STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BRIDGET D. NELSON,

Petitioner,

vs. Case No. 19-1562

AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent.
_____/

RECOMMENDED ORDER

A formal hearing was conducted in this case on July 2, 2019, in Tallahassee, Florida, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge with the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner: Bridget D. Nelson, pro se
3001 Mock Drive
Tallahassee, Florida 32301

For Respondent: Susan Sapoznikoff, Esquire
Andrew Taylor Sheeran, Esquire
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 3
Tallahassee, Florida 32308

STATEMENT OF THE ISSUE

The issue is whether Respondent, Agency for Health Care Administration ("AHCA" or "the Agency"), discriminated against Petitioner, Bridget D. Nelson, now Levens ("Petitioner"), based

upon her sex, race, or age, in violation of section 760.10, Florida Statutes (2017),[1/] and/or whether the Agency retaliated against Petitioner for the exercise of protected rights under section 760.10.

PRELIMINARY STATEMENT

The parties agree that on March 29, 2018, Petitioner filed an Employment Complaint of Discrimination with the Florida Commission on Human Relations ("FCHR"). The Employment Complaint of Discrimination was not provided to DOAH by the FCHR. Petitioner alleged the Agency retaliated against her by terminating her employment after she filed an internal grievance alleging discrimination.

The FCHR conducted an investigation of Petitioner's allegations. On March 19, 2019, the FCHR issued a written determination that there was no reasonable cause to believe that an unlawful practice occurred. The FCHR's determination stated as follows, in relevant part:

> Complainant worked for Respondent, a state agency, as a program administrator. Complainant claimed that she was wrongfully terminated after she filed an internal complaint regarding discrimination. In addition, Complainant claimed that Respondent gave prospective new employers negative references regarding her performance. Respondent submitted affidavits from Complainant's supervisors and Respondent's human resources professional. These affidavits state that when prospective new employers ask for

> references for its former employees, Respondent only provides the dates of employment, job title, and salary. Furthermore, the investigation revealed that Complainant was terminated in May 2017 and that she filed her discrimination complaint in September 2016. Complainant alleged that Respondent retaliated against her. Complainant fails to prove a prima facie case because the evidence does not show a causal link between Complainant's discrimination complaint and any adverse action that she suffered.

On March 20, 2019, Petitioner timely filed a Petition for Relief with the FCHR. On March 21, 2019, the FCHR referred the case to DOAH. The case was scheduled for hearing on May 16, 2019. On April 5, 2019, the Agency informed DOAH that its counsel had a scheduling conflict necessitating a brief continuance of the hearing. The parties agreed to move the hearing to July 2, 2019, on which date it was convened and completed.

Petitioner testified on her own behalf, including brief rebuttal testimony, and presented the testimony of Robert Kennedy. Petitioner's Exhibits 1 through 9 were entered into evidence. The Agency presented the testimony of the following AHCA employees: Human Resources ("HR") Bureau Chief Jamie Skipper; HR Manager Alesia Carroll; Senior Management Analyst Supervisor Luis Diaz; and Recipient and Provider Assistance Bureau Chief Damon Rich. The Agency's Exhibits 1 through 6 were entered into evidence.

On July 12, 2019, Petitioner submitted a 66-page document (with thumb drive), titled "Facts and Findings." The document appears to be an attempt to supplement Petitioner's testimony and rebut the testimony of the Agency's witnesses. There is no indication that this document was served on the Agency. This document has not been considered in the preparation of this Recommended Order.

The one-volume Transcript of the hearing was filed at DOAH on July 25, 2019. The Agency timely filed its Proposed Recommended Order on August 5, 2019. Petitioner filed her Proposed Recommended Order on August 7, 2019, two days after the 10-day deadline established by Florida Administrative Code Rule 28-106.216.[2/] The Agency objected to Petitioner's late filed Proposed Recommended Order in a written Motion to Strike filed on August 13, 2019. The Agency objected not merely to the late-filing, but because Petitioner's Proposed Recommended Order was clearly a responsive document to the Agency's Proposed Recommended Order, was more than twice the 40-page limit set forth in rule 28-106.215, and contained numerous allegations of fact and hearsay statements beyond the record established at the formal hearing. The Agency's Motion to Strike is well-taken. Petitioner's late-filed Proposed Recommended Order has not been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Agency is an employer as that term is defined in section 760.02(7).

2. Petitioner, an African American female born on July 23, 1968, was hired by the Agency as a Program Administrator in the Bureau of Recipient and Provider Assistance ("RPA" or "Bureau") on September 13, 2013. She worked in that job position until her employment was terminated on May 18, 2017.

3. Petitioner's position was classified as Select Exempt Service ("SES"). SES employees serve at the pleasure of the agency head and are subject to suspension, dismissal, reduction in pay, demotion, transfer, or other personnel action at the discretion of the agency head. Such personnel actions are exempt from the provisions of chapter 120, Florida Statutes. § 110.604, Fla. Stat.

4. At the time she was hired, Petitioner supervised two employees. Luis Diaz was a fellow Program Administrator who sat at a desk next to hers. Both Petitioner and Mr. Diaz were supervised by Damon Rich.

5. Petitioner had, prior to her employment with the Agency, worked with Mr. Rich and Mr. Diaz at Affiliated Computer Services ("ACS"), a private sector company. Mr. Rich testified that he supervised Petitioner for a time at ACS and that he

became friends with Petitioner and her husband. Mr. Diaz also worked in a higher position than Petitioner at ACS.

6. Petitioner testified that when Mr. Rich hired her to work at the Agency, he advised her that she should consider herself an equal to Mr. Diaz and that she should not let Mr. Diaz make her feel that she was answerable to him.

7. Petitioner testified that Mr. Diaz often had conflicts with female employees and would look to Petitioner for assistance. Petitioner testified that she assumed supervision of Ivis Suarez, one of Mr. Diaz's employees, at his request because he could not make her understand what he needed her to do.

8. Petitioner stated that Ms. Suarez filed a complaint against Mr. Diaz. Petitioner disagreed with the complaint at the time but attributed her disagreement to not yet understanding the full dynamics of the situation in the office. Petitioner only knew that the working environment was not good. Petitioner testified that she was able to work with Ms. Suarez, who eventually resigned her position with the Agency.

9. Petitioner described a similar situation that occurred in 2014. Another subordinate of Mr. Diaz, Natasha Hampton, complained to Petitioner that she did not understand the training she was receiving. Mr. Diaz complained to Petitioner

that Ms. Hampton was not catching on to the job. Petitioner agreed to take over the supervision of Ms. Hampton.

10. Petitioner testified that she asked Mr. Diaz for copies of Ms. Hampton's workplace "coachings" because she was taking over her supervision in the middle of the year and needed to know where Ms. Hampton stood in terms of her annual evaluation. Petitioner stated that Mr. Diaz ignored her repeated requests for the coachings.

11. By 2016, Mr. Rich had been promoted to Bureau Chief and Mr. Diaz had been promoted to a supervisory position that made him Petitioner's direct superior. Petitioner was upset that she was not consulted about Mr. Diaz's "elevation." Mr. Rich believed that Petitioner's subsequent problems in the workplace were attributable to her resentment at having to answer to Mr. Diaz.

12. For her part, Petitioner claimed that Mr. Diaz created a hostile working environment. She testified that every time Mr. Diaz had a problem with a female employee, she would end up as that employee's supervisor. She stated that Mr. Diaz once told her that if an order were given to downsize their unit, he would recommend eliminating all of her subordinates but one.

13. One incident that especially galled Petitioner was Mr. Diaz's procrastination in signing a tuition waiver that would allow her to take the final class required for her college

degree. Mr. Rich explained that the delay in approving Petitioner's waiver was because her unit was about to implement a procurement. Mr. Rich and Mr. Diaz needed to make sure that accommodating Petitioner's request to attend class would not adversely affect the Agency's business needs.

14. Petitioner nonetheless complained to the HR department about the delay in processing her tuition waiver, which was eventually signed by Mr. Diaz. Petitioner testified that she resented being required to go to HR for something so minor and attributed her problem to the hostile environment created by Mr. Diaz, who did everything he could to make things more difficult for her. Mr. Rich testified that school attendance seemed a greater priority for Petitioner than her job duties.

