STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GINA A. RUIZ,

Petitioner,

vs. Case No. 17-2367

LOGISTIC SERVICES INTERNATIONAL, INC.

Respondent.
_____/

RECOMMENDED ORDER

An administrative hearing was conducted in this case on July 12, 2017, by video teleconference at locations in Tallahassee and Pensacola, Florida, before James H. Peterson III, Administrative Law Judge with the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Gina A. Ruiz, pro se
3445 Wasatch Range Loop
Pensacola, Florida 32526

For Respondent: Kathryn K. Rudderman, Esquire
Robert G. Riegel, Jr., Esquire
Buchanan Ingersoll & Rooney PC
50 North Laura Street, Suite 2800
Jacksonville, Florida 32202

STATEMENT OF THE ISSUE

Whether Logistic Services International, Inc. (Respondent or LSI), discriminated against Gina A. Ruiz (Petitioner) in her

employment with LSI on the basis of Petitioner's race or because of unlawful retaliation in violation of the Florida Civil Rights Act of 1992.

PRELIMINARY STATEMENT

Petitioner filed an Employment Charge of Discrimination (Complaint) dated October 9, 2016, with the Florida Commission on Human Relations (the Commission) alleging that Respondent violated the Florida Civil Rights Act by terminating her employment based on her race, age, gender, retaliation, and prohibited employment practices.[2/]

The Commission investigated the Complaint, which was assigned FCHR No. 201602034. Following completion of its investigation, the Commission issued a Determination signed by its executive director on March 16, 2017, finding that "no reasonable cause exists to believe an unlawful practice occurred." The same day, the Commission sent Petitioner a "Notice of Determination: No Reasonable Cause," which advised Petitioner of her right to file a Petition for Relief for an administrative proceeding on her Complaint within 35 days from the date the Determination was signed by the executive director.

Petitioner timely filed a Petition for Relief with the Commission on April 18, 2017. The Commission referred the matter to the Division of Administrative Hearings, and the case

was assigned to the undersigned to conduct an administrative hearing pursuant to chapter 120, Florida Statutes (2017).[1/]

At the final hearing, Petitioner testified on her own behalf, presented the testimony of six other witnesses, and offered five exhibits received into evidence as Exhibits P-1 through P-3, P-6, and P-12. By agreement of the parties, Respondent presented the testimony of some of the witnesses called by Petitioner through expanded inquiry after cross-examination, and offered the testimony of two additional witnesses. Respondent offered nine exhibits received into evidence as Exhibits R-3, R-5, R-7 through R-9, R-11, R-15, R-19, and R-20. Joint Exhibit 1, which was the same as R-15, was also received into evidence.

The proceedings were recorded and a transcript was ordered. The parties were given 30 days from the filing of the transcript within which to submit their respective Proposed Recommended Orders. The two-volume Transcript was filed on August 7, 2017. The parties timely filed their respective Proposed Recommended Orders on September 6, 2017, both of which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. LSI's Pensacola facility builds training devices for the U.S. Army by salvaging damaged aircraft and fashioning

simulated parts to be used in military aircraft maintenance training.

2. Petitioner is an African-American female who was employed by LSI's Pensacola facility for 19 months, from February 17, 2015, to September 9, 2016.

3. During her employment with LSI, Petitioner held three different positions: tools and parts attendant, shipping and receiving clerk, and procurement planner.

4. Initially, from February 17, 2015, until approximately April 2015, Petitioner worked as a tools and parts attendant at the rate of $14.00 per hour.

5. Beginning in approximately April 2015, Petitioner moved from her job as tools and parts attendant to a position in shipping and receiving. At the final hearing, Petitioner testified that her move to the shipping and receiving position was actually a demotion because it had a lower classification number than her previous tools and parts attendant position. Petitioner, however, liked the shipping and receiving position at the time and considered it to be a positive move based on her skills. Petitioner received a raise to $14.75 per hour with the move.

6. In approximately May 2015, Petitioner received a 90-day appraisal report rating of 6.38 out of 10 from her then-LSI supervisor, Bernard Hill. Mr. Hill is African-American. While

Petitioner testified that she does not believe that Mr. Hill's appraisal of her was based on her race, she asserts that a director at LSI, David Corbisier, interfered with that appraisal.

7. Petitioner testified that she was not happy with her 6.38 appraisal rating and thought that she should have received at least an 8 or 9 out of 10 for that appraisal. Petitioner admitted, however, that she does not know the significance of the numbers assigned under LSI's employee rating system.

