STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ANA-MARIA ENCIU,

Petitioner,

vs. Case No. 17-3862

DEPARTMENT OF CHILDREN AND FAMILIES,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, this case was heard on September 13, 2017, via video teleconference in Tallahassee and Pensacola, Florida, before Administrative Law Judge Suzanne Van Wyk.

APPEARANCES

For Petitioner: Ana-Marie Encui, pro se
3441 Jubilee Drive
Milton, Florida 32571

For Respondent: Brian J. Stabley, Esquire
Office of the Attorney General
Plaza Level 01
The Capitol
Tallahassee, Florida 32399

STATEMENT OF THE ISSUES

Whether Petitioner was subject to an unlawful employment practice by Respondent based on her race, national origin, or in retaliation for participating in a protected activity, in violation of section 760.10, Florida Statutes (2016);[1/] and if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On March 15, 2017, Petitioner filed an Employment Charge of Discrimination with the Florida Commission on Human Relations ("Commission") which alleged that Respondent violated section 760.10 by discriminating against her on the basis of her race, national origin, and in retaliation for engaging in a protected activity.

On June 14, 2017, the Commission issued a Determination: No Cause and a Notice of Determination: No Cause, by which the Commission determined that reasonable cause did not exist to believe that an unlawful employment practice occurred. On July 7, 2017, Petitioner filed a Petition for Relief with the Commission, which was transmitted that same date to the Division of Administrative Hearings to conduct a final hearing.

The final hearing was scheduled for September 13, 2017, via video teleconference in Tallahassee and Pensacola, Florida, and commenced as scheduled.

At the final hearing, Petitioner testified on her own behalf and introduced Exhibits P1 through P14, which were admitted in evidence.

Respondent presented the testimony of Katelyn Paschal, Department Child Protective Investigator; Stacy Amaro, Department Program Administrator; Geanetta Salter, Department Operations Program Administrator; Julie Yeadon, Department Operations

Management Consultant II; and Tina Cain, Department Northwest Region Operations Manager for Circuit 1. Respondent's Exhibits R1 through R34 were admitted in evidence.

A two-volume Transcript of the proceedings was filed on September 28, 2017. The parties timely filed Proposed Recommended Orders which have been considered by the undersigned in preparing this Recommended Order.

FINDINGS OF FACT

Background

1. Petitioner, Ana-Marie Encui, is Caucasian, a native of Bucharest, Romania, and speaks with a Romanian accent.

2. Petitioner's son and daughter both reside with her. At all times relevant hereto, Petitioner's son was 13 years old and her daughter, 11.

3. Petitioner was first employed by Respondent, Department of Children and Families ("Department" or "Respondent") as a Child Protective Investigator ("CPI") in the Office of Family Safety in Brevard County, Region 5, on October 26, 2012.

4. Petitioner and her children relocated to Pace, Florida, in Santa Rosa County in 2014. Petitioner was again employed by the Department as a CPI in neighboring Escambia County, Region 1, from May 9, 2014, until her resignation effective February 16, 2017.

5. A CPI's responsibilities are to investigate allegations of child abuse, neglect, and/or abandonment, received through the Department's central abuse hotline and other sources. CPIs investigate allegations of abuse and neglect by interviewing children and adults involved in the allegations, as well as "collaterals," such as relatives living outside the home, teachers, and other caregivers.

6. Through investigation, CPIs assess the validity of allegations, document living conditions, and determine the steps needed to protect children from unsafe environments. CPIs also coordinate with, and refer clients to, social services for support, and conduct follow-up visits to ensure the safety of children is being maintained and supports are in place. CPIs may be called upon to testify in court regarding the circumstances of cases under investigation.

Abuse Complaint Involving Petitioner's Household

7. On August 15, 2016, the Department received an anonymous complaint through the central abuse hotline regarding Petitioner's household.

8. Petitioner was not named as the perpetrator of abuse or neglect of children in the household. The complaint implicated other adult members of the household.

9. Department Policy 170-16 (the "Policy"), Chapter 5, governs the procedure to be followed when Department employees

are the subject of a report of abuse, neglect or exploitation. Such reports are designated as "special handling" reports.

10. When a "special handling" report is received, the hotline supervisor must notify the appropriate manager, in this case the Region 1 Program Administrator, who must review the report immediately upon receipt.

