

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

SALANA TYSON,

Petitioner,

vs.

Case No. 19-3672

ALACHUA COUNTY TAX COLLECTOR,

Respondent.

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RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on November 20 and 21, 2019, in Gainesville, Florida, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge (“ALJ”) of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Salana Tyson, pro se  
21812 Northwest 210th Avenue  
High Springs, Florida 32643

For Respondent: William H. Andrews, Esquire  
Gray Robinson, P.A.  
Suite 1100  
50 North Laura Street  
Jacksonville, Florida 32202-3611

STATEMENT OF THE ISSUES

The issues are whether Respondent, Alachua County Tax Collector, discriminated against Petitioner based upon her race, in violation of section

760.10, Florida Statutes,<sup>1</sup> and/or whether Respondent retaliated against Petitioner for the exercise of protected rights under section 760.10.

PRELIMINARY STATEMENT

On June 1, 2018, Petitioner, Salana Tyson (“Ms. Tyson” or “Petitioner”), filed with the Florida Commission on Human Relations (“FCHR”) an Employment Complaint of Discrimination against the Alachua County Tax Collector (“Tax Collector”). Ms. Tyson alleged that she had been discriminated against pursuant to chapter 760 and Title VII of the Federal Civil Rights Act, based upon her race and color, and that the Tax Collector had retaliated against her, resulting in the termination of her employment.

The FCHR conducted an investigation of Ms. Tyson’s allegations. On June 5, 2019, the FCHR issued a written determination that there was no reasonable cause to believe that an unlawful practice occurred. The FCHR’s amended determination stated as follows, in relevant part:

Complainant worked for Respondent most recently as a Coordinator. She was employed with Respondent for 24 years before she was terminated. Complainant alleged that Respondent discriminated against her due to her race and color, and that Respondent retaliated against her for engaging in a protected activity. However, the investigation did not support her allegations. The investigation revealed that Complainant was insubordinate to her superiors, which led to her termination. Although Complainant provided affidavits attesting to her character and pleasant nature as an employee, Respondent provided affidavits stating that Complainant was difficult to work with and that one customer specifically requested that Complainant not interact with the customer in the future. Complainant had been

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<sup>1</sup> Citations shall be to Florida Statutes (2019) 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.

disciplined previously for her behavior and received a low score in her performance review for attendance. The investigation did not reveal any evidence that Complainant was treated less favorably than any other employee due to her race or color. Additionally, the investigation did not reveal that those in charge of Complainant's employment were aware that she engaged in any protected activity that could lead to unlawful retaliation under the Florida Civil Rights Act. Therefore, it is not reasonable to believe that Respondent discriminated against Complainant.

On July 10, 2019, Ms. Tyson timely filed a Petition for Relief with the FCHR. On July 11, 2019, the FCHR referred the case to the Division of Administrative Hearings (“DOAH”) for the assignment of an ALJ and the conduct of a formal hearing. The final hearing was initially scheduled for September 17 and 18, 2019. Petitioner filed a motion for continuance that was granted by Order dated September 4, 2019. The hearing was rescheduled for November 20 and 21, 2019, on which dates it was convened and completed.

At the hearing, Ms. Tyson testified on her own behalf and presented the testimony of: former Tax Collector employees Isaiah Minter, Toya Williams, and Marina Bethany; car dealer Anthony Brown; former Tax Collector interns Ashley Depeiza and Amber Allen; Ms. Depeiza’s mother, Gale Depeiza; and current Tax Collector employees Shannon Blankenship, Colette True, Kimberley Reshard, Brenda Martinez, Lori Carmichael, and Donna Johnson. Ms. Tyson also offered rebuttal testimony. Petitioner’s Composite Exhibit 1 was admitted into evidence. Respondent presented the testimony of Tax Collector John Power and Tax Collector employees Venus McCray, Veronica Taylor, and Jon Costabile. Mr. Costabile also presented brief rebuttal testimony. Respondent’s Exhibits 1 through 34 were admitted into evidence.

The two-volume Transcript of the final hearing was filed with DOAH on February 4, 2020. Multiple extensions of the time for filing proposed recommended orders were granted. In keeping with the last Order Granting Extension, the parties filed their Proposed Recommended Orders on March 10, 2020. The Proposed Recommended Orders have been duly considered in the writing of this Recommended Order.