8. The 6.38 employee rating received by Petitioner under LSI's employee rating system translates to a "highly effective" performance rating.

9. Petitioner never complained about Mr. Hill's appraisal of her until after submitting a resignation from her employment with LSI on August 29, 2016.

10. In October 2015, Petitioner was promoted to the position of procurement planner. With her promotion, Petitioner received an increase in compensation from $14.75 to $16.67 per hour. Petitioner was happy with her promotion.

11. The position of procurement planner was a newly-created position at LSI. Both Petitioner and another employee, Patricia Koons, were assigned to work as procurement planners. Petitioner and Patricia Koons were the only two procurement

planners. Initially, both Petitioner and Ms. Koons were supervised by Jason Delsandro.

12. On October 16, 2015, LSI hired Petitioner's husband, Victor Ruiz, as a government-furnished equipment clerk at the Pensacola facility. After approximately three months, Mr. Ruiz was promoted to the position of inventory control manager, where he understood he would be supervising Sheila Corbisier.

13. Sheila Corbisier is the wife of David Corbisier. David Corbisier is, and was at the time, director of manufacturing for LSI's Pensacola facility. In that capacity, Mr. Corbisier oversaw the Pensacola facility's production and supervised Petitioner's supervisor, Mr. Delsandro, as well as other supervisors at LSI.

14. At some point, Mr. Ruiz became aware that Ms. Corbisier may have been abusing her overtime. He reported his suspicions to his immediate supervisors, Victor Wright and Bernard Hill. Mr. Ruiz did not tell Sheila Corbisier that he thought she was abusing overtime or that he would be reporting his concerns to anyone. Mr. Ruiz never reported his concerns to Mr. Corbisier.

15. LSI production manager Mark Case testified that the issue was not with Ms. Corbisier's abuse of overtime, but whether she would be given the opportunity to work overtime if

authorized. To Mr. Case's knowledge, Ms. Corbisier did not work any overtime.

16. At some point after Mr. Ruiz reported to his supervisors his concerns about Ms. Corbisier's overtime, Ms. Corbisier resigned from LSI. Mr. Ruiz does not know why Ms. Corbisier resigned. No evidence was submitted indicating the reason or providing an explanation of why Ms. Corbisier resigned, or whether it had anything to do with her overtime.

17. Petitioner alleges that, because her husband, Mr. Ruiz reported his concerns about Ms. Corbisier to his supervisors, Mr. Corbisier retaliated against Petitioner by interfering with Petitioner's appraisals and assigning her menial tasks of inventory control that were to be performed in areas without air-conditioning. Petitioner also contends that Mr. Corbisier took these alleged adverse employment actions against her because of her race.

18. At the final hearing, Petitioner's husband, Mr. Ruiz, could not say how Mr. Corbisier had retaliated against Petitioner. The evidence was otherwise insufficient to reasonably suggest that Mr. Corbisier retaliated against Petitioner or that Mr. Corbisier discriminated against Petitioner in her employment based upon her race.

19. As to Petitioner's alleged assignment to menial tasks of inventory control, the evidence failed to show that

Mr. Corbisier assigned any tasks to Petitioner. In his capacity of supervisor over the two procurement planners, Mr. Delsandro, and no one else, decided which tasks were assigned to Petitioner and Ms. Koons.

20. As procurement planners, both Petitioner and Ms. Koons were responsible for inputting requisitions into the system, gathering backup data for proposals, conducting inventory control, and timely planning and requisitioning parts for training devices.

21. Inventory control requires the monitoring of inventory levels to ensure consistency with forecasted demand and inventory goals for common stock items.

22. The procurement planner job description provides that the work is to be performed in office and production floor environments. As used in the job description, "production floor environment" refers to an area that is not air-conditioned. While procurement requisitions are prepared in air-conditioned office space, approximately 90 percent of the facilities at LSI's Pensacola location are not air-conditioned.

23. During his supervision, Mr. Delsandro had the intention of dividing work assignments equally between Petitioner and Ms. Koons. Ms. Koons, however, who had more procurement experience than Petitioner, ended up performing more

requisitions than Petitioner, and Petitioner was assigned more inventory control.

24. The inventory control function includes the counting of inventory. Petitioner and Ms. Koons were both involved in counting various items for inventory control. Mr. Delsandro also engaged in inventory control tasks.

