STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

NOU M. WALL,

Petitioner,

vs. Case No. 18-4091

GORDON FOOD SERVICES,

Respondent.
_____/

RECOMMENDED ORDER

On December 17, 2018, Administrative Law Judge Hetal Desai of the Division of Administrative Hearings (DOAH) conducted the final hearing in this matter in Tampa, Florida.

APPEARANCES

For Petitioner: Nou M. Wall, pro se
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Lakeland, Florida 33811

For Respondent: Karen M. Morinelli, Esquire
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STATEMENT OF THE ISSUE

Whether Respondent, Gordon Food Services, Inc. (GFS), discriminated against Petitioner, Nou M. Wall, based on her race (Asian), gender (female), and age (40) in violation of the Florida Civil Rights Act (FCRA).

PRELIMINARY STATEMENT

On October 23, 2017, Petitioner filed an Amended Employment Complaint of Discrimination with the Florida Commission on Human Relations (the Commission) alleging discrimination based on "Race," "Sex," and "Age." Specifically, Petitioner alleged the following acts were discriminatory: (1) she was wrongfully accused of work violations in November 2016 and May 2017; (2) she was wrongfully accused of gossiping and placed on a corrective action plan in August 2017; and (3) she received disparate treatment in her work load and discipline.

The Commission issued a "Determination: No Reasonable Cause" on July 6, 2018, and Petitioner timely filed a Petition for Relief to contest the Commission's determination on August 2, 2018. The Commission transmitted the Petition to DOAH, where it was assigned to the undersigned and noticed for a final hearing.

Prior to the final hearing, Respondent filed a motion to compel, which was heard on November 10, 2018, during a telephonic pre-hearing conference. During this telephonic hearing, the parties also discussed issues relating to the final hearing such as burden of proof, exhibits, and witnesses.

Petitioner presented her own testimony and offered Exhibits P1 through P4, all of which were admitted into evidence without objection. Respondent offered the testimony of four witnesses: Lemonde Rush, Jim Reid, Mayra Vanacore, and Mario Bracero.

Respondent's Exhibits R1 through R29 were admitted into evidence without objection.

The parties stipulated to a number of facts on the record at the final hearing, and in a Joint Pre-hearing Stipulation. Those facts have been accepted and incorporated in this Recommended Order.

The Transcript was filed January 28, 2019. The parties timely filed their Proposed Recommended Orders (PROs) and both PROs were considered in preparing this Recommended Order.

Unless otherwise indicated, all statutory and administrative rule references are to the 2018 version of the Florida Statutes and Florida Administrative Code.

FINDINGS OF FACT

Parties

1. Ms. Wall, a 40-year old Asian female, began employment with GFS as a custodian in the Maintenance Department at the Plant City Distribution Center (Plant City Center) on January 6, 2013.

2. As of the date of the hearing, Ms. Wall remained in this position of custodian.

3. GFS is in the business of distributing food products and supplies to hospitals, schools, and restaurants. It is an "employer" as defined by section 760.02(7), Florida Statutes.

4. GFS has distribution centers nationwide. The Plant City Center worksite is one million square feet.

5. The Plant City Center is staffed by approximately 265 employees. This workforce is diverse, but Ms. Wall is the only Asian woman.

6. Lemonde Rush, an African-American male, is the "Director of Warehouse" at the Plant City Center. He reports to a general manager, but oversees the staff, budget, operations, and safety issues related to the Plant City Center. He is involved in most disciplinary actions, either directly or indirectly, and makes the ultimate decisions regarding staffing, including hiring and terminations.

7. Mr. Jim Reid, a Caucasian male, reports to Mr. Rush. He became Petitioner's supervisor in January 2014, and has served as a GFS maintenance supervisor at all times relevant to Ms. Wall's allegations.

8. Mr. Reid is responsible for the maintenance team which is made up of two Maintenance Leads, three parts personnel, eight mechanics, and 13 custodians.

9. Mario Bracero, a Hispanic male, was the Maintenance Lead for Petitioner's custodial team. Mr. Bracero had no authority to hire, fire, or discipline Ms. Wall. Mr. Bracero reported to Mr. Reid.

10. Mayra Vanacore is the Human Resources (HR) Generalist at the Plant City Center. She reports to E.J. Laviolette, who works at the GFS headquarters out of the state. Ms. Vanacore is in charge of employee relations, including investigations, leave, workers' compensation, and recruiting and employee training. She does not make any decisions regarding hiring, disciplining, or termination, although she does facilitate and consulate with supervisors regarding these actions.

Relevant Policies

11. Although Ms. Wall executed an Acknowledgment of Receipt for an "Employee eHandbook and Code of Business Conduct (with Appendix A - Fraud Policy and Integrity Hotline Brochure)," neither party offered the Code of Business Conduct or the Employee eHandbook into evidence. No equal employment policy, disciplinary policy, anti-discrimination policy, anti-harassment policy, or employee complaint procedure was introduced into evidence.