15. Petitioner offered other examples of what she termed Mr. Diaz's hostile behavior. A former employee, Ms. Suarez, had expressed an interest in coming back to work at the Agency but Mr. Diaz declined to interrupt a meeting to speak with her on the phone. Petitioner stated that other employees were constantly coming to her with problems because they were afraid to talk to Mr. Diaz about them. Petitioner stated that Mr. Diaz would leave her out of meetings. A rumor circulated that Mr. Diaz and Mr. Rich had received raises at a time when no one else in the unit had received a raise for several years, which made the employees feel underappreciated.

16. Petitioner complained that Mr. Diaz required her to submit leave requests for his approval, whereas Mr. Rich had not done so. Petitioner believed that as a supervisor, she should not be required to ask for time off. She met with Mr. Rich, who explained to her that every manager deals with things a little differently and that even the Secretary of the Agency must obtain the Governor's approval to be out of the office. Mr. Rich's practice had been to respond to leave requests only when he intended to deny them, which he believed may have left Petitioner with the impression that she did not have to obtain approval. Mr. Diaz wanted to affirmatively grant the leave requests. Mr. Rich testified that Petitioner's leave requests were not handled any differently than those of any other employee in her unit. He did not consider the issue worth the time Petitioner was taking to argue about it.

17. After the leave request dustup, Mr. Rich sent Petitioner an email, dated August 15, 2016, stating his intention to schedule a meeting with Mr. Diaz and her, "to get to the root of communication and other underlying issues to determine the best way forward. We cannot continue to have this type of fragmented leadership and disagreement about routine functions between you and your supervisor, Luis [Diaz]." A follow-up email from Mr. Rich indicated that the meeting was somewhat successful, but the resolution was not to be lasting.

18. Petitioner complained about her annual evaluation. She stated that during a full year of working under Mr. Diaz, she had received no one-on-one coachings. Petitioner conducted monthly coachings with her subordinates so that they would know exactly where they stood on their evaluations.

19. Petitioner testified that she felt blind-sided when she received her annual evaluation from Mr. Diaz for 2015-16 and it was substantially lower than her 2014-15 evaluation done by Mr. Rich. She submitted a written rebuttal to the evaluation and declined to sign it until she could meet with Mr. Rich to discuss it.

20. In his testimony, Mr. Rich made it clear that by this time, he was tiring of Petitioner's inability to work out her disputes with Mr. Diaz without involving him or other Bureau-level personnel. When he hired Petitioner, Mr. Rich was overseeing 17 employees. Petitioner was part of his leadership team and he had the time to meet regularly with her and deal with her complaints. However, Mr. Rich was now a Bureau Chief in charge of 230 employees. Petitioner was no longer part of Mr. Rich's leadership team and no longer directly reported to him. Directly dealing with Petitioner's complaints now meant that Mr. Rich was forced to put aside other duties.

21. Petitioner testified that HR was pressuring the unit to submit the performance evaluations, but that she continued to

resist signing hers. Mr. Rich met with her and agreed to change one score on her evaluation. Petitioner then signed the evaluation "under duress."

22. Petitioner complained about the lack of input she was allowed into her performance expectations for the following year, 2016-17. She stated that Mr. Rich used to ask for her input and give her plenty of time to respond. Mr. Diaz sent her an email with the draft performance expectations for Petitioner and her subordinates two days before the final version was to be submitted to HR. He asked her to go over the expectations with her staff. Petitioner stated that her staff was confused and did not understand the proposed expectations. Petitioner again took the issue to Mr. Rich.

23. Mr. Rich explained that the performance expectations had been set by him in conjunction with his leadership team, which did not include Petitioner. Mr. Rich testified that, at Petitioner's suggestion, he met one-on-one with each person on her staff to learn the nature of their problems with the draft performance expectations. He stated that he met with them in this manner to hear their independent opinions and to allow them the confidentiality to speak frankly. None of Petitioner's subordinates reported any concerns with the performance expectations.

24. On September 14, 2016, Petitioner filed a grievance with HR that was investigated by the Agency's Office of Inspector General. Petitioner complained of a hostile working environment and gender discrimination. The factual allegations involved the performance evaluation, performance expectations, and tuition waiver disputes discussed above. The investigation disclosed no statutory, rule, or policy violations, and found insufficient evidence to prove or disprove Petitioner's hostile working environment claim. By way of a written report dated October 11, 2016, the case was closed with no further activity recommended by the Office of Inspector General.