25. While Petitioner apparently had more assigned tasks in inventory control than Ms. Koons, Mr. Delsandro attempted to assign inventory control tasks to Petitioner and Ms. Koons as equally as he could, based on their availability. At least once, when Petitioner was performing inventory control tasks in an environment without air-conditioning, Mr. Delsandro offered to let Petitioner take the inventory items into his office to work in air-conditioning. Petitioner, however, elected to work on the floor instead.

26. On at least one other occasion, Petitioner asked Mr. Delsandro if she could help her husband in the warehouse, which is not air-conditioned.

27. Prior to Mr. Delsandro's supervision, Petitioner had worked in the tool room, an area which is not air-conditioned.

28. The evidence does not support a finding that Petitioner's assignments to work in inventory control were influenced by Mr. Corbisier, or were the result of retaliation or racial discrimination.

29. Regarding Petitioner's appraisals, there is no evidence that Mr. Corbisier, or anyone else, retaliated or discriminated against Petitioner. As noted above, Petitioner's first appraisal, a 90-day appraisal report conducted in May 2015, gave Petitioner a "highly effective" rating.

30. Petitioner's only other appraisal, dated March 2, 2016, resulted in an even higher rating of "outstanding."

31. Petitioner's March 2, 2016, appraisal was prepared and approved in accordance with LSI's procedures designed to promote consistency in the appraisal process. In accordance with that process, draft appraisals are first prepared by employees' supervisors, and then shared with the supervisors of those supervisors; in this case, David Corbisier. If the supervisor's supervisor agrees with the evaluation, then it would be approved. Otherwise, there would be some discussion that may lead to changes, for consistency purposes. Any appraisal recommending a merit pay increase of more than three percent required justification prior to approval. Even with this interaction, the individual supervisors are ultimately responsible for the final appraisals.

32. Petitioner and Ms. Koons were the first employees that Mr. Delsandro had supervised, and the appraisals for those two employees were the first appraisals that Mr. Delsandro had prepared for LSI. In accordance with LSI's procedures, and

considering the fact the appraisals of Petitioner and Ms. Koons were Mr. Delsandro's first appraisals, Mr. Corbisier met with Mr. Delsandro to discuss the appraisals.

33. Mr. Delsandro's draft appraisal for Petitioner gave Petitioner an overall "outstanding" rating and recommended a 3.5-percent merit pay raise. When Mr. Corbisier met with Mr. Delsandro to discuss Petitioner's draft appraisal, there were some differences in opinion. Providing a score between 1 and 10 for each category on the draft appraisal, Mr. Delsandro had initially assigned Petitioner a rating of 7 for job knowledge, 7 for teamwork, 9 for accountability, 7 for communications, 7 for incentive, and 8 for quality; for an overall rating of 7.5 across the categories, which is an "outstanding" rating. On the other hand, Mr. Corbisier assigned Petitioner a rating of 6 for job knowledge, 6 for teamwork, 8 for accountability, 7 for communications, 7 for incentive, and 7 for quality; for an overall rating of 6.83 across the categories, which is a "highly effective" rating.

34. The discussions between Mr. Delsandro and Mr. Corbisier resulted in Petitioner receiving an overall "outstanding" rating of 7.17, and Mr. Delsandro and Mr. Corbisier agreed that Petitioner's merit increase would remain at 3.5 percent as initially recommended by Mr. Delsandro.

35. After Petitioner's appraisal report was approved by Mr. Corbisier, Mr. Delsandro met with Petitioner to review her evaluation. Petitioner accepted the appraisal report without objection. Based on Petitioner's overall rating of 7.17, as reflected in her March 2016 appraisal, Respondent received a 3.5-percent merit pay increase, from $16.67 per hour to $17.25 per hour.[3/]

36. On approximately August 1, 2016, while still serving as procurement planners, both Petitioner and Ms. Koons were transferred from supervisor Mr. Delsandro to a new supervisor, Victor Wright. That same month, Petitioner was reassigned to work in LSI's newly acquired building. Some of the employees referred to the new building as "the penthouse" because everything was so new.

37. Petitioner's pay was raised to $17.53 per hour, effective September 1, 2016.

38. At the time, Petitioner did not object to her reassignment and made no complaint while working in the new building. Petitioner considered Mr. Wright to be fair and did not have any issues with Mr. Wright.

39. On August 29, 2016, Petitioner submitted her voluntary resignation with a two-week notice to LSI, indicating that her last day of employment with LSI would be September 9, 2016. Prior to submitting her resignation, Petitioner had never

complained about her appraisals, job duties, or work environment, and had not alleged retaliation or discrimination.