11. Section 5-6b. of the Policy provides, as follows:

> To maintain confidentiality, provide an objective assessment, and avoid the appearance of impropriety, the Circuit or Regional Program Administrator or Program Manager shall determine if the report needs to be reassigned to a different region or county.

12. According to the Policy, in all cases in which the employee is the alleged perpetrator, the employee must be removed from customer contact while the investigation is pending, and the employee's access to the Florida Safe Families Network ("FSFN") database must be restricted by the close of business the following day.

13. The Policy further provides that investigative activities on "special handling" cases "shall be expedited to ensure a timely but thorough investigation." The decision regarding when, or if, the employee may return to assigned duties is at the discretion of the appropriate manager, which, in the case at hand is the regional manager.

14. Stacy Amaro, DCF Region 1 Program Administrator, was notified of the "special handling" report involving Petitioner's household. She approached Santa Rosa CPI, Katelyn Paschal, who was in line for assignment of the next case in the normal course of business. Ms. Amaro questioned Ms. Paschal about whether she knew Petitioner, who was a CPI in neighboring Escambia County.

15. Ms. Amaro determined that Ms. Paschal had never worked directly with Petitioner, although the two had collaborated on out-of-town inquiries ("OTIs") over the phone and via electronic mail, and may have attended Department trainings events together. Ms. Paschal was not friends with Petitioner, did not have social or personal interactions with Petitioner, and did not discuss Petitioner's family or personal life with Petitioner.

16. Ultimately, Ms. Amaro determined Ms. Paschal would be impartial and investigate the report fairly and thoroughly. Ms. Amaro decided to keep the report in the Santa Rosa office and assign it to Ms. Paschal for investigation.

17. Ms. Paschal investigated the complaint from the date it was assigned to her--August 16, 2016--through October 22, 2016, when she closed the investigation finding the allegations of maltreatment of Petitioner's children non-substantiated.

18. During her investigation, Ms. Paschal interviewed Petitioner's son at his school. Ms. Paschal asked Petitioner's son questions about all the members of the household, activities

in the household, arguments between adults, and the adults' use of alcohol. During this interview, Petitioner's son shared with Ms. Paschal that his sister had a learning disability.

19. What Ms. Paschal said in response to that information was a subject of debate at the final hearing and is the crux of Petitioner's complaint in this case.

20. According to Petitioner, in Ms. Paschal's subsequent interviews with collaterals, Ms. Paschal referred to her daughter as "slow" or "retarded," or both.

21. Ms. Paschal denied ever referring to Petitioner's daughter as either "slow" or "retarded."

Petitioner's Whistleblower Complaint

22. On December 9, 2016, Petitioner filed a complaint with the Department's Inspector General's Office ("IG's Office"), in Tallahassee, alleging the Department failed to follow correct procedures in investigating the abuse complaint involving her family. Petitioner alleged, and insisted at final hearing, that the complaint involving her family should have been assigned to a "neutral" county. Petitioner further alleged the CPI disclosed confidential health information regarding her daughter during interviews with collaterals, and failed to follow Department policy in other aspects of the investigation.

23. On January 31, 2017, after a "preliminary review" of the complaint, the IG's office responded to Petitioner in writing, as follows:

> [T]his office has determined that your complaint "does not demonstrate reasonable cause to suspect that an employee or agent of an agency or independent contractor has violated any federal, state, or local law, rule or regulation, thereby creating and presenting a substantial and specific danger to the public's health, safety, or welfare or has committed an act of gross mismanagement, malfeasance, misfeasance, gross waste of public funds, or gross neglect of duty" as required under section 112.3187-112.31895, Florida Statutes, also known as the "Whistle-blower's Act."

24. The IG's office simultaneously forwarded Petitioner's complaint to the Department's Northwest Region Manager, Walter Sachs, for "any action deemed appropriate by [his] office."

25. Finally, because Petitioner's complaint raised the possibility of a HIPPA violation, the IG's office also forwarded Petitioner's complaint to Herschel Minnis, Human Resources Administrator, Civil Rights Division.

Petitioner's Corrective Action Plan

26. On January 24, 2017, Petitioner was presented with a Performance Corrective Action Plan, or PCAP, by her supervisor, Shavon Terrell. The PCAP noted seven different performance expectations for which Petitioner had fallen short, along with a

summary of the particular reasons Petitioner's performance was substandard.

