STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PEGGY F. WESLEY,

Petitioner,

vs. Case No. 18-2066

SAINT LUCIE COUNTY SHERIFF'S OFFICE,

Respondent.
_____/

RECOMMENDED ORDER

This case came before Administrative Law Judge June C. McKinney of the Division of Administrative Hearings for final hearing on November 30, 2018, and February 11 and 12, 2019, in Port St. Lucie, Florida, and on May 28, 2019, by video teleconferencing in Fort Pierce and Tallahassee, Florida.

APPEARANCES

For Petitioner: Peggy F. Wesley, pro se
(Address of Record)

For Respondent: R. W. Evans, Esquire
Allen, Norton & Blue, P.A.
906 North Monroe Street
Tallahassee, Florida 32303

STATEMENT OF THE ISSUES

The issues in this case are whether Respondent engaged in an unlawful employment practice against Petitioner on the basis of

disability, and whether Respondent retaliated against Petitioner in violation of the Civil Rights Act.

PRELIMINARY STATEMENT

On or about September 22, 2016, Petitioner Peggy Wesley ("Wesley" or "Petitioner") filed a discrimination complaint with the Florida Commission on Human Relations ("FCHR"), alleging that Respondent Saint Lucie County Sheriff's Office ("SLCSO" or "Respondent") discriminated and retaliated against Petitioner based on her disability.

The FCHR investigated the case and issued a Notice of Determination: No Reasonable Cause on March 16, 2018, which notified the parties that "no reasonable cause exists to believe that an unlawful practice occurred." Thereafter, Petitioner elected to contest the decision and pursue administrative remedies by filing a Petition for Relief with the FCHR on or about April 12, 2018.

The FCHR transmitted the Petition for Relief to the Division of Administrative Hearings ("DOAH") on April 20, 2018, and the undersigned was assigned to hear the case. The final hearing was held on November 30, 2018. The case was continued and held on February 11 and 12, 2019, then completed on May 28, 2019.

At the hearing, Respondent argued a motion that the issues at hearing be limited. Petitioner agreed that a number of issues she wanted to contest were at a different point in the process at FCHR

and that a determination had not been made. The undersigned granted the motion and limited the issues at hearing to the ones that were within DOAH's jurisdiction and excluded the issues regarding race or sex discrimination, termination, and accommodations to which FCHR had neither completed an investigation nor made a determination at the time.

Petitioner presented the testimony of four witnesses: Jo Ann Coleman, Bennan Keeler, Rosa Winston, and herself. Petitioner's Exhibits 1 through 19, 21 through 25, 27 through 29, and 31 through 34 were received into evidence. Respondent presented the testimony of seven witnesses: Deron Brown, William Lawhorn, Adam Goodner, Wallace Long, Michael Sheeler, Peggy Wesley, and Kimberly Briglia. Respondent's Exhibits 1 through 25, 28, 31 through 33, 37, 40 through 48, 51 through 61, 63, 64, 66 through 68, and 70 through 86 were admitted into evidence.

The proceedings were recorded and transcribed. On June 20, 2019, Volumes I, II, III, IV, V, and VI of the Transcript were filed at DOAH.

Proposed recommended orders were due three weeks after the Transcript was filed. On July 8, 2019, Respondent filed its Proposed Recommended Order. On July 17, 2019, Petitioner filed her Proposed Recommended Order. On July 18, 2019, Respondent filed a Motion to Strike ("Motion"), requesting that Petitioner's Proposed Recommended Order be stricken from the record for the

untimely filing. On July 18, 2019, Petitioner filed Petitioner's Amended Recommended Order and a Response to Respondent's Motion to Strike, asserting that she did comply with the 21 days but did not count the weekends so her filing was timely. The undersigned denies the Motion. On July 19, 2019, Respondent filed a Motion to Strike Petitioner's Amended Recommended Order. On July 19, 2019, Petitioner filed a Response to Respondent's Motion to Strike. The undersigned grants the motion dated July 19, 2019. Therefore, this tribunal will consider both proposed recommended orders in rendering this order.

Unless otherwise noted, all statutory references are to the Florida Statutes (2016).

FINDINGS OF FACT

1. SLCSO is a law enforcement agency in Port St. Lucie, Florida.

2. On April 15, 1996, Petitioner began employment with SLCSO as a corrections officer. She worked as a detention deputy overseeing inmates and was assigned to booking most of her career.

3. Petitioner was good at her job and typically got above average on her evaluations related to her work performance. She also got along with her colleagues.

4. After 2005, when Wesley had a conflict with Lieutenant Stephanie Lyons ("Lt. Lyons"), Petitioner began to believe that

she was working in a hostile work environment and that her colleagues were out to get her at the direction of Lt. Lyons.

5. Wesley reported and filed complaints throughout her employment whenever she believed improper behavior occurred. She reported multiple incidents, including ones where she felt employees made statements about her that were untrue. As a result, numerous investigations were conducted by her supervisors and SLCSO Internal Affairs, to which the majority were concluded unfounded.

6. Many of the incidents Wesley reported were unsettling to her and ultimately made her depressed with anxiety, have panic attacks, and elevated her blood pressure.

7. Lt. Lyons, Lt. Daniel O'Brien ("Lt. O'Brien"), Sergeant Jeffrey Jackson ("Sgt. Jackson"), Sgt. James Mullins ("Sgt. Mullins"), and Sgt. Johnny Henry ("Sgt. Henry") were some of Petitioner's supervisors while employed at SLCSO.

8. One incident that has been extremely troubling to Wesley is her observation of Sgt. Jackson punching a pregnant inmate in the stomach. The incident is so upsetting to Wesley that even though she reported the incident when it occurred, she continues to be upset by the incident and continues to relive it, which distresses her.

9. During her employment, Wesley also lost her mom and brother in the same year, 2011. The losses took an added toll on her and caused more emotional difficulties.

10. Another major personal event that stressed Wesley was that she found out the deputy that she thought she had been in a 15-year monogamous relationship with was having an affair with another deputy on Wesley's shift. Those working conditions caused Wesley even more emotional harm.

11. At some point, Wesley had an emotional breakdown, could not get out of bed, and even thought she no longer wanted to live. Eventually, Wesley's illnesses became debilitating, and her high blood pressure was unstable.

12. Wesley started missing work because of her illnesses. She physically was unable to work.

13. On June 20, 2012, after Wesley was absent five times, she was counseled for abuse of sick leave benefits in violation of SLCSO Policy 5.1.33. During the counseling, Wesley was told she "needs to achieve and maintain an acceptable level of sick time usage to improve [her] below average status. Deputy Wesley will receive a below standard on her evaluation for sick time usage."

14. Wesley first applied for the Family Medical Leave Act ("FMLA") on September 25, 2012, but the process was not completed.

15. On February 25, 2014, Wesley was issued a reprimand for abuse of sick leave in violation of SLCSO Policy 5.1.33 after she

was absent another five days in 12 months. She was warned that "any further absences will result in continued progressive discipline." Wesley did not lose pay when she was reprimanded.

16. On or about August 21, 2014, Wesley submitted an Intermittent Family Medical Leave Act request for her own "Serious Health Condition" to the SLCSO Human Resources Office ("Human Resources"). Wesley's application was incomplete.

17. On October 8, 2014, Petitioner submitted the outstanding medical certification needed for the application submitted on August 21, 2014. Human Resource Manager Lori Pereira ("Pereira") denied the FMLA request on October 13, 2014, because the medical certification was submitted untimely, 52 days from the date of Petitioner's last absence.

18. On October 22, 2014, Wesley requested reconsideration of her FMLA application, and Human Resources denied it on October 27, 2014.

19. On March 20, 2015, Wesley requested FMLA leave again. In her application, Wesley provided a medical certification filled out by her cardiologist, Dr. Abdul Shadani ("Dr. Shadani"), which stated the patient will be absent from work for treatment "2-6 per year," and the underlying medical condition is systemic arterial hypertension ("hypertension"). "N/A" was the response Dr. Shadani supplied on the medical certification for probable duration of patient's incapacity. The hours/week section was marked

intermittent. The certification box was also checked "No" after the question, "Will it be necessary for the employee to work intermittently or to work less than a full schedule as a result of the conditions?"

20. On April 1, 2015, Human Resources approved Wesley's request for Intermittent FMLA leave due to medical reasons. The approval cycle was from August 21, 2014, through August 20, 2015. Pereira backdated Wesley's leave to August 21, 2014, the date Dr. Shadani identified as the beginning of Wesley's medical condition. The backdating converted Wesley's unexcused absences to excused absences, and she avoided additional disciplinary action for unexcused absences.

21. SLCSO policy required that when an employee is on Intermittent FMLA leave, the employee has to call out as needed and report which type of leave is being used. The policy for taking sick leave required that employees call in two hours prior to the shift and notify your supervisor.

22. Wesley felt it was unnecessary to have to call in so frequently.

23. In order to maintain FMLA leave, employees are required to get renewed medical certifications for the cycles. Human Resources notified Wesley when she needed to provide a physician recertification to continue her FMLA leave.

24. When Wesley had to get recertifications, she felt like it was too frequently and that she was being harassed. Obtaining recertifications required that Wesley pay co-pays, which she believed were very expensive since she was not working. Wesley also felt like she was being punished for using the FMLA leave benefit.

25. During the August 21, 2014, to August 20, 2015, FMLA leave cycle, Wesley was absent approximately 444 hours.

26. Pereira discovered Wesley's high leave rate, 444 hours, and noticed that it did not coincide with the projected two to six absences a year on the medical certification. Pereira conferred with her supervisor, Lt. Sheeler, and they decided to verify with Dr. Shadani whether the 444 hours were absences related to Wesley's underlying medical condition to which Wesley had FMLA leave approval.

27. On August 31, 2015, Pereira wrote Dr. Shadani a letter inquiring about the 444 hours Wesley had been absent.

28. By facsimile dated September 4, 2015, Dr. Shadani responded to Pereira's request and confirmed that the amount of absences listed in the medical certification was correct without further explanation or reference to Wesley's hypertension.

29. On September 9, 2015, Human Resources approved Wesley's Intermittent FMLA request for the August 21, 2015, through August 20, 2016, cycle for Petitioner's own serious health

condition. It was backdated to cover the dates Wesley missed back to August 21, 2015, even though the recertification was not completed until near the end of the covered FMLA period.

30. While working at SLCSO, Wesley sought mental health counseling to help deal with her feelings about the workplace. She wanted to continue working for SLCSO and perform successfully.

31. Human Resources decided they needed a better understanding of Wesley's condition with the extensive time she had been absent contrary to Dr. Shadani's absence projection. Pereira and Lt. Sheeler decided to request a second opinion since no detailed information was provided from Dr. Shadani. Pereira contacted Dr. Joseph Gage ("Dr. Gage"), a cardiologist and requested that he provide a second opinion.

32. Dr. Gage was asked to review Wesley's job description and evaluate if her 444 hours of absences were reasonable for her medical condition, provide the reasoning for the number of absences from work for her medical condition, and determine if Wesley was capable of performing her job functions. SLCSO also requested that they be invoiced for the co-pay for Wesley's visit to Dr. Gage.

33. On or about September 29, 2015, Pereira spoke with Wesley and told her she needed to go get a second opinion and that SLCSO was choosing a cardiologist, Dr. Gage, for the mandatory second opinion.

34. That same day, Wesley received a call from Stuart Cardiology that she needed to report for a second opinion. SLCSO set up the appointment for Wesley. Wesley felt that SLCSO's making her report for a second opinion was harassment after her doctor, Dr. Shadani, had already responded to the Human Resources' request.

35. Wesley emailed Pereira and told her "I am starting to feel punished for being on FMLA." Wesley also emailed Pereira and asked for the "specific reason(s) for your request for a second opinion."

36. On or about October 2, 2015, Pereira responded to Wesley by email and stated:

> As I mentioned in our phone call a few moments ago, since Dr. Shadani's medical certification states that you would be absent for treatment for your medical condition for 2-6 times per year and due to the fact that you missed 444 hours within the past year, we are requiring this second opinion with our choice of cardiologist, Dr. Gage.