40. Petitioner worked during the two-week notice period from the date of her resignation letter on August 29, 2016, until September 9, 2016. Petitioner's rate of pay never decreased during her employment with LSI.

41. For the first time, on September 7, 2017, two days prior to her last day at LSI, in a telephone conversation with LSI's director of human resources, David Edwards, Petitioner alleged retaliation and discrimination. During that conversation, Petitioner advised Mr. Edwards that she had been told that Mr. Corbisier had made a racial comment about her husband, Victor Ruiz. She advised Mr. Edwards that she also believed Mr. Corbisier had retaliated against her because her husband had reported an overtime issue concerning Ms. Corbisier.

42. Petitioner did not hear the alleged racial comment and neither did her husband. Rather, Petitioner and her husband were allegedly told by Steve Lewis, who was a production manager at LSI, that Mr. Corbisier had made racial statements.

43. After conducting an investigation to determine whether Mr. Corbisier made racial statements about Mr. Ruiz, Mr. Edwards determined that the allegation was without merit. According to

Mr. Edwards, "Mr. Lewis was unable to specifically say that Mr. Corbisier had made any specific racial comments against [Victor Ruiz]."

44. Steve Lewis, the only one who allegedly heard Mr. Corbisier make a racial statement about Mr. Ruiz, testified at the final hearing. Consideration of his testimony, in light of testimony of other witnesses and other evidence, casts doubt upon the credibility of Mr. Lewis's assertion that Mr. Corbisier made a racial statement about Mr. Ruiz or anyone else.

45. Although Steve Lewis was still employed at LSI at the time that Petitioner resigned, he later resigned from employment with LSI. According to Mr. Lewis, he resigned from LSI due to conflicts with David Corbisier.

46. Mr. Lewis testified that, on just one occasion in Mr. Corbisier's office, when just he and Mr. Corbisier were present, Mr. Corbisier made comments of a racial nature about Victor Ruiz.[4/] During his testimony, however, Mr. Lewis could not recall the exact comment or comments that Mr. Corbisier allegedly made about Mr. Ruiz, but said that Mr. Corbisier had used the "N" word when referring to Mr. Ruiz.

47. Mr. Lewis further testified that Mr. Corbisier had used the "N" word freely in another conversation when he and

co-worker, Mark Case, were present. Mr. Lewis testified that, on that occasion, the "N" word was not necessarily directed at anyone.

48. Although Mr. Lewis had received training on reporting discrimination as part of his management training with LSI, he did not report any racial comments by Mr. Corbisier at the time that they were allegedly made. Rather, Mr. Lewis did not discuss the allegations with LSI's human resources department until after Petitioner had resigned from her employment with LSI.

49. When Mr. Lewis finally spoke to LSI's human resources department about the matter, he told Mr. David Edwards that he had heard Mr. Corbisier make a racial comment about Mr. Ruiz, but that he could not recall the comment.

50. Mr. Edwards recalled that Mr. Lewis told him that he believed Mr. Corbisier's racial comment about Mr. Ruiz was a one-time comment in the heat of the moment. Mr. Edwards testified that Mr. Lewis never told him that Mr. Corbisier used the "N" word.

51. Mark Case also testified. Mr. Case did not hear Mr. Corbisier make any racial statements, at the workplace or socially.

52. Melissa Griffith, LSI's human resources generalist who is the human resources contact for LSI's Pensacola facility,

testified that she has never heard Mr. Corbisier make any racial comments about Mr. Ruiz or anyone else.

53. In his testimony, Mr. Corbisier denied ever making a racial statement about Mr. Ruiz. He further testified that he has not used the "N" word regarding Mr. Ruiz, has not made racial comments in the presence of Mr. Lewis, and did not make a racial statement about Mr. Ruiz in an alleged one-on-one meeting with Mr. Lewis. Mr. Corbisier further testified that he does not have any hostility or resentment toward Mr. Ruiz and that he has no motivation to harm or retaliate against Petitioner based on anything concerning Petitioner or her husband.
Mr. Corbisier's testimony was credible and is credited.

54. The evidence presented at the final hearing was insufficient to support a finding that Mr. Corbisier used racial slurs against Petitioner's husband or retaliated against Petitioner.

