

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

KARSEN SPRADLIN,

Petitioner,

vs.

Case No. 17-6468

FLORIDA DEPARTMENT OF EDUCATION,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted on March 9, 2018, in Tallahassee, Florida, and on April 13, 2018, in Marianna, Florida, before Garnett W. Chisenhall, a duly designated Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner: Karsen Elizabeth Spradlin, pro se
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Malone, Florida 32445

For Respondent: Riley Michelle Landy, Esquire
Department of Education
Turlington Building, Suite 1244
325 West Gaines Street
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STATEMENT OF THE ISSUE

The issue is whether the Florida Department of Education ("the Department") committed one or more unlawful

employment practices against Petitioner ("Ms. Spradlin") by discriminating against her based on race.

PRELIMINARY STATEMENT

On October 13, 2016, Ms. Spradlin filed a Charge of Discrimination with the Florida Commission on Human Relations ("the Commission") alleging that the Department subjected her to disparate treatment:

During my employment with Vocational Rehabilitation in Marianna, Florida, as an Entry Level Counselor, beginning in 2011 and ending on May 18, 2016, I was repeatedly harassed by my supervisor Tawana Gilbert, African American, female because of my race (Caucasian). Ms. Gilbert's constant disciplinary actions, berating and condemning statements, and disparaging treatment of me created a hostile work environment.

In 2012, I applied for two openings in our Marianna VR office for Senior Counselor position(s). Both positions were filled by African Americans, one of which was an external candidate, male, with no VR experience or credentials. I was passed over for promotion for Senior Counselor twice in 2012, with Ms. Gilbert on the interview committees. In May 2016, I applied for another Senior Counselor position in the Marianna VR office. I was passed over for promotion again for an African American female with no VR experience and no credentials. Ms. Gilbert was on the interview committee. Ms. Gilbert and the Area Supervisor Allison Gill came into my office on May 18, 2016 to inform me that they had selected another candidate for the Senior Counselor position. I asked that an investigation into a hostile work environment be initiated, and Ms. Gilbert

commenced with berating and verbally bashing me. Following this encounter, I was then required to sit next to Ms. Gilbert in a lengthy meeting while she glared at me. Based on the foregoing, I allege that I was discriminated against based on my race, when in 2012 I was not selected for either of the two senior counselor positions, and again passed over in 2016 for another Senior Counselor position despite my superior qualifications, experience, and job performance/knowledge in comparison to the hired candidates who are all African American. Furthermore, I allege that I was required to work in a hostile work environment in Marianna, Florida's VR office due to constant harassment I endured at the hands of Ms. Gilbert, and the discriminatory hiring practices of Florida's Department of Education, Vocational Rehabilitation from 2011 - May 18, 2016.

On November 3, 2017, the Commission issued a letter notifying Ms. Spradlin that it had determined that there was "no reasonable cause" to conclude that an unlawful employment practice had occurred:

[Ms. Spradlin] worked for [the Department], a state agency, as a vocational counselor. She alleged that she was subjected to disparate treatment based on her race and color. [Ms. Spradlin] fails to prove a prima facie case. [Ms. Spradlin] claimed that she was denied flex time and FMLA, while her coworkers were permitted to work flexible schedules. [The Department]'s documents indicate that [Ms. Spradlin] failed to request and document time off according to [the Department]'s designated procedure; however [the Department] permitted [Ms. Spradlin] to take time off as needed. [Ms. Spradlin] was required to donate successfully completed cases to new coworkers, but this requirement

applied to all of [the Department]'s vocational counselors. Therefore, [Ms. Spradlin] failed to provide evidence of similarly situated comparators outside her protected class who were treated more favorably. Also, [Ms. Spradlin] alleged failure to promote based on her race and color. [Ms. Spradlin] fails to prove a prima facie case. [Ms. Spradlin] applied for four positions and was not hired for any of them. [The Department]'s records indicate that these positions were filled based on candidates scores on written exercises and interviews. Each time she applied, other candidates scored higher than [Ms. Spradlin]. [Ms. Spradlin] then applied for and was offered the position of Vocational Rehabilitation Consultant. Thus, the evidence shows [Ms. Spradlin] was not denied a promotion. In addition, [Ms. Spradlin] alleged that she was harassed. [Ms. Spradlin] fails to prove a prima facie case. [Ms. Spradlin]'s supervisor did reprimand [Ms. Spradlin] for violating [the Department]'s policies; however this is not severe or pervasive conduct. Also, [Ms. Spradlin] alleged that [the Department] retaliated against her. [Ms. Spradlin] fails to prove a prima facie case because she failed to describe any adverse action she may have suffered.

