STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LOUISE JONES,

Petitioner,

vs. Case No. 19-5066

GREYSTONE HEALTHCARE, D/B/A PARK MEADOWS,

Respondent.
_____/

RECOMMENDED ORDER

On January 27, 2020, Yolonda Y. Green, a duly-designated Administrative Law Judge of the Division of Administrative Hearings ("Division"), conducted a hearing pursuant to section 120.57(1), Florida Statutes (2019), via video-teleconference with locations in Gainesville and Tallahassee, Florida.

APPEARANCES

For Petitioner: Louise Jones, pro se
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For Respondent: Angelo M. Filippi, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner was subject to unlawful discrimination, in violation of chapter 760, Florida Statutes.

PRELIMINARY STATEMENT

On July 30, 2018, Petitioner, Louise Jones ("Ms. Jones" or "Petitioner"), filed a Charge of Discrimination ("Charge") with the Florida Commission on Human Relations ("FCHR") alleging that Respondent, Greystone Healthcare, d/b/a Park Meadows ("Greystone" or "Respondent"), unlawfully terminated her employment as a Licensed Practical Nurse ("LPN") by discriminating against her on the basis of her disability, age, and/or retaliation for engaging in a protected activity. On August 15, 2019, FCHR issued a Notice of Determination to Ms. Jones indicating that FCHR found "no reasonable cause" to demonstrate that discrimination occurred. Dissatisfied with FCHR's finding, Ms. Jones filed a Petition for Relief seeking an administrative hearing. FCHR referred the Petition to the Division on September 19, 2019, and the undersigned was assigned to conduct the hearing in this case.

The undersigned initially scheduled this matter for hearing on November 12, 2019. After one continuance at the request of Respondent filed on November 4, 2019, the final hearing proceeded as scheduled on January 27, 2020. Petitioner testified on her own behalf and presented the testimony of Sylvia Strickland.[1] Petitioner's Exhibits 1 through 3 were admitted into evidence. Respondent's Exhibits 1 through 5 were admitted into evidence.

[1] At hearing, Petitioner stated that she served subpoenas to several other witnesses who are purportedly current employees of Greystone but did not appear at the hearing. Petitioner claimed that the witnesses did not appear because they were advised by Greystone staff not to appear. Petitioner was given the opportunity to contact the witnesses by phone but was unsuccessful. The witnesses to whom Petitioner served subpoenas included: Debra Singleton, Sherry Hesters, Ebony Rucker, Cathy Jones, and Karen Dricco.

The Transcript of the hearing was filed on February 28, 2020. Both parties filed Proposed Recommended Orders, which have been considered in preparation of this Recommended Order.

Unless otherwise indicated, all references to Florida Statutes will be to the 2017 codification, which was the statute in effect at the time of the alleged violations.

FINDINGS OF FACT

1. Greystone is a skilled nursing facility that provides residential care to vulnerable elderly patients receiving care for various conditions including rehabilitation, dementia, and long-term care.

2. Ms. Jones became employed with Respondent in 2007 as an LPN and worked at the facility until her termination on April 27, 2018. Ms. Jones was 66 years of age when she was terminated.

3. In Ms. Jones' role as an LPN, she was responsible for supervision, delivery, and administration of nursing care as directed by physician orders and standards of practice to meet the needs of the residents. Specifically, she was tasked with implementing the care plans for patients, including reviewing patient charts, dispensