STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DONNA M. CYRUS,

Petitioner,

vs. Case No. 17-4839

EXPRESS SCRIPTS,

Respondent.
_____/

RECOMMENDED ORDER

The final hearing in this matter was conducted before J. Bruce Culpepper, Administrative Law Judge of the Division of Administrative Hearings, pursuant to sections 120.569 and 120.57(1), Florida Statutes (2017),[1/] on November 8, 2017, in Orlando, Florida.

APPEARANCES

For Petitioner: Donna Michelle Cyrus, pro se
4411 Prairie Court
Orlando, Florida 32808

For Respondent: B. Tyler White, Esquire
Jackson Lewis, P.C.
501 Riverside Avenue, Suite 902
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STATEMENT OF THE ISSUE

Whether Petitioner, Donna M. Cyrus, was subject to an unlawful employment practice by Respondent, Express Scripts, based on her race in violation of the Florida Civil Rights Act.

PRELIMINARY STATEMENT

On February 22, 2017, Petitioner filed an Employment Complaint of Discrimination with the Florida Commission on Human Relations (the "Commission") alleging that Respondent, Express Scripts, violated the Florida Civil Rights Act ("FCRA") by discriminating against her based on her race and in retaliation for her practice of an activity protected by the FCRA.

On August 21, 2017, the Commission notified Petitioner that no reasonable cause existed to believe that Express Scripts had committed an unlawful employment practice.

On August 24, 2017, Petitioner filed a Petition for Relief with the Commission alleging a discriminatory employment practice. The Commission transmitted the Petition to the Division of Administrative Hearings ("DOAH") to conduct a chapter 120 evidentiary hearing.

The final hearing was held on November 8, 2017. At the final hearing, Petitioner testified on her own behalf. Petitioner's Exhibits A through E were admitted into evidence. Express Scripts called Robin Morris and Karina Ward as witnesses at the final hearing. Respondent's Exhibits 1 through 7 were admitted into evidence.

A two-volume Transcript of the final hearing was filed with DOAH on December 27, 2017. At the close of the hearing, the parties were advised of a ten-day timeframe following DOAH's

receipt of the hearing transcript to file post-hearing submittals. Both parties timely filed post-hearing submittals which were duly considered in preparing this Recommended Order.

FINDINGS OF FACT

1. Express Scripts is a prescription benefit management company. Express Scripts provides pharmaceutical home delivery services, pharmacy claims processing, and benefit plan management for its patient clients.

2. Petitioner, a Black woman, began working for Express Scripts in January 2013. Petitioner was hired as a nurse clinician. Petitioner explained that she acted as a telephonic nurse. Her job was to perform clinical assessments for new and existing medical patients regarding their medications. Thereafter, she would provide Express Scripts customers with drug specific counselling and education. Petitioner's work was primarily done with a computer and over the telephone. Beginning in December 2014, Petitioner worked exclusively from her home.

3. As required for her job, Petitioner held an active nursing license with the State of Florida.

4. By all accounts, Petitioner was a consistent and reliable worker with no marked deficiencies in her job performance.

5. However, by the fall of 2013, Petitioner became increasingly disenchanted by what she perceived to be

discriminatory harassment by her supervisors. In or about October 2013, Petitioner e-mailed her direct supervisor, Robin Morris, to complain about several negative assessments she had received. Petitioner felt like she was being judged more harshly because she was Black. Petitioner also commented about how she believed that Express Scripts was treating a white employee better than her. Petitioner relayed that she felt the white employee was provided more lenience in meeting his job responsibilities and in being granted time off from work.

6. In addition, Petitioner testified that around this time she formally reported to Express Scripts the discrimination she alleged to have experienced in her workplace. Petitioner explained that she contacted the Express Scripts compliance hotline which was a phone number listed in the Equal Employment Opportunity section of the Express Scripts employee policy handbook. However, Petitioner did not disclose to either Ms. Morris or the Express Scripts human resources department that she had called the hotline.

7. After her phone call to the hotline, Petitioner asserts that she began to experience "subtle," but persistent, discrimination. Petitioner endured what she described as Express Scripts' abusive, offensive, and unfair treatment based upon her race, as well as retaliation for her complaint of discrimination. Specific instances in which Petitioner asserts Express Scripts

subjected her to different terms and conditions from her (white) co-workers, include the following:

a. Denied Requested Time Off

8. Petitioner claims that she was denied requested time off from work based on her race. Petitioner described an incident in October 2013 when she asked for two hours off for personal leave. She inputted her request into the Express Scripts computer program as required. However, five minutes later, she observed that her request had been deleted in the system. She reentered her request. Less than an hour later, she discovered that the computer program had deleted her request for a second time. She did not know how or why she was not allowed to take the leave hours she requested.