37. On October 5, 2015, Dr. Gage evaluated Wesley.

38. On October 9, 2015, Dr. Gage provided Human Resources his results of Wesley's evaluation. Dr. Gage was not able to confirm if the absences were from Wesley's hypertension because he did not have her blood pressure measurements during the absent dates. However, Dr. Gage was concerned about Wesley's blood pressure level and instructed Wesley not to return to work until

the hypertension was more regulated. Dr. Gage also recommended Wesley expedite a visit to her cardiologist, Dr. Shadani, before being released.

39. Wesley was released to return to work by Dr. Shadani on October 6, 2015. However, she did not provide her return to work release to Human Resources, contrary to SLCSO policy. Instead, Wesley provided the doctor's note to her supervisors.

40. SLCSO policy requires medical clearance be provided to Human Resources if a deputy has missed more than 40 hours of consecutive work.

41. On October 20, 2015, Kimberly Briglia ("Briglia"), the then human resources manager that replaced Pereira, called and told Wesley that a physician medical clearance had to be provided to Human Resources for her to return to work.

42. Briglia's call was followed up by an email, and Wesley felt harassed, which she reported.

43. On October 23, 2015, Lt. Sheeler reminded Wesley by memo that she had been sent an email by Human Resources on October 19, 2015, requesting a fitness for duty evaluation be provided by her physician. The memo informed Wesley that it was a "direct order" that she provide a fitness for duty report by November 2, 2015.

44. Human Resources had sent previous correspondences to Wesley by certified mail that were returned unclaimed. SLCSO's

practice was to have documents personally served by Civil Unit deputies when certified mail was unclaimed.

45. Since Wesley had not been claiming her certified mail, Briglia had the SLCSO's Civil Unit personally serve Wesley at her residence with Lt. Sheeler's fitness for duty report memo dated October 23, 2015, to ensure Wesley received it because of the November 2, 2015, impending deadline.

46. Wesley believed the personal service was harassment, and having to go to another doctor for a fitness of duty clearance was also harassment.

47. On October 30, 2015, Wesley provided the fitness for duty report to Briglia and Lt. Sheeler.

48. On October 31, 2015, Wesley was released to full duty without restrictions.

49. On January 5, 2016, Human Resource Specialist Caitlyn Tighe requested Wesley provide a medical recertification to continue her FMLA leave.

50. On January 22, 2016, Wesley provided Human Resources a FMLA medical certification signed by Dr. Shadani even though she felt it was harassing when SLCSO requested such documentation.

51. On March 7, 2016, Wesley requested a retroactive pay increase because she believed that a deputy had received a similar pay increase and that she deserved the same.

52. Wesley continued to believe that her supervisors were harassing her. On or about March 24, 2016, Wesley reported to Captain William Lawhorn ("Capt. Lawhorn") that she had been mistreated by Lt. Lyons yet again, as she had been doing since 2005. Wesley complained of the following problems with Lt. Lyons:

a. Lt. Lyons assigned Sgt. Jackson over Wesley because he was "someone who feeds off of [Lt. Lyons]."

b. Lt. Lyons tried to discipline Wesley while she was applying for FMLA leave.

c. Lt. Lyons directed Sgt. Tom Siegart ("Sgt. Siegart") to call Wesley to let her know that she would need a doctor's note to return to work if she was out another day because she was on her third consecutive sick day.

d. The "needs improvement" on Wesley's performance evaluation was only the rating because Lt. Lyons directed Sgt. Siegart to lower it.

e. Lt. Lyons asked the deputies over radio communications had they seen Wesley who was late for roll call. Wesley believed Lt. Lyons was trying to embarrass her by calling her over the radio and not looking for her when she came in late.

53. On April 19, 2016, Director of Finance Toby Long denied Wesley's request for a pay increase and explained that in 2007, Wesley had been provided an increase that corrected the

discrepancy in her pay grade. He also informed Wesley that she had been paid properly since the 2007 increase.

54. On April 22, 2016, Capt. Lawhorn had a meeting with Wesley and Lt. Lyons to discuss the March 24, 2016, complaint. Lt. Lyons agreed not to address Wesley publicly on the radio and talk with her privately going forward. Wesley declined the transfer Capt. Lawhorn offered, and Wesley and Lt. Lyons agreed they could work together.