Ms. Spradlin filed a Petition for Relief with the Commission on November 28, 2017, and the Commission transferred the case to DOAH on November 29, 2017.

Via a Notice of Hearing issued on December 11, 2017, the undersigned scheduled the final hearing to occur in Tallahassee, Florida, on February 13, 2018.

On February 5, 2018, the Department filed an "Agreed Motion to Continue Formal Hearing," and the undersigned issued

an Order rescheduling the final hearing to occur on March 9, 2018.

The final hearing was commenced as scheduled on March 9, 2018, but was not completed that day. The final hearing was completed on April 13, 2018, in Marianna, Florida.

In addition to her own testimony, Ms. Spradlin presented the telephonic testimony of Alvin Webb and Amy Asselin. The Department presented the testimony of Evelyn Langmaid, Allison Gill, and Tawana Gilbert.

Ms. Spradlin's Exhibits 1 through 10, 12, and 13 were accepted into evidence. The Department's Exhibits 1 through 21 were accepted into evidence.

The final volume of the three-volume hearing Transcript was filed on May 31, 2018.

On June 4, 2018, the Department filed an unopposed Motion asking that the deadline for the parties' proposed recommended orders be extended to June 21, 2018. The undersigned issued an Order granting that motion on June 4, 2018.

Both parties filed timely Proposed Recommended Orders that were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Based on the oral and documentary evidence adduced at the final hearing and the entire record in this proceeding, the following Findings of Fact are made:

1. Ms. Spradlin worked from 2006 to 2010 as a psychological specialist at a facility known as Sunland in Marianna, Florida. Ms. Spradlin is Caucasian.

2. During a portion of the time that Ms. Spradlin was at Sunland, Tawana Gilbert worked there as a human service administrator. Ms. Gilbert is African-American.

3. Ms. Spradlin and Ms. Gilbert did not work closely together, but they served on the same interdisciplinary team and worked with the same residents.

4. Ms. Gilbert's only knowledge of Ms. Spradlin was through the documentation that Ms. Spradlin submitted to the interdisciplinary team.

5. Ms. Gilbert left Sunland in approximately November of 2009, and began working for the Department as a unit supervisor for a vocational rehabilitation services unit in Marianna, Florida.

6. Vocational rehabilitation assists people by providing them with services that enable them to obtain and maintain gainful employment.

7. During the time period relevant to the instant case, the Marianna unit had 10 staff members and served five counties. Of those 10 staff members, five were counselors and one was the unit supervisor.

8. At some point after Ms. Gilbert left Sunland, Ms. Spradlin saw an advertisement for an entry level vocational rehabilitation counselor position at the Marianna unit. Ms. Spradlin applied for the position and was hired in 2010.

9. In March or April of 2011, Ms. Gilbert invited all of her coworkers to a special event at her church.

10. Ms. Gilbert asked her coworkers with children if their child would like to participate in a program that was to be part of the festivities.

11. Ms. Spradlin said that her daughter was willing to participate, and Ms. Gilbert typed out the words that Ms. Spradlin's daughter was to recite during the program.

12. When it was time for Ms. Spradlin's daughter to recite her part, she became nervous, and her grandmother read the part.

13. Following this event, Ms. Spradlin asserts that Ms. Gilbert's attitude toward her changed and that the unlawful employment practices alleged in her Charge of Discrimination began.

Findings Regarding Ms. Spradlin's Interviews for Senior Counselor Positions

14. There were two openings for senior vocational rehabilitation counselors at the Marianna unit in October of 2012.^{1/}

15. When the Department is considering applicants for a particular position, it utilizes a three-person panel to conduct interviews and score the applicants.

16. After the interviews, the three-person panel reaches a consensus as to each applicant's scores, and the Department uses a standardized matrix to rank each applicant.

17. The panel for the two senior vocational rehabilitation counselor openings consisted of Allison Gill, the Department's area supervisor; Michael Nobles, the former supervisor of the Marianna unit; and Ms. Gilbert.

18. Ms. Gill and Mr. Nobles are Caucasian.

19. Of the five people who interviewed for the two openings, Ramonia Robinson earned the highest score, a 72.

20. With regard to Ms. Robinson's qualifications, Ms. Gilbert testified as follows:

Ms. Robinson, she was a current employee there. She was an entry-level counselor, had been for many, many years. She was there prior to my hiring with VR, so I was familiar with her work history. And she was very thorough, very detailed, very flexible, and very unemotionally involved with her cases. So she, in conducting her cases and case management, was awesome. And she was very knowledgeable about the questions that were being asked. She had had a long history of experience with case management, providing services to individuals with disabilities, and just adequately managing her caseload. She did very well on her interview.

21. Ms. Spradlin received the second highest score, a 56. Keith Sutton, an outside applicant, received a score of 55.

22. When two applicants' scores are within one point of each other, the Department bases the ultimate hiring decision on reference checks.

23. Ms. Gilbert contacted Mr. Sutton's references and received positive feedback about him.

24. As for Mr. Sutton's qualifications, Ms. Gilbert provided the following testimony:

Q: What about Mr. Sutton's experience, resume was notable to you in the interview process?

A: Well, he had his degree. It's directly related to the field of counseling. He had a wealth of experience in the counseling field. He came to us from the Agency for Persons with Disabilities, which is Sunland, where he had a year there, and he met at least the minimum qualifications. He was very - his application was very detailed, and it identified precisely his experience based on his ability to - or his experience with providing counseling, providing services for those with disabilities. And he had a long history from where he had previously worked in the field of counseling.

Q: Okay, so Mr. Sutton achieved a Master's in Counseling in 2011, is that correct, according to his application?

A: Yes.

Q: And that's directly related to the position; is that correct?

A: Yes, that's correct.

Q: And he had experience as a master's level therapist?

A: Yes.

Q: Is that accurate, according to the application?

A: Yes. He worked for Florida Therapy as a master's level therapist, where he was expected to provide counseling, psychotherapy to children, adults and their families, but doing so on an independent basis. That demonstrated he was very flexible, detailed oriented and [had] the ability to function independently.

25. Because she was Ms. Spradlin's supervisor at the time, Ms. Gilbert acted as her reference and did not recommend her for a senior counselor position.

26. In explaining her reasoning, Ms. Gilbert testified that:

Ms. Spradlin was difficult to work with and she was very negative. She had several participant complaints during the span of [] that year. In her first year coming in, she was very challenging, she did not want to accept constructive criticism from me as the unit supervisor. She did not want very - she wanted very little feedback from me based on her performance. Several participant complaints, calling me directly, contacting the ombudsman, faxing me complaints based on their interaction with Ms. Spradlin, how they felt that they were being treated unfairly, they did not agree with her tone from time to time. She

was not at all culturally sensitive to some of our participants. She was insubordinate. She would - there were times she would just leave the unit because things - conditions were unfavorable to her.

27. Ms. Gilbert submitted her recommendation to the Department's area director, and Mr. Sutton was ultimately offered a senior counselor position.

28. Mr. Sutton is currently the supervisor of the Marianna unit.

29. There is no persuasive evidence that Ms. Spradlin was not promoted because of her race or any animus from Ms. Gilbert. The interview panel, consisting of two Caucasians, had legitimate, nondiscriminatory grounds for concluding that Ms. Robinson and Mr. Sutton were more qualified for the openings.

30. In short, the greater weight of the evidence demonstrates that there was no unlawful employment practice associated with the Department's selection of applicants for the two openings discussed above.

31. In May of 2016, Ms. Spradlin applied for another senior counselor position in the Marianna unit.

32. The interview panel for this opening consisted of Ms. Gilbert and two other Department employees, Evelyn Langmaid and Rebecca Stevens.

33. Ms. Langmaid and Ms. Stevens are Caucasian.

34. Ms. Gilbert did not supervise Ms. Langmaid or Ms. Stevens, and she did not attempt to influence their decision-making.

35. Georgia Britt received the highest score from the interview panel and was offered the senior counselor position.

36. Ms. Langmaid described Ms. Britt's interview as follows:

She just came in and every answer we'd or every question that we gave her she was just right on with the answers and [was] hitting the points on the - because we have sort of like a little sheet that we can look for certain points that we're looking for answers, and she was just right on every point, and was very, very knowledgeable of what was going on.

37. Ms. Spradlin had obtained a certified rehabilitation counseling certification in October of 2014, and Ms. Britt lacked that certification. However, Ms. Britt's other credentials bolstered her application.

38. For instance, she has a bachelor's degree in elementary and special education and a master's degree in counseling.

39. Ms. Britt also had relevant work experience.

40. When she applied for the senior counselor position, Ms. Britt was employed at Sunland as a behavior specialist working with adults with developmental disabilities.

41. Ms. Britt wrote in her application that she had been able to "work with all different types of individuals at all intellectual levels" via her position at Sunland.

42. Prior to working at Sunland, Ms. Britt had worked in a children's psychiatric hospital in Dothan, Alabama.

43. That position also gave her an opportunity to work with individuals from diverse backgrounds.

44. Ms. Britt wrote on her application that her position at the hospital required her to engage in some counseling and that she had to use counseling skills in order to obtain psychiatric histories and other information.

45. Ms. Britt's interview bolstered her application. According to Ms. Langmaid, Ms. Britt "blew it out of the water. She was fantastic on the interview."

46. Ms. Gilbert was also very complimentary of Ms. Britt's interview:

Q: What about Ms. Britt stood out to you and the panel?

A: Her ability to respond to the questions as they were being asked. At that time, we were transitioning to where we were asking more emotional [intelligence] questions where - to identify a counselor's ability to emotionally manage cases and refrain from being emotionally involved with that case. So she answered the questions. It's on ones that can give a thorough answer based on the

circumstance that occurred, the actions that took place and the results of the question.

Q: Okay.

A: She was really, really thorough with her answers.

47. There is no persuasive evidence that Ms. Spradlin did not receive the promotion because of her race or due to any animus from Ms. Gilbert. The interview panel, consisting of two Caucasians, had legitimate, nondiscriminatory grounds for concluding Ms. Britt was more qualified for the opening.

48. In short, the greater weight of the evidence demonstrates that there was no unlawful employment practice associated with the Department's selection of Ms. Britt.

Findings Regarding Ms. Spradlin's Hostile Work Environment Allegations

49. Ms. Spradlin made several allegations during the final hearing that she was subjected to a hostile work environment during her time with the Marianna unit.^{2/}

50. For example, in October of 2010, Ms. Spradlin exposed at least part of her posterior to a coworker in the Marianna unit in order to demonstrate the severity of a sunburn.

51. Ms. Gilbert did not learn of that incident until another incident was reported to her on May 2, 2011.

52. That day, Ms. Spradlin was seated in an office within the Marianna unit when a female coworker got very close to Ms. Spradlin and "twerked" in her face.

53. Ms. Spradlin states that she placed her hands on the coworkers posterior and playfully pushed her away. However, the coworker reported to Ms. Gilbert that Ms. Spradlin had pinched her posterior.

54. Upon learning of both incidents, Ms. Gilbert discussed them with Ms. Spradlin and conferred with the Department's labor relations unit on formulating a proper course of action.

55. With input from the labor relations unit, Ms. Gilbert issued a counseling memorandum to Ms. Spradlin on October 4, 2011.^{3/}

56. The counseling memorandum^{4/} read in pertinent part as follows:

You are being issued a Counseling Memorandum for your violation of Rule 60L-36.005(2)(f)(1), Florida Administrative Code (F.A.C.), Conduct unbecoming a public employee.

On October 12, 2010, you signed the Department's Acknowledgement Form stating you received copies of the policies and rules of the Department. Please be aware that you are expected to abide by all Standards of Conduct as stated in 60L-36.005, F.A.C.

On May 2, 2011, you violated the following rule and policy:

Rule 60L-36.005(2) (f) (1), F.A.C., requires that "Employees shall conduct themselves, on and off the job, in a manner that will not bring discredit or embarrassment to the state.

1. Employees shall be courteous, considerate, respectful, and prompt in dealing with and serving the public and co-workers."

On May 2, 2011, it was reported by one employee that you pulled your pants down exposing your buttocks and "mooned" that employee. Another employee informed me that on that same day you pinched her on her buttocks. After I was told about these incidents that day, I counseled you and informed you that this was inappropriate behavior and it was explained that your actions were unacceptable.

This type of conduct is not conducive to a satisfactory work environment. Your conduct has adversely impacted the morale and efficiency of your unit and the Department, is detrimental to the best interests of the state and Department, and adversely affects your effectiveness with the Department, as well as your ability to continue to perform your job. This behavior must cease immediately. Should you continue conduct unbecoming a public employee, disciplinary actions, up to and including dismissal may be taken.

57. Ms. Spradlin signed the counseling memorandum on October 4, 2011, and added the following comments:

These two incidents happened on [sic] different persons. The incident w/ "mooning" was with [a] coworker after I incurred a severe sunburn. It was done only to show my burns not to offend her. She sobbed - I was not wearing pants - skirt instead. On the second occasion w/co-worker

E.R. she put her buttocks in my face, playing around, & I pinched it as if to express my willingness to play as well. It was provoked - not done in an offensive manner.

I understand that this type of behavior is not accepted in my work environment. They were done in a playful uplifting manner, not intentional. However, I will refrain from this behavior as I have obviously offended my colleagues.

58. Another allegation of disparate treatment concerned an incident with a Department client named B.H., who Ms. Spradlin assisted with enrolling in nursing school.

59. B.H. arrived at the Marianna unit one day without an appointment and reported that he wanted to do something other than nursing.

60. Ms. Spradlin asserts that B.H. got aggressive when his requested changes could not be accomplished immediately. Ms. Spradlin further asserts that she became afraid, threatened to call 9-1-1, and managed to get past B.H. and into the hallway outside her office.

61. Ms. Gilbert heard the commotion and called the police. By the time the police arrived at the Marianna unit, B.H. was very calm, and Ms. Gilbert concluded there had been no need to call law enforcement.

62. While Ms. Spradlin asserts that she became an object of ridicule in the Marianna office for overreacting, Ms. Gilbert

asserts that she was ridiculed for failing to give the address of the Marianna office when she called 9-1-1.

63. As another example of disparate treatment, Ms. Spradlin cites an incident on November 14, 2013, involving a cigarette butt.

64. Ms. Spradlin was in Ms. Gilbert's office and dropped a cigarette butt into a trashcan.

65. According to Ms. Spradlin, Ms. Gilbert demanded that she remove the cigarette butt and forced Ms. Spradlin to search through used tissues for the cigarette butt.

66. Ms. Gilbert acknowledged that she asked Ms. Spradlin to remove the cigarette butt from the trashcan, but she credibly denied berating Ms. Spradlin or yelling at her. According to Ms. Gilbert, Ms. Spradlin was able to quickly remove the butt from the trashcan and was not upset about having to do so.

67. Ms. Spradlin made several other allegations about how Ms. Gilbert gave African-American employees in the Marianna unit preferential treatment.

68. For example, Ms. Spradlin alleges that she was required to handle more cases and incur more travel than her African-American coworkers. With regard to her travel reimbursements, Ms. Spradlin alleged that Ms. Gilbert refused to account for all the miles she traveled.

69. Ms. Spradlin further asserts that Ms. Gilbert subjected her to disparate treatment by requiring her to maintain more documentation of her daily activities, inundating her with e-mails inquiring about the status of her work, and being less lenient regarding Ms. Spradlin's use of flex and leave time.

70. Ms. Gilbert testified that she has never denied a request for annual leave and that she approved the majority of Ms. Spradlin's requests for flex time, even though Ms. Spradlin did not follow the proper procedure for making such requests.

71. As for the other allegations mentioned above, Ms. Gilbert credibly testified that she did not subject Ms. Spradlin to any disparate treatment.

72. Finally, Ms. Spradlin alleges that Ms. Gilbert unfairly administered a system by which counselors within the Marianna unit shared their successful cases with African-American counselors who had fewer successful cases. This system was implemented because counselors within the Marianna unit were expected to have a certain number of successful cases.

73. Ms. Gilbert credibly denied that the system was administered unfairly:

Q: Ms. Gilbert, do you ever ask counselors to donate their successful cases or case numbers to other counselor?

A: I never asked counselors specifically to do that. I did discuss it with the unit, with our team as an option.

Q: Okay, and why would that be an option they may want to do?

A: Well, the way Vocational Rehabilitation operates is a person has to be on their job a minimum - a minimum of three months, okay, 90 days, to consider that person as successfully rehabilitated. And that was a measurement. That was an expectation on each counselor's performance evaluation, that they had to get so many successful rehabs within one year.

So someone that's being hired and coming to Vocational Rehabilitation in the middle of the year, they don't have that opportunity to monitor that person for 90 days, if they don't already have someone that's in that employment status ready to begin monitoring. So it's difficult. But I did not want that to be a negative reflection of a counselor that's really trying and that's working their caseload and trying to get their successful rehabs.

So I would ask counselors once they've received all of their rehabs and they close enough people successfully that allows them to get the most maximum score that they can get on their evaluation, I would ask them if they wanted to, share those rehabs with someone that's probably a new counselor or that's just having a difficult time with obtaining their successful rehabs.

Q: Okay. And so Mr. Sutton's first year, might he have received some successful numbers donated to him from other counselors?

A: That is a possibility.

Q: Okay. Did Ms. Spradlin ever receive any successful numbers donated to her when she had a lower number?

A: Yes.

* * *

Q: Okay. And so that number of successes or successful rehabilitations is important to counselors?

A: Absolutely.

Q: Because they are - are they evaluated on that each year in their yearly performance evaluation?

A: Yes. Each level of counselor, if you're an entry-level counselor, your first year you may be expected to get five. Those numbers are prorated. So the cutoff period is last business day of June, so if you have a new counselor that starts in February or March, they're at a disadvantage, they don't have the time. Time works against them. But if they are involved with their cases and they are trying to work their cases, I felt that it was only reasonable to assist them.

* * *

Q: Okay, so you said that Ms. Spradlin would have received a donation of successful cases maybe early on in her career?

A: Yes.

Q: Did she donate cases once she became a more proficient counselor?

A: I'm pretty sure she did.

Q: And did you specifically ask her to donate cases to any particular employee?

A: No.

74. Ms. Spradlin resigned from the Department on August 10, 2016.

75. There is no sufficiently persuasive evidence to support Ms. Spradlin's disparate treatment claims. The greater weight of the evidence demonstrates that Ms. Spradlin was not subjected to any disparate treatment during her tenure in the Marianna unit.

CONCLUSIONS OF LAW

76. 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, Florida Statutes (2016),^{5/} and Florida Administrative Code Rule 60Y-4.016(1).

77. The State of Florida, under the legislative scheme contained in sections 760.01-760.11 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.

78. Section 760.10, 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." § 760.10(1)(a), Fla. Stat.

79. Ms. Spradlin alleged in her Charge of Discrimination that she was the victim of disparate treatment under the FCRA; in other words, Ms. Spradlin claimed that she was treated differently because of her race. As a result, Ms. Spradlin has the burden of proving by a preponderance of the evidence that the Department discriminated against her. See Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981).

80. A party may prove unlawful race discrimination by direct or circumstantial evidence. Smith v. Fla. Dep't of Corr., 2009 U.S. Dist. LEXIS 44885 (M.D. Fla. 2009). When a petitioner alleges disparate treatment under the FCRA, the petitioner must prove that his race "actually motivated the employer's decision. That is, the [petitioner's race] 'must have actually played a role [in the employer's decision making] process and had a determinative influence on the outcome.'" Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 141 (2000).

81. Direct evidence is evidence that, "if believed, proves [the] existence of [a] fact in issue without inference or

presumption.” Burrell v. Bd. of Trs. of Ga. Mil. Coll., 125 F.3d 1390, 1393 (11th Cir. 1997). Direct evidence consists of “only the most blatant remarks, whose intent could be nothing other than to discriminate” on the basis of an impermissible factor. Carter v. City of Miami, 870 F.2d 578, 582 (11th Cir. 1989).

82. There is no direct evidence of unlawful race discrimination in the instant case. That is not uncommon because “direct evidence of intent is often unavailable.” Shealy v. City of Albany, 89 F.3d 804, 806 (11th Cir. 1996). Accordingly, those who claim to be victims of intentional discrimination “are permitted to establish their cases through inferential and circumstantial proof.” Kline v. Tenn. Valley Auth., 128 F.3d 337, 348 (6th Cir. 1997).

83. 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, nondiscriminatory 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, 25 (Fla. 3d DCA 2009). Facts that are sufficient to establish a

prima facie case must be adequate to permit an inference of discrimination. Id.

84. With regard to Ms. Spradlin's allegations that she should have been promoted to a senior counselor position in 2012 and 2016, one establishes a prima facie case of discrimination on failure-to-promote grounds by showing that: (a) she is a member of a protected class^{6/}; (b) she was qualified for and applied for the promotion; (c) she was rejected despite these qualifications; and (d) other equally or less qualified employees who were not members of the protected class were promoted. See Beal v. CSX Corp., 308 Fed. Appx. 324, 326 (11th Cir. 2009) (citing Walker v. Prudential Prop. & Cas. Ins. Co., 286 F.3d 1270, 1274-75 (11th Cir. 2002)).

85. The interview panels that considered Ms. Spradlin's applications for promotion in 2012 and 2016 had legitimate, nondiscriminatory grounds for concluding that others were more qualified for those senior counselor positions than Ms. Spradlin. Thus, Ms. Spradlin failed to prove this aspect of her case by a preponderance of the evidence.

86. As for Ms. Spradlin's claims of disparate treatment, one can establish a prima facie case of discrimination by demonstrating that: (a) she is a member of a protected class; (b) she was qualified for the position held; (c) she was subjected to an adverse employment action; and (d) other

similarly situated employees, who are not members of the protected group, were treated more favorably. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). "When 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 (11th Cir. 2004).

87. There is no sufficiently persuasive evidence to support Ms. Spradlin's disparate treatment claims. The greater weight of the evidence demonstrates that Ms. Spradlin was not subjected to any disparate treatment during her tenure in the Marianna unit.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations issue a final order dismissing Petitioner's Petition for Relief.

DONE AND ENTERED this 24th day of July 2018, in
Tallahassee, Leon County, Florida.

Garnett Chisenhall

G. W. CHISENHALL
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of July 2018.

ENDNOTES

^{1/} Section 760.11(1), Florida Statutes (2016), allows a person alleging discrimination, pursuant to the Florida Civil Rights Act, to file a complaint within 365 days of the alleged violation. Thus, violations occurring more than 365 days prior to the October 13, 2016, filing of Ms. Spradlin's Charge of Discrimination are not actionable. However, the Commission did not dismiss any of Ms. Spradlin's claims. Because those claims were fully addressed by the parties at the final hearing, they are discussed and evaluated herein so as to establish a comprehensive record.

^{2/} Ms. Spradlin's Charge of Discrimination only makes a general allegation that she was subjected to disparate treatment and gives no description of specific incidents. As a result, the Department argued at the final hearing that it was not on notice that it would have to defend against such allegations. However, the Commission's November 3, 2017, letter indicates that it investigated disparate treatment allegations, and the Department had an opportunity to inquire about all the allegations Ms. Spradlin intended to raise when it deposed her. Given the fact that Ms. Spradlin was unrepresented by counsel and the Department was able to present an adequate defense through Ms. Gilbert's testimony, the undersigned has elected to

proceed as if the Department was on notice regarding Ms. Spradlin's disparate treatment allegations.

^{3/} There was no explanation at the final hearing as to why the October 2010 incident was not brought to Ms. Gilbert's attention until May of 2011. There was also no explanation about why the counseling memorandum was not issued until October 4, 2011. However, those facts do not indicate any disparate treatment.

^{4/} Ms. Gilbert denied ever disciplining Ms. Spradlin and testified that the counseling memorandum was not discipline: "And actually, the counseling memorandum is not technically disciplinary action. It is more - it is more feedback, assisting the employee with identifying what occurred, what went wrong, and just trying to assist them with appropriate behaviors or appropriate presentations of themselves while on the job. It's [supposed] to be assisting, not punitive at all." Ms. Gilbert denied ever imposing any punitive measures on Ms. Spradlin such as a reprimand or a suspension.

^{5/} Unless stated otherwise, all statutory citations will be to the 2016 version of the Florida Statutes.

^{6/} The Commission explained in Phillip McTaggart v. Pensacola Bay Transportation Company, Case No. 10-1182 (Fla. DOAH June 1, 2010; FCHR August 11, 2010), that "people of all races are entitled to establish discrimination claims under the Florida Civil Rights Act of 1992, not just those belonging to a 'racial minority.'" As a result, the Commission reframes the first element of a prima facie discrimination case as whether the petitioner "belongs to a group protected by the statute."

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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.