On March 17, 2020, Respondent filed a Motion to Strike Portions of Petitioner's Proposed Recommended Order. The Motion is hereby denied.

#### FINDINGS OF FACT

Based on the evidence adduced at hearing, and the record as a whole, the following Findings of Fact are made:

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

2. Ms. Tyson is an African American female who worked for the Tax Collector from 1993 until her employment was terminated on June 22, 2017.

3. John Power is the elected Alachua County Tax Collector. Below him in the chain of command is Jon Costabile, the Chief Deputy Tax Collector. Directly below Mr. Costabile is Executive Director Donna Johnson.

4. The Tax Collector has four offices in Gainesville: Downtown, Southwest, Northwest, and a Communication and Processing Center (the "CPC"). Each of these offices is supervised by a branch Director who reports to Ms. Johnson. Two supervisors called Coordinators directly report to each Director.

5. At the time of her dismissal, Ms. Tyson was a Coordinator at the Downtown office. The other Coordinator at the Downtown office was Veronica Taylor, also an African American female.

6. Ms. Tyson's employee evaluations over the years were generally positive as to her performance. However, she had a reputation, at least among her fellow supervisory employees, of being temperamental and

difficult to work with. Her ultimate dismissal was based on her insubordinate conduct, not her job performance.

7. The series of events leading to Ms. Tyson's dismissal began in Spring 2017, when the decision was made to move Lori Carmichael, the Director of the Downtown office, to the CPC facility. This move created a vacancy in the Downtown office.

8. For supervisory positions, the Tax Collector seeks to promote internally. Mr. Costabile testified that the pool for the vacant Director position comprised the current branch Coordinators, including Ms. Tyson. Mr. Costabile and Ms. Johnson consulted the Directors regarding their recommendations for the position.

9. Mr. Costabile testified that Venus McCray, a Coordinator in the Southwest office, was the clear number one choice for the Downtown Director position. All of the Directors agreed on the choice of Ms. McCray, who is African American. Not only was Ms. McCray the unanimous choice of the other Directors, but she was senior to Ms. Tyson in the Tax Collector's office.

10. Mr. Costabile testified that the Directors are a close knit group that works closely together. Two of the Directors told him point-blank that they did not want to work with Ms. Tyson. There were no specific complaints about Ms. Tyson, just a general feeling that she was "standoffish" and people had to "walk on eggshells" around her.

11. Ms. Tyson testified that Ms. Carmichael recommended her for the Downtown Director position. In her testimony, Ms. Carmichael was generally positive about Ms. Tyson but did not confirm that she recommended her as Director.

12. Ms. Carmichael did confirm Ms. Tyson's testimony that, upon learning of Ms. McCray's promotion, Ms. Tyson asked Ms. Carmichael why she was passed over for promotion. Ms. Carmichael agreed to take up the issue with Ms. Johnson, who told her that Ms. Tyson had a propensity for ignoring the

Directors and needed to make an effort to be more interactive and look people in the eye. Ms. Carmichael passed this information on to Ms. Tyson.

13. Ms. Tyson testified that Ms. Johnson was referring to occasions when Directors from other offices would visit the Downtown office. She stated that these were four white women who would not acknowledge her when she spoke to them, or at best would “smirk” at her. Ms. Tyson felt insulted by their behavior. She told Ms. Carmichael that Ms. Johnson’s advice was demeaning, inhumane, and “slave-ish.”

14. Ms. McCray testified that she had “bumped heads” with Ms. Tyson in the past and therefore had some reservations about accepting the Downtown position. Her misgivings appeared justified when she went to the office to shadow Ms. Carmichael before taking over her position. Ms. Carmichael was not there when Ms. McCray arrived, so she spoke to Ms. Tyson and Ms. Taylor, the two Coordinators in the Downtown office.

15. Ms. Tyson asked Ms. McCray why she had not personally contacted her to tell her about her promotion. Ms. McCray responded that she had been told not to discuss the promotion before the official announcement. This answer did not satisfy Ms. Tyson. The conversation was uncomfortable enough that Ms. Taylor felt compelled to walk away and give privacy to the other two women.

16. After taking over as Director, Ms. McCray would have regular meetings with her Coordinators. She testified that Ms. Taylor was positive and cooperative but Ms. Tyson was consistently disagreeable. Ms. McCray testified that she dreaded coming to work in the morning knowing she had to deal with Ms. Tyson.

17. At a meeting on June 19, 2017, Ms. McCray was questioning her Coordinators about the duties of office personnel, trying to get a feel for the daily operation of the Downtown office. Ms. McCray testified that Ms. Tyson studiously avoided making any eye contact with her. Ms. Tyson sat with her head down. She doodled on a piece of paper while Ms. McCray spoke.

Ms. McCray asked Ms. Tyson to please do her the courtesy of looking her in the eye. Ms. Tyson said, "I don't have to," and continued scribbling on the paper.

18. Ms. Tyson testified that she was taking thorough notes during the meeting. She stated that she takes pain medications for carpal tunnel syndrome and wants to be sure she gets things right because she does not want her superiors blaming mistakes on her medications. Ms. Tyson testified that when Ms. McCray asked her to look her in the eye, she looked up and asked Ms. McCray why she needed to look her in the eye while taking notes.

19. Ms. McCray's version of the June 19, 2017, meeting is more believable. Ms. McCray is credited with knowing the difference between avid notetaking and idle scribbling. It is noted that even Ms. Tyson's version of the meeting presents Ms. Tyson as defensive and somewhat truculent toward her superior.

20. Mr. Costabile testified that after she had been at the Downtown office for a couple of weeks, Ms. McCray requested a meeting with Ms. Johnson and him to discuss her difficulties with Ms. Tyson. Ms. McCray stated that she might have to go back to being a Coordinator in a different office if the situation did not improve. Mr. Costabile recalled Ms. McCray stating that she did not want to be a Director if it was going to affect her health.

21. Mr. Power testified that Ms. Johnson came to him with concerns about Ms. Tyson's acceptance of Ms. McCray as her Director. Ms. Johnson reported that Ms. Tyson was being very disrespectful and difficult to work with. Mr. Power testified that he took this matter seriously because Ms. Johnson does not come to him with personnel matters unless they are important.

22. Mr. Power testified that Ms. McCray herself spoke to him after a morning meeting at the Northwest office. She told him that things were not going well and he responded that he had heard about the problem. Ms. McCray told him that Ms. Tyson was being disrespectful, embarrassing,

and disruptive. Mr. Power advised her to give the situation some time to sort itself out.

23. The Downtown office opened to the public at 8:30 a.m. It was Ms. McCray's practice to hold an all-employees meeting at 8:15 each morning. On the morning of June 22, 2017, Mr. Power, Mr. Costabile, and Ms. Johnson happened to be present at the meeting. Ms. McCray stood at the front of the group, flanked by her Coordinators, Ms. Tyson and Ms. Taylor.

24. Ms. McCray convened the meeting and announced that she wanted the employees to set personal and professional goals for themselves. She distributed "goal sheets" for each employee to fill out. This exercise served the dual purpose of helping the employees establish priorities and helping Ms. McCray get to know them better. The general feeling in the room was enthusiastic support for Ms. McCray's idea.

25. The meeting lasted about 15 minutes. Everyone in the room was oriented toward, and listening to, Ms. McCray, except for Ms. Tyson. Ms. Tyson stood with her arms folded across her chest, ostentatiously turned away from Ms. McCray. She stared at the ceiling, apparently uninterested, while Ms. McCray spoke.

26. At the conclusion of her presentation, Ms. McCray turned to her Coordinators to ask if they had anything to add. She first asked Ms. Taylor, who responded that she thought the goal setting exercise was a good idea. Ms. McCray then asked Ms. Tyson if she had anything to add. Without looking away from the ceiling or turning toward Ms. McCray, she said, "Nope."

27. The testimony of Mr. Power, Mr. Costabile, Ms. McCray, and Ms. Taylor all agreed on the facts as set forth in the previous two paragraphs. Ms. Tyson stood in front of all the Downtown employees and all her superiors in the Tax Collector's office in a manner clearly intended to convey contempt



for Ms. McCray. Each of these witnesses heard Ms. Tyson answer “nope” to Ms. McCray’s question.<sup>2</sup>

28. Ms. Tyson testified that she was turned away from Ms. McCray because she was speaking to another employee. She stated that her arms are always crossed because of her severe pain. She testified that the state of her C5 and C7 vertebrae make it impossible for her to look at the ceiling for 15 minutes. She stated that it is “not my nature” to turn away from Ms. McCray and that “nope’ is not in my vocabulary.” Given the unanimity of the contrary testimony, Ms. Tyson’s version of the June 22, 2017, meeting cannot be credited.

29. Mr. Power testified that Ms. Tyson’s behavior at the meeting left him aghast. Her body language indicated she was removing herself from the meeting, though as a supervisor she was expected to set an example for the front line employees. Mr. Power stated that he “about fell on the floor” when Ms. Tyson said “nope” in answer to Ms. McCray’s question.

30. After the meeting, Mr. Power retired to his office to ponder his options as to Ms. Tyson. He had been hearing reports about Ms. Tyson’s behavior for the past month and now he had seen it with his own eyes. Ms. Tyson was a leader in the organization and had blatantly shown disrespect to a member of senior management in front of all the Downtown staff. She was advertising her opinion that no one should listen to Ms. McCray.

31. Mr. Power decided that Ms. Tyson’s employment should be terminated. He directed Mr. Costabile to release Ms. Tyson from the Tax Collector’s office.

32. Mr. Costabile prepared the paperwork and convened the termination meeting with Ms. Tyson. Also present at the meeting was Human Resources Administrator Linda Power, whose only function was to serve as a witness.

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<sup>2</sup> It is possible to answer “nope” in a way that conveys a positive attitude toward the questioner. However, each of these witnesses demonstrated the contemptuous manner in which Ms. Tyson spoke the word.

The meeting was brief. Mr. Costabile told Ms. Tyson that her insubordination was a serious matter. He stated that every employee needs to accept change, but Ms. Tyson was apparently unable to accept Ms. McCray's promotion. Ms. Tyson was a member of management and was expected to set an example for her subordinates.

33. The Tax Collector's policy is to offer an employment resignation agreement, waiver, and release when a long-term employee is terminated for cause, in lieu of termination. The agreement includes a severance package. Ms. Tyson declined to accept the offer to resign. Mr. Costabile terminated her employment effectively immediately.

34. Ms. Tyson testified that Mr. Costabile told her that she was being fired for failing to look Donna Johnson in the eye at the morning meeting. Ms. Tyson responded that Donna Johnson wasn't speaking at the meeting. "Why would I be looking her in the eye?" She testified that Mr. Costabile told her she was bringing down the morale of the office and that people were complaining.

35. Mr. Costabile credibly denied telling Ms. Tyson she was being fired for not looking someone in the eye.

36. Ms. Tyson's position as Coordinator was ultimately filled by Christie Tyson, a white woman who is not related to Ms. Tyson. Ms. McCray testified that Ms. Johnson asked her whether she thought the job should go to Christie Tyson or to Regina Gainey, an African American woman. Ms. McCray testified that she recommended Christie Tyson, based on prior experience of working with her. Ms. Taylor, the other Coordinator in the Downtown office, also recommended Christie Tyson.<sup>3</sup>

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<sup>3</sup> Ms. Tyson made an issue of the fact that Christie Tyson and Donna Johnson share a grandson. However, given the unanimity of the recommendation, it is found that Ms. Johnson did not improperly favor Christie Tyson. Furthermore, whether Ms. Tyson's replacement had a familial relationship with one of her former superiors has nothing to do with whether Ms. Tyson was terminated on the basis of her race.

37. Ms. Tyson believed that her dismissal had been in the works since April, and that Christie Tyson had been “groomed” to take her place. She saw a nefarious connection between Ms. Johnson’s advice that she greet and look the Directors in the eye and Ms. McCray’s request that she look her in the eye at the June 19 meeting. She offered no supporting evidence for her intuitions.

38. Ms. Tyson testified that because the Tax Collector’s office was planning to fire her, a black woman, they needed another black woman to take her place in order to fend off public complaint. She further testified, without support, that Ms. McCray was a useful pawn in that regard, willing to lie about her interactions with Ms. Tyson to advance her own career.

39. Ms. Tyson testified that after being told multiple times to look people in the eye, she was sure that something was up. She stated that she went to Veronica Taylor’s office and told her she knew she would not be around much longer. Ms. Taylor did not confirm this incident in her testimony.

