STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LESTER L. WASHINGTON,

Petitioner,

vs. Case No. 18-0367

ESCAMBIA COUNTY SCHOOL DISTRICT,

Respondent.
_____/

RECOMMENDED ORDER

A final hearing was conducted in this case on May 10 and June 5, 2018, in Pensacola, Florida, before James H. Peterson, III, Administrative Law Judge with the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Lester L. Washington, pro se
Apt 809
1878 East 9 Mile Road
Pensacola, Florida 32514-3125

For Respondent: Joseph L. Hammons, Esquire
The Hammons Law Firm, P.A.
17 West Cervantes Street
Pensacola, Florida 32501

STATEMENT OF THE ISSUE

Whether the Escambia County School District (School District or Respondent) discriminated against Lester Washington (Petitioner) on the basis of his race, gender, or age, or in retaliation against him for engaging in protected activities, in

violation of the Florida Civil Rights Act of 1992,[1/] by terminating Petitioner's employment, or removing Petitioner from the School District's authorized list of substitute teachers.

PRELIMINARY STATEMENT

On April 11, 2017, Petitioner filed an Employment Complaint of Discrimination (Complaint) with the Florida Commission on Human Relations (the Commission or FCHR). The Commission investigated the Complaint, which was assigned FCHR No. 201700803. At the completion of its investigation, the Commission issued a Determination dated December 15, 2017, finding no reasonable cause. On the same date, the Commission sent Petitioner a Notice of Determination (Notice) on the Complaint stating that no reasonable cause exists to believe that an unlawful practice occurred.

The Notice advised Petitioner that the Commission's Determination would become final unless Petitioner filed a Petition for Relief within 35 days. Petitioner timely filed a Petition for Relief. The Commission referred the matter to DOAH, and the case was assigned to the undersigned to conduct an administrative hearing pursuant to chapter 120, Florida Statutes.

The first day of the administrative hearing in this case was held May 10, 2018, and, after a day of hearing, another full day was scheduled and then heard on June 5, 2018. At hearing,

Petitioner called 11 witnesses, testified on his own behalf, and offered seven exhibits received into evidence as Petitioner's Exhibits P0 through P3, P77, P101, and P102. The School District presented the testimony of two witnesses and offered four exhibits received into evidence as Respondent's Exhibits R1 through R4 (three versions of R4 provided). The proceedings were recorded, but no transcript was ordered. The parties were given until September 1, 2018, to submit their proposed recommended orders.

The School District timely filed its Proposed Recommended Order on August 31, 2018, and, after Petitioner filed two motions for extensions of time, which were granted, Petitioner filed his Proposed Recommended Order on September 7, 2018, with various subsequent renditions, corrections, and motions with regard thereto, on September 10, 11, 12, and 14, 2018. Petitioner's post-hearing filings are voluminous and confusing, but were nonetheless reviewed and considered, along with the School District's Proposed Recommended Order, in preparing this Recommended Order.

FINDINGS OF FACT

1. Petitioner was employed in the position of exceptional student education (ESE) department chair at Warrington Middle School pursuant to an instructional appointment signed by

Petitioner on June 13, 2016. The instructional appointment includes the following language:

> I understand further that upon signing this appointment form, I shall be bound to serve as provided in s 1012.335, F.S. during the duration of this contract, I may be dismissed without cause or may resign from this contractual position without breach of contract.

2. Consistent with the terms of Petitioner's instructional appointment, section 1012.335(1)(c), Florida Statutes, provides that School District instructional employees with probationary contracts may be dismissed without cause or may resign without breach of contract.

3. Petitioner's instructional appointment as the ESE department chair for Warrington Middle School was recommended by Dr. Regina Lipnick, the principal of Warrington Middle School. Although Petitioner was not certified by the Department of Education as an ESE instructor, Petitioner was authorized to occupy that position so long as the certification could be achieved within one year, as allowed by section 1012.42.

4. In addition to Petitioner, Warrington Middle School had other new instructional staff in need of ESE training for the 2016-2017 school year, in accordance with federal requirements under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C., § 1412. Recognizing this need for training, the School District's ESE Department authorized and provided

additional training for Petitioner and other new instructional staff on ESE procedures.

