STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

VIRGINIA HOWELL,

Petitioner,

vs. Case No. 19-0029

COLLEGE OF CENTRAL FLORIDA,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was conducted before Administrative Law Judge Garnett W. Chisenhall of the Division of Administrative Hearings ("DOAH") in Ocala, Florida, on March 28, 2019.

APPEARANCES

For Petitioner: Joseph C. Shoemaker, Esquire
Bogin, Munns, and Munns, P.A.
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For Respondent: Craig Frischer Novick, Esquire
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STATEMENT OF THE ISSUES

The issues for determination are: (1) did the College of Central Florida ("CCF") commit an unlawful employment practice by discriminating against Petitioner on the basis of age and/or sex;

and (2) did CCF unlawfully retaliate against Petitioner by firing her.

PRELIMINARY STATEMENT

On June 6, 2018, Petitioner ("Ms. Howell") filed a Charge of Discrimination with the Florida Commission on Human Relations ("the Commission"), alleging that she was the victim of age and sex discrimination. In support thereof, Ms. Howell alleged the following:

> I was employed by [CCF] from approximately August 2015 until I was unlawfully discharged on or about July 21, 2017.
>
> I was employed by CCF as a landscape worker for nearly two years. During my employment with [CCF], I did not miss work, never had any sort of discipline or corrective action taken against me, and was an exemplary employee. Nonetheless, I do believe that I was discriminated [against] in the work place and treated unfairly based upon my gender and/or my age and ultimately fired in retaliation for complaining about such unlawful behavior.
>
> Such unlawful actions started early on in my employment and continued until my termination. In approximately January of 2016, a co-worker, Josh, came up in a Kubota four-wheel drive vehicle and tried to push me and a handicapped co-worker, Marvin, while we were in the parking lot in a golf cart. As this was both inappropriate and obviously dangerous, I, of course, told him to stop, but he refused to do so and activity of this sort continued.
>
> Thereafter, in approximately March 2016, Josh came up behind me while I was getting ice and ran his finger down my neck. This action

startled me and was, of course, completely inappropriate. I pushed him away from me and told him to keep his hands off of me. Other employees in the area laughed at the incident.

In approximately June of 2016, Josh, along with another co-worker, again pushed me with the Kubota vehicle while I was in the golf cart. Josh hit me harder in this incident than in the previous one. Josh and his co-worker laughed at me after the incident. I told both to stop and noted that I had a rod in my back.

Next, in approximately August 2016, another co-worker, Craig, hit the golf cart that I was in with the company pickup truck. Two mechanics at the incident started laughing and told me to "act like I was hurt."

Throughout my employment I was harassed nearly every day by my younger male co-workers. This included calling me various, vicious names and acting like they were going to hit me with vehicles. I reported these various, ongoing incidents to management, but they continued nonetheless.

I was, for example, given the middle finger many times by Thomas Smith and was called a "[c*nt]" and a "[f***ing c*nt]" by Mr. Smith. I told him that I found this offensive and asked him to stop and he merely told me that he talked to his wife that way. Mr. Smith communicated these incidents to his wife, who is also an employee, and I believe she may have played some role in getting me terminated.

I asked many times to be present when management spoke to the offending employees as to my complaints, but I was not allowed to do so. Mr. Morelock, the plant operations manager, had a meeting with me as to these issues. I was told that he would get back to me as to my concerns, but did not do so and

> never spoke to me again. I was ultimately terminated on or about July 21, 2017 with a phone call wherein I was simply told I was "no longer needed."
>
> I felt that I was clearly singled out based upon my age and gender and was treated significantly less favorably than younger and/or male employees of the company. Moreover, I was terminated for complaining about the ongoing, varied harassment that I suffered while employed by CCF.

After conducting an investigation, the Commission issued a notice on November 29, 2018, stating that "no reasonable cause exists to believe that an unlawful practice occurred." The Commission explained its determination as follows:

> [Ms. Howell] worked for [CCF], a college, as a landscape worker and groundskeeper. [Ms. Howell] claimed that she was wrongfully terminated after she complained of mistreatment by her coworkers. [Ms. Howell] explained that a coworker, Josh, tried to use his four-wheel drive vehicle to push her while she was sitting in a golf cart. Furthermore, [Ms. Howell] stated that Josh ran his finger down her neck and hit her golf cart while he was driving a truck. According to [Ms. Howell], these incidents took place between January 2016 and August 2016. [Ms. Howell] discussed mistreatment by her co-workers during a meeting with [CCF]'s manager of plant safety and facility operations, in June 2017. At this time, [Ms. Howell] never mentioned any discriminatory conduct and stated that she did not want to file a formal complaint. Approximately two days after this meeting, [CCF] noticed video footage of [Ms. Howell] engaging in a verbal altercation with a coworker. [CCF] terminated [Ms. Howell] as a result. The investigation did not reveal

> other employees who engaged in similar conduct without being disciplined. [Ms. Howell] alleged that she was subjected to disparate treatment based on her age and sex. [Ms. Howell] fails to prove a prima facie case because the investigation did not reveal evidence of similarly situated comparators outside [Ms. Howell]'s protected classes who were treated more favorably or any other evidence of discrimination. Also, [Ms. Howell] alleged that she was harassed based on her sex and age. Assuming [Ms. Howell] can prove a prima facie case, this claim still fails because the evidence shows that the severe and pervasive conduct [Ms. Howell] suffered occurred in 2016. Therefore, this claim is not timely. In addition, [Ms. Howell] alleged that [CCF] retaliated against her. [Ms. Howell] fails to prove a prima facie case because she was not engaged in protected activity as described in Section 760.10(7), Florida Statutes.

Ms. Howell responded by filing a Petition for Relief with the Commission on January 2, 2019, and the Commission referred the case to DOAH that same day.

Via a Notice of Hearing, issued on January 24, 2019, the undersigned scheduled the final hearing to occur in Ocala, Florida, on March 28 and 29, 2019.

On March 24, 2019, CCF filed a "Motion to Relinquish Jurisdiction from the Administrative Law Judge to the Florida Commission on Human Relations" ("the Motion to Relinquish"). In addition to arguing that there were no disputed issues of material fact, CCF asserted that Ms. Howell's complaint was untimely with regard to the majority of the alleged violations.

See § 760.11(1), Fla. Stat. (2015-2017)[1/] (mandating that "[a]ny person aggrieved by a violation of ss. 760.01-760.10 may file a complaint with the commission within 365 days of the alleged violation, naming the employer . . . responsible for the violation and describing the violation.").

After considering Ms. Howell's response, the undersigned issued an Order on March 25, 2019, denying the Motion to Relinquish. The aforementioned Order stated that "[w]hile the Motion to Relinquish was unsuccessful in definitively establishing that there are no disputed issues of material fact, it was successful in demonstrating that the issues to be addressed at the final hearing can be substantially narrowed." Therefore, the Order specified that "[n]o alleged incidents that occurred more than 365 days prior to the date that [Ms. Howell] filed her Charge of Discrimination with [the Commission] are at issue in this proceeding."

The final hearing was commenced as scheduled and completed on March 28, 2019. Ms. Howell testified on her own behalf and presented the testimony of Newell Melton, Thomas Smith, Mark Sakowski, and Katherine Hunt. CCF presented the testimony of Carol Smith.

Joint Exhibits 1 through 5 and 8 through 10 were accepted into evidence. Ms. Howell's Exhibits 2 and 3 and CCF's Exhibits 1 through 7 were accepted into evidence.

At the close of the final hearing, the undersigned granted the parties' request that the deadline for their proposed recommended orders be 30 days after the filing of the transcript.

The Transcript was filed with DOAH on April 19, 2019, and the parties timely filed their proposed recommended orders on May 20, 2019. The undersigned considered all of the post-hearing submittals in the preparation of this Recommended Order.

FINDINGS OF FACT

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

1. Ms. Howell began working in CCF's lawn maintenance department on August 17, 2015. She worked 25 hours a week performing activities such as removing weeds, picking up debris, and maintaining the flower beds around CCF's campus.