9. Petitioner asserted that other non-black employees were authorized to take personal leave of their choice. Petitioner specifically identified another nurse clinician named Jonathon Guyette, a white male, who was freely granted his requests for time off. Petitioner also identified Nicole Deverling, another nurse clinician and a white female, who was regularly given time off. Petitioner felt that Linda Hampson, who was not her immediate supervisor but supervised all nurse clinicians, showed favoritism in granting or denying personal leave time. Petitioner concluded that, particularly in light of Petitioner's

seniority over Ms. Deverling, that Ms. Hampson personally denied her leave because of her race.

b. Harassment Following an On-the-job Injury

10. In December 2015, Petitioner began to experience pain in her right wrist. Petitioner attributed her injury to the overuse of her computer during her job. Petitioner was ultimately diagnosed with DeQuervain's disease. Petitioner reported her injury to Ms. Morris. However, she felt that Express Scripts was grossly unsympathetic about her injury.

11. Then, in June 2016, Petitioner's left wrist began to ache. Petitioner described the pain as a constant burning and tingling sensation, as well as numbness. Petitioner was eventually diagnosed with tendinitis and carpel tunnel syndrome. Petitioner needed multiple surgeries on her left and right wrists.

12. Petitioner expressed that Ms. Morris harassed her about the medical care and treatment she sought for her wrist pain. Petitioner maintained that Ms. Morris' callous reaction to her injuries effectively prevented her from using the same employee benefits as her co-workers. For instance, Ms. Morris demanded that Petitioner provide written documentation recording the dates and times of her doctors' appointments. Petitioner declared that Ms. Morris unfairly wrote her up in 2015 and 2016 for violating the Express Scripts' medical leave policy for being absent

without authorization. Petitioner claimed that the days she took off were legitimately due to her medical appointments.

13. Petitioner also accused Ms. Morris and her workers' compensation caseworker (Sarah Reichert) of forcing her to overuse her left hand to type while her right hand was recuperating. Petitioner felt that not only was she wrongfully harassed and rushed, but her work conditions exacerbated (if not caused) the injury to her left wrist.

14. Finally, Petitioner testified that Express Scripts unjustifiably interfered with her ability to obtain medical care for her injuries. Petitioner relayed that Ms. Reichert determined what of Petitioner's medical treatments was compensable under Express Scripts' workers' compensation coverage. Petitioner complained that Ms. Reichert unfairly denied certain medical procedures Petitioner required.

c. Not Given Work Schedule Preference

15. Petitioner accuses Express Scripts of not allowing her to work her preferred work schedule. Instead, Express Scripts permitted white employees to work during the shift she desired. Specifically, in May 2015, Express Scripts offered its nurse clinicians the opportunity to work an alternative schedule of 4 days a week/10 hours a day (as opposed to 5 days a week/8 hours a day). Petitioner did not accept the flex schedule. Instead,

Petitioner e-mailed her supervisor, Ms. Morris, that she "would prefer to work 8hr shifts only, 8-4:30pm if possible."

16. Several months later, however, Petitioner expressed to Express Scripts that she would like to work the 4-day/10-hour work week. Express Scripts did not approve her request. On the other hand, Petitioner represented that a white employee (Mr. Guyette) was allowed to work the flex schedule.

d. Not Equal Acknowledgment of Workplace Accomplishments

17. In December 2014, Express Scripts did not include Petitioner on an e-mail that congratulated two nurse clinicians on their two-year anniversary with the company. Petitioner was hired at the same time as these employees. Upon learning of the oversight from Petitioner, Express Scripts issued a separate, company-wide e-mail in January 2015 congratulating Petitioner on her two-year anniversary. Neither was Petitioner's picture ever featured on the office wall. Petitioner was devastated. She felt that both omissions were intentional and based on her race.

e. Denied Workplace Privileges

18. Petitioner generally complained that Express Scripts did not promote her or provide her special jobs or privileges as it did for other (white) nurse clinicians. Petitioner also asserted that her bonus was lower than her co-workers. In addition, Petitioner proclaimed that her co-workers and supervisors intentionally acted in a way to intimidate her and

force her to resign from the company. Finally, Petitioner conveyed that she received many groundless verbal "write-ups." However, at the final hearing, Petitioner did not provide evidence supporting any of these claims outside of her own testimony.

19. Robin Morris, Petitioner's direct supervisor at Express Scripts, testified at the final hearing. Ms. Morris managed approximately 14 nurse clinicians.

20. Ms. Morris commented that Petitioner was a solid employee and generally met all job expectations. Although Petitioner accumulated several attendance "points" for unexcused absences, she never received any disciplinary action during her employment. On the converse, Petitioner was given merit pay increases every year she worked for Express Scripts.

21. Concerning Petitioner's complaint that Express Scripts was less than helpful regarding her use of leave time for her injuries, Ms. Morris explained that Express Scripts required all employees to provide medical documentation to justify medical time off. Therefore, any frustration Petitioner experienced regarding her medical leave was based on the lack of documentation that Petitioner produced confirming her medical visits. Ms. Morris recalled that, at least on one occasion, she gave Petitioner a verbal coaching about her failure to provide a

doctor's note recording the times she arrived and left her doctor's office.