5. Mary Cameron was employed as a teacher's assistant during Petitioner's employment at Warrington Middle School. In August, September, and October 2016, Lester Washington was Ms. Cameron's immediate supervisor, while Ms. Cameron worked as a teacher's assistant in the ESE Department.

6. Ashleigh Frizen, a behavior coach at Warrington Middle, told Ms. Cameron not to turn in the ESE paperwork completed by Mr. Washington because it was incorrect, and that Ms. Frizen would have to redo it before it could be submitted. Ms. Frizen corrected a number of forms that had been completed incorrectly by Mr. Washington.

7. In her testimony, Ms. Cameron was critical of the Warrington Middle School's principal, Dr. Lipnick. According to Ms. Cameron, Dr. Lipnick was too demanding and expected too much of the staff. Ms. Cameron further testified, however, that Dr. Lipnick's harshness was without regard to any employee's race, age, or gender.

8. Ms. Cameron testified that, on one occasion, she smelled alcohol on Ms. Frizen's breath. She reported this to Mr. Washington, who reported it to Dr. Lipnick. Ms. Cameron testified that Ms. Frizen did not exhibit any signs of intoxication nor did she observe Ms. Frizen engaging in any

abusive or inappropriate behavior. According to Ms. Cameron, the odor was as if the alcohol had been consumed over the weekend.

9. In October of 2016, Elizabeth Oakes, the School District's human resources director, was directed to go to Warrington Middle School to advise Mr. Washington of the termination of his probationary first-year teacher contract. Ms. Oakes explained to Mr. Washington that he was being terminated from his probationary contract, with the option to resign. Mr. Washington decided to resign and thereafter was placed on the School District's approved substitute teacher list.

10. Gary Marsh is employed by the School District as an investigator. His experience prior to employment with the Escambia County School District was through the Naval Criminal Investigative Unit. Mr. Marsh testified that he attended the meeting at Warrington Middle School with Ms. Oakes and Mr. Washington, during which Ms. Oakes advised Mr. Washington that his employment was being terminated. According to Mr. Marsh, Petitioner became very upset, and Mr. Marsh became concerned that Petitioner might become aggressive. Petitioner, however, did not become aggressive.

11. Keith Leonard, the School District's director of human resources, described his acceptance of Petitioner's resignation

and how the resignation gave Mr. Washington an opportunity to regain employment as opposed to being terminated. Mr. Leonard reiterated that Florida first-year teachers were on a probationary contract that can be terminated without cause and without any claim of wrongdoing.

12. Aggie Bauer, the principal of Cordova Park Elementary School, described that on January 5, 2017, Mr. Washington had served as a substitute teacher at that school. While substituting that day, Mr. Washington left kindergarten students unsupervised in the classroom while he took another group of students to another location.

13. Ms. Bauer spoke with Mr. Washington about what happened. Mr. Washington claimed a monitor was outside the classroom door when he left the room. Ms. Bauer had no knowledge of a monitor being outside the classroom.

14. Because Mr. Washington left kindergarten students unsupervised in the classroom, Ms. Bauer requested that Mr. Washington not be returned to substitute at Cordova Park Elementary School.

15. Holly McGee, Weis Elementary School principal, testified that when Mr. Washington was at Weis Elementary School as a substitute teacher, he placed his hands on the throat of a middle school student in violation of the School District's policies and procedures for managing students engaged in

misbehavior. Ms. McGee believed Mr. Washington was too physical in addressing students and advised the School District that she did not want Mr. Washington to return to her school as a substitute teacher.

16. Petitioner called his brother, Oberly Washington, as well as James Williams, Ellison Bennett, and Ashleigh Frizen, as witnesses. Oberly Washington, Mr. Williams, and Mr. Bennett spoke favorably of Mr. Washington, but offered no testimony with respect to his performance as a teacher at Warrington Middle School or his performance as a substitute teacher thereafter. They had no knowledge regarding the circumstances of Mr. Washington's termination from his teacher contract or his removal from the approved substitute teacher list.