25. Both Mr. Diaz and Mr. Rich testified that they were unaware of Petitioner's grievance at the time she filed it. Mr. Rich testified that he received a copy of the Inspector General's report and only then became aware of the grievance. Mr. Rich testified that Petitioner never told him that she felt discriminated against because of her sex, age, or race.

26. Petitioner testified that in early 2017 she began finding particles of some white powdery substance in her office and on the path she walked to her office. She did not know what the substance was but stated that it triggered her asthma. Petitioner was convinced that someone at the Agency was putting the white substance in her office. She eventually changed offices, but the white substance began appearing there as well.

27. Mr. Rich testified that he investigated the situation. He noted that Petitioner was an inveterate user of air fresheners and cleaners, to the point that other employees complained that the fumes coming from Petitioner's office were making them nauseous. Mr. Rich, and then-HR Bureau Chief Cynthia Mazzara, went into Petitioner's office after hours to seek the source of the white powder. They sprayed one of the air fresheners. When the particles dried on the desk, they turned white. This solved the mystery to Mr. Rich's satisfaction, though Petitioner remained convinced she was being sabotaged.

28. Mr. Rich testified that Petitioner's behavior and attitude continued to worsen over time, especially after the Office of Inspector General found no cause to credit her claims of a hostile working environment and gender discrimination. She refused to comply with a section-wide requirement that office doors remain open. She continued to expect the Agency to accommodate her frequently changing school schedule. Petitioner continued to over-complicate work assignments and challenge directions from her superiors. She even requested that Mr. Rich cease using the color red for emphasis in his emails because red "denotes yelling and angry emotions."

29. The final straw for Mr. Rich came in early May 2017, when Petitioner encouraged and facilitated another employee's

falsification of a time sheet. The employee was out of annual leave but expressed a desire to go home and deal with a situation involving a relative. Petitioner sent the employee home, then falsely reported that the employee was not feeling well so that she could use sick leave.

30. In a memo to HR dated May 2, 2017, Mr. Rich outlined his reasons for wishing to terminate Petitioner's employment. The memo stated as follows, in relevant part, omitting references to attached documents:

> This memo is to provides [sic] a summary of expressed concerns regarding the conduct of employee Bridget Nelson.
>
> * * *
>
> During her employ, Ms. Nelson has occasionally displayed instances that border [on] insubordination, but recently there has been an increased [sic]. Of specific concern is her ability to "resolve any difference with management in a constructive manner." Her communications are almost always accusatory in nature, taking no consideration of her own accountability in related issues.
>
> Additionally, her behavior is becoming more disruptive to the work environment, sometimes affecting those outside the Bureau.
>
> The following are some examples where Ms. Nelson has not been constructive in her interactions with management and/or caused disruption in the work place.
>
> * On August 11, 2016, Ms. Nelson submitted a rebuttal to her performance expectations

. . . . Mr. Diaz and I had previously met with Ms. Nelson to discuss her concern and there were few concerns expressed compared to the document sent to Mr. David Rogers (my boss), Mr. Diaz and myself.

* On the same day, I responded to Ms. Nelson concerning her email and informed her that I would meet with her and her staff to evaluate the concerns.

* During the week of August 15, 2016 I met with Ms. Nelson individually, followed by individual meetings with her staff. Her staff was unaware of the concerns to which Ms. Nelson was referring and understood their performance expectations.

* On August 15, 2016 Ms. Nelson had an adverse reaction to an email sent by her supervisor, Mr. Luis Diaz. She characterized the email as "unprofessional" and seemed to imply that managers have special privileges in the context of the issue raised [i.e., Petitioner's belief that as a manager, she was not required to have leave requests approved by Mr. Diaz].

* Ms. Nelson does not take the time to properly read and respond to emails in context. There is a sense of entitlement by Ms. Nelson that the Agency work is second priority to her needs.

* In or around March of 2017 Ms. Nelson had to be relocated to a different office after allegations that someone had sabotaged her office by spraying some foreign substance, which produced a strong odor, and "white residue" in her office.[3/] On March 9, 2017 I sent an email directly to Ms. Nelson about discontinuing the use of chemicals in her new office and sent a general email to all staff on the floor to the same effect after receiving complaints about "strong odors" in the vicinity of her new office. On the morning of March 17, 2017 I receive[d] more

complaints regarding a strong odor coming from her office. I reminded her of the previous email from the 9th. Additionally, during a meeting with Ms. Nelson on April 18, 2017 I [had] to remind Ms. Nelson of the policy concerning the closing of office doors which had previously been sent to all staff on 4/4/16, 9/16/16 and 11/18/16. I was informed by others in the area, during a different incident concerning her new office and foreign substances that she was still spraying things in her office, which may be why she continued to keep the door close[d].