12. Based on Mr. Rush's testimony, when GFS receives complaints from one employee against another, he would, if possible, facilitate a face-to-face meeting between the employees. If an employee is uncomfortable meeting with another employee, he would get the complaint in writing.

13. Sexual harassment complaints by GFS employees are turned over to Ms. Vanacore in Human Relations to conduct the

investigation if required. Ms. Vanacore keeps these investigations confidential.

14. According to the GFS "Human Practice HR10 Policy" (HR Policy 10), to be eligible for open positions at GFS, GFS employees cannot have a formal documented disciplinary action issued against them within the past six months.

Ms. Wall's Job Duties

15. There are 13 custodians at GFS who work in shifts. The work is divided among the custodians as equally as possible by square footage.

16. As a custodian, Ms. Wall's job duties involved cleaning tasks in her assigned area such as sweeping, mopping, addressing spills and leaks, sorting trash into plastic and cardboard, and emptying trash bins.

17. GFS also evaluated its employees on Measurable Performance Criteria in the general area of "communication." For Ms. Wall, these standards involved the handling of cleaning requests made from customers (employees from other departments) in the Plant City Center, including those made over radios. Specifically, included in the communication criteria was an expectation "to maintain a professional demeanor with internal customers, contractors, vendors, co-workers, and leadership."

18. According to GFS' witnesses, the cleanliness of the Plant City Center was paramount to its business. GFS is subject

to numerous food and safety standards because it distributes food products to commercial (i.e., restaurants) and government-run (i.e., schools and prisons) kitchens. GFS must pass regular periodic inspections and audits by government regulators and private auditors. GFS also keeps extensive documentation regarding its cleaning regiment. This documentation is necessary in case of a food recall or other irregularity so that GFS can show how specific food products were handled and stored.

19. As a result, the custodial staff is constantly monitored and evaluated; their annual compensation is dependent on how GFS rates in these inspections and audits.

20. In addition to her job duties, Ms. Wall was required to wear a GFS uniform and, when appropriate, safety equipment. According to the "Basic Job Performance Expectations" document for Custodial Maintenance employees, Ms. Wall was required to wear safety glasses in designated areas, and while working with chemicals and dangerous tools.

Ms. Wall's Work History and Performance

21. Ms. Wall had perfect attendance, performed her cleaning duties well, and was a reliable employee. She, however, had a history of insubordination and not getting along with her co-workers.

22. In September 2014, Ms. Wall was issued a "Written Notice of Corrective Action" (Corrective Action) for gossiping

about her co-workers. Ms. Wall signed the document without comment.

23. On June 24, 2015, Ms. Wall was issued a Corrective Action for Insubordination. As a result, she received a three-day suspension. The disciplinary action was triggered by Ms. Wall failing to wear safety glasses after being instructed to do so. Ms. Wall signed the document and stated she agreed with the terms, but contested additional details in the Corrective Action.

24. On October 29, 2015, Mr. Reid held a coaching session with Ms. Wall regarding the way she answered customer service calls. GFS considered the coaching session a mentoring opportunity and not a disciplinary action, although it was documented by a memorandum and placed in her file.

25. As established by Mr. Reid's testimony, he counseled Ms. Wall because he had received complaints that she had been rude when answering custodial request calls, and he felt it would help Ms. Wall improve in the area of communications. Subsequent to the counseling session, Mr. Reid did not receive any complaints regarding Ms. Wall's professionalism on the radio.

26. On January 20, 2016, Ms. Wall received her semi-annual performance review, scoring 750 points out of 800. This is considered a good score.

27. In the January 2016 review, Mr. Reid noted the following regarding work relationships:

> Michelle, the cooperation levels between you, customers and team members need to improve.
>
> * * *
>
> [Y]ou have some good qualities that you bring to the team but you also have some qualities that need improvement. . . . [Y]ou have times where you struggle to meet the expectations and lose focus of maintaining healthy relationships.

28. On August 9, 2017, Mr. Rush and Mr. Reid met with Ms. Wall and issued her a Corrective Action (August 2017 Corrective Action) for gossiping and "harassing behavior that is creating an unproductive and hostile work environment for those that have to work with you."

29. This disciplinary action was issued after Mr. Rush received a complaint from a third-party vendor that Ms. Wall had a conflict with one of its employees (a non-GFS employee), and he had received approximately a dozen complaints from other GFS employees against Ms. Wall within a short timeframe. Ms. Wall also had confrontational interactions with members of the custodial team. Based on these complaints, Mr. Reid interviewed the complainants, obtained written documentation, and drafted the August 2017 Corrective Action with Mr. Rush.

30. Based on the unrebutted testimony of Mr. Rush and Ms. Vanacore, the undersigned finds GFS did receive complaints about Ms. Wall, but makes no finding regarding the substance or veracity of those complaints.[1/]

31. The August 2017 Corrective Action was not vetted through Human Relations or Ms. Vanacore prior to being issued to Ms. Wall.

32. The August 2017 Corrective Action also states,

> Consequences/Actions: Michelle, any future incidents of you making derogatory comments about your peers spreading rumor [sic] or your participation in harassing behavior is totally unacceptable and may be cause for further disciplinary action up to and including separation of employment.

Additionally, it warned that if there are any other "additional performance or policy violation issues, you will be subject to further disciplinary action up to and including termination."

33. Upon receiving the August 2017 Corrective Action from Mr. Rush, Ms. Wall was upset and disagreed with it.

34. In Ms. Wall's next performance review on March 18, 2018, Mr. Reid instructed her to adhere to the GFS Code of Conduct, avoid gossip, and "challenge yourself to get more involved with your team members and build positive relationship[s] with them."

35. Other than the three-day suspension in 2015, there was no evidence Ms. Wall lost salary or a bonus for the Corrective Actions, counseling session, or her performance scores.

36. Based on the wording of the Corrective Actions, HR Policy 10, and Ms. Vanacore's testimony, all of the Corrective Actions made Ms. Wall ineligible for other positions at GFS for six months after they were issued. Therefore, as explained in the Conclusions of Law below, the undersigned finds the Corrective Actions are formal discipline, and constitute adverse employment actions.

37. Based on the same reasoning, Ms. Wall's counseling session and the performance reviews do not constitute adverse employment actions.

38. Ms. Wall has been a good employee since the August 2017 Corrective Action.

39. In June 2018, Mr. Rush sent Ms. Wall an email indicating she was doing good work in her area. In October 2018, Ms. Wall was offered a change in shifts and work areas, but she declined the move.

40. In her PRO and at the hearing, Ms. Wall argued she suffered from a hostile work environment based on four separate incidents in November 2016, March 2017, May 2017 and August 2017; mistreatment by her superiors; and discriminatory comments from her co-workers.

False Accusations

41. GFS falsely accused Ms. Wall twice of violating company policy. The first accusation was for stealing company time in November 2016. Mr. Reid observed Ms. Wall taking a break at an unusual time. When he checked the time clock program to see if Ms. Wall had clocked out, it showed that she had not. Ms. Wall insisted she had properly clocked out before going on break. After reviewing the time clock program again with Ms. Wall, it showed Ms. Wall had in fact properly checked out. Mr. Reid was not aware the time clock program had a short delay; it had not updated itself when he had first checked it. Upon learning of his mistake, Mr. Reid apologized to Ms. Wall.

42. The second incident was in April 2017. Mr. Bracero issued a "fail" note on Plaintiff's work order, indicating Ms. Wall had failed to clean the smoke area and guard check area. The note was not considered discipline, but rather, feedback. It was the typical type of counseling a mechanic or custodian may get to alert the employee he or she needed to improve.

43. Upon seeing the note, Ms. Wall denied she was responsible for the failure and offered proof that she was not scheduled on the day the "fail" was issued to her. After a review of the schedule, Mr. Rush determined Mr. Bracero had made a mistake and that Ms. Wall had been on vacation on the date in

question. The "fail" was removed and Mr. Bracero and Mr. Reid apologized to Ms. Wall.

44. After the time clock incident, Mr. Rush counseled Mr. Reid to familiarize himself with the time clock program. Regarding the false "fail," Mr. Rush admitted Mr. Bracero had made a mistake in failing to take the schedule into consideration when inspecting and evaluating areas for satisfactory work.

45. There was no evidence the time clock or "fail" incidents resulted in a Corrective Action or that Ms. Wall suffered any discipline, demotion, or financial detriment as a result of Mr. Reid's and Mr. Bracero's mistakes.

Increased Workload

46. On March 27, 2017, Ms. Wall complained to Mr. Reid about her workload. She did not claim she had more than other workers. Rather, she complained the increased workload would not allow her to complete her existing duties. As a result, her work area was eventually decreased.

47. GFS offered credible evidence that the total workload at the Plant City Center had increased and it was short-staffed. As a result, all of the custodial crew had increased work.

48. Ms. Wall did not offer evidence of the race, age, or gender of any other custodian.

49. There was no credible evidence at the hearing that Ms. Wall's workload was more than any of the other custodial workers.

Mr. Bracero's Conduct

50. Ms. Wall also alleges that around March 2017, Mr. Bracero was watching her work, calling her when she was in the bathroom, and yelling at her. Although Mr. Bracero denied this behavior, it is clear from their testimony that Mr. Bracero and Ms. Wall have had a less than friendly working relationship. The undersigned finds Ms. Wall's testimony regarding Mr. Bracero more credible and finds Mr. Bracero got upset with Ms. Wall, watched Ms. Wall, and called her while she was on break.

51. There is no evidence, however, that Mr. Bracero's conduct was related to Ms. Wall's age, ethnicity, or gender. As a Maintenance Lead, Mr. Bracero's duties were to take care of day-to-day situations on the floor, record attendance, monitor workflow, and assist the maintenance and custodial crews in performing their tasks.

52. Watching the custodians, including Ms. Wall, and calling them on the radio were part of his duties. There was no evidence Ms. Wall had been singled out, or that Mr. Bracero treated other employees differently.

Discriminatory Comments

53. Ms. Wall alleges that Leon Bennett told her during their work shift that he was going to go online and order two Asian women, one for cleaning and one for his entertainment. There was no evidence of Mr. Bennett's position or when he made this statement to Ms. Wall.

54. Mike Parm had made a similar comment to Ms. Wall and asked her repeatedly if she would clean his house. When she declined, he told her he would order three Asian women: one for dishes, one for vacuuming, and one for himself. There was no evidence of Mr. Parm's position or when this statement was made.

55. GFS offered no evidence at the hearing contradicting Ms. Wall's account of the comments made to her by Mr. Bennett and Mr. Parm.[2/] The undersigned finds that based on Ms. Wall's unrefuted testimony, and based on her demeanor at the hearing that Mr. Bennett and Mr. Parm made these offensive statements to her.

56. At the meeting on Ms. Wall's Corrective Action for gossiping in August 2017, Ms. Wall told Mr. Rush and Mr. Reid about these comments. This was the first time she had complained to anyone at GFS about any kind of discrimination.

57. There is conflicting testimony about what happened next. Mr. Rush testified he told Ms. Wall he could not act on

the information she gave him, and it would need to be addressed by HR. Mr. Rush states he passed the information on to HR.

58. Ms. Vanacore's testimony and the emails admitted into evidence show that Mr. Rush did not inform HR about Ms. Wall's allegations against Mr. Bennett and Mr. Leon. Rather, Ms. Vanacore was on vacation during the August 9, 2017, meeting, and was approached by Ms. Wall when she returned. The undersigned finds it was Ms. Wall who raised the inappropriate comments by Mr. Bennett and Mr. Parm to Ms. Vanacore after she received the August 2017 Corrective Action.

59. Regardless, after Ms. Wall told Ms. Vanacore she had been verbally harassed, Ms. Vanacore took Ms. Wall's statement and asked her if she wished HR to investigate the claims. Ms. Wall indicated, "yes."

60. As a result, Ms. Vanacore alerted her supervisor, Mr. Laviolette, and they developed an action plan related to the investigation. During the investigation Ms. Vanacore communicated regularly with Ms. Wall.

61. On August 23, 2017, Ms. Wall relayed an additional allegation to Ms. Vanacore that Mr. Bennett drove up to her in a golf cart and asked her, "want to go for a ride on my ride." It was in this email to Ms. Vanacore that Ms. Wall gave more details about the previous comments made by Mr. Bennett and Mr. Parm.

62. Ms. Vanacore and Mr. Laviolette conducted interviews with Mr. Bennett and Mr. Parm. Both denied making the comments to Ms. Wall. Ms. Vanacore then asked Ms. Wall if she had any other details or evidence regarding these statements. Ms. Wall gave Ms. Vanacore mixed signals by indicating to her she did not want anyone to know she had made the allegations, but also listing other people for HR to talk to. Eventually, HR did not interview any of the people Ms. Wall provided because they were not working at the time of the investigation.

63. After conducting the investigation, Ms. Vanacore believed Mr. Bennett and Mr. Parm, and concluded there was no evidence to sustain Ms. Wall's allegations.

64. The undersigned finds that once Ms. Wall reported these statements to HR, GFS investigated the claims and closed the file.

65. There was no evidence of any further offensive comments or adverse action after the August 2017 Corrective Action and investigation into the discriminatory comments. Ms. Wall continues to work as a custodian at the Plant City Center.

CONCLUSIONS OF LAW

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

67. The FCRA protects individuals from discrimination in the workplace. See §§ 760.10 and 760.11, Fla. Stat. Section 760.10 states, in pertinent part:

> (1) It is an unlawful employment practice for an employer:
>
> (a) To discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status. (emphasis added).

68. Because the FCRA is patterned after Title VII of the Civil Rights Act of 1964, as amended (Title VII), and the Age Discrimination in Employment Act (ADEA), Florida courts are guided by federal decisions construing Title VII and the ADEA when considering claims under the FCRA. See Thompson v. Baptist Hosp. of Miami, Inc., 279 F. App'x 884, 888 n.5 (11th Cir. 2008) (affirming dismissal of race discrimination FCRA claim for the same reasons as dismissing Title VII claims); Yaro v. Israel, 242 So. 3d 1140, 1141 (Fla. 4th DCA 2018) ("Appellant made his claims under the Florida Civil Rights Act, but we apply federal case law interpreting the ADEA to cases arising under the FCRA.").

69. The burden of proof in an administrative proceeding is on Ms. Wall as the complainant. See Dep't of Banking & Fin., Div. of Sec. & Investor Prot. v. Osborne Stern & Co., 670 So. 2d 932, 935 (Fla. 1996)("The general rule is that a party asserting the

affirmative of an issue has the burden of presenting evidence as to that issue."). To show a violation of the FCRA, Ms. Wall must establish, by a preponderance of the evidence, a prima facie case of discrimination. See St. Louis v. Fla. Int'l Univ., 60 So. 3d 455, 458-59 (Fla. 3d DCA 2011)(reversing jury verdict awarding damages on FCRA racial discrimination and retaliation claims where employee failed to show similarly situated employees outside his protected class were treated more favorably; finding prima facie case not established).

70. "Preponderance of the evidence" is the "greater weight" of the evidence, or evidence that "more likely than not" tends to prove the fact at issue. This means that if the undersigned found the parties presented equally competent substantial evidence, Ms. Wall would not have proved her claims by the "greater weight" of the evidence, and would not prevail in this proceeding. See Gross v. Lyons, 763 So. 2d 276, 289 n.1 (Fla. 2000).

71. A petitioner may establish an FCRA claim by presenting direct evidence of discrimination, or circumstantial evidence that creates an inference of discrimination. See Tseng v. Fla. A&M Univ., 380 Fed. App'x 908, 909 (11th Cir. 2010); Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17, 22 (Fla. 3d DCA 2009).

72. Direct evidence is evidence that, if believed, would prove the existence of discriminatory intent behind an employment decision without any inference or presumption. Denney v. City of

Albany, 247 F.3d 1172, 1182 (11th Cir. 2001); see also Holifield v. Reno, 115 F.3d 1555, 1561 (11th Cir. 1997). Courts have held that "'only the most blatant remarks, whose intent could be nothing other than to discriminate . . .' will constitute direct evidence of discrimination." Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d 1354, 1358-59 (11th Cir. 1999)(citations omitted). Although there is no question the alleged remarks made by Mr. Bennett and Mr. Parm that they were going to order an Asian women to perform various tasks were blatantly discriminatory, Mr. Bennett's poorly worded offer to ride the golf cart is not.

73. To constitute direct evidence of discrimination, statements of discriminatory intent must also be made by a person involved in the challenged decision. See Wheatley v. Baptist Hosp. of Miami, 16 F. Supp. 2d 1356, 1359-60 (11th Cir. 1999). Based on this record, even though the "Asian women" comments are blatantly offensive, they are "stray remarks," which do not constitute direct evidence of discrimination because the comments were not (1) made by decision makers or actors (Mr. Rush, Mr. Bracero, or Mr. Reid) responsible for the alleged discrimination; and (2) made in the context of the challenged decision. See Vickers v. Fed. Express Corp., 132 F. Supp. 2d 1371 (S.D. Fla. 2000).

74. Although the alleged comments made by Mr. Parm and Mr. Bennett were boorish and insensitive, neither Mr. Parm nor Mr. Bennett were involved in any of the actions Ms. Wall complains about -- the false accusations, the Corrective Actions, or her workload. Therefore, these statements cannot be considered direct evidence of discriminatory intent.

75. Alternatively, Ms. Wall can establish her case through circumstantial proof following the framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). In this case, the framework involves a three-step process. First, Ms. Wall must establish a prima facie case of discrimination based on her gender, race/ethnicity, and age; if Ms. Wall does so, a presumption of discrimination arises against Respondent. If Ms. Wall completes step one, Respondent has the burden to present a legitimate, non-discriminatory reason for its employment actions; if Respondent can put forth such a reason, Petitioner's presumption of discrimination evaporates. Finally, if Respondent can complete the second step, Ms. Wall has the burden of proving the reason established by Respondent was a pretext for discrimination. A "pretext" is a reason given in justification for conduct that is not the real reason. McDonnell Douglas Corp., 411 U.S. at 802; Scholz v. RDV Sports, Inc., 710 So. 2d 618, 624 (Fla. 5th DCA 1998)(evaluating race discrimination claim under FCRA).