17. Ms. Frizen was a behavior coach at Warrington Middle School while Petitioner was employed there. She has since transferred to another school where she is an intervention coordinator. According to Ms. Frizen, Mr. Washington's duties while at Warrington Middle were to assure that the ESE Department's Individual Education Plans (IEPs) were in place and that appropriate services were being provided to ESE students. Mr. Washington was to properly complete student information and IEP forms. Ms. Frizen described working with Mr. Washington and her attempts to assist and train him in the performance of his duties.

18. Teri Szafran, the director of the School District's ESE Department, described the requirements of IDEA and the School District's ESE Department's responsibility of implementing those requirements. She described the requirements for completion of IEP's for qualified students and the significant consequences of failure to comply. While Petitioner was employed at Warrington Middle School, Ms. Szafran was informed by an ESE worker at Warrington Middle School, that Mr. Washington was not able to perform the duties of his position involving ESE procedures, forms, and services.

19. Recognizing there were several new ESE teachers and employees at Warrington Middle School for the 2016-2017 school year, Ms. Szafran met with Dr. Lipnick to insure there would be some additional ESE training for the Warrington Middle School ESE staff. Ms. Szafran attended part of that training, which was provided, for the most part, by her assistant, Sondra Hill.

20. Ms. Hill provided individualized assistance to Petitioner for over three months before concluding, in October 2016, that he was not making sufficient progress required to satisfactorily perform his duties related to ESE students. As part of her responsibilities to the School District and ESE students, Ms. Hill reported to Dr. Lipnick and expressed her concern that the ESE services at Warrington Middle School could not be sufficiently provided by Mr. Washington based on his

inability to grasp and learn the necessary procedures and responsibilities.

21. While Ms. Hill was aware of Mr. Washington's report of Ms. Frizen having alcohol on her breath, that knowledge was not a factor in fulfilling her responsibility to report Petitioner's failure to learn the necessary skills and procedures to properly perform his ESE duties.

22. Petitioner testified on his own behalf. According to Petitioner, his report to the principal that Ms. Frizen had alcohol on her breath was a protected activity under Federal or state law and that he believed that his communication in that regard caused Dr. Lipnick to retaliate against him. Mr. Washington also expressed the belief that he had been denied due process because he was not afforded a hearing with respect to the termination of his probationary contract. Mr. Washington also believes that his race, age, or gender played a role in the termination of his instructional contract by Dr. Lipnick.

23. Petitioner's beliefs that his termination and removal from the substitute teacher list were based on discrimination or retaliation are not supported by the facts. Dr. Lipnick was the one who had initially recommended Petitioner for his employment at Warrington Middle School.

24. Rather than prove discrimination or retaliation, the evidence demonstrated that Petitioner did not have the necessary

knowledge of ESE procedures and responsibilities and was unable to acquire the necessary knowledge and skills. Notwithstanding Petitioner's effort to do so, his inability to perform the duties and responsibilities of his position, and Ms. Hills' report to Dr. Lipnick of that inability, constituted valid, nondiscriminatory reasons for the decision to end Petitioner's employment under his probationary contract. There is no evidence reasonably supporting a conclusion that the decision to terminate Petitioner's employment was because of race, age, or gender, or that it was in retaliation for Petitioner's report that a fellow employee had alcohol on her breath.

25. In consideration of all of the testimony and other evidence in this case, Petitioner failed to demonstrate that the decision to terminate his first-year teacher probationary contract was based on unlawful consideration of race, gender, age, or in retaliation for engaging in a protected activity. Neither is there evidence that, after Mr. Washington was authorized to serve as a substitute teacher, his removal from the authorized substitute teacher list was predicated on race, gender, age, or retaliation for his engagement in a protected activity.

CONCLUSIONS OF LAW

26. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this

proceeding. See §§ 120.569, 120.57(1), and 760.11(4)(b), Fla. Stat.; see also Fla. Admin. Code R. 60Y-4.016.

27. The Florida Civil Rights Act of 1992, as amended (the Act), is codified in sections 760.01 through 760.11, Florida Statutes.