55. Moreover, the evidence failed to show adverse action against Petitioner. Both of Petitioner's employment appraisals at LSI were positive. Her last appraisal resulted in a merit pay raise higher that her co-worker, Ms. Koons.[5/] During her 19 months of employment with LSI, Petitioner received four salary increases.

56. At all material times, LSI had a grievance procedure in its employee handbook that provided employees with a

complaint procedure for reporting discrimination, retaliation, or harassment. Petitioner received training on LSI's grievance procedures during her new employee orientation process with LSI, and signed an acknowledgement regarding her receipt of LSI's employee handbook.

57. Petitioner had no complaints at the time of her assignments to various jobs. In fact, prior to her resignation, Petitioner never once complained to her supervisors or human resources under LSI's grievance procedures or otherwise. She liked her immediate supervisors. Mr. Corbisier's interactions with Petitioner's supervisors did not result in adverse consequences against Petitioner and lacked retaliatory or discriminatory intent.

58. In sum, the evidence did not demonstrate that Petitioner was subjected to retaliation or unlawful discrimination while employed at LSI.

CONCLUSIONS OF LAW

59. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes, and Florida Administrative Code Rule 60Y-4.016(1).

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

FCRA), incorporates and adopts the legal principles and precedents established in the federal anti-discrimination laws specifically set forth under Title VII of the Civil Rights Act of 1964, as amended. 42 U.S.C. § 2000e, et seq.

61. Section 760.10 of the FCRA prohibits unlawful employment practices. Petitioner alleges unlawful discrimination based on her race and retaliation. Section 760.10(1)(a) prohibits discrimination "against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status." Section 760.10(7) of the FCRA prohibits an employer from retaliating against an employee who 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." This opposition is often referred to as the employee "engaging in protected activity."

62. Florida courts have held that because the FCRA is patterned after Title VII of the Civil Rights Act of 1964, as amended, federal case law dealing with Title VII is applicable. See, e.g., Fla. Dep't of Cmty. Aff. v. Bryant, 586 So. 2d 1205, 1209 (Fla. 1st DCA 1991).

63. As developed in federal cases, a prima facie case of discrimination under Title VII may be established by statistical proof of a pattern of discrimination, or on the basis of direct evidence, which, if believed, would prove the existence of discrimination without inference or presumption.[6/] Holifield v. Reno, 115 F.3d 1555, 1561 (11th Cir. 1997). Usually, however, as in this case, direct evidence is lacking and one seeking to prove discrimination must rely on circumstantial evidence of discriminatory intent, using the shifting burden of proof pattern established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). See Holifield, 115 F.3d at 1561-62.

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

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

U.S. Dep't of Hous. & Urban Dev. v. Blackwell, 908 F.2d 864, 870 (11th Cir. 1990)(citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-804); Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17, 22 (Fla. 3d DCA 2009)).

Racial Discrimination

65. In order to establish a prima facie case of racial discrimination under the FCRA, Petitioner is required to prove by a preponderance of the evidence that: (1) she belongs to a protected group; (2) she was qualified for the position held; (3) she suffered an adverse employment action; and (4) a similarly-situated employee outside Petitioner's protected class was treated more favorably. See Holifield, 115 F.3d at 1562.

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

67. While direct evidence of discrimination is not necessary, a petitioner's speculation as to the motives of Respondent, standing alone, is insufficient to establish a prima facie case of discrimination. See, e.g., Lizardo v. Denny's, Inc., 270 F.3d 94, 104 (2d Cir. 2001) ("Plaintiffs have done little more than cite to their mistreatment and ask the court to conclude that it must have been related to their race. This is not sufficient.").

68. Petitioner established the first two elements of her racial discrimination claim by showing (1) as an African-American, she belongs to a protected group; and (2) through evidence of positive appraisals, Petitioner demonstrated that she was qualified for the positions that she held at LSI.

69. To meet the element (3), Petitioner was required to show that she suffered an adverse employment action. The adverse employment actions addressed under section 760.10(1)(a) of the FCRA relate to "compensation, terms, conditions, or privileges of employment." It is well-established that "Title VII prohibits discrimination on the basis of race, color, religion, sex, and national origin 'with respect to . . . compensation, terms, conditions, or privileges of employment,' and discriminatory practices that would 'deprive any individual of employment opportunities or otherwise adversely affect his status as an employee.'" Thompson v. N. Am. Stainless, LP, 562 U.S. 170, 173-74 (2011)(first quoting Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 62 (2006);(then quoting 42 U.S.C. § 2000e-2(a)).