55. Capt. Lawhorn found no misconduct for any of the five complaints Wesley made on March 24, 2016. He found that the assignment of Sgt. Jackson was an arrangement based on need. The corrective action was moot because it was retracted when it no longer applied since Wesley's FMLA leave was backdated. He also determined that Lt. Lyons frequently used the radio to communicate all issues to deputies and was not singling Wesley out. Next, Capt. Lawhorn decided it was common practice to have a deputy call to check on another deputy about leave and to determine how to plan the work schedule. He also concluded Lt. Lyons used proper discretion when lowering Wesley's rating to "needs improvement," because Wesley had a zero sick leave balance and was tardy to work. Lastly, Wesley had been late at roll call; so, it was appropriate to look for her.

56. Soon after the meeting, Wesley complained to Capt. Lawhorn that Lt. Lyons had discussed the meeting with Lt. Lyons'

friend, Deputy Denetta Johnson ("Dep. Johnson"), and Dep. Johnson glared at her. Capt. Lawhorn followed up the complaint by investigating. He met with Dep. Johnson and found out that Lt. Lyons had not discussed the meeting with her.

57. On May 27, 2016, Wesley provided SLCSO a Certification of Health Care Provider for Employee's Serious Health Condition signed by Dr. Shadani to continue her FMLA leave.

58. In May 2016, Wesley's Intermittent FMLA was approved after she provided the FMLA medical recertification to Human Resources.

59. In May 2016, Capt. Lawhorn tried to assist Wesley and found himself compiling a history of Wesley's career, including ten years of complaints against Lt. Lyons and other supervisors, reviewing her discipline and attendance history, medical condition, FMLA leave, and injuries. He evaluated Wesley's complaint that Lt. Lyons and the other supervisors were causing her undue stress and that she was being treated differently.

60. Capt. Lawhorn discovered that Wesley had ten corrective actions for her whole tenure with the sheriff's office, which were related to neglect on-duty charges or sick leave abuse. Her record confirmed approved Intermittent FMLA leave for a personal, serious medical condition.

61. Capt. Lawhorn's review found that Wesley's work history pattern of declining attendance, including periods without a full

paycheck, started in 2013 and included: 2013, missed two full paychecks; 2014, missed one full paycheck; 2015, missed ten full paychecks; and 2016, missed four out of nine checks (YTD).

62. Capt. Lawhorn addressed the possibility of Wesley qualifying for workers' compensation benefits because of her complaints about workplace stress, anxiety, and interactions with Lt. Lyons. Capt. Lawhorn addressed the issues in a memo to Major Tighe dated May 16, 2016. However, it was determined that Wesley did not qualify for workers' compensation benefits.

63. By July 2016, Wesley's FMLA leave was running out. Human Resources Clerk JoLeah Rake prepared and sent a letter to Wesley to notify her that the FMLA leave exhausted July 26, 2016. The letter was returned unclaimed.

64. Briglia determined that notifying Wesley that her leave was exhausted was an urgent matter and that she requested personal service to Wesley's residence by the SLCSO Civil Unit to ensure Wesley received the notice.

65. On or about August 3, 2016, Wesley provided a return to work note to Briglia from Dr. Denise Punger ("Dr. Punger"), stating that Wesley could return to work on August 5, 2016. Wesley had just missed five days of work.

66. Briglia could not determine the nature of Wesley's illness because Dr. Punger's note did not provide an explanation for Wesley's five absent days of work. Also, Dr. Punger was not

Dr. Shadani, the doctor who had previously provided Wesley's medical certifications for FMLA leave.

67. Briglia was concerned for Wesley's safety and the safety of her co-workers. On August 4, 2016, Briglia made an independent Human Resources decision and requested by letter that Wesley provide a more detailed explanation from Dr. Punger for her absences, to ensure Wesley was fit for duty to return to work.

68. Briglia had the Civil Unit personally serve the letter dated August 4, 2016, to Wesley at her residence.

69. On August 4 2016, Wesley called Briglia to address her displeasure with the request for details from her physician and the personal service at her residence a second day in a row. Wesley described the SLCSO actions as embarrassing, harassment, retaliation, discrimination, and a violation of her rights. Wesley informed Briglia that they were making her situation worse. Briglia told Wesley she would return her call.

70. On August 5, 2016, together Briglia and Lt. Sheeler called Wesley back to explain that it was within SLCSO policy to verify details of medical conditions. They further told Wesley that since the release was signed by a physician other than Dr. Shadani who had previously provided the explanation for her FMLA leave medical certifications and absences, the medical reasons for the absences needed to be clarified and provided. Lt. Sheeler and Briglia also told Wesley that workplace safety was the

priority that created the need for the request in order to both protect employees and to make sure SLCSO is not going against the orders of Wesley's doctor. It was also explained to Wesley that civil service was necessary because she did not claim her certified mail, she needed to be notified, and she could not return to work without a fitness for duty clearance. Wesley did not believe Briglia and Lt. Sheeler. Each request for medical documents caused Wesley additional stress.

71. Wesley admitted at hearing that she did not claim her certified mail.

72. Afterwards, Wesley provided a medical excuse slip from Dr. Punger, clarifying that Wesley's absences were due to migraines and high blood pressure. Human Resources allowed Wesley to return to work after receiving Dr. Punger's excuse slip.

73. On August 22, 2016, Wesley filed a complaint against Briglia.

74. On August 22, 2016, Wesley received a corrective action for abuse of sick leave and an informal counseling for the five sick absences in four months that were not FMLA leave related. Wesley violated agency policy by taking time off without accrued sick leave.

75. On or about September 8, 2016, Wesley provided SLCSO a Certification of Health Care Provider for Employee's Serious Health Condition signed by Dr. Shadani.

76. On September 19, 2016, Wesley filed a complaint regarding the August 22, 2016, corrective action. After reviewing the corrective action, Capt. Lawhorn found the corrective action appropriate and the informal discipline fair and supported by policy. Wesley did not lose pay for the discipline.

77. On September 22, 2016, Wesley filed a discrimination case with the FCHR, alleging SLCSO discriminated against her by subjecting her to harassment and discrimination, and retaliation, for taking FMLA leave due to her disability, hypertension.

78. On March 16, 2018, FCHR issued a Determination: No Reasonable Cause. Wesley filed a Petition for Relief on or about April 12, 2018, to contest the determination.

79. Wesley claims in her petition that the requirement that she acquire a second opinion from Dr. Gage, the personal service to her residence by the SLCSO Civil Unit deputies to deliver correspondence, and the requirement that her physician, Dr. Punger, clarify her medical condition to return to work were harassment, discrimination, and retaliation for her utilizing her FMLA leave benefit.

CONCLUSIONS OF LAW

80. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to sections 120.569 and 120.57(1), Florida Statutes (2018).

81. Petitioner alleges harassment and discrimination on the basis of her disability and retaliation for engaging in the protected conduct of taking FMLA leave.

82. The Florida Civil Rights Act of 1992 ("Florida Act") is codified in sections 760.01 through 760.11, Florida Statutes. The Florida Act prohibits discrimination in the workplace and prohibits employer retaliation for engaging in protected activity.

83. Petitioner has the burden of proving by a preponderance of the evidence that Respondent committed an unlawful employment practice. See St. Louis v. Fla. Int'l Univ., 60 So. 3d 455 (Fla. 3d DCA 2011); Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981).

84. A "discriminatory practice," as defined in the Florida Act, "means any practice made unlawful by the Florida Civil Rights Act of 1992." § 760.02(4), Fla. Stat.

85. Section 760.01 of the Florida Act explains that the general purpose of the Act is to:

> [S]ecure for all individuals within the state freedom from discrimination because of race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status and thereby to protect their interest in personal dignity, to make available to the state their full productive capacities, to secure the state against domestic strife and unrest, to preserve the public safety, health, and general welfare, and to promote the interests, rights, and privileges of individuals within the state.

86. Section 760.10 provides, in relevant part:

> (1) It is an unlawful employment practice for an employer:
>
> (a) To discharge or to fail or refuse to hire an 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.

87. The Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12102(1) provides, in pertinent part, the following definition of the term "disability":

> (1) Disability. The term "disability" means, with respect to an individual—
>
> (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment . . . .

Discrimination

88. Disability discrimination claims under the Florida Act are analyzed under the same analytical framework for analogous claims arising under the ADA. 42 U.S.C. § 12101, et seq., as amended. See, e.g., Greenberg v. BellSouth Telecomms., Inc., 498 F.3d 1258, 1263-64 (11th Cir. 2007). Accordingly, federal case law interpreting the ADA is applicable to cases arising under the Florida Act.

89. ADA claims are evaluated using the McDonnell Douglas burden-shifting analysis. Holly v. Clairson Indus., L.L.C., 492 F.3d 1247, 1255 (11th Cir. 2007). In McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-803 (1973), the U.S. Supreme Court established a framework for analyzing employment discrimination claims where, as here, the complainant relies upon circumstantial evidence of discriminatory intent.

90. Under the McDonnell Douglas framework, a plaintiff must first establish, by a preponderance of the evidence, a prima facie case of discrimination. If successful, this raises a presumption of discrimination against the defendant. If a prima facie showing is made, the burden of proof then shifts to the employer to offer a legitimate, non-discriminatory reason for the adverse employment action. If the employer meets its burden, the presumption of discrimination disappears, and the employee must prove that the employer's legitimate reasons for dismissal were a pretext for discrimination. The ultimate burden of proving discrimination rests at all times with the plaintiff.

91. To establish a prima facie claim of disability discrimination under the ADA and consequently under the Florida Act, Wesley must prove that: (1) she has a disability; (2) she is a qualified individual; and (3) the employer unlawfully discriminated against her because of her disability. See Morisky v. Broward Cnty., 80 F.3d 445, 447 (11th Cir. 1996).

92. The first two elements for the forgoing test are satisfied, as SLCSO does not dispute that Wesley's hypertension was a disability for Wesley. Additionally, Wesley also meets the "qualified individual" prong, because she has been working successfully as a deputy as evidenced by her approximately 20 years of service with SLCSO, and she consistently received average or above average on performance evaluations regarding her job performance, which means she possesses the basic skills to be qualified, the second element of a prima facie case. See Gregory v. Daly, 243 F.3d 687, 696 (2d Cir. 2001)(holding that a plaintiff "need only make the minimal showing that [she] possesses the basic skills necessary for the performance of [the] job" to satisfy the requirement that the plaintiff was qualified).

93. As to the third element of a prima facie case, the record is void of evidence to demonstrate that SLCSO discriminated against Wesley because of her hypertension or for her utilizing FMLA leave. No evidence supports Wesley's conclusory allegations that she was either being harassed by Lt. Lyons and other supervisors or that any harassment was because of her hypertension or for taking FMLA leave. Instead, the competent substantial evidence shows that Human Resources made independent decisions regarding Wesley's FMLA leave. Specifically, Pereira, Briglia, and Lt. Sheeler were the individuals involved in the incidents to which Wesley alleges are

discriminatory and retaliatory: the requirement of a second opinion from Dr. Gage; the personal service to her residence by the Civil Unit deputies to deliver correspondence; and the requirement that her physician, Dr. Punger, clarify her medical condition to return to work. Hence, Wesley failed to establish a prima facie discrimination case, because no evidence was presented to show element three. Therefore, the record shows that SLCSO did not discriminate against Wesley because of her disability.

94. Even if Wesley had met the burden for disability discrimination, then the burden would have shifted to SLCSO to articulate legitimate, non-discriminatory reasons for their actions. An employer has the burden of production, not persuasion, to demonstrate to the finder-of-fact that the decision was non-discriminatory. Id. This burden of production is "exceedingly light." Holifield v. Reno, 115 F.3d 1555, 1564 (11th Cir. 1997).

95. Respondent met its burden by introducing evidence that Wesley's absences of 444 hours far exceeded Dr. Shadani's two to six absences a year. To that end, Pereira was justified in asking Dr. Gage for a second opinion when Dr. Shadani did not provide an explanation. The record also demonstrates that Wesley consistently failed to claim her certified mail. Therefore, to inform Petitioner of important information such as exhaustion of

FMLA leave, the only option SLCSO had to ensure she received the communications was to deliver them to her home by Civil Unit deputies. Respondent also demonstrated a legitimate safety concern for Wesley, her co-workers, and the inmates, by requiring a fitness for duty detailed medical explanation from Dr. Punger before Wesley could return to work. Respondent made the aforementioned employment decisions for legitimate reasons that were both nondiscriminatory and non-retaliatory reasons. Thereupon, Wesley failed to show that the reasons SLCSO offered for each of their actions were pretextual for unlawful discrimination and not worthy of belief.

Retaliation Claim

96. Respondent contends that this tribunal does not have jurisdiction to decide "Wesley's claims of FMLA retaliation." The undersigned is not persuaded by Respondent's position. The matter at issue is not what Respondent maintains, a question regarding Petitioner's FMLA rights being violated. That subject matter would be a Wage and Hour Board issue not jurisdiction of DOAH. However, the issue Wesley is asserting is that she was retaliated against because she was utilizing the FMLA benefit, which the undersigned has jurisdiction to decide.

97. As to Petitioner's retaliation claim, to establish a prima facie case under section 760.10(7), a plaintiff must demonstrate: (1) that she engaged in statutorily protected

activity; (2) that she suffered adverse employment action; and (3) that the adverse employment action was causally related to the protected activity. Blizzard v. Appliance Direct, Inc., 16 So. 3d 922, 926 (Fla. 5th DCA 2009).

98. Once the plaintiff makes a prima facie showing, the burden shifts, and the defendant must articulate a legitimate, nondiscriminatory reason for the adverse employment action. Wells v. Colo. DOT, 325 F.3d 1205, 1212 (10th Cir. 2003). The plaintiff must then respond by demonstrating that Defendant's asserted reasons for the adverse action are pretextual. Id.

99. The first prong for a prima facie case of retaliation is met in this matter. Wesley's protected activity is that she was engaged in taking FMLA leave.

100. An employment action is considered adverse only if it results in some tangible negative affect on plaintiff's employment. Lucas v. Grainger, Inc., 257 F.3d 1249, 1261 (11th Cir. 2001). In this matter, the undersigned is prohibited from considering any acts that took place after September 22, 2016, when the complaint was filed with FCHR.

101. At the time Wesley filed her complaint, Wesley was still employed with SLCSO. The record is void of adverse job action in this case. Instead, the credible evidence demonstrates that the SLCSO backdated Wesley's FMLA leave cycles on more than one occasion to assist her so she didn't have unexcused absences

and would not be disciplined. Also, the record shows SLCSO would contact Wesley to get recertifications so that she could continue on FMLA leave. Additionally, Capt. Lawhorn even tried to get her worker's compensation to assist her with her stress she was having on the job. Further, Wesley's claims, the independent medical evaluation by Dr. Gage, the personal service of correspondence from Human Resources, and the request for a more detailed explanation from Dr. Punger regarding Wesley's absences from work all failed to have any negative effect on Wesley's employment. And, even when Wesley received corrective actions, no pay was lost. Hence, the second prong for retaliation fails. No adverse employment action was established by credible evidence in this matter.

102. Additionally, Wesley's retaliation allegation also fails because she did not demonstrate the third prong—-a causal connection between the adverse employment action and the protected activity. Since no adverse employment action exists in this matter, a causal connection cannot be made. As a consequence, Petitioner's failure to establish a prima facie case of retaliation ends any further inquiry regarding this issue. Therefore, Wesley's claim of retaliation is without merit and must fail.

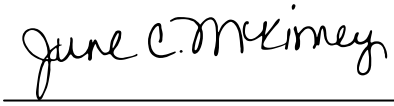
103. Accordingly, Wesley did not meet her burden to demonstrate SLCSO committed an unlawful employment practice by

harassment, discrimination, or retaliation against Petitioner for her disability. Therefore, Wesley's Petition should be dismissed.

RECOMMENDATION

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

DONE AND ENTERED this 30th day of August, 2019, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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this 30th day of August, 2019.

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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.