2. CCF's lawn maintenance department consisted of approximately 20 people, but Ms. Howell was the only female. At the time of the final hearing, Ms. Howell was 67 years old.

3. Tommy Morelock, CCF's director of facilities, made the decision to hire Ms. Howell.

4. Ms. Howell claims that her co-workers mistreated her. For example, she asserts that there were at least three occasions when co-workers intentionally drove a four-wheel drive vehicle or a pickup truck into a golf cart driven by her. Another alleged

incident involved a co-worker running a finger down her neck. In addition, Thomas Smith supposedly "flipped her off" on numerous occasions throughout her tenure at CCF and referred to her as a "f***ing c*nt."

5. In approximately August of 2016, after a co-worker allegedly used a vehicle to strike a golf cart driven by Ms. Howell, her fiancée, Newell Melton, called CCF in order to lodge a complaint with Mr. Morelock. Mr. Melton ultimately spoke with Katherine Hunt, one of Mr. Morelock's subordinates and CCF's manager of facility operations and construction projects.

6. Ms. Hunt met with Ms. Howell soon afterward about these alleged incidents. Ms. Howell also described how her male co-workers would grab themselves between the legs. However, Ms. Howell did not indicate that those actions were directed toward her.

7. Ms. Howell did not mention any improper conduct by Thomas Smith during her meeting with Ms. Hunt.

8. In late 2016 or early 2017, Ms. Howell also met with Mark Sakowski, another of Mr. Morelock's subordinates and CCF's manager of plant safety and facility operations, about one of the vehicle incidents. Mr. Sakowski told Ms. Howell that he would talk to the co-worker in question and asked her to bring any future issues to his attention.

9. Ms. Howell did not mention anything to Mr. Sakowski about Thomas Smith directing obscene gestures toward her.

10. After the meeting, Mr. Sakowski spoke to employees within the lawn maintenance department about professionalism, safety, and having respect for others.

11. Ms. Howell never filed a formal complaint with CCF about her co-workers' alleged misconduct.

12. At Mr. Morelock's request, Ms. Howell met with him and Caroline Smith, CCF's equity officer, on June 7, 2017, to discuss her complaints. During this meeting, Ms. Howell described: (a) how her co-workers would drive vehicles into golf carts she was occupying; (b) the incident in which a co-worker ran a finger down her neck; and (c) a rumor among her co-workers that she was planning to file a sexual harassment complaint.

13. As CCF's equity officer, Ms. Smith is responsible for investigating student and employee claims of discrimination or harassment. After hearing Ms. Smith's description of the alleged incidents, she concluded that the allegations involved inappropriate "horseplay" rather than age and/or gender-based discrimination. She then explained CCF's employee complaint procedure to Ms. Howell, but Ms. Howell declined to initiate a formal complaint.

14. Ms. Howell did not mention Mr. Smith's alleged misconduct during her meeting with Mr. Morelock and Ms. Smith.

15. In a memorandum dated June 7, 2017, and addressed to Ms. Howell, Mr. Morelock wrote the following:

> As discussed in our 11:00 AM meeting today with the College Equity Officer, Mrs. Smith, to address your complaints regarding horseplay in the workplace, rumors, and possible harassment, I have met with the 3 employees in your complaint and have addressed these issues.
>
> Please let me know immediately if there are any further incidents or if you have any additional concerns.

16. Mr. Morelock noted in the memorandum that Ms. Hunt, Mr. Sakowski, and Ms. Smith received copies. Ms. Howell received a copy of Mr. Morelock's memorandum shortly after their meeting.

17. At approximately 12:30 p.m. on July 19, 2017, Ms. Howell was nearing the end of her workday and driving a golf cart. She crossed paths with a vehicle driven by Mr. Smith and noticed in her rearview mirror that Mr. Smith was directing an obscene gesture toward her.[2/]

18. Ms. Howell proceeded on her way to leaving the CCF campus. However, she reversed course and, with the assistance of another co-worker, spent approximately ten minutes driving around the CCF campus looking for Mr. Smith.