70. According to Petitioner, racial discrimination by LSI director, Mr. Corbisier, resulted in adverse employment actions consisting of a demotion, less than optimal appraisals, a reduced merit pay increase, and the assignment of menial tasks to be performed in unfavorable working conditions. Petitioner's

first three alleged "adverse employment actions" are not supported by the evidence, but are rather based on Petitioner's speculations and beliefs. Petitioner's beliefs, however, without supporting evidence, amount to "conclusory allegations" or "unwarranted factual deductions masquerading as facts" that are not sufficient to meet Petitioner's burden of proof. See Davila v. Delta Air Lines, Inc., 326 F.3d 1183, 1185 (11th Cir. 2003).

71. Petitioner's allegation of a demotion relates to Petitioner's first position move from tools and parts attendant to a shipping and receiving position. At the time of the move, Petitioner liked her new position, considered it a positive move, and received a raise from $14.00 per hour to $14.75 per hour. She never complained that it was a demotion while she was employed by LSI. Only later, after her resignation, did Petitioner speculate that the move was actually a demotion because the new position had a lower classification number than her previous position.

72. As to her appraisals, the facts show that both of her appraisals were positive. The first appraisal determined Petitioner to be a "highly effective" employee. The second determined Petitioner to be "outstanding." Other than Petitioner's unsubstantiated belief that she should have

received higher appraisals, there is no support for the allegation. Petitioner admittedly does not understand LSI's employee appraisal scoring system.

73. There is also a lack of evidence to support Petitioner's belief that she received a reduced merit pay increase. The evidence demonstrated that she received the same 3.5-percent merit pay increase initially recommended by her immediate supervisor. There was also no support for Petitioner's belief that she should have received a 4-percent salary increase.

74. The only alleged "adverse employment action" with any support is Petitioner's allegation that she received more inventory control assignments than her co-worker. Her immediate supervisor explained, however, that assignments to inventory control were not influenced by Mr. Corbisier, but were his own decisions, based on availability. Further, the evidence indicated that Petitioner's co-worker, Ms. Koons, had more requisition experience.

75. Petitioner also failed to prove element (4) of her prima facie case, i.e., that a similarly-situated employee outside Petitioner's protected class was treated more favorably. Petitioner did not indicate the race of her alleged comparator, Patricia Koons. Even if she had, a comparison showed that Petitioner received a higher appraisal and a greater merit pay

raise than Ms. Koons. While the evidence indicated that Petitioner may have been assigned more inventory control than Ms. Koons, Petitioner did not complain prior to her resignation, and declined at least one offer to work in an air-conditioned environment while assigned to inventory control.

76. Therefore, considering the required elements, it is concluded that Petitioner failed to make a prima facie showing of racial discrimination.

77. Even if Petitioner was able to establish a prima facie case of racial discrimination, Respondent proffered legitimate, non-discriminatory reasons for the only alleged "adverse employment action" with any evidentiary support--Petitioner's assignments to inventory control. As explained by Petitioner's immediate supervisor, the decision for Petitioner's assignments to conduct inventory control was his decision alone. Petitioner's co-worker, who had more requisition experience, was assigned more requisition work than Petitioner. However, the evidence also shows that Petitioner's immediate supervisor conducted inventory control himself and tried to assign those tasks to Petitioner and her co-worker as evenly as possible, based upon availability. Inventory control was an essential part of Petitioner's job description as a procurement planner.

78. Finally, Petitioner offered no proof that LSI's proffered reasons for assigning her to conduct inventory control

were a pretext for unlawful discrimination. In order to prove that an employer's asserted reason is merely a pretext:

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

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

79. Here, LSI, through Petitioner's immediate supervisor, proffered reasons for Petitioner's assignment to inventory control, and those reasons are legitimate reasons which might motivate a reasonable employer to assign Petitioner to perform those inventory duties.

80. For the foregoing reasons, it is concluded that Petitioner failed to carry her burden of persuasion necessary to establish a prima facie case of racial discrimination. Even if she had, Respondent proved legitimate, non-discriminatory reasons for assigning Petitioner to inventory control, which Petitioner failed to show were a mere pretext for unlawful racial discrimination.

Retaliation

81. Similar to claims of race and age discrimination, claims of retaliation are analyzed under the McDonnell Douglas burden-shifting paradigm.