27. In each and every section, the summary included, "see write up for specific case information."

28. The "write-up" referred to an Employee Disciplinary Action Proposal Form, completed by Julie Yeadon, Ms. Salter's assistant. The Form summarized specific cases with deficiencies in case follow-up, danger assessments, and case notes, and documented untimely submission of her cases to her supervisor when danger was identified. The Form documented Petitioner's historic case backlog and past efforts to address the backlog by transfer of her cases to other CPIs.

29. The PCAP period was two months--January 24 through March 24, 2017--during which Petitioner was expected to correct the noted performance expectation deficiencies by completing the specific corrective actions noted in the plan. The PCAP expressly stated the corrective actions must be taken "to attain satisfactory performance in your current position."

30. The PCAP expressly stated, "Non-compliance may result in: Disciplinary action, up to and including dismissal may be initiated." The PCAP provided that the plan was in accordance with "Standards of Conduct and Standards of Disciplinary Action for Department Employees CFOP 60-55, chapter 1."[2/]

31. Petitioner refused to sign the PCAP agreeing to participate in the corrective action plan.

Petitioner's Resignation

32. On January 31, 2017, Petitioner informed Ms. Terrell that she would not agree to the PCAP and would, instead, resign her position.

33. In her resignation letter, Petitioner explained that she was resigning due to retaliation, unfair treatment, and negative job action taken against her for expressing her concerns regarding the "unlawful, unprofessional, and disrespectful manner that [her] children and family were approached and treated" during the investigation of the complaint involving her household.

34. Petitioner's resignation was effective February 16, 2017.

Retaliation Claim

35. Petitioner maintains the PCAP was a means of retaliation against her for filing the IG Complaint with the Department.

36. Respondent presented Petitioner with the PCAP on January 24, 2017, 26 days after Petitioner filed the IG Complaint on December 9, 2016.

37. The decision to place Petitioner on a PCAP was made by the following employees of the Escambia County office:

Petitioner's supervisor, Ms. Terrell; Operations Management Consultant, Julie Yeadon; and Program Administrator, Ms. Salter.

38. Although the IG Complaint concerned the actions of, and was investigated by personnel in, the Santa Rosa office, Ms. Salter was aware in December 2016 that Petitioner had filed the IG Complaint.

39. Ms. Yeadon was not aware of the IG Complaint until she began preparing for testimony in the instant proceeding.

40. The record does not support a finding of whether Ms. Terrell had knowledge of the IG Complaint prior to participating in the decision to place Petitioner on a PCAP.

41. Between May 2014 and September 2015, Petitioner was supervised in the Escambia County office by CPI Supervisor ("CPIS") Tonja Odom. On January 28, 2015, Ms. Odom issued Petitioner a Documented Counseling for Poor Performance. The following excerpt is notable:

> As you are aware, the Family Functioning Assessment (FFA) is a valuable tool we use to help determine whether a child is safe or not. If a child is determined to be unsafe, then the family is referred to services with a Family First Network (FFN) provider. We have 14 days to complete [the FFA] and turn the case over to our FFN provider. Lately, you have missed the 14 day deadline and have cases that have exceeded 30 days.
>
> * * *
>
> In one of the overdue cases, (14-316539), the children were deemed unsafe; yet your FFA

> documents were not complete and the transfer to the provider did not take place timely. On January 22, 2015, this case was scheduled to be heard [by a judge] for a Case Plan approval. Your lack of action resulted in the FFN caseworker not being able to fulfill their duties and could have potentially harmed a child. Fortunately, the agency did not receive a penalty and the children are safe.
>
> Prior to this latest incident, I had several conversations with you, individually and within our group, stressing the importance of completing the FFA timely. The families we serve do not receive the needed services available if the FFA is not completed timely.
>
> * * *
>
> Your actions are unacceptable and any future violations may result in disciplinary action, up to and including dismissal.

42. Petitioner acknowledged receipt of the Documented Counseling by her signature dated January 28, 2015.

43. Ms. Salter was the Program Administrator in 2015 and was aware of the performance issue with Petitioner and issuance of the Documented Counseling.

44. Ms. Salter testified, credibly, that Petitioner's performance improved "for a brief while" after the Documented Counseling. Within a couple of months, Ms. Salter and Petitioner's then-supervisor, Ms. Terrell, were discussing with her again the importance of timely follow up with victims and inputting notes in the system.

