total Sys. Servs., 221 F.3d at 1176.

111. 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. Until Mr. Tucker's March 27, 2014, outburst, Petitioner's complaints to management were based exclusively on incidents of non-compliance with office policies, and with the occasionally rude and/or insubordinate responses from CSPs under

her supervision to her efforts to enforce strict adherence to those policies. Petitioner's complaints had nothing to do with discrimination. As to Mr. Tucker's profanity-laced outburst, rather than retaliating against Petitioner for her report of the outburst, Respondent acted to immediately terminate the transgressor.

112. In order to establish a prima facie case of retaliation under the opposition clause 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).

113. The record is devoid of evidence to demonstrate what "statutorily protected expression" underlies Petitioner's claim of retaliation. To the extent the "expression" is related to her myriad of complaints of tardiness, dress code violations, and general lack of due regard for her authority, that is simply not statutorily-protected expression. Her allegations have nothing to do with whether anyone affiliated with H&R Block

engaged in wrongful conduct as a result of her opposition to acts of discrimination directed against herself or others.

114. Furthermore, as set forth in detail above, there was no evidence that Petitioner suffered any adverse employment action as a result of any action or lack thereof on the part of Respondent.

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

Conclusion

116. Section 760.10 is designed to eliminate workplace discrimination. Petitioner failed to put forth any credible evidence that Respondent discriminated against her in any way.

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, H and R Block Enterprises, did not commit any unlawful employment practice as to Petitioner, Mary Ann De Matas, and dismissing the Petition for Relief filed in FCHR No. 2014-01148.

DONE AND ENTERED this 12th day of October, 2015, in Tallahassee, Leon County, Florida.

E. GARY EARLY
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of October, 2015.

ENDNOTES

[1/] Exactly how Mr. Tucker would have been able to log an unexpected appointment into the "appointment manager" was not explained by Petitioner, nor was there any reason given, other than rote adherence to office "procedures," for discouraging or penalizing conduct that was clearly motivated by a desire to meet the needs of H&R Block clients.

[2/] Mr. Bassriel's statement regarding Petitioner's behavior around clients was substantiated by Ms. Heflin, who described an incident in which Petitioner hovered over Mr. Bassriel's desk when he was having a teleconference with a client at the client's request, causing him to cut the call short, after which Petitioner admonished him for his unscheduled visit to the office.

[3/] Several weeks after Mr. Tucker's termination, Petitioner was the victim of an assault in her home. There have been no arrests in that case. During the course of this proceeding, Petitioner sought to discuss the assault, in the apparent hope that the undersigned would draw an inference that the assault had something to do with Mr. Tucker or Respondent. All objections to testimony and evidence of the unsolved assault were sustained.

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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.