82. In order to demonstrate a prima facie case of retaliation, Petitioner must show: (1) that she, or someone closely related to her who was employed by the same employer,[7/] was engaged in statutorily-protected expression or conduct; (2) that she suffered an adverse action from her employer; and (3) that there is some causal relationship between the two events. Holifield v. Reno, 115 F.3d at 1556; Thompson v. N. Am. Stainless, LP, 562 U.S. at 178-79. The lesser standard of "some causal relationship" articulated in Holifield has been replaced with "the causation in fact" standard. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2525 (2013).

83. If the employee makes out a prima facie case of retaliation, then the burden shifts to the employer to demonstrate a legitimate, non-retaliatory reason for its challenged action. Once the employer does so, the burden returns to the employee to demonstrate that the employer's articulated reason is pretext for retaliatory action. See McDonnell Douglas, 411 U.S. at 804.

84. In this case, the alleged retaliation is not based on Petitioner's own engagement in statutorily-protected expression or conduct. Rather, it is based on the alleged protected activity of Petitioner's husband, who allegedly reported Ms. Corbisier's alleged abuse of overtime.

85. If Mr. Ruiz's report of alleged overtime abuse was statutorily-protected activity within the meaning of the anti-retaliation provisions, then it could meet the first element for a prima facia case of retaliation claim by Petitioner, his wife. As explained by the United States Supreme Court in Thompson, 562 U.S. at 178, in an opinion which, by applying the "zone of interests" test, allowed plaintiff Thompson to sue his employer for retaliation when he was fired after his co-employee's fiancé engaged in protected activity:

> Applying that test here, we conclude that Thompson falls within the zone of interests protected by Title VII. Thompson was an employee of NAS, and the purpose of Title VII is to protect employees from their employers' unlawful actions. Moreover, accepting the facts as alleged, Thompson is not an accidental victim of the retaliation --collateral damage, so to speak, of the employer's unlawful act. To the contrary, injuring him was the employer's intended means of harming [his fiancé]. Hurting him was the unlawful act by which the employer punished her. In those circumstances, we think Thompson well within the zone of interests sought to be protected by Title VII. He is a person aggrieved with standing to sue.

86. Mr. Ruiz's report of alleged overtime abuse, however, is not statutorily-protected activity within the meaning of the state and federal prohibitions against retaliation. Section 760.10(7) provides:

> It is an unlawful employment practice for an employer, an employment agency, a joint labor-management committee, or a labor organization 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.[8/]

(Emphasis added).

87. While Petitioner attempts to claim that her husband's report of alleged overtime abuse by Ms. Corbisier should serve as the "protected activity" for her retaliation claim, according to section 760.10(7), quoted above, the activities that are protected from retaliation are activities opposing discrimination "under this section." Id. Mr. Ruiz's alleged reports of overtime abuses by Ms. Corbisier were not complaints made "under this section," and the evidence does not otherwise show that either Mr. Ruiz or Petitioner were engaged in statutorily-protected activity. Therefore, Petitioner failed to establish the first element for a prima facie showing of retaliation.

88. As to the second element, the adverse actions allegedly imposed as retaliation are the same as addressed under the heading Racial Discrimination, above, consisting of a demotion, poor appraisals, a reduced pay increase, and inventory control assignments.[9/] As previously analyzed, all but the

inventory control assignments are not supported by the evidence, and the inventory control assignments are supported by legitimate, non-discriminatory reasons which Petitioner did not show were mere pretext. In addition, considered from an objective standard, none of the actions allegedly taken against Petitioner are "materially adverse." See Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 68 (2006)("In our view, a plaintiff must show that a reasonable employee would have found the challenged action materially adverse . . . . We refer to reactions of a reasonable employee because we believe that the [antiretaliation] provision's standard for judging harm must be objective.").

89. Petitioner also failed to satisfy the third element for a prima facie case of retaliation because she did not provide credible evidence showing a causal relationship between her husband's alleged protected activity and any alleged adverse employment options. The evidence did not show that either Mr. Corbisier or Ms. Corbisier were aware that Mr. Ruiz reported to his supervisors that Ms. Corbisier was abusing overtime. And, it was Petitioner's immediate supervisors, not Mr. Corbisier, who gave Petitioner her job assignments. There is no evidence that Mr. Corbisier made or interfered with Petitioner's job assignments during her employment with LSI.