45. In October 2016, the Department reassigned a number of Petitioner's cases to other CPIs in order to address Petitioner's backlog. When the cases were reviewed upon reassignment, the Department discovered that follow-up investigations had not been conducted timely, victims were not being seen according to protocols, OTIs were not processed timely, and documented appropriately, and there was an overall lack of documentation of Petitioner's cases.

46. In October and November 2016, Ms. Salter, Ms. Yeadon, and Ms. Terrell embarked on an effort to get Petitioner back on track with her investigations and case work. Following a meeting in which Department management discussed how to address backlogs with a number of CPIs, Ms. Yeadon, at Ms. Salter's direction, reviewed Petitioner's case files and documented specific deficiencies in follow up and documentation. That documentation was recorded on the Employee Disciplinary Action Form which was later used in conjunction with Petitioner's PCAP.

47. Ms. Yeadon subsequently drafted the PCAP which is the subject of the instant proceeding.

48. Prior to presenting the PCAP to Petitioner, Ms. Yeadon discussed the PCAP with Petitioner's supervisor, Ms. Terrell; Ms. Salter; and, ultimately, the Northwest Region Operations Manager for District 1.

49. The PCAP provided Petitioner with specific performance improvement objectives to be performed within a two-month period. The PCAP provided that failure to comply may result in disciplinary action, up to and including termination.

PCAP as Pretext

50. Petitioner claims the PCAP and the Department's allegations of poor work performance in late 2015 through 2016 are false and a mere pretext for unlawful retaliation.

51. Petitioner argued that her performance evaluations from the Department were very good. Further, she argued that the Department would not have continued to assign her heavy caseloads in 2015 and 2016 if her performance were substandard as the Department represented.

52. In support of her argument, Petitioner introduced spreadsheets reporting individual monthly totals of cases assigned to CPIs for the years 2014, 2015, and 2016 in the Escambia office.

53. Petitioner was assigned only 64 new cases in calendar year 2015; however, in 2016, Petitioner was assigned a total of 231 new cases. For 2016, out of 44 CPIs, Petitioner was one of only nine assigned more than 200 cases.

54. Twice in late 2016, Ms. Salter directed the transfer of cases from Petitioner in order to address her case backlog. Ms. Salter first directed the transfer of 40 of Petitioner's

cases, followed by another 20 in late December to Ms. Yeadon for management.

55. Three of Petitioner's relevant performance evaluations were introduced in evidence.

56. For the review period July 1 through December 31, 2013, Petitioner received an overall rating of Satisfactory, scoring 3 out of a possible 5. Notably, the supervisor commented, "CPI Encui at times struggles to provide timely information to bring her cases to closure. She is actively working to improve in this area."

57. For the review period January 1 through June 30, 2014, Ms. Odom rated Petitioner Satisfactory, assigning a score of 3 out of 5. This performance evaluation was made prior to Ms. Odom's January 2015 Documented Counseling to Petitioner.

58. For the review period July 1, 2014 through June 30, 2015, Ms. Odom again rated Petitioner Satisfactory, assigning a score of 3 out of 5. Ms. Odom made the following relevant comments:

> Ana has improved greatly in completing her assignments timely. She is learning how to prioritize her workload.
>
> * * *
>
> If provided a weekly list of cases needed to be submitted, Ana works diligently to get these files submitted to supervisor on time.

* * *

> Ana's cases have been submitted for closure prior to the 60 day deadline with supervision from management. Ana often needs to be prompted by management to complete her FFA corrections within 24 hours.

This performance evaluation was made during the year in which Ms. Odom issued the Documented Counseling to Petitioner.

59. No performance evaluation for FY 2015-2016 was introduced in evidence.

60. Tina Cain is the Northwest Region Operations Manager for Circuit 1. She transferred to the Escambia County office as Program Administrator in June 2016. At that time, Ms. Cain was confronted with a number of employees with performance issues including a number of CPIs with case backlogs.

61. Evaluations were due to be performed in June and July, but, as Ms. Cain explained, unless an employee was on a performance improvement plan prior to their evaluation, the employee could be rated no lower than Satisfactory, a 3 out of 5.