28. Section 760.10 provides, in pertinent part:

> 1. It is an unlawful employment practice for an employer:
>
> (a) To discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.
>
> (b) To limit, segregate, or classify employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities, or adversely affect any individual's status as an employee, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.

29. The Escambia County School District is an "employer" within the meaning of the Act. See § 760.02(7), Fla. Stat. ("'Employer' means any person employing 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such a person."); see also § 760.02(7), Fla. Stat. ("'Person' includes . . . any governmental entity or agency.").

30. As developed in federal cases, a prima facie case of discrimination under Title VII may be established by direct evidence, which, if believed, would prove the existence of discrimination without inference or presumption. Direct evidence, consisting of blatant remarks whose intent could be nothing other than discriminatory, does not exist in this case. See Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d 1354, 1358-1359 (11th Cir 1999). Where direct evidence is lacking, one seeking to prove discrimination must rely on circumstantial evidence of discriminatory intent, using the three-part shifting "burden of proof" pattern established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). See Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997).

31. Under McDonnell Douglas, first, Petitioner has the burden of proving a prima facie case of discrimination by a preponderance of the evidence. Second, if Petitioner sufficiently establishes a prima facie case, the burden shifts to Respondent to "articulate some legitimate, nondiscriminatory reason" for its action. Third, if Respondent satisfies this burden, Petitioner has the opportunity to prove by a preponderance of the evidence that the legitimate reasons asserted by Respondent are in fact mere pretext. McDonnell Douglas Corp., 411 U.S. at 802-04. In order to establish a prima facie case under McDonnell Douglas, a plaintiff or

petitioner alleging unlawful discrimination under Title VII must show (1) he belongs to a protected group; (2) that he was subjected to an adverse employment action; (3) his employer treated similarly situated employees outside his classification more favorably; and (4) he was qualified to do the job. Holifield v. Reno, 115 F.3d, at 1562; McDonnell Douglas Corp., 411 U.S., at 802.

32. Petitioner has not presented sufficient evidence to show a prima facie case of unlawful discrimination on the basis of race, gender, or age. While the evidence demonstrates that Petitioner falls within a protected group and that Petitioner suffered an adverse employment action, there is no evidence of record that the School District treated similarly situated employees outside the protected groups more favorably. Nor is there evidence that Petitioner was "qualified to do the job."

33. While there is evidence that Petitioner was hired with the expectation that he would become qualified to do the job, there is no evidence that he was successful in that pursuit, through experience or training. As part of a prima facie case, it was incumbent upon Mr. Washington to demonstrate that qualification.

34. Even if Petitioner was deemed to have submitted sufficient evidence to show a prima facie case of unlawful discrimination on the basis of race, gender, or age, unrefuted

evidence in this case demonstrates that the actions taken by the School District to terminate Petitioner's probationary contract was because of actual or perceived ineffectiveness and inability of Petitioner to fully perform the duties and responsibilities required of his position with respect to the IDEA and ESE procedures and requirements.

35. The School District presented credible evidence of legitimate, nondiscriminatory reasons for its actions in terminating Petitioner's instructional probationary contract and for his removal from the approved substitute teacher list. Petitioner did not demonstrate with credible evidence that the reasons asserted by the School District were mere pretext for unlawful discrimination or retaliation. Id. at 802.

36. Petitioner also failed to demonstrate a prima facie case of unlawful retaliation in violation of the Act or Title VII. Title VII makes it unlawful for employers to retaliate against employees for opposing unlawful employment practices. See 42 U.S.C. § 2000e-3(a); see also § 760.10(7), Fla. Stat. (It is an unlawful employment practice for an employer to discriminate against a person because that person has, "opposed any practice which is an unlawful employment practice" or because that person "has made a charge . . . under this subsection.)."

37. Just as in discrimination claims based on status, a plaintiff or petitioner may establish a claim of illegal retaliation using either direct or circumstantial evidence. Direct evidence of retaliation does not exist in this case. In relying on circumstantial evidence, tribunals use the McDonnell Douglas analytical framework. See Bryant v. Jones, 575 F.3d 1281, 1307-08 (11th Cir. 2009). "Under [that] framework, a plaintiff alleging retaliation must first establish a prima facie case by showing that: (1) he engaged in a statutorily protected activity; (2) he suffered an adverse employment action; and (3) he established a causal link between the protected activity and the adverse action." Id.