22. Ms. Morris further explained that Sarah Reichert was not an Express Scripts employee. Instead, she was a contract worker for Express Script's workers' compensation insurer, Traveler's Insurance. Ms. Reichert managed Petitioner's workers' compensation claims. Ms. Morris testified that she did not have any input into how Traveler's administered or authorized Petitioner's medical treatment or doctor's visits.

23. Ms. Morris denied that she, or any other Express Scripts supervisor, showed any favoritism in approving personal time off for the nurse clinicians. Ms. Morris testified that all Express Scripts employees requested leave hours/days through an automated computer program that automatically approved or denied leave requests. Leave was granted on a first come, first serve basis. Ms. Morris further added that Express Scripts' leave policy allowed only 10 percent of a company section off of work at any one time. This policy effectively allowed only one nurse clinician a day to take leave. Consequently, Ms. Morris explained that if Petitioner's personal leave requests were denied, then another nurse clinician had asked for that particular date/time off first. Ms. Morris refuted Petitioner's allegation that Express Scripts ever refused to allow her to take personal leave based on her race.

24. After she filed her Employment Complaint of Discrimination with the Commission in February 2017, Petitioner continued to work for Express Scripts. Karina Ward, Express Scripts' Senior Human Resources Advisor, testified regarding Express Scripts' reaction to Petitioner's complaint.

25. After learning of Petitioner's complaint, Ms. Ward opened an internal investigation. Ms. Ward's first step was to contact Petitioner to discuss her concerns about fair treatment in the workplace. Ms. Ward called Petitioner on or about February 13, 2017. During their phone call, Petitioner described the incidents of discrimination she experienced.

26. At the end of their conversation, Ms. Ward told Petitioner that she would call her the following day to review Petitioner's desired outcome. When Ms. Ward called on February 14, 2017, however, Petitioner did not answer. Neither was Ms. Ward able to reach Petitioner when she called her on February 16 and 22, 2017.

27. Despite not speaking further with Petitioner about her allegations, Ms. Ward continued to investigate Petitioner's claim of discrimination. Ms. Ward contacted Petitioner's co-workers to explore any additional concerns regarding disparate or unfair treatment. Ms. Ward did not uncover any information substantiating Petitioner's allegations of discrimination. With

no further communication from Petitioner, Ms. Ward closed her investigation on March 6, 2017.

28. Regarding Petitioner's testimony that she called a compliance hotline in 2013 to report discrimination, Ms. Ward relayed that, at that time, Express Scripts did not have a central phone number for employees to report workplace disputes such as discrimination. Instead, the complaint hotline which Petitioner called was administered by a third-party vender. Ms. Ward testified that she was not aware of, nor had she ever received any information regarding, Petitioner's report of discrimination in 2013. Neither could she find any evidence of Petitioner's complaint in the Express Scripts' human resources records. (Ms. Morris also denied any knowledge of Petitioner's 2013 phone call.)

29. At the final hearing, Ms. Ward also responded to Petitioner's complaint that Express Scripts did not allow her to work alternate hours. Ms. Ward explained that Express Scripts had offered Petitioner the option of working a 4-day a week/10-hour a day schedule, just as it offered to every nurse clinician. Petitioner, however, declined to take advantage of the opportunity when it was offered. Ms. Ward recalled that Petitioner then contacted Express Scripts approximately six months later requesting the alternate work hours. But, by that

time, Express Scripts had determined not to offer the flex schedule to any employee.

30. Ms. Ward further explained that the white employee Petitioner identified (Mr. Guyette) was allowed to work the 4-day/10-hour work week based on a medical accommodation. Mr. Guyette was the only Express Scripts employee who was authorized to work an alternate schedule. (Ms. Morris echoed Ms. Ward's testimony that Petitioner declined the initial opportunity to work a flex schedule. Ms. Morris also repeated that Mr. Guyette was allowed to work a 4-day work week to accommodate a medical issue.)

31. After her complaint to the Commission in February 2017, Petitioner regularly asked for medical leave based on her recurring health issues. Finally, in May 2017, Petitioner stopped reporting in for work, citing her medical condition. In July 2017, however, Ms. Ward learned from the Traveler's workers' compensation department that on May 31, 2017, Petitioner had been medically cleared to return to work with no restrictions. Therefore, Ms. Ward contacted Petitioner and asked her to produce medical documentation supporting her recent leave requests. Petitioner responded that, on the contrary, her doctor told her that she had not been medically cleared to work. However, Petitioner did not provide Ms. Ward any additional documentation

substantiating either the days she had taken medical leave or her need for future medical treatment.

32. On July 14, 2017, Ms. Ward spoke with Petitioner, and notified her that Express Scripts considered her in an unapproved leave of absence status. Express Scripts received no communication from Petitioner after that date. Therefore, on July 27, 2017, Ms. Ward concluded that Petitioner had voluntarily resigned her job. Express Scripts terminated Petitioner's employment due to "job abandonment."[2/]

33. At the final hearing, Petitioner claimed that all the days that she was absent from work were related to medical care she received for her wrist injuries. Petitioner also represented that she had applied for short-term disability in order to take time off to care for her various health issues.