90. Thus, Petitioner failed to prove her claim of retaliation.

Constructive Discharge

91. By alleging that she was forced to resign because of alleged discrimination and retaliation, Petitioner claims constructive discharge. To prove constructive discharge, Petitioner must demonstrate that LSI deliberately made her working conditions so intolerable that a reasonable person in her position would be compelled to resign. Doe v. DeKalb Cnty. Sch. Dist., 145 F.3d 1441, 1450 (11th Cir. 1998). According to the United States Eleventh Circuit Court of Appeals:

> In assessing constructive discharge claims, we do not consider a plaintiff's subjective feelings about his employer's actions. Rather, we determine whether "a reasonable person in [the plaintiff's] position would be compelled to resign."

Doe, 145 F.3d at 1450 (citing Steele v. Offshore Ship., Inc., 867 F.2d 1311, 1317 (11th Cir. 1989); accord, Webb v. Fla. Health Care Mgmt. Corp, 804 So. 2d, 422, 424 (Fla. 4th DCA 2001)(explaining that "[i]n order to prevail on a constructive discharge claim, an employee must show, under an objective standard, that the employer made working conditions so difficult that a reasonable person would feel compelled to resign.")).

92. Petitioner did not demonstrate that a reasonable person in her position would be forced to resign. She had

positive appraisals, continual raises, and was satisfied with her immediate supervisors during her employment with LSI.

93. Moreover, Petitioner never complained prior to her resignation, thus, depriving LSI of the opportunity to remedy the alleged intolerable situation. For that reason as well, Petitioner has failed to sustain her claim for constructive discharge. See Kilgore v. Thompson & Brock Mgmt., Inc., 93 F.3d 752, 754 (11th Cir. 1996)("A constructive discharge will generally not be found if the employer is not given sufficient time to remedy the situation.").

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Florida Commission on Human Relations enter a final order dismissing Petitioner's Complaint of Discrimination and Petition for Relief consistent with the terms of this Recommended Order.

DONE AND ENTERED this 16th day of October, 2017, in Tallahassee, Leon County, Florida.

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

Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of October, 2017.

ENDNOTES

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

[2/] Petitioner testified that she only checked the boxes for "age" and "sex" in her charge of discrimination (which she signed under oath) because the "EEOC lady" told her to. Tr. 80:18-21. At the final hearing, Petitioner admitted that she does not have any evidence to support a claim of age or sex discrimination. Therefore, those claims are no longer pending and have not been analyzed.

[3/] LSI's salary information report for Petitioner indicates that the effective date of the increase to $17.25 per hour was February 16, 2016. The rate of $17.25 per hour is a 3.5 percent increase over Petitioner's previous rate of $16.67 per hour. See Exhibit P-9.

[4/] Victor Ruiz testified that his race is "American Indian and Hispanic, of Spanish descent."

[5/] Petitioner never indicated the race of her alleged comparator, Patricia Koons, in her Charge of Discrimination, Petition for Relief, or during the final hearing held on July 12, 2017.

[6/] An example of direct evidence, for instance in an age discrimination case, would be the employer's memorandum stating, "Fire [the plaintiff] – he is too old," clearly and directly evincing that the plaintiff was terminated based on his age. See Early v. Champion Int'l Corp., 907 F.2d 1077, 1081 (11th Cir. 1990)). The evidence was also insufficient to prove the alleged racial animus. Evidence of alleged racial statements attributed to Mr. Corbisier was unpersuasive in light of his credible denials and other evidence.

[7/] See Conclusion of Law, ¶ 85, infra.

[8/] Similarly, Title VII provides that "it shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

[9/] "[T]he antiretaliation provision, unlike the substantive provision [that protects against status discrimination], is not limited to discriminatory actions that affect the terms and conditions of employment." Burlington Northern & Santa Fe Ry. v. White, 548 U.S. 53, 64 (2006). Nonetheless, the alleged adverse actions raised by Petitioner in this case are the same under both her racial discrimination and retaliation claims.

COPIES FURNISHED:

Tammy S. Barton, Agency Clerk
Florida Commission on Human Relations
4075 Esplanade Way, Room 110
Tallahassee, Florida 32399
(eServed)

Gina A. Ruiz
3445 Wasatch Range Loop
Pensacola, Florida 32526
(eServed)

Kathryn K. Rudderman, Esquire
Robert G. Riegel, Jr., Esquire
Buchanan Ingersoll & Rooney PC
50 North Laura Street, Suite 2800
Jacksonville, Florida 32202
(eServed)

Cheyanne Costilla, General Counsel
Florida Commission on Human Relations
4075 Esplanade Way, Room 110
Tallahassee, Florida 32399
(eServed)

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.