76. Although these burdens of production shift back and forth, the ultimate burden of persuasion that GFS intentionally discriminated against her remains at all times with Ms. Wall. See EEOC v. Joe's Stone Crabs, Inc., 296 F.3d 1265, 1273 (11th Cir. 2002); Byrd v. RT Foods, Inc., 948 So. 2d 921, 927 (Fla. 4th DCA 2007)(noting under FCRA the ultimate burden of proving intentional discrimination remains with the plaintiff at all times.).

Age Discrimination

77. To prevail on her age discrimination claim, Ms. Wall must prove by a preponderance of the evidence that 1) she is a member of a protected class; 2) she was qualified for this position; 3) she was subjected to an adverse employment action; and 4) GFS treated employees of a different age more favorably than she was treated.[3/] Moreover, she must show that she suffered from an adverse employment action that would not have occurred "but for" her age. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 180, 129 S. Ct. 2343, 2352, 174 L. Ed. 2d 119 (2009).

78. Here, Ms. Wall testified she was 40 years old, but there was no evidence regarding the ages of any of the other employees. There was no evidence -- direct or otherwise -- that any comments made to her or any action taken against her was based on her age. As such, Ms. Wall has failed to show that any actions by GFS would not have been taken "but for" her age, and her age discrimination claim fails.

Race/Ethnic and Gender Discrimination

A. Disparate Treatment

79. To establish a prima facie case of gender or ethnic discrimination, the burden is on Ms. Wall to show: (1) she belongs to a protected class; (2) she is qualified to perform the job; (3) she suffered an adverse employment action; and (4) GFS treated similarly situated employees outside the employee's protected class more favorably. Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997); Guadamuz v. Entercom Miami, LLC, 2019 U.S. Dist. LEXIS 15678, at *20-21 (S.D. Fla. Jan. 29, 2019).

80. Regarding the first prong, Ms. Wall has shown she belongs to a protected class based on her race or ethnicity, and her gender.

81. As to the second prong, Respondent argues in its PRO that Ms. Wall is not qualified because she does not get along with her co-workers. The evidence, however, establishes otherwise. Petitioner's performance reviews, Mr. Rush's email commending Petitioner's improvement in the area, and the offer to allow Ms. Wall to change to another shift and area all support a finding that Ms. Wall was and is qualified. It is doubtful GFS would allow unqualified employees to continue to clean the Plant City Center facility given the detrimental results a negative audit or inspection would have. Therefore, Ms. Wall has met the

burden of showing she was qualified for the position of custodian.

82. Ms. Wall complains of numerous actions taken by GFS.[4/] Not everything, however, that makes an employee unhappy is an actionable adverse action. See Davis v. Town of Lake Park, 245 F.3d 1232, 1238 (11th Cir. 2001). To constitute an actionable "adverse employment action," the action must impact the terms, conditions, or privileges of the job in a real or demonstrable way. See Crawford v. Carroll, 529 F.3d 961 (11th Cir. 2008); Town of Lake Park, 245 F.3d at 1239. In other words, the action must require a material change in terms and conditions of employment. See McCaw Cellular Comm. v. Kwiatek, 763 So. 2d 1063, 1066 (Fla. 4th DCA 1999).

83. GFS argues that other than the suspension she received in 2016 for insubordination, Ms. Wall did not suffer any material change in the terms and conditions of her employment, nor did she suffer monetarily. Ms. Wall established that the Corrective Actions did impact her eligibility for promotions within GFS. As such, the Corrective Actions constitute adverse actions under the FCRA.

84. Finally, to meet the fourth "comparator" element of a disparate treatment claim, Ms. Wall must show she is similarly situated in all relevant respects to the employees she claims were given preferential treatment. See Woods v. Cent. Fellowship

Christian Acad., 545 F. App'x 939, 945 (11th Cir. 2013) ("When a Title VII plaintiff attempts to show discriminatory intent by pointing to non-protected class members treated differently, the proffered comparator must be nearly identical to the plaintiff.") (citations omitted). More specifically, to be valid comparators for disparate discipline they must have "(1) dealt with the same supervisor, (2) been subject to the same standards, and (3) engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it." Sanguinetti v. United Parcel Serv., Inc., 114 F. Supp. 2d 1313, 1317 (S.D. Fla. 2000).

85. Of the three Corrective Actions, Ms. Wall has only alleged comparators relating to the one from August 2017 -- Mr. Bennett and Mr. Parm. Although not artfully alleged, Ms. Wall essentially argues she was wrongfully disciplined based on hearsay and anonymous complaints. The investigation against her, an Asian-American female, was treated differently than the investigation of Mr. Bennett and Mr. Parm, two non-Asian males.