40. Ms. Tyson testified that, a day or so after her conversation with Ms. Taylor, she accidentally bumped into Mr. Power in the office, and he said to her, “You look like the type that will fight.” Ms. Tyson stated that this scared her because she did not know why he would say that. She went to her office and scoured her notes looking for what she had done wrong. She tearfully phoned her mother and asked for her prayers because she was about to be fired.

41. Mr. Power flatly and credibly denied telling Ms. Tyson that she looked like she would fight.

42. Ms. Tyson presented the testimony of other Tax Collector employees who believed there was an element of racism in the running of the office. Isaiah Minter, an African American male, worked in the Tax Collector’s office in a non-supervisory capacity from 2013 to 2015. Ms. Tyson was his Coordinator. He testified that he came to the job with a bachelor’s degree from the University of Florida and experience as a driver’s license examiner.

He expected to advance quickly. He was upset when Ms. Johnson told him that he would have to prove himself and that it might take five years for him to be promoted into a supervisory job. He was offended that Mr. Power told him he was needed at the front desk. Mr. Minter left the Tax Collector's office in good standing to take a job at the Veterans Administration.

43. Moranda Bethley, an African American female, worked in the Tax Collector's office from December 2003 until March 2017. She worked with Ms. Tyson at the Northwest and Downtown offices. Ms. Bethley described Ms. Tyson as a "saint," always friendly, personable, positive, and helpful.

44. Ms. Bethley testified that there was no room for black people to advance in the Tax Collector's office. The supervisors would tell the black employees they were doing a good job, keep up the good work, but would never offer a promotion. The white supervisors were less interested in helping than in pointing the finger at the employee seeking help. Ms. Bethley would seek out the assistance of Ms. Tyson rather than her own supervisor because of the latter's negativity.

45. Ms. Bethley resigned in lieu of termination as a result of her persistent practice of disruptive behavior in the workplace, culminating in a weeks-long conflict with a fellow employee that could not be resolved and that escalated to the point that management concluded that Ms. Bethley's employment was no longer tenable. The weight given to Ms. Bethley's testimony as to the atmosphere of the office is lessened by the evidence of her own unprofessional behavior.

46. Toya Williams, an African American female, worked at the Tax Collector's office from 2013 until May 11, 2017. Ms. Tyson supervised her for at least part of that time. She found it unsettling that in her two interviews for positions with the agency, she met with two white males and five white females. She asked questions about the racial mix of personnel and was assured that progress would come. Ms. Williams testified that in her four years, she never served under a Director of color.

47. Ms. Williams initially worked at the Southwest office, where there was a lot of “cliquish foolery.” The Director was incompetent, unable to explain the work they were doing. Venus McCray was one of the Coordinators and was the only knowledgeable supervisor in the office. At one point, Ms. McCray asked the employees to stop coming to her for help so often, because the Director and the other Coordinator had noticed that no one ever sought their assistance.

48. Ms. Williams immediately felt a difference when she moved to the Downtown office. There were frequent morning meetings and Ms. Tyson went out of her way to greet everyone in the morning. Ms. Tyson was good for morale. If an employee made a mistake, she used it as a teaching method rather than an opportunity to castigate the employee.

49. Ms. Williams testified to being shocked when Mr. Power referred to the Downtown office as the “ghetto office” at a morning meeting. She wondered whether he gave it that name because it was in a decrepit old building, or because it was the only office with two black Coordinators and was located in a part of town where many black people lived.

50. Ms. Williams resigned from the Tax Collector’s office as an employee in good standing to accept another job.

51. Amber Allen, an African American female, worked as an intern at the Tax Collector’s office from 2013 through March 2016. Ms. Allen testified that she worked with Ms. Tyson at the Downtown office and that Ms. Tyson was the only reason she stayed as long as she did. Ms. Tyson encouraged her to focus on her work instead of office politics and the racism of the white supervisors.

52. Ms. Allen testified that one day she changed into flat shoes before going out into the street for her lunch hour. Ms. Johnson told her that her overall demeanor, appearance, and hairstyle were too relaxed for the Tax Collector’s professional environment. Ms. Allen stated that on that day, she had pinned up her hair on one side. The other side was in an Afro style.

53. Ms. Allen testified that she spent the rest of that lunch hour on the phone crying to her mother, asking why she was required to gauge how black she was allowed to look at work. She wanted to quit the job, but Ms. Tyson took her into her office and counseled her to advocate for herself in the office, but not in a disrespectful or demeaning way.

54. Ms. Allen testified that Ms. Johnson never made any more comments about her relaxed appearance but that she did make comments about her hair. Ms. Allen found this especially galling because her white counterparts would arrive at work with hair so wet that it soaked the backs of their chairs and their shirts, but Ms. Johnson said nothing. Ms. Allen stated that Ms. Johnson's comments made her feel small.

55. Ms. Allen testified that she was also at the meeting at which Mr. Power referred to the Downtown office as the ghetto office. Mr. Power stated that the office dealt with many different types of people, many of them unsavory. He also mentioned that much of the Downtown client base came from the east side of Gainesville, known as a minority area. Ms. Allen was certain that Mr. Power was not referring to the physical condition of the building, but the people who were being served in the building. She testified that a number of black employees found the comments "disgusting."

56. Mr. Power testified that he indeed referred to the Downtown office as the ghetto office at a morning meeting. He stated that he used that term because the building was in a "deplorable condition," like a building in a ghetto. It was embarrassing to the staff. One day, a rat fell through the ceiling in the middle of work. Mr. Power testified that his use of "ghetto" referred only to the building, not to any of the building's customers. He stated that he would not use "east side" as a pejorative term, if for no other reason than because he lives on the east side.

57. Copious evidence was presented attesting to Mr. Power's personal and professional involvement in the African American community of Alachua County. There is little question that Mr. Power does not harbor any

animosity or personal discriminatory feelings toward African Americans. However, this finding is not inconsistent with Ms. Tyson's allegation that there is an element of institutional racism at work in the Tax Collector's office.

58. The testimony of Petitioner's supporting witnesses should not be minimized. It is clear that the Tax Collector has at least a perception problem. Rightly or wrongly, some African American employees believe that their working environment and path to advancement are tainted by racism. It might prove fruitful for Mr. Power to institute a program of institutional soul-searching on the question.

59. That being said, the purpose of this proceeding is not to undertake a systemic analysis of racism in the Tax Collector's office. This proceeding is limited to the question of whether the adverse employment action taken against Ms. Tyson was an act of racial discrimination. The overwhelming evidence is that it was not.

60. Ms. Tyson presented no persuasive evidence that comparable employees outside of her protected group were treated differently. She alleged that a white supervisor named Valerie Jerkins had a practice of clocking in to the workplace then leaving without clocking out, thus stealing time from the Tax Collector, without being subject to any adverse employment action. Ms. Tyson had no firsthand knowledge of this alleged behavior.

61. The only employee claiming direct knowledge of Ms. Jerkins's behavior was Ms. Bethley, who claimed that she reported the matter to Ms. Johnson. None of the supervisory employees who testified, including Ms. Johnson, had any recollection of having received a report or complaint of Ms. Jerkins stealing time.

62. Mr. Costabile testified as to a former employee named Tracy Jones, a Caucasian woman who held several positions in the Tax Collector's office and was a Director at the time her employment was terminated in June 2018.

Ms. Johnson had asked Ms. Jones to accept a reassignment. Ms. Jones proceeded to announce her displeasure to other employees and customers. Ms. Jones was dismissed for insubordination.

63. In summary, it is found that the decision to terminate Ms. Tyson's employment was based entirely on her own behavior. It is clear that Ms. Tyson's bitterness at being passed over for the Director's job poisoned her relationship with Ms. McCray and led her to behave in a manner so startlingly unprofessional that Mr. Power saw no option but to dismiss her.<sup>4</sup>

64. Ms. Tyson offered no evidence that, prior to her termination, she opposed any discriminatory practices at the Tax Collector's office, or that she participated in an investigation, proceeding, or hearing challenging discriminatory practices at the Tax Collector's office. Ms. Tyson offered no evidence to support her allegation that the Tax Collector retaliated against her for engaging in protected activity.

65. Ms. Tyson offered no credible evidence disputing the legitimate, non-discriminatory reason given by the Tax Collector for her termination.

66. Ms. Tyson offered no credible evidence that the Tax Collector's stated reason for her termination was a pretext for discrimination based on her race or color.