34. Ms. Ward denied that Express Script disapproved any request for leave days based on Petitioner's race or in retaliation for a complaint of discrimination. Neither was Express Script's decision to terminate Petitioner's employment based on Petitioner's race or her participation in an activity protected by the FCRA.

35. Based on the competent substantial evidence in the record, the preponderance of the evidence does not establish that Express Scripts discriminated against Petitioner based on her race or in retaliation for her complaint of discrimination.

Accordingly, Petitioner failed to meet her burden of proving that Express Scripts committed an unlawful employment action against her in violation of the FCRA.

CONCLUSIONS OF LAW

36. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this cause pursuant to sections 120.569, 120.57(1), and 760.11(7), Florida Statutes. See also Fla. Admin. Code R. 60Y-4.016.

37. Petitioner brings this matter alleging that Express Scripts: 1) discriminated against her based on her race in violation of the FCRA; and 2) retaliated against her based on her participation in an activity protected by the FCRA.

38. The FCRA protects individuals from discrimination in the workplace. See §§ 760.10 and 760.11, Fla. Stat. Section 760.10 states, 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, pregnancy, national origin, age, handicap, or marital status.

39. The FCRA also protects employees from certain retaliatory acts. The FCRA's anti-retaliation provision is found in section 760.10(7) and states, in pertinent part:

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

40. Section 760.11(7) permits a party for whom the Commission determines that there is not reasonable cause to believe that a violation of the FCRA has occurred to request an administrative hearing before DOAH. Following an administrative hearing, if the Administrative Law Judge ("ALJ") finds that a discriminatory act has occurred, the ALJ "shall issue an appropriate recommended order to the commission prohibiting the practice and recommending affirmative relief from the effects of the practice, including back pay." § 760.11(7), Fla. Stat.

41. The burden of proof in an administrative proceeding, absent a statutory directive to the contrary, is on the party asserting the affirmative of the issue. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981); see also Dep't of Banking & Fin., Div. of Sec. & Investor Prot. v. Osborne Stern & Co., 670 So. 2d 932, 935 (Fla. 1996)("The general rule is that a party asserting the affirmative of an issue has the burden of presenting evidence as to that issue."). The preponderance of the evidence standard is applicable to this matter. See § 120.57(1)(j), Fla. Stat.

42. The FCRA is patterned after Title VII of the Civil Rights Act of 1964, as amended. Accordingly, Florida courts hold that federal decisions construing Title VII are applicable when considering claims under the FCRA. Harper v. Blockbuster Entm't Corp., 139 F.3d 1385, 1387 (11th Cir. 1998); Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17, 21 (Fla. 3d DCA 2009); and Fla. State Univ. v. Sondel, 685 So. 2d 923, 925 n.1 (Fla. 1st DCA 1996).

43. Discrimination may be proven by direct, statistical, or circumstantial evidence. Valenzuela, 18 So. 3d at 22. Direct evidence is evidence that, if believed, would prove the existence of discriminatory intent behind the employment decision without any inference or presumption. Denney v. City of Albany, 247 F.3d 1172, 1182 (11th Cir. 2001); see also 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).

44. Petitioner presented no direct evidence of race discrimination on the part of Express Scripts. Similarly, the record in this proceeding contains no statistical evidence of discrimination by Express Scripts.

45. In the absence of direct or statistical evidence of discriminatory intent, Petitioner must rely on circumstantial evidence of discrimination to prove her case. For discrimination claims involving circumstantial evidence, Florida courts follow the three-part, burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and its progeny. Valenzuela, 18 So. 3d at 21-22; see also St. Louis v. Fla. Int'l Univ., 60 So. 3d 455, 458 (Fla. 3d DCA 2011).

46. In a race discrimination action, Petitioner bears the initial burden of establishing, by a preponderance of the evidence, a prima facie case of discrimination. To establish a prima facie case, Petitioner must show that: (1) she belongs to a protected class (race); (2) she was qualified for her position; (3) she was subjected to an adverse employment action; and (4) her employer treated similarly-situated employees outside of her protected class more favorably than she was treated. See McDonnell Douglas, 411 U.S. at 802-04; Burke-Fowler v. Orange Cnty., 447 F.3d 1319, 1323 (11th Cir. 2006).

47. Demonstrating a prima facie case is not difficult, but rather only requires the petitioner "to establish facts adequate to permit an inference of discrimination." Holifield, 115 F.3d at 1562.