* Ms. Nelson often escalates issue[s] unnecessarily, which contributes to confusion, conclusion jumping and increase[d] work for others.

* Ms. Nelson is confrontational and often misapplies Agency or other state policy in a manner that comes across as a veiled threat.

Most recently it came to my attention that Ms. Nelson may have attempted to encourage an employee to falsify their timesheet because they did not have any Annual Leave remaining and had a family issue. Based on the email sent by Ms. Nelson, it appears that she implied, on behalf of the employee, that they had to leave because they were not feeling well.

In summary, I am not sure how to continue with Ms. Nelson in the employ of the Agency or what next steps should be taken. Her behavior as a manager is disruptive to the portion of the Agency mission for which the Bureau of RPA is accountable.

Although Ms. Nelson has been a part of the Agency for more than 3 years, she seems not to have grasped the means to perform her duties in a constructive manner.

31. By letter dated May 18, 2017, Mr. Rich informed Petitioner that her services were no longer required by the Agency, effective at the close of business on that date.

32. At the hearing, Mr. Rich credibly testified that the termination was not based on the grievance filed by Petitioner eight months earlier, nor based on Petitioner's sex, race, or age. The termination was based on the documented instances of Petitioner's insubordination, her inability to resolve differences with management in a constructive manner, her accusatory communications, her inability to accept her own accountability when disputes arose, and the fact that her behavior was becoming increasingly disruptive to the work environment at the Agency both in and outside of the Bureau.

33. At the hearing, Petitioner essentially abandoned any claim that her dismissal was based on her race or her age. She offered no evidence or argument regarding race or age discrimination.

34. Petitioner's focus was on sex-based discrimination by Mr. Diaz. Petitioner asserted that Mr. Diaz's actions demonstrated that he has a "problem with women," and that her treatment by Mr. Diaz was motivated by his bias toward women. Petitioner offered no corroborating evidence regarding the female employees she claimed were moved from Mr. Diaz's supervision to hers. Petitioner also offered her personal view

that Mr. Diaz was generally more deferential to his male subordinates than to the females. Petitioner presented no other witnesses to corroborate her opinion on this point.

35. Mr. Diaz and Mr. Rich credibly testified that Petitioner never made a contemporaneous complaint to them that any of her many office disputes had anything to do with her sex.

36. Petitioner offered no credible evidence that any adverse employment actions taken against her had anything to do with her sex. The evidence established that Petitioner was a disputatious employee in the best of times. Her resentment at having Mr. Diaz elevated to the position of her supervisor led Petitioner to question and undermine virtually any action taken by Mr. Diaz, no matter how inconsequential.

37. Petitioner claimed that Mr. Diaz had conflicts with some female employees, but could point to no adverse actions Mr. Diaz ever took against her. Petitioner took great offense at Mr. Diaz's insistence that she submit leave requests like any other Agency employee. However, Petitioner's subjectively felt outrage does not transform this trivial workaday directive into an adverse employment action. Petitioner's termination was the only actual adverse employment action in this case and it was effectuated by Mr. Rich, the Bureau Chief, not Mr. Diaz.

38. The evidence established that, perhaps because of their prior relationships with Petitioner at ACS, Mr. Diaz and

Mr. Rich continued attempting to mollify and work with Petitioner well after Mr. Rich would have been justified in terminating her employment for insubordination and constant disruption of the workplace.

39. Subsequent to her dismissal by AHCA, Petitioner applied for a position at the Department of Highway Safety and Motor Vehicles ("DHSMV"). She interviewed for that job in August 2017. Petitioner stated, without corroboration, that DHSMV assured her that she would be hired if her references were good. In September 2017, Petitioner was advised that DHSMV would not be hiring her. From this sequence of events, Petitioner concluded that she was not hired by DHSMV either because AHCA gave her a negative reference or because of something inappropriate in her AHCA personnel file, in retaliation for actions while an employee of AHCA.