62. Ms. Cain met with her supervisors and instructed them to prepare improvement plans for employees who were not meeting expectations. She directed her supervisors, many of whom were new, to coordinate with Human Resources to prepare the plans appropriately.

63. Ms. Yeadon was instructed to assist Ms. Salter in preparation of Petitioner's PCAP, as well as plans for other

employees under her supervision. Ms. Yeadon prepared the specific case "write-up" on the Employee Disciplinary Action Form out of ignorance, as she was not familiar with the correct forms to use. Once the error was brought to her attention, Ms. Yeadon prepared the PCAP form with reference to specific case notes on the "write-up."

64. At Ms. Cain's direction, PCAPs were developed for several employees in the Escambia office in October, November, and December 2016.

65. Petitioner did not prove the PCAP was a pretext for retaliation. The evidence supports a finding that Petitioner's performance issues were documented in the years prior to Petitioner's IG Complaint, and that Petitioner's supervisor and other management discussed and began preparing the PCAP to improve Petitioner's performance months prior to Petitioner's IG Complaint.

PCAP as Disciplinary Action

66. The Department contends that the PCAP itself is not disciplinary action.

67. The Department follows a progressive disciplinary policy. The first step is a verbal counseling. If the issue is not resolved after a verbal counseling, it is followed by a documented counseling. If the issue is not resolved following a documented counseling, the employee is placed on a performance

improvement plan. Ms. Salter testified that, if the employee fails to meet the expectations in a performance improvement plan, the employee may be subject to discipline in the form of termination or placement on a probationary period.

68. The PCAP form stated, "Non-compliance may result in: Disciplinary action, up to and including dismissal[.]"

69. The PCAP did not materially alter the terms, conditions, or privileges of Petitioner's employment.

Racial Discrimination Claim

70. Petitioner was directly supervised in Escambia County first by Ms. Odom, an African-American female, then by Ms. Terrell, also an African-American female.

71. Ms. Salter, also an African-American female, supervised Ms. Odom and Ms. Terrell and directly participated in the decision to place Petitioner on a PCAP.

72. Ms. Salter's second in command was Ms. Yeadon, who is a Caucasian female. Ms. Yeadon directly participated in drafting Petitioner's PCAP.

73. Ms. Cain, who is a Caucasian female, directed Ms. Yeadon and Ms. Salter to prepare Petitioner's PCAP.

74. Petitioner contends that her African-American supervisors discriminated against her by creating a hostile work environment and disciplining her unfairly.

75. When asked to recount specific remarks made by her supervisors that were derogatory in nature, Petitioner could only recall references such as "this type of people" or "those people." Petitioner admitted that the remarks were not "really clear cut" discrimination.

National Origin Discrimination Claim

76. Finally, Petitioner claims her supervisors discriminated against her and created a hostile work environment based on her national origin.

77. Specifically, Petitioner claims that her supervisors and other employees made fun of, or picked on her about, her accent.

78. When asked by the undersigned to identify the specific individuals and statement made by them, Petitioner identified Ms. Odom as rude and disrespectful to her for the entire period in which Ms. Odom was Petitioner's supervisor. Petitioner stated Ms. Odom frequently responded to Petitioner's questions with, "I think this is a language problem" or "This must be a comprehension problem."

79. Petitioner identified no additional specific comments made by Ms. Odom regarding Petitioner's national origin or her accent.

80. Petitioner never complained to anyone at the Department regarding Ms. Odom's treatment of her prior to her resignation.

81. Ms. Odom was Petitioner's supervisor from May 2014 to September 2015.

82. Ms. Terrell became Petitioner's supervisor in September 2015 and continued as Petitioner's supervisor until Petitioner's resignation.

83. Although Petitioner testified that Ms. Terrell made derogatory remarks about Petitioner's national origin and her accent, she was unable to give any specific example.

84. Petitioner also complained that Ms. Salter made fun of her accent, but could not remember any specific statement.

CONCLUSIONS OF LAW

85. The Division has jurisdiction over the subject matter and parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2017).

86. Petitioner has the burden of proving by a preponderance of the evidence that Respondent committed an unlawful employment practice. See § 120.57(1)(j), Fla. Stat.

Race and National Origin Claims

87. The Florida Civil Rights Act of 1992 (the "Act"), makes it unlawful for an employer to discriminate against any individual with respect to compensation, terms, conditions or privileges of employment, because of the individual's race or national origin. § 760.10(1)(a), Fla. Stat.