67. Ms. Tyson offered no credible evidence that the Tax Collector discriminated against her because of her race or color in violation of section 760.10.

#### CONCLUSIONS OF LAW

68. 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.

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<sup>4</sup> The undersigned has not ignored Ms. Tyson's testimony that she was not upset at being passed over for the promotion because Ms. McCray was senior to her in the organization. When assessed in light of her behavior toward Ms. McCray, Ms. Tyson's testimony on this point is not credible.



69. The Florida Civil Rights Act of 1992 (the “Florida Civil Rights Act” or the “FCRA”), chapter 760, prohibits discrimination in the workplace.

70. 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.

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(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.

71. The Tax Collector 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.

72. 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. 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).

73. “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)). In *Carter v. City of Miami*, 870 F.2d 578, 582 (11th Cir. 1989), the court stated:

This Court has held that not every comment concerning a person's age presents direct evidence of discrimination. [*Young v. Gen. Foods Corp.*, 840 F.2d 825, 829 (11th Cir. 1988)]. The *Young* Court made clear that remarks merely referring to characteristics associated with increasing age, or facially neutral comments from which a plaintiff has inferred discriminatory intent, are not directly probative of discrimination. *Id.* Rather, courts have found only the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of age, to constitute direct evidence of discrimination.

Petitioner offered no evidence that would satisfy the stringent standard of direct evidence of discrimination.

74. 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).

75. 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) the Tax Collector 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 Cty*, 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).

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

77. Petitioner is an African American female and is therefore a member of a protected group.

78. Petitioner was fired from her position with the Tax Collector and was therefore subject to an adverse employment action.

79. As to the question of disparate treatment, the applicable standard was set forth in *Maniccia v. Brown*, 171 F.3d 1364, 1368-69 (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.”).[<sup>5</sup>] (emphasis added).

80. Petitioner offered no evidence as to disparate treatment of similarly situated employees outside of her protected classification, aside from allegations that a white supervisory employee, Valerie Jerkins, had stolen time from the Tax Collector with impunity. The allegation was not adequately substantiated. The Tax Collector offered evidence that a Caucasian Director, Tracy Jones, was fired for insubordination that was substantially similar to the actions that led to Ms. Tyson’s dismissal. Having failed to establish the disparate treatment element, Petitioner has not established a prima facie case of employment discrimination.

81. The evidence demonstrated that Petitioner was not performing her job at a level that met her employer’s legitimate expectations. Ms. Tyson was insubordinate to her superiors and disruptive to the workplace. Her behavior in meetings with Ms. McCray prior to June 22, 2017, had caused Mr. Power, Mr. Costabile, and Ms. Johnson to take notice and become concerned with the situation in the Downtown office. When Ms. Tyson exercised the stunningly poor judgment to openly flout her contempt for Ms. McCray at an all-hands meeting attended by all of her superiors in the Tax Collector’s office, Mr. Power saw no alternative to terminating her employment. One could cavil that Mr. Power might have done more to salvage the career of a long-

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<sup>5</sup> 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.

time employee, but one could not argue that Mr. Power was motivated by anything other than the morale and good order of his office or that Ms. Tyson had not earned the discipline she received.

82. Even if Petitioner had met the burden, Respondent presented ample evidence of legitimate, non-discriminatory reasons for Petitioner's termination. All of the factors set forth in the preceding paragraph, combined with Ms. Tyson's history of being a difficult employee, demonstrate that the Tax Collector had more than adequate reason to terminate Ms. Tyson's employment because of her deleterious effect on the workplace.

83. 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.*

84. Petitioner made no evidentiary showing that any employment or post-employment action by the Tax Collector was causally related to any statutorily protected activity she took while an employee. There was no evidence that Ms. Tyson ever lodged a formal complaint about discrimination in the workplace or even complained to a superior about discriminatory treatment. She made no showing that the adverse employment action was

causally related to any protected activity. As a matter of proof, it is concluded that Ms. Tyson abandoned the retaliation claim.

RECOMMENDATION

Based upon 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 Alachua County Tax Commissioner did not commit any unlawful employment practices and dismissing the Petition for Relief filed in this case.

DONE AND ENTERED this 31st day of March, 2020, in Tallahassee, Leon County, Florida.



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LAWRENCE P. STEVENSON  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 31st day of March, 2020.

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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.