48. If Petitioner establishes a prima facie case, she creates a presumption of discrimination. At that point, the

burden shifts to the employer to articulate a legitimate, non-discriminatory reason for taking the adverse action. Valenzuela, 18 So. 3d at 22. The reason for the employer's decision should be clear, reasonably specific, and worthy of credence. Dep't of Corr. v. Chandler, 582 So. 2d 1183, 1186 (Fla. 1st DCA 1991). The employer has the burden of production, not the burden of persuasion, to demonstrate to the finder of fact that the decision was non-discriminatory. Flowers v. Troup Cnty., 803 F.3d 1327, 1336 (11th Cir. 2015). This burden of production is "exceedingly light." Holifield, 115 F.3d at 1564. The employer only needs to produce evidence of a reason for its decision. It is not required to persuade the trier of fact that its decision was actually motivated by the reason given. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (U.S. 1993).

49. If the employer meets its burden, the presumption of discrimination disappears. The burden then shifts back to Petitioner to prove that the employer's proffered reason was not the true reason but merely a "pretext" for discrimination. Combs v. Plantation Patterns, 106 F.3d 1519, 1538 (11th Cir. 1997); Valenzuela, 18 So. 3d at 25.

50. In order to satisfy this final step of the process, the 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 . . . decision is not worthy of

belief." Chandler, 582 So. 2d at 1186 (citing Tex. Dep't of Cmty. Aff. v. Burdine, 450 U.S. 248, 252-256 (1981)). The proffered explanation is unworthy of belief if the petitioner demonstrates "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence." Combs, 106 F.3d at 1538; see also Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000). The petitioner must prove that the reasons articulated were false and that the discrimination was the real reason for the action. City of Miami v. Hervis, 65 So. 3d 1110, 1117 (Fla. 3d DCA 2011)(citing St. Mary's Honor Ctr., 509 U.S. at 515)("[A] reason cannot be proved to be 'a pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason.").

51. Despite the shifting burdens of proof, "the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the [petitioner]." Burdine, 450 U.S. at 253; Valenzuela, 18 So. 3d at 22.

52. Applying the burden-shifting analysis to the facts found in this matter, Petitioner established a prima facie case that Express Scripts discriminated against her based on her race. Petitioner sufficiently demonstrated that she belongs to a

protected class, was qualified to perform as a nurse clinician, and was subject to an adverse employment action (denial of requested leave time and denial of her requested work schedule).[3/] Petitioner also established that Express Scripts treated at least one similarly situated, white employee (Jonathon Guyette) differently.[4/]

53. However, despite the fact that Petitioner established a prima facie case of race discrimination, Express Scripts articulated legitimate, non-discriminatory reasons for the adverse employment action about which Petitioner complains. Express Scripts' burden to refute Petitioner's prima facie case is light. Express Scripts met this burden by providing credible testimony that its decisions regarding Petitioner's leave were based on internal policies and procedures that were uniformly applied to all employees. Express Scripts further explained that any medical leave of absence which Petitioner believes she was denied was due to her failure to provide sufficient medical documentation justifying the leave. Again, Express Scripts attested that all its employees were obligated to comply with this requirement.

54. Regarding Petitioner's allegation that Express Scripts refused to authorize her to work a modified work schedule, Express Scripts responded that it did offer Petitioner the opportunity to adjust her work hours in May 2015. However, she

did not timely accept the offer. (In fact, she expressed her preference to continue working 8-hour shifts.) When Petitioner requested the 4-day/10-hour work week several months later, Express Scripts had already decided not to offer the alternate work hours to any nurse clinician. Express Scripts also credibly explained that Mr. Guyette was authorized to work the flex schedule based specifically on a medical accommodation. Therefore, Express Scripts sufficiently articulated legitimate, non-discriminatory reasons for its alleged adverse employment decisions.

55. Completing the McDonnell Douglas burden-shifting analysis, Petitioner did not prove that Express Scripts' stated reasons for denying her leave and flex schedule requests were not its true reasons, but were merely a "pretext" for discrimination. The evidentiary record does not support a finding or conclusion that Express Scripts' explanations are false or not worthy of credence. As persuasively attested by Ms. Morris and Ms. Ward, Express Scripts' employment decisions regarding Petitioner were firmly based on company policy, which it uniformly applied to all company employees. Conversely, while Petitioner repeatedly asserted that Express Scripts treated her less favorably than other employees, the evidence in the record does not establish that the actions about which she complains were in any way based on, or influenced by, her race.

56. Therefore, even though Petitioner presented enough evidence to establish a prima facie case of discrimination, she did not produce sufficient evidence to prove that Express Scripts treated her differently because of her race. Consequently, Petitioner did not meet her ultimate burden of proving, by a preponderance of the evidence, that Express Scripts' decisions affecting her employment were based on discriminatory animus.

57. Furthermore, Petitioner did not meet her burden of proving that Express Scripts retaliated against her based on her communication to the hotline in 2013. The FCRA provides that no person shall discriminate against any individual because such individual has opposed an unlawful employment act or practice. See Stewart v. Happy Herman's Cheshire Bridge, Inc., 117 F.3d 1278, 1287 (11th Cir. 1997); see also 42 U.S.C. § 12203(a) and § 760.10(7) Fla. Stat.

58. When a petitioner produces only circumstantial evidence of retaliation (as in this matter), Florida courts use the burden shifting framework set forth in McDonnell Douglas. To establish a prima facie case of retaliation, Petitioner must demonstrate that: (1) she engaged in statutorily protected activity; (2) she suffered a materially adverse employment action; and (3) there was a causal connection between the protected activity and the adverse employment action. Kidd v. Mando Am. Corp., 731 F.3d 1196, 1211 (11th Cir. 2013); Webb-Edwards v. Orange Cnty.

Sheriff's Off., 525 F.3d 1013, 1028 (11th Cir. 2008). The failure to satisfy any of these elements is fatal to a complaint of retaliation. Higdon v. Jackson, 393 F.3d 1211, 1219 (11th Cir. 2004).

59. For an action to be "materially adverse" in the context of retaliation, it "must be harmful to the point that [it] could well dissuade a reasonable worker from making or supporting a charge of discrimination." Wolf v. MWH Constructors, Inc., 34 F. Supp. 3d 1213, 1227 (M.D. Fla. 2014); Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 68, 126 S. Ct. 2405, 2415 (2006).

60. Regarding a "causal connection" between the protected activity and the adverse action, at the prima facie stage, a petitioner "need only establish that the protected activity and the adverse action were not wholly unrelated." Taylor v. Runyon, 175 F.3d 861, 868 (11th Cir. 1999). A petitioner need not definitively establish causation. Frazier v. Sec'y, Dep't of HHS, No. 16-16329, 2017 U.S. App. LEXIS 18819, at *14 (11th Cir. Sep. 29, 2017).

61. Retaliation claims under the FCRA use the same evidentiary framework as Title VII retaliation claims. Stewart, 117 F.3d at 1287; Harper, 139 F.3d at 1389. As such, Petitioner bears the ultimate burden of persuading the trier of fact that Express Scripts intentionally retaliated against her. Burdine, 450 U.S. at 253.

62. Based on the evidence in the record, Petitioner did not establish a prima facie case of retaliation. Concerning the first two elements, Petitioner credibly testified that she reported to the Express Scripts compliance hotline in 2013 that she had experienced and observed elements of racial discrimination in her workplace. Petitioner also satisfied the "adverse action" prong of her prima facie claim through her testimony that Express Scripts refused to modify her work schedule or grant her personal leave under the same conditions as her co-workers.[5/] However, Petitioner failed to demonstrate a "causal connection" between her protected activity in 2013 and the adverse employment action about which she complains.

63. Initially, the evidence in the record does not establish that Petitioner's supervisors had sufficient knowledge of her 2013 report of discrimination at the time they allegedly retaliated against her in 2015 and 2016. A petitioner "must generally show that the decision maker was aware of the protected conduct at the time of the adverse employment action." Brungart v. Bellsouth Telecomms., Inc., 231 F.3d 791, 799 (11th Cir. 2000). In other words, a decision maker cannot have been motivated to retaliate by events of which the decision maker is unaware. Butts v. Ameripath, Inc., 794 F. Supp. 2d 1277, 1294 (S.D. Fla. 2011). Petitioner must present sufficient evidence to allow a court to plausibly infer the existence of retaliatory intent on the part of

the employer. Ramsey v. Greenbush Logistics, Inc., Case No. 3:17-cv-01167-AKK, 2017 U.S. Dist. LEXIS 207880, at *14-15 (N.D. Ala. Dec. 19, 2017).

64. Express Scripts persuasively argues that the Express Scripts supervisors who allegedly retaliated against Petitioner were not aware of her protected activity at the time of their reputed retaliatory actions. On the contrary, both Ms. Morris and Ms. Ward credibly testified that they had no knowledge of Petitioner's 2013 phone call when they made any decisions regarding her work terms or conditions. Petitioner's explanation that she called an "800" number to report her concerns instead of directly informing her supervisors or the human resource department further supports this conclusion.

65. Secondly, Petitioner did not demonstrate that Express Scripts' adverse actions were "not wholly unrelated" to her complaint in 2013. Petitioner did not request an alternative work schedule until around September 2015. Further, Petitioner's medical leave requests followed her on-the-job injuries in December 2015 and June 2016. Petitioner did not sufficiently show how her 2013 complaint was related to Express Scripts' denial of her leave or work schedule requests in 2015 or 2016. See Higdon, 393 F.3d at 1220 (If there is a substantial delay between the protected expression and the adverse action, in the absence of other evidence tending to show causation, the

complaint of retaliation fails as a matter of law.).[6/] Petitioner did produce an e-mail she sent to Ms. Morris in October 2013 generally complaining about racial disparities in the workplace. However, this single e-mail is too attenuated to connect with Express Scripts' alleged retaliation two years later. Therefore, for purposes of establishing her prima facie case, Petitioner did not present the requisite "causal connection" to infer the existence of retaliatory intent on the part of her supervisors at Express Scripts.

66. Finally, even assuming that Petitioner established a prima facie case, she did not meet her ultimate burden of proving that Express Scripts wrongfully retaliated against her. Title VII retaliation claims require a petitioner to prove that the employer's unlawful retaliation was the "but-for" cause of the adverse employment action. Palm Beach Cty. Sch. Bd. v. Leha "Bonnie" Wright, 217 So. 3d 163, 165 (Fla. 4th DCA 2017)(citing Univ. of Tx. SW Med. Ctr. v. Nassar, 133 S. Ct. 2517 (2013)). This standard "requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer." Nassar, 133 S. Ct. at 2533. In other words, Petitioner must demonstrate that the complained-of employment decisions would not have occurred "but-for" Express Scripts' actual intent to retaliate against her because of her 2013 complaint of discrimination. Frazier-White, 818 F.3d at

1258; Trask v. Sec'y, Dep't of Vets. Aff., 822 F.3d 1179, 1194 (11th Cir. 2016); and Mealing v. Ga. Dep't of Juv. Just., 564 F. App'x 421 (11th Cir. 2014).[7/]

67. In her various claims, Petitioner's strongest argument for a retaliatory employment act is that Express Scripts did not allow her to take personal leave under the same conditions, or work the same flex schedule, as her white co-worker. However, Express Scripts' witnesses credibly explained that Petitioner's requests for leave and an alternative work schedule were not denied based on her 2013 complaint. Instead, Express Scripts applied the same policies (and computer program) to all decisions regarding Petitioner's leave time and work schedule as it did to every other nurse clinician. The only exception to this procedure was Mr. Guyette who had a specific medical condition.

68. At its core, Petitioner's complaint consists of broad assertions that all Express Scripts' decisions with which she took umbrage were based on racism. However, the evidence and testimony in the record does not, either directly or circumstantially, link the frustrations Petitioner experienced with actual racial animus or retaliation. On the contrary, Express Scripts presented plausible explanations for its employment decisions, and Petitioner did not demonstrate that those explanations were a "pretext." Consequently, Petitioner failed to meet her ultimate burden of proving that Express

Scripts took action against her in retaliation for her complaint of discrimination in 2013. Accordingly, Petitioner did not prove that unlawful retaliation was the "but-for" cause of Express Scripts' adverse employment actions.

69. In sum, the evidence on record does not support Petitioner's claim that Express Scripts discriminated against her based on her race. Petitioner did not prove that the "subtle" workplace tribulations she experienced were in any way motivated by racial animus or in retaliation for her complaint of discrimination. Accordingly, Petitioner's Petition for Relief must be dismissed.

RECOMMENDATIONS

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 Petitioner, Donna M. Cyrus, did not prove that Respondent, Express Scripts, committed an unlawful employment practice against her; and dismissing her Petition for Relief from an unlawful employment practice.

DONE AND ENTERED this 27th day of February, 2018, in Tallahassee, Leon County, Florida.

J. BRUCE CULPEPPER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of February, 2018.

ENDNOTES

[1/] All statutory references are to Florida Statutes (2017), unless otherwise noted.

[2/] Petitioner's termination in July 2017 occurred after she filed her Employment Complaint of Discrimination with the Commission in February 2017. Consequently, the undersigned did not consider the circumstances regarding Petitioner's departure from Express Scripts in the scope of her allegations of discrimination and retaliation in this matter.

Initially, the undersigned notes that only those claims fairly encompassed within a timely-filed complaint and investigated by the Commission may be the subject of an administrative hearing conducted pursuant to chapter 120. See generally, Mulhall v. Advance Sec. Inc., 19 F.3d 586, 589 n.8 (11th Cir. 1994); and Davis v. City of Panama City, 510 F. Supp. 2d 671, 691 (N.D. Fla. 2007). Although new acts that occur during the pendency of an administrative charge may be included in the scope of the complaint, those actions must grow out of the charge of discrimination. The facts found in the underlying record, however, did not establish that Petitioner's termination was reasonably related to the allegations listed in Petitioner's Complaint of Discrimination to the Commission. See Ward v. Fla.,

212 F. Supp. 2d 1349, 1355 (N.D. Fla. 2002)). This reasoning prevents complainants from circumventing the Commission's specific investigatory and conciliatory role in discrimination actions.

Secondly, at the final hearing, Petitioner specifically conceded that Express Scripts' decision to terminate her employment was not related to her report of discrimination to the compliance hotline in 2013, or otherwise based on her race. Accordingly, the undersigned restricted the analysis and review in this matter to those claims specifically identified in Petitioner's complaint to the Commission.

[3/] The undersigned notes that the review of Petitioner's complaint should be limited to alleged adverse employment actions that occurred within 365 days prior to her Employment Complaint of Discrimination to the Commission on February 22, 2017. See Wolf v. MWH Constructors, Inc., 34 F. Supp. 3d 1213, 1222 (M.D. Fla. 2014)(a plaintiff cannot recover for discrete acts of discrimination and retaliation that occur outside the applicable statutory time period set forth in section 760.11(1), i.e., 365 days). Discrete discriminatory acts, such as termination, failure to promote, etc., are not actionable if time barred, even when they are related to acts alleged in timely filed charges. Each discrete discriminatory act starts a new clock for filing charges alleging that act. See Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 113 (2002).

However, the "continuing violation doctrine" offers an exception to this limitation period and allows a petitioner to assert an otherwise time-barred claim where at least one violation occurred within the period. See Hipp v. Liberty Nat'l Life Ins. Co., 252 F.3d 1208, 1221 (11th Cir. 2001). "In determining whether a discriminatory employment practice constitutes a continuing violation, '[the court]' must distinguish between the present consequence of a one-time violation, which does not extend the limitations period, and the continuation of the violation into the present, which does." EEOC v. Joe's Stone Crabs, Inc., 296 F.3d 1265, 1271 (11th Cir. 2002). A petitioner must maintain that "a pattern of discrimination or an employment practice presently exists to perpetuate the alleged wrong." Jacobs v. Bd. of Regents, 473 F. Supp. 663, 669 (S.D. Fla. 1979).

Petitioner filed her Employment Complaint of Discrimination with the Commission on February 22, 2017. Consequently, all discrete discriminatory and retaliatory acts that occurred before

February 22, 2016, for FCRA purposes, are untimely filed and no longer actionable.

However, Petitioner described her supervisor's alleged retaliatory decisions as a continual effort to deny her requests for medical leave and an alternate work schedule beginning in the fall of 2015 and continuing through her termination from the company. Therefore, the undersigned considered the alleged adverse employment actions examined above to flow out of the same series and events as those adverse decisions that fall within the applicable statutory time period. Accordingly, all Petitioner's cognizable complaints up through February 22, 2017, are considered in the scope of this action.

[4/] In determining whether employees are similarly situated for purposes of establishing a prima facie case, "[w]hen comparing similarly situated individuals to raise an inference of discriminatory motivation, these individuals must be similarly situated in all relevant respects." Jackson v. BellSouth Telecomm., 372 F.3d 1250, 1273 (l1th Cir. 2004). Based on the evidence in the record, Mr. Guyette meets this requirement.

[5/] The working conditions Petitioner described include sufficient allegations to meet the second prong of her prima facie case of retaliation. (See paragraphs 8-16 above). However, several of the perceived inequities Petitioner detailed do not constitute "materially adverse employment actions" that support a claim of retaliation under the FCRA.

To prove an "adverse employment action," Petitioner "must show a *serious and material* change in the terms, conditions, or privileges of employment." Davis v. Town of Lake Park, 245 F.3d 1232, 1239 (11th Cir. 2001). "The employer's action must impact the 'terms, conditions, or privileges' of the plaintiff's job in a real and demonstrable way." Id. An employment action "is considered 'adverse' only if it results in some tangible, negative effect on the plaintiff's employment." Lucas v. W. W. Grainger, Inc., 257 F.3d 1249, 1261 (11th Cir. 2001)(negative performance evaluations that did not result in any effect on the employee's employment did not constitute "adverse employment action."). "Trivial harms" and "petty slights" unconnected to any "tangible job consequences," do not constitute an adverse employment action. Juback v. Michaels Stores, Inc., 143 F. Supp. 3d 1195, 1206 (M.D. Fla. 2015). Further, Petitioner's subjective beliefs about the employer's actions do not control. The challenged employment action must be "materially adverse as viewed by a reasonable person in the circumstances." Davis, 245

F.3d at 1239; see also Butler v. Ala. Dep't of Transp., 536 F.3d 1209, 1215 (11th Cir. 2008).

At the final hearing, Petitioner complained that a supervisor (not hers) periodically provided a doughnut to a co-worker, but no supervisor ever gave her a doughnut. Petitioner also recounted that one day, she was alarmed to find dry splashes of paint all over her desk chair. (Ms. Morris promptly replaced her chair after she reported it.) While these discourtesies may have left Petitioner feeling "violated and scared" and like "a slave on a plantation," no evidence indicates that these incidents so affected the terms or conditions of her employment that they would have dissuaded a reasonable worker from making or supporting a charge of discrimination.

[6/] See also Novella v. Wal-Mart Stores, Inc., 459 F. Supp. 2d 1231, 1235 (M.D. Fla. 2006)(A plaintiff cannot establish the causal link element in a retaliation claim simply by inference.).

[7/] As with discrimination cases under the FCRA, courts apply the McDonnell Douglas burden-shifting approach to evaluate the weight of circumstantial evidence to establish a prima facie case of retaliation. See Butts v. Ameripath, Inc., 794 F. Supp. 2d 1277, 1289 (S.D. Fla. 2011). The Trask court indicates that "but-for" causation is a part of the prima facie case of retaliation under the McDonnell Douglas framework.

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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.