88. The Act is patterned after Title VII of the Civil Rights Act of 1964, as amended. Thus, case law construing Title VII is persuasive when construing the Act. See, e.g., Fla. State Univ. v. Sondel, 685 So. 2d 923, 925 n.1 (Fla. 1st DCA 1996).

89. Petitioner can meet her burden of proof with either direct or circumstantial evidence. Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d 1358 (11th Cir. 1999), cert. den. 529 U.S. 1109 (2000). Direct evidence must evince discrimination without the need for inference of presumption. Standard v. A.B.E.L Svcs., Inc., 161 F.3d 1318, 1330 (11th Cir. 1998).

90. There is no direct evidence the Department imposed the PCAP against Petitioner based on either her race or national origin.

91. Because Petitioner presented no direct evidence of discrimination, Petitioner must prove her allegations by circumstantial evidence. Circumstantial evidence of discrimination is subject to the burden-shifting framework established in McDonnell Douglas Corporation v. Green, 411 U.S. 792, 802 (1973).

92. To prove unlawful discrimination by circumstantial evidence, a party must establish a prima facie case of discrimination by a preponderance of the evidence. If

successful, this creates a presumption of discrimination. Then the burden shifts to the employer to offer a legitimate, non-discriminatory reason for the adverse employment action. If the employer meets that burden, the presumption disappears and the employee must prove that the legitimate reasons were a pretext. Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17 (Fla. 3d DCA 2009). Facts that are sufficient to establish a prima facie case must be adequate to permit an inference of discrimination. Id.

93. Petitioner must first establish a prima facie case by showing: (1) she is a member of a protected class; (2) she was qualified for the position held; (3) she was subjected to an adverse employment action; and (4) other similarly-situated employees, who are not members of the protected group, were treated more favorably than Petitioner. See McDonnell Douglas, 411 U.S. at 802.

94. The Findings of Fact here are not sufficient to establish a prima facie case of discrimination based on either race or national origin. Petitioner did establish the first two elements: she is of a different race and national origin than her supervisors, as well as the majority of her supervisors' supervisors; and she was qualified for the position of CPI. However, Petitioner did not establish the third element--that she suffered an adverse employment action.

95. "Not all conduct by an employer negatively affecting an employee constitutes adverse employment action." Davis v. Town of Lake Park Fla., 245 F. 3d 1232, 1238 (11th Cir. 2001) (Plaintiff, who received one oral reprimand, one written reprimand, the withholding of a bank key, and a restriction on cashing non-account-holder checks, did not suffer an adverse employment action). "The asserted impact cannot be speculative and must at least have a tangible adverse effect on the plaintiff's employment." Id. at 1239. An employee is required to show a "serious and material change in the terms, conditions, or privileges of employment." Id.

96. In this case, the record does not support a finding that the PCAP, even if Petitioner had agreed to it, constituted an adverse employment action. The PCAP itself had no tangible effect on Petitioner's employment. The PCAP did not result in her termination, demotion, suspension, a reduction in pay, or a change in job duties.

97. The fact that the PCAP was a step in the Department's progressive disciplinary policy was also an insufficient basis to conclude that it constituted an adverse employment action. See Barnett v. Athens Reg'l Med. Ctr., 2013 U.S. App. LEXIS 24867 *5-6 (11th Cir. Dec. 16, 2013)(Plaintiff's argument that the written reprimands and the negative performance evaluation were successive steps in the employer's progressive disciplinary

policy, which could have led to harsher disciplinary action, was insufficient to establish an adverse employment action.) The Petitioner must establish that the actions actually led to any tangible effect on his or her employment. Id.

98. Assuming, arguendo, the PCAP did constitute an adverse employment action, Petitioner still failed to establish a prima facie case because she did not establish that similarly-situated employees outside of either of her protected classes were treated more favorably. Petitioner presented no evidence regarding any other employee with backlogged cases who was not placed on a PCAP. In fact, when Petitioner questioned Ms. Salter whether other CPIs were placed on performance improvement plans, Ms. Salter confirmed that all employees with performance issues were placed on PCAPs.

99. Finally, even if Petitioner had established a prima facie case of discrimination based on either race or national origin, the Department presented a legitimate, non-discriminatory reason for placing Petitioner on a PCAP, which Petitioner did not prove was mere pretext.