86. The complaints made against Mr. Bennett and Mr. Parm were handled differently than the complaints against Ms. Wall. The Bennett/Parm investigation was handled by HR, involved interviews by two GFS employees (Ms. Vanacore and Mr. Laviolette), and both men were allowed to give their side of the story before the investigation was closed. In contrast, the

complaints against Ms. Wall were not investigated by HR, but rather, solely by Mr. Reid (HR was not even informed until after Ms. Wall had been disciplined); and Ms. Wall was not given an opportunity to respond until being issued the discipline.

87. Applying the factors used to evaluate the comparability of the actual complaints, however, is a closer call. The first and second factors favor finding comparability. Mr. Bennett, Mr. Parm, and Ms. Wall all reported to Mr. Reid, and all GFS employees were subject to the same GFS Employee Code of Conduct.

88. Regarding the third factor, however, it cannot be said on this record that the conduct alleged against Ms. Wall was the same kind of conduct as the conduct she alleged against Mr. Bennett and Mr. Parm. Whereas there was only one complaint against Mr. Parm and two complaints against Mr. Bennett in an unknown timeframe, Ms. Wall had numerous complaints filed against her in a short period of time by her co-workers and a third-party vendor also complained about Ms. Wall's conduct. Moreover, while Ms. Wall had a history of discipline for gossiping and insubordination, there was no evidence her comparators had been previously disciplined at all. As such, GFS's different treatment of Ms. Wall as compared with that of Mr. Bennett and Mr. Parm cannot be said to be based on similar conduct.

89. As such, Ms. Wall fails to make out a prima facie discrimination case of disparate treatment because she has not

identified any similarly situated employees outside of her protected class who were treated more favorably for similar conduct. Because she fails to establish a prima facie case of discrimination under the McDonnell Douglas burden-shifting framework, it is unnecessary to discuss the other burdens relating to non-discriminatory reasons or pretext.

B. Hostile Work Environment

90. Ms. Wall also alleges GFS required her to work in a hostile workplace. The FCRA protects an employee from a hostile workplace. See Webb v. Worldwide Flight Serv., 407 F.3d 1192 (11th Cir. Fla. 2005).

91. To be hostile, the workplace must be so "permeated with discriminatory intimidation, ridicule, and insult, that [it] is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Harris v. Forklift Sys., Inc., 510 U.S. 17, 21, 114 S.Ct. 367, 370, 126 L. Ed. 2d 295 (1993)(citations and quotations omitted). The requirement that the harassment be "severe or pervasive" contains both a subjective and objective component. Id. (citations omitted). Thus, to be actionable, the behavior must result in both an environment that a reasonable person would find hostile or abusive, and an environment that the victim subjectively perceives to be abusive. Id.

92. In evaluating the objectivity requirement, the Eleventh Circuit has explained that courts should review the totality of the circumstances and consider: (1) the frequency of the conduct; (2) the severity of the conduct; (3) whether the conduct is physically threatening or a "mere offensive utterance;" and (4) whether the conduct unreasonably interferes with job performance. Id. Behavior amounts to a hostile work environment when instances are repetitive or escalate in frequency. See Jones v. UPS Ground Freight, 683 F.3d 1283, 1303 (11th Cir. 2012). Though all of these factors should be taken into account, "no single factor is required." Id. Finally, in making this determination, the court can only consider instances of harassment that were based on a protected class. See Zhou v. Intergraph Corp., 2019 U.S. Dist. LEXIS 2438, at *18 (N.D. Ala. Jan. 7, 2019)(finding harassment was too infrequent where it occurred 15 times over a three-to-four year period, but was severe in that they were indirect propositions for sex).

93. Here, although Ms. Wall complains about Mr. Bracero's conduct and the false accusations as harassment, there is no evidence that these actions were motivated by Ms. Wall's ethnicity or gender.

94. The statements by Mr. Bennett and Mr. Parm, however, were certainly derogatory and based on Ms. Wall's ethnicity and gender. There is nothing in the record indicating when the two

"online purchase of Asian women" comments were made by Mr. Parm and Mr. Bennett. But even if they were made within the 365-day timeframe allowable under FCRA, they are too infrequent under Eleventh Circuit case law to qualify as severe and pervasive. See, e.g., Guthrie v. Waffle House, 460 F. App'x 803, 807 (11th Cir. 2012) (finding that "a few dozen comments or actions . . . spread out over a period of eleven months" was insufficiently frequent); Mitchell v. Pope, 189 F. App'x 911, 913 (11th Cir. 2006)(finding that specific instances of offensive conduct over four years was insufficiently frequent).