19. Upon finding Mr. Smith at the back of the CCF campus planting junipers, Ms. Howell exited the golf cart and angrily told Mr. Smith to stop directing obscene gestures toward her. According to Mr. Smith, Ms. Howell went into a "tirade."

20. After confronting Mr. Smith, Ms. Howell left the campus without reporting this new incident to any supervisors. As far as she knew, none of the pertinent supervisors were available.

21. Mr. Smith felt threatened and immediately sought out Mr. Sakowski. Mr. Smith reported that Ms. Howell demanded that he stop spreading rumors about her, and Ms. Howell supposedly stated that CCF, Mr. Smith, and Mr. Smith's wife "would be sorry."[3/]

22. Rather than obtaining Ms. Howell's version of the confrontation, Mr. Sakowski and Ms. Hunt spoke to Mr. Morelock, who was on vacation at the time. Mr. Morelock recommended that they confer with CCF's director of Human Resources and authorized them to resolve the matter as they saw fit.

23. Mr. Sakowski and Ms. Smith called Ms. Howell on July 21, 2017, and notified her that she had been fired. The only explanation given to Ms. Howell was that she did not work well with supervisors and co-workers.

24. Mr. Sakowski explained that he was concerned about his staff's safety and that of CCF's students:

> We take safety very seriously on the campus. And in this day and age with mass-casualty and active-shooter scenarios, we practice these drills on campus on an annual basis. And it did scare me that -- I did not want it [to] make national news.

25. Mr. Sakowski was also concerned by the fact that Ms. Howell confronted Mr. Smith rather than reporting his obscene gesture to a supervisor:

> Instead of coming back onto campus after leaving her shift, she should have come into the building and either got myself or Ms. Hunt at that time and explained what had just happened instead of taking matters into her own hands.

26. Because Mr. Morelock's memorandum to Ms. Howell directed her to "[p]lease let me know immediately if there are any further incidents or if you have any additional concerns," Ms. Hunt considered Ms. Howell to be insubordinate when she confronted Mr. Smith on July 19, 2017.[4/]

27. This was the first disciplinary action that CCF had taken against Ms. Howell.

28. Since being fired by CCF, Ms. Howell has unsuccessfully applied for two positions, a greeter at a hospital and a landscaping technician at a local cemetery. While she considers herself to be retired, Ms. Howell is still looking for employment.

Ultimate Findings

29. Ms. Howell persuasively testified that Mr. Smith directed an obscene gesture toward her on July 19, 2017.

30. However, the preponderance of the evidence demonstrates that CCF did not know nor should have known that Mr. Smith

directed obscene gestures and/or language toward Ms. Howell. While Ms. Howell consistently testified that she did not discuss Mr. Smith's conduct with Mr. Sakowski or Ms. Hunt, she gave conflicting testimony as to whether she reported Mr. Smith's conduct to Mr. Morelock during their meeting on June 7, 2017. In contrast, Carol Smith, CCF's equity officer, persuasively testified that Mr. Smith's conduct was not discussed during that meeting.[5/]

CONCLUSIONS OF LAW

31. DOAH has jurisdiction over the parties and the subject matter of this proceeding pursuant to sections 120.569 and 120.57, Florida Statutes, and Florida Administrative Code Rule 60Y-4.016(1).

32. The legislative scheme contained in sections 760.01 through 760.11, Florida Statutes, is known as the Florida Civil Rights Act of 1992 ("the FCRA").

33. Section 760.10(1)(a) prohibits discrimination "against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status."

34. The FCRA incorporates and adopts the legal principles and precedents established in the federal anti-discrimination

laws specifically set forth under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et. seq.

35. Florida courts have determined that federal discrimination law should be used as guidance when construing the FCRA. See Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17, 21 (Fla. 3d DCA 2009); Brand v. Fla. Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994).

36. In the instant case, Ms. Howell has the burden of proving by a preponderance of the evidence that CCF committed an unlawful employment practice. See EEOC v. Joe's Stone Crabs, Inc., 296 F.3d 1265, 1273 (11th Cir. 2002)(noting that a claimant bears the ultimate burden of persuading the trier of fact that the employer intentionally discriminated against the employee); § 120.57(1)(j), Fla. Stat.

Ms. Howell's Hostile Work Environment Claim

37. Ms. Howell argues that she was subjected to a hostile work environment due to her age and/or sex. As discussed in the Preliminary Statement, the majority of the alleged misconduct occurred more than 365 days prior to the filing of Ms. Howell's Charge of Discrimination and could not be addressed in this proceeding. See § 760.11(1), Fla. Stat. (2015-2017)(mandating that "[a]ny person aggrieved by a violation of s. 509.092 may file a complaint with the commission within 365 days of the

alleged violation naming the person responsible for the violation and describing the violation.").

38. Because Ms. Howell filed her Charge of Discrimination on June 6, 2018, the only misconduct that can be addressed is the incident on July 19, 2017, when Mr. Smith directed an obscene gesture toward Ms. Howell. While the undersigned credited Ms. Howell's version of what transpired that day, that alone does not demonstrate that she has a meritorious hostile work environment claim based on age and/or sex discrimination.[6/]

39. "Title VII is violated when the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Coles v. Post Master Gen. United States Postal Serv., 711 Fed. Appx. 890, 897 (11th Cir. 2017).

40. In order to substantiate such a claim, a plaintiff must satisfy the following criteria: (a) she belongs to a protected group; (b) she has been subjected to unwelcome harassment; (c) the harassment was based on a protected characteristic of the employee; (d) the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment; and (e) the employer was responsible for the harassment under a theory of vicarious or direct liability. See Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1275 (11th Cir. 2002).

41. "Only conduct that is based on a protected category, such as age, may be considered in a hostile work environment analysis." Dexter v. Amedisys Home Health, Inc., 965 F. Supp. 2d 1280, 1289 (N.D. Ala. 2013). "Innocuous statements or conduct, or boorish ones that do not relate to the age of the actor or of the offended party (the plaintiff), are not counted." Id.

42. With regard to the severity or pervasiveness of harassment, an employee must subjectively perceive the harassment as sufficiently severe or pervasive to alter the terms or conditions of employment, and the employee's subjective perception must be objectively reasonable. Mendoza v. Borden, Inc., 195 F.3d 1238, 1246 (11th Cir. 1999). "The burden is on [the] Plaintiff to demonstrate that she perceived, and that a reasonable person would perceive, the working environment to be hostile or abusive." Dexter, 965 F. Supp. 2d at 1290.

43. As for whether an employee's subjective perception is objectively reasonable, the United States Supreme Court has held that courts should consider: (a) the frequency and severity of the conduct at issue; (b) whether the conduct is physically threatening or humiliating rather than a mere offensive utterance; and (c) whether the conduct unreasonably interferes with the plaintiff's job performance. Mendoza, 195 F.3d at 1246. "Although these factors help guide the inquiry, the objective element is not subject to mathematical precision." Smelter v. S.

Home Care Servs., 904 F.3d 1276, 1285 (11th Cir. 2018). A court "must view the evidence cumulatively and in the totality of the circumstances." Id.

44. The Supreme Court has repeatedly emphasized that simple teasing, offhand comments, and isolated incidents, unless extremely serious, will not amount to discriminatory changes in the terms and conditions of employment. Dexter, 965 F. Supp. 2d at 1290. "The Eleventh Circuit considers an incident a week to be sufficiently frequent to bolster a plaintiff's case but considers an incident every two months to be insufficiently frequent to do so." Id. But see Smelter, 904 F.3d at 1286 (rejecting an argument that a single use of the n-word was insufficient to establish severity as a matter of law and noting "[t]his Court has observed that the use of this word is particularly egregious when directed toward a person in an offensive or humiliating manner.").

45. In assessing whether the employer is responsible for harassment perpetrated by a co-worker under a theory of vicarious or direct liability, "an employer is directly liable for an employee's unlawful harassment if the employer was negligent with respect to the offensive behavior." Vance v. Ball State Univ., 133 S. Ct. 2434, 2441, 186 L. Ed. 2d 565 (2013). Employer liability based on a co-worker's actions requires a showing of negligence. Id. A plaintiff must show that the employer knew or

should have known of the harassing conduct, but failed to take prompt remedial action. Baldwin v. Blue Cross/Blue Shield of Ala., 480 F.3d 1287 (11th Cir. 2007). "Actual notice is established by proof that management knew of the harassment, whereas constructive notice will be found where the harassment was so severe and pervasive that management should have known of it." Miller, 277 F.3d at 1278. In evaluating whether there was constructive notice, tribunals evaluate the remoteness of the location of the harassment as compared to the location of management, whether the harassment occurred intermittently over a long period of time, whether the victim worked full or part-time, and whether there were only a few, discrete instances of harassment.

46. As for the sufficiency of an employer's remedial action, there is no bright-line test. "Whether an employer's response is sufficient depends on, among other things, the effectiveness of the steps taken, and whether it was reasonably likely to prevent the misconduct from recurring." Hollon v. DAS N.A., Inc., 2016 U.S. Dist. LEXIS 114609, at *19-20 (M.D. Ala. 2016).

47. With regard to the instant case, even if one were to assume that Ms. Howell belongs to a protected group, was subjected to unwelcome harassment, that the harassment was based on a protected characteristic, and that the harassment was

sufficiently severe or pervasive to alter the terms and conditions of her employment, she still would not have a prima facie hostile work environment claim because the preponderance of the evidence demonstrated that Ms. Howell did not put CCF on notice of Mr. Smith's allegedly pervasive conduct that occurred prior to the obscene gesture on July 19, 2017.

48. Even if one were to accept Ms. Howell's testimony that she complained about Mr. Smith during her meeting with Mr. Morelock, the fact that she waited until June 7, 2017, to notify a supervisor indicates she did not subjectively perceive Mr. Smith's conduct to be sufficiently severe or pervasive to alter the terms or conditions of employment.[7/] Therefore, even if one were to credit Ms. Howell's description of the June 7, 2017, meeting over that of Mr. Smith (which the undersigned does not), Ms. Howell would still be unable to satisfy all of the elements of a prima facie hostile work environment claim.

Ms. Howell's Retaliation Claim

49. As for Ms. Howell's claim that her termination was unlawful retaliation, the burden of proof in Title VII retaliation cases is governed by the framework established in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). A plaintiff establishes a prima facie case by demonstrating the following: (a) that she engaged in a statutorily protected activity; (b) she experienced an adverse

employment action; and (c) a causal link between the protected expression and the adverse action. Coles, 711 Fed. Appx. at 896. The burden then shifts to the defendant to negate the inference of retaliation by presenting legitimate reasons for the adverse employment action. If the defendant is successful, then the plaintiff bears the burden of proving that the reasons offered by the defendant are pretextual. Id.

50. With regard to the causal link element, the Eleventh Circuit construes "the causal link element broadly so that a plaintiff merely has to prove that the protected activity and the adverse action are not completely unrelated." Williams v. Ala. Dep't of Indus. Rels., 684 Fed. Appx. 888, 894 (11th Cir. 2017). "A plaintiff satisfies this element (for the purpose of making a prima facie case) if he provides evidence that (1) the defendant was aware of his protected expression or activity; and (2) there was a close temporal proximity between this awareness and the adverse action." Id. at 894. "A close temporal proximity between the protected expression and an adverse action is sufficient circumstantial evidence of a causal connection for purposes of a prima facie case." Higdon v. Jackson, 393 F.3d 1211, 1220 (11th Cir. 2004). See Donnellon v. Fruehaud Corp., 794 F.2d 598, 601 (11th Cir. 1986)(stating that "[t]he short period of time [(one month)] between the filing of the discrimination complaint and the plaintiff's discharge belies any

assertion by the defendant that the plaintiff failed to prove causation."). However, "[i]f there is a substantial delay between the protected expression and the adverse action in the absence of other evidence tending to show causation, the complaint of retaliation fails as a matter of law." Dexter, 965 F. Supp. 2d at 1295.

51. If an employer articulates a legitimate, non-discriminatory and non-retaliatory reason for the adverse action, then a petitioner establishes that the aforementioned reason was merely a pretext by demonstrating that the proffered reason was not the true reason for the employment decision. Jackson v. State of Ala. State Tenure Comm'n, 405 F.3d 1276, 1289 (11th Cir. 2005). "A reason is not pretext for discrimination unless it is shown both that the reason was false, and that discrimination was the real reason." Brooks v. Cnty. Comm'n of Jefferson Cnty., Ala., 446 F.3d 1160, 1163 (11th Cir. 2006). A plaintiff "can meet her burden either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Dexter, 965 F. Supp. 2d at 1296. See Jones v. Gerwens, 874 F.2d 1534, 1541 (11th Cir. 1989)(noting that when assessing whether an employer's proffered reason was pretextual, it is the decision-maker's motive that is at issue); Watkins v. Sverdrup Tech., Inc., 153 F.3d 1308, 1314 (11th Cir.

1998)(stating that in order to discredit an employer's explanation, a plaintiff "must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find all of those reasons unworthy of credence."); Murphree v. Comm'r, 644 Fed. Appx. 962, 968 (11th Cir. 2016)(noting that "[i]n evaluating pretext, we ask whether the plaintiff has cast sufficient doubt on the defendant's proffered nondiscriminatory reasons to permit a reasonable factfinder to conclude that the employee's proffered legitimate reasons were not what actually motivated its conduct.").

52. If the proffered reason is one that might motivate a reasonable employer, "an employee must meet that reason head on and rebut it, and the employee cannot succeed by simply quarreling with the wisdom of that reason." Chapman v. AI Transp., 229 F.3d 1012, 1030 (11th Cir. 2000)(en banc). Pretext must be established with "concrete evidence in the form of specific facts" showing that the proffered reason was pretext; "mere conclusory allegations and assertions" are insufficient. Bryant v. Jones, 575 F.3d 1281, 1308 (11th Cir. 2009). A reason cannot be pretext for discrimination "unless it is shown both that the reason was false, and that discrimination was the real

reason." Fla. Stat. Univ. v. Sondel, 685 So. 2d 923, 927 (Fla. 1st DCA 1996).

53. The undersigned does not agree with CCF's decision to fire Ms. Howell, especially given the fact that Mr. Sakowski and Ms. Hunt did not hear her version of what transpired between herself and Mr. Smith on July 19, 2017. Nevertheless, Ms. Howell has not presented specific facts demonstrating that the safety concerns cited by Mr. Sakowski and Ms. Hunt were a pretext for discrimination. See Denney v. City of Albany, 247 F.3d 1172, 1188 (11th Cir. 2001)(noting that a court's role is not to act as a "super-personnel department" and second-guess a company's business decisions).[8/]

RECOMMENDATION

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

DONE AND ENTERED this 17th day of June, 2019, in Tallahassee, Leon County, Florida.

Garnett Chisenhall

G. W. CHISENHALL
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of June, 2019.

ENDNOTES

[1/] Unless stated otherwise, all statutory citations will be to the 2018 version of the Florida Statutes.

[2/] Mr. Sakowski was able to view security camera footage of the two vehicles passing each other during the time in question. According to Mr. Sakowski, the video did not indicate that Mr. Smith directed an obscene gesture toward Ms. Howell. Because CCF did not move a copy of the video into evidence, the undersigned was unable to independently assess what was visible to the camera. Given Ms. Howell's subsequent action of returning to campus and confronting Mr. Smith, the undersigned finds that the preponderance of the evidence demonstrates that Mr. Smith directed an obscene gesture toward Ms. Howell when she was leaving work on July 19 or 20, 2017.

[3/] Mr. Smith's wife works for CCF as the executive administrative assistant to the vice president of Student Affairs. Tr., 84-85.

[4/] Ms. Hunt corroborated Mr. Sakowski's explanation as to why they decided to fire Ms. Howell:

Q: Why was [Ms. Howell] terminated?

A: Because of an incident that occurred on college grounds. She went and directly contacted one of her other [co-workers] after the incident, after she had left campus, and did not directly go and talk to a manager first.

And we were worried about the fact that she did not listen to a prior request to talk [to] a manager first, as well as the safety factor of leaving campus and then coming back and directly confronting a fellow co-worker. So we thought that presented a safety . . .

Q: Okay. I'll ask you a little of that in more detail, but what's the safety issue that you're referencing about leaving campus and coming [back]? How's that unsafe?

A: Well, she was done with her shift and came back and confronted the other co-worker. And so with everything that goes on nowadays, you just never know what could happen. So just to, you know, keep our staff safe as well as our student population.

Q: But, again, what does that have to do with being done with her shift?

A: She had had a confrontation with an individual, and that individual, after the confrontation, had went to one of the other managers and told him about the confrontation, and they reviewed it. And I guess it wasn't until she had gone back to campus that that individual had gone to the other manager, Mark Sakowksi, to tell him that.

Q: Well, maybe I'm confused. The question though, what does her leaving the campus have to do with safety?

A: When you come back onto campus and confront somebody verbally . . .

Q: Right.

A: [W]hen you're asked to go talk to a manager if you have a grievance with that person, then that is a safety factor.

[5/] Ms. Howell testified that she did not report Mr. Smith's conduct "[a]t first" but ultimately notified Mr. Morelock. See Tr., 19. Ms. Howell reiterated those points later in her testimony. See Tr., 48, 58. However, she contradicted herself by testifying that she did not bring Mr. Smith's behavior to the attention of anyone at the college. See Tr., 54. Ms. Hunt corroborated Ms. Howell's testimony by testifying that she was unaware of any incidents between Ms. Howell and Mr. Smith and that Mr. Smith was not discussed during her meeting with Ms. Howell. See Tr., 159, 170-71, 193-94. However and with regard to whether Mr. Smith's conduct was discussed during Ms. Howell's meeting with Mr. Morelock, Carol Smith testified that: (a) Mr. Smith was never mentioned; (b) Ms. Howell never reported that Mr. Smith had made an obscene gesture toward her; and (c) it was never reported that Mr. Smith had called Ms. Howell a "f***ing c*nt." See Tr., 215.

[6/] A compelling argument could have been made that all of Mr. Smith's conduct should have been at issue due to the Continuing Violation Doctrine. As explained by the United States Supreme Court in Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 115, 22 S. Ct. 2061, 153 L. Ed. 2d 106 (2002), "[h]ostile environment claims are different in kind from discrete acts. Their very nature involves repeated conduct." "The 'unlawful employment practice' therefore cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own." Id. Because "incidents constituting a hostile work environment are part of one unlawful employment practice, the employer may be liable for all acts that are part of this single claim." Id. at 118. See Betz v. Chertoff, 578 F.3d 929, 937-38 (8th Cir. 2009)(stating that, in the Title VII context, "[t]he Supreme Court has held that the continuing violation doctrine applies in hostile work environment claims, where, although one incident may not support a claim, the claim may be supported by a series of incidents that occur over a period of time.").

Because the preponderance of the evidence demonstrated that Ms. Howell did not notify CCF about Mr. Smith's conduct, application of the Continuing Violation Doctrine is irrelevant to the instant case.

[7/] Ms. Howell testified that she considered Mr. Smith's conduct to be "child's play, that's the way I looked at it at first. Then I got fed up with it." See Tr., 54.

[8/] If Ms. Howell had filed her Charge of Discrimination sooner so that the allegations of co-workers intentionally driving vehicles into golf carts driven by her could have been at issue and if she had been able to prove those claims, then Ms. Howell would have had a much stronger basis for arguing that CCF's safety concerns were a pretext. Multiple instances of employees intentionally driving larger vehicles into a golf cart driven by a co-worker presents a much more significant safety issue than a single instance of an employee verbally confronting a co-worker about an obscene gesture. The former is much more worthy of a summary dismissal than the latter.

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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.