Retaliation Claim

100. Section 760.10(7) prohibits retaliation in employment as follows:

> (7) It is an unlawful employment practice for an employer . . . to discriminate against any person because that person has

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

101. The burden of proving retaliation follows the general rules enunciated for proving discrimination. Reed v. A.W. Lawrence & Co., 95 F.3d 1170, 1178 (2d Cir. 1996).

102. There is no direct evidence the Department imposed Petitioner's PCAP in retaliation against Petitioner for filing the IG Complaint.

103. To establish a prima facie case of discrimination in retaliation by indirect evidence, Petitioner must show: (1) that she was engaged in statutorily protected expression or conduct; (2) that she suffered an adverse employment action; and (3) that there is some causal relationship between the two events. Holifield v. Reno, 115 F.3d 1555, 1566 (11th Cir. 1997).

104. Petitioner did not prove she was engaged in statutorily-protected expression or conduct when she filed her IG Complaint. Section 760.10 protects employees who oppose "any practice which is an unlawful employment practice under this section," i.e., discrimination on the basis of race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status. The IG Complaint alleged that the Department

failed to follow Department Policy 170.16, governing the procedure to be followed when a Department employee is the subject of a child welfare complaint. Petitioner's IG Complaint was not filed in opposition to any employment practice unlawful pursuant to section 760.10.

105. Petitioner failed to prove a prima facie case of unlawful retaliation because she did not engage in an activity protected under the Act.

Hostile Work Environment Claim

106. Petitioner's Charge of Discrimination against the Department alleges that Petitioner was subjected to a hostile work environment based on both her race and national origin. Petitioner alleges she "felt [she] had no other choice but to quit [her] job duties, due to the unfair treatment received [sic] ongoing retaliation, harassment and discrimination."

107. A hostile work environment claim is established upon proof that "the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1275 (11th Cir. 2002)(quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1998)).

108. In order to establish a prima facie case under the hostile work environment theory, Petitioner must show: (1) that

she belongs to a protected group; (2) that she has been subject to unwelcome harassment; (3) that the harassment must have been based on a protected characteristic of the employee, such as race or national origin; (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 the employer is responsible for such environment under a theory of vicarious or of direct liability. Id.

109. Factors relevant in determining whether conduct is sufficiently severe and pervasive to show a hostile work environment include, among others: (a) the frequency of the conduct, (b) the severity of the conduct, (c) whether the conduct is physically threatening or humiliating, or a mere offensive utterance, and (d) whether the conduct unreasonably interferes with the employee's job performance. Miller, 277 F.3d at 1276.

110. Petitioner failed to establish a prima facie case of hostile work environment based on either race or national origin. Petitioner is Caucasian and her direct supervisors were African-American. The only comments Petitioner identified as offensive or racially-motivated were general references made by unspecified employees to "these type of people" or "these people." Petitioner did not identify any racially-derogatory comments made

on behalf of any supervisor or anyone else in Petitioner's chain of command.

111. Petitioner failed to prove that she was subject to intimidation, intentional embarrassment, or ridicule, based on her race that were sufficiently severe and pervasive to alter the terms and conditions of her employment and create a hostile work environment.

112. With regard to her national origin, Petitioner identified Ms. Odom's references to "language problems" and "comprehension problems," generally. Petitioner was unable to recall any other specific comments directed toward, or treatment of, her by any other employee on the basis of her national origin.

113. Petitioner failed to prove that she was subject to intimidation, intentional embarrassment, or ridicule, based on her national origin that was sufficiently severe and pervasive to alter the terms and conditions of her employment and create a hostile work environment.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations dismiss the Petition for Relief from an Unlawful Employment Practice filed by Petitioner against Respondent in Case No. 201700691.

DONE AND ENTERED this 17th day of October, 2017, in Tallahassee, Leon County, Florida.

SUZANNE VAN WYK
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of October, 2017.

ENDNOTES

[1/] Except as otherwise noted herein, all references to the Florida Statutes are to the 2016 version. Although both the 2015 and 2016 versions of the Civil Rights Act of 1992 were in effect at times when the alleged discriminatory actions against Petitioner took place, there is no substantive difference between the two versions to warrant separate citation to each.

[2/] The referenced Department document was not offered in evidence at the final hearing.

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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.