40. Petitioner offered no direct evidence that anyone from AHCA gave her a poor reference. She offered the testimony of Robert Kennedy, a person who agreed to let Petitioner use him as a reference. Mr. Kennedy testified that no one from DHSMV ever called him about Petitioner. Based on his experience in hiring employees, Mr. Kennedy found it "odd" that he was not contacted.

41. Jamie Skipper, Chief of the Agency's HR Bureau, testified that AHCA's policy on job references is to give only the job title, salary, and dates of employment, without any

qualitative assessment. AHCA will make the affected employee's personnel file available upon request. Ms. Skipper testified that all requests for employee references are routed through her office, and that her office had no record of DHSMV ever asking about Petitioner.

42. Ms. Skipper testified that she had no reason to believe anyone from DHSMV ever reviewed Petitioner's personnel file. In any event, Petitioner's personnel file simply reflects that she was involuntarily separated from AHCA in May 2017.

43. Mr. Diaz and Mr. Rich both testified that their consistent practice is to forward any employee reference requests to HR. Both men testified that they never received a reference request from anyone, including DHSMV, regarding Petitioner.

44. There is no record evidence that anyone, including DHSMV, sought an employment reference from AHCA about Petitioner or that anyone at the Agency provided a negative reference regarding Petitioner.

45. In summary, Petitioner offered no credible evidence that the Agency retaliated against her for engaging in protected activity.

46. Petitioner offered no credible evidence disputing the legitimate, non-discriminatory reason given by AHCA for her termination.

47. Petitioner offered no credible evidence that AHCA's stated reason for her termination was a pretext for discrimination based on Petitioner's race, age, or sex.

48. Petitioner offered no credible evidence that AHCA discriminated against her because of her race, age, or sex in violation of section 760.10.

CONCLUSIONS OF LAW

49. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

50. The Florida Civil Rights Act of 1992 (the "Florida Civil Rights Act" or the "Act"), chapter 760, prohibits employer retaliation for engaging in protected activity.

51. Section 760.10 states the following, in relevant part:

> (1) It is an unlawful employment practice for an employer:
>
> (a) To discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.
>
> * * *
>
> (7) It is an unlawful employment practice for an employer, an employment agency, a joint labor-management committee, or a labor organization to discriminate against any person because that person has opposed any

> practice which is an unlawful employment practice under this section, or because that person has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section.

52. AHCA is an "employer" as defined in section 760.02(7), which provides the following:

> (7) "Employer" means any person employing 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such a person.

53. Florida courts have determined that federal case law applies to claims arising under the Florida Civil Rights Act, and as such, the United States Supreme Court's model for employment discrimination cases set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), applies to claims arising under section 760.10, absent direct evidence of discrimination or retaliation.[4/] See Harper v. Blockbuster Entm't Corp., 139 F.3d 1385, 1387 (11th Cir. 1998); Paraohao v. Bankers Club, Inc., 225 F. Supp. 2d 1353, 1361 (S.D. Fla. 2002); Fla. State Univ. v. Sondel, 685 So. 2d 923, 925 n.1 (Fla. 1st DCA 1996); Fla. Dep't of Cmty. Aff. v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991).

54. Under the McDonnell analysis, in employment discrimination cases, Petitioner has the burden of establishing, by a preponderance of evidence, a prima facie case of unlawful

discrimination. If the prima facie case is established, the burden shifts to the employer to rebut this preliminary showing by producing evidence that the adverse action was taken for some legitimate, non-discriminatory reason. If the employer rebuts the prima facie case, the burden shifts back to Petitioner to show by a preponderance of evidence that the employer's offered reasons for its adverse employment decision were pretextual. See Texas Dep't of Cmty. Aff. v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981).

55. In order to prove a prima facie case of unlawful employment discrimination under chapter 760, Petitioner must establish that: (1) she is a member of the protected group; (2) she was subject to adverse employment action; (3) AHCA treated similarly situated employees outside of her protected classifications more favorably; and (4) Petitioner was qualified to do the job and/or was performing her job at a level that met the employer's legitimate expectations. See, e.g., Jiles v. United Parcel Serv., Inc., 360 Fed. Appx. 61, 64 (11th Cir. 2010); Burke-Fowler v. Orange Cnty, 447 F.3d 1319, 1323 (11th Cir. 2006); Knight v. Baptist Hosp. of Miami, Inc., 330 F.3d 1313, 1316 (11th Cir. 2003); Williams v. Vitro Servs. Corp., 144 F.3d 1438, 1441 (11th Cir. 1998); McKenzie v. EAP Mgmt. Corp., 40 F. Supp. 2d 1369, 1374-75 (S.D. Fla. 1999).