95. Moreover, even though Ms. Wall believes GFS should have done more to address her complaints about the inappropriate comments, it responded to the incident with "immediate and appropriate corrective action" that was "reasonably likely to prevent the misconduct from recurring." See Watson v. Blue Circle, Inc., 324 F.3d 1252, 1260-61 (11th Cir. 2003); Kilgore v. Thompson & Brock Mgmt., Inc., 93 F.3d 752, 754 (11th Cir. 1996). Thus, the undersigned finds that Ms. Wall's claim of hostile work environment based on her ethnicity and gender fail. See Gadling-Cole v. Bd. of Trs. of the Univ. of Ala., 2015 U.S. Dist. LEXIS 127161, at *2 (N.D. Ala. Sep. 23, 2015) (granting employer summary judgment in race discrimination case even though employee testified about negative behavior from co-workers and microaggressions).

96. Finally, the crux of Ms. Wall's testimony and argument at the hearing was that she was being treated badly by Mr. Bracero and Mr. Reid, and the discipline taken against her was unfair since it was based on inaccurate statements by her co-workers. Even if the undersigned agreed that GFS handled the August 2017 Corrective Action badly, it did not violate the FCRA. See Sunbeam TV Corp. v. Mitzel, 83 So. 3d 865, 872 (Fla. 3d DCA 2012)("bad business decisions do not necessarily correlate with decisions that violate the law."); see also Damon, 196 F.3d at 1361 ("We have repeatedly and emphatically held that a defendant may terminate an employee for a good or bad reason without violating federal law. . . . We are not in the business of adjudging whether employment decisions are prudent or fair."); Alexander v. Fulton Cnty., Ga., 207 F.3d 1303, 1341 (11th Cir. 2000)("[I]t is not the court's role to second-guess the wisdom of an employer's decisions as long as the decisions are not racially motivated.").

97. Consequently, Ms. Wall did not meet her ultimate burden of proving by a preponderance of the evidence that GFS's actions were discriminatory based on her age, gender, or ethnicity. Thus, there has been no violation of the FCRA. Accordingly, the Petition for Relief must be dismissed.

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 finding that Petitioner, Nou M. Wall, did not prove that Respondent, Gordon Food Services, committed an unlawful employment practice against her; and dismissing her Petition for Relief from an unlawful employment practice.

DONE AND ENTERED this 27th day of February, 2019, in Tallahassee, Leon County, Florida.

HETAL DESAI
Administrative Law Judge
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Filed with the Clerk of the
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this 27th day of February, 2019.

ENDNOTES

[1/] Although GFS asserts employees threatened to quit if Ms. Wall's behavior continued, claimed employees complained that they did not feel safe around Ms. Wall, and stated she made comments about an employee's weight, there was no credible evidence regarding these statements. Mr. Rush's testimony regarding the substance of the complaints is not reflected in the August 2017 Corrective Action. Although Mr. Rush stated these complaints were documented by Mr. Reid, these documents were not offered into evidence by GFS. There was no evidence at the final hearing of who made the complaints against Ms. Wall, when these complaints were made, to whom they were made, or the nature of the complaints against her. Mr. Rush could not even identify the complainants' race or age. As such, Mr. Rush's testimony

regarding the fact that there were complaints is accepted, but the testimony regarding the substance of the complaints is rejected.

[2/] Ms. Wall's testimony as to the statements made to her by her co-workers were not offered into evidence to "prove the truth of the matter asserted" (which was that Mr. Bennett and Mr. Parm were going to order Asian women) and, therefore, are not hearsay. See §90.801(1)(c), Fla. Stat. Even if they were hearsay statements, the statements made to Ms. Wall these statements would be considered admissions and qualify as exceptions to the hearsay rule. See 90.803(18)(d), Fla. Stat. (creating an exception to the hearsay rule for a "statement by the party's agent or servant concerning a matter within the scope of the agency or employment thereof, made during the existence of the relationship").

[3/] The FCRA differs from the ADEA in that the ADEA specifically protects employees aged 40 and older, and the FCRA does not set a minimum age for a protected class. The Commission has determined that the age "40" has no significance in determining whether age discrimination has occurred under the FCRA. See Ellis v. Am. Aluminum, Case No. 14-5355, (DOAH July 14, 2015) modified, (Fla. FCHR Sep. 17, 2015). Thus, whereas under the ADEA an employee must be 40 years old and the comparator must be significantly younger, under the FCRA a petitioner can simply show that individuals similarly situated of a "different" age were treated more favorably.

[4/] Section 760.11(1) allows a person alleging an FCRA discrimination claim to file a complaint within 365 days of the alleged violation. Thus, actions occurring more than 365 days prior to Ms. Wall's October 23, 2017, filing of her Charge of Discrimination are not actionable. These would include the Corrective Actions from 2014 and 2015, the false accusation of stealing time from 2016, and perhaps the undated comments made by Mr. Bennett and Mr. Parm. However, because the Commission did not dismiss any of Ms. Wall's claims, and because GFS raised Ms. Wall's work history back to her hire date, these events are discussed in the context of Petitioner's hostile environment claim, and evaluated by the undersigned in an effort to address all the issues raised at the final hearing.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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