38. "Once a plaintiff establishes a prima facie case of retaliation, the burden of production shifts to the defendant to rebut the presumption by articulating a legitimate non-discriminatory reason for the adverse employment action." Bryant, 575 F.3d at 1308; see also Tipton v. Canadian Imperial Bank of Commerce, 872 F.2d 1491, 1495 (11th Cir. 1989)(noting that an "employer's burden of rebuttal is 'extremely light'"). If the employer carries its burden by articulating a legitimate non-discriminatory reason, "[t]he burden then shifts to the plaintiff to prove by a preponderance of the evidence that the 'legitimate' reason is merely pretext for prohibited,

retaliatory conduct." Sierminski v. Transouth Fin. Corp., 216 F.3d 945, 950 (11th Cir. 2000).

39. To establish pretext, a plaintiff must "present concrete evidence in the form of specific facts" showing that the defendant's proffered reason was pretextual. Bryant, 575 F.3d at 1308; see also Vessels v. Atlanta Indep. Sch. Sys., 408 F.3d 763, 771 (11th Cir. 2005)(quoting Cooper v. S. Co., 390 F.3d 695, 725 (11th Cir. 2004))(A plaintiff's evidence of pretext "must reveal 'such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its actions that a reasonable factfinder could find them unworthy of credence.'"). "If the proffered reason is one that might motivate a reasonable employer, a plaintiff cannot recast the reason but must meet it head on and rebut it. [citation omitted] Space Quarreling with that reason is not sufficient." Wilson v. B/E Aerospace, Inc., 376 F.3d 1079, 1088 (11th Cir. 2004). Conclusory allegations and assertions are insufficient. See Bryant, 575 F.3d at 1308.

40. In addition, a claim under Title VII or the Act requires proof that the employer's desire to retaliate was the "but-for" cause of the challenged employment action. Univ. of Texas Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 360 (2013).

41. In this case, the undisputed evidence does not establish a prima facie case of retaliation. Petitioner's

report to the Warrington Middle School's principal that the behavior coach, Ms. Frizen, had been reported to him by Ms. Cameron as smelling of alcohol, is not a report of an unlawful employment practice. Even if it were, the School District, as Petitioner's employer, presented credible evidence that its reason for terminating Petitioner's employment under his probationary contract was his inability to train and learn to do the job for which he was hired. Petitioner failed to demonstrate that the School District's reason for terminating him was pretextual.

42. Further, under the "but-for" causation standard, "Title VII retaliation claims must be proved according to traditional principles of but-for causation . . . . This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer." Nassar, 570 U.S. at 360. In failing to do so, and in otherwise failing to demonstrate that the School District's adverse actions against his employment were pretextual, Petitioner failed to demonstrate, by a preponderance of the evidence, that the School District engaged in unlawful retaliation when it terminated his employment. The same is true with respect to Petitioner's removal from the approved substitute teacher list. Instead of showing "but-for" or pretext, the credible evidence demonstrated that two school

principals, from separate schools, reported inappropriate conduct by Petitioner while he was a substitute teacher, advising the School District that they did not want Petitioner to return to their schools.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations enter a final order dismissing Petitioner's Complaint of Discrimination and Petition for Relief consistent with the terms of this Recommended Order.

DONE AND ENTERED this 3rd day of October, 2018, in Tallahassee, Leon County, Florida.

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

Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of October, 2018.

ENDNOTE

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

COPIES FURNISHED:

Tammy S. Barton, Agency Clerk
Florida Commission on Human Relations
Room 110
4075 Esplanade Way
Tallahassee, Florida 32399-7020
(eServed)

Lester L. Washington
Apartment 809
1878 East 9 Mile Road
Pensacola, Florida 32514
(eServed)

Joseph L. Hammons, Esquire
The Hammons Law Firm, P.A.
17 West Cervantes Street
Pensacola, Florida 32501-3125
(eServed)

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

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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