56. Petitioner has failed to prove a prima facie case of unlawful employment discrimination.

57. Petitioner is an African American female who was 48 years old at the time her employment with AHCA was terminated. She is therefore a member of a protected group.

58. Petitioner was fired from her position with AHCA and was therefore subject to an adverse employment action.

59. As to the question of disparate treatment, the applicable standard was set forth in Maniccia v. Brown, 171 F.3d 1364, 1368-1369 (11th Cir. 1999):

> "In determining whether employees are similarly situated for purposes of establishing a prima facie case, it is necessary to consider whether the employees are involved in, or accused of, the same or similar conduct and are disciplined in different ways." Jones v. Bessemer Carraway Med. Ctr., 137 F.3d 1306, 1311 (11th Cir.), opinion modified by 151 F.3d 1321 (1998) (quoting Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997)). "The most important factors in the disciplinary context are the nature of the offenses committed and the nature of the punishments imposed." Id. (internal quotations and citations omitted). We require that the quantity and quality of the comparator's misconduct be nearly identical to prevent courts from second-guessing employers' reasonable decisions and confusing apples with oranges. See Dartmouth Review v. Dartmouth College, 889 F.2d 13, 19 (1st Cir. 1989) ("Exact correlation is neither likely nor necessary, but the cases must be fair congeners. In other words, apples should be compared to apples.").[5/] (Emphasis added).

60. Petitioner offered no evidence as to disparate treatment of similarly situated employees outside of her protected classification, aside from uncorroborated allegations that her supervisor, Luis Diaz, had a "problem with women" and treated male subordinates more respectfully than he did females. She pointed to no specific action or statement by Mr. Diaz that evidenced discrimination against her, much less against a similarly situated comparator. Having failed to establish the disparate treatment element, Petitioner has not established a prima facie case of employment discrimination.

61. The evidence demonstrated that Petitioner was not performing her job at a level that met her employer's legitimate expectations. Petitioner was insubordinate to her superiors and disruptive to the workplace. She had a chip on her shoulder regarding Mr. Diaz and was on the constant lookout for things to which she could take offense. Instead of resolving her disputes with Mr. Diaz at the staff level, Petitioner insisted on taking them to her Bureau Chief, Mr. Rich. Petitioner demonstrated an inability to work as part of a team or to prioritize the needs of her employer above her personal conflicts. Petitioner submitted a false statement in order to assist another employee in taking leave to which she was not entitled.

62. Even if Petitioner had met the burden, AHCA presented ample evidence of legitimate, non-discriminatory reasons for

Petitioner's termination. All of the factors set forth in the preceding paragraph, described in greater detail in Mr. Rich's May 2, 2017, memorandum, see Finding of Fact 30, supra, demonstrate that AHCA had more than adequate reason to terminate Petitioner's employment because of her deleterious effect on the workplace.

63. As to Petitioner's retaliation claim, the court in Blizzard v. Appliance Direct, Inc., 16 So. 3d 922, 926 (Fla. 5th DCA 2009), described the elements of such a claim as follows:

> To establish a prima facie case of retaliation under section 760.10(7), a plaintiff must demonstrate: (1) that he or she engaged in statutorily protected activity; (2) that he or she suffered adverse employment action and (3) that the adverse employment action was causally related to the protected activity. See Harper v. Blockbuster Entm't Corp., 139 F.3d 1385, 1388 (11th Cir.), cert. denied 525 U.S. 1000, 119 S.Ct. 509, 142 L.Ed.2d 422 (1998). 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. Colorado Dep't of Transp., 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.

64. Petitioner failed to prove that any employment or post-employment action by AHCA was causally related to her statutorily protected activity of filing a grievance with HR alleging a hostile working environment and a "gender related

issue." The Office of Inspector General investigated Petitioner's allegations and found them unproven. Petitioner's superiors were unaware of the grievance at the time it was filed and took little notice of it once they were notified that the investigation was complete. Mr. Rich continued working with Petitioner for another eight months after her grievance was resolved. He conscientiously tried to establish a way forward for Petitioner to continue working at AHCA, but was ultimately unable to obtain any reasonable level of cooperation from her.

65. Even if Petitioner had met her burden and established a prima facie case of retaliation, she failed to show that AHCA's legitimate business reasons for its decisions were false and a pretext for retaliation. To establish pretext, Petitioner must "cast sufficient doubt" on the AHCA's proffered nondiscriminatory reasons "to permit a reasonable factfinder to conclude that the [employer's] proffered legitimate reasons were not what actually motivated its conduct." Murphree v. Comm'r, 644 Fed. Appx. 962, 968 (11th Cir. 2016)(quoting Combs v. Plantation Patterns, 106 F.3d 1519, 1538 (11th Cir. 1997)). 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)(quoting Earley v. Champion Int'l Corp., 907 F.2d 1077, 1081 (11th Cir. 1990)).

66. Petitioner failed to provide evidence that AHCA's proffered reasons for the supervisory actions taken by Mr. Diaz and Mr. Rich were pretextual or used as a means of surreptitious retaliation against Petitioner. There was no evidence that any of Mr. Diaz's or Mr. Rich's supervisory decisions had anything to do with Petitioner's discrimination grievance.

67. In summary, Petitioner failed to establish that any employment action taken by the Agency was in retaliation for Petitioner's having engaged in protected activities.

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 the Agency for Health Care Administration did not commit any unlawful employment practices and dismissing the Petition for Relief filed in this case.

DONE AND ENTERED this 21st day of August, 2019, in Tallahassee, Leon County, Florida.

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

Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of August, 2019.

ENDNOTES

[1/] Citations shall be to Florida Statutes (2017) unless otherwise specified. Section 760.10 has been unchanged since 1992, save for a 2015 amendment adding pregnancy to the list of classifications protected from discriminatory employment practices. Ch. 2015-68, § 6, Laws of Fla.

[2/] The 10-day deadline was explained to Petitioner on the record at the conclusion of the final hearing. Petitioner was also told that the undersigned is "fairly liberal" about granting extensions of the deadline and was told how to request an extension. No extension was requested.

[3/] On the point of the "strong odor," Mr. Rich's recollection is inaccurate. Petitioner testified that the white substance was odorless. The complaints about strong odors came from other people in the office and were directed at Petitioner's use of potent air fresheners.

[4/] "Direct evidence is 'evidence, which if believed, proves existence of fact in issue without inference or presumption.'" Rollins v. TechSouth, Inc., 833 F.2d 1525, 1528 n.6 (11th Cir. 1987) (quoting Black's Law Dictionary 413 (5th ed. 1979)). "Only the most blatant remarks, whose intent could be nothing

other than to discriminate on the basis of a protected classification, constitute direct evidence." Kilpatrick v. Tyson Foods, Inc., 268 Fed. Appx. 860, 862 (11th Cir. 2008)(citation omitted). Direct testimony that a defendant acted with a retaliatory motive, if credited by the finder of fact, would change the legal standard "dramatically" from the McDonnell test. Bell v. Birmingham Linen Serv., 715 F.2d 1552, 1557 (11th Cir. 1983). Petitioner offered no evidence that would satisfy the stringent standard of direct evidence of discrimination or retaliation.

[5/] The Eleventh Circuit has questioned the "nearly identical" standard enunciated in Maniccia, but has, in recent years, reaffirmed its adherence to it. See, e.g., Brown v. Jacobs Eng'g, Inc., 572 Fed. Appx. 750, 751 (11th Cir. 2014); Escarra v. Regions Bank, 353 Fed. Appx. 401, 404 (11th Cir. 2009); Burke-Fowler, 447 F.3d at 1323 n.2.

COPIES FURNISHED:

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

Bridget D. Nelson
3001 Mock Drive
Tallahassee, Florida 32301

Susan Sapoznikoff, Esquire
Agency for Health Care Administration
Mail Stop 3
2727 Mahan Drive
Tallahassee, Florida 32308
(eServed)

Andrew Taylor Sheeran, Esquire
Agency for Health Care Administration
Mail Stop 3
2727 Mahan Drive
Tallahassee, Florida 32308
(eServed)

Cheyanne Costilla, General Counsel
Florida Commission on Human Relations
4075 Esplanade Way, Room 110
Tallahassee, Florida 32399-7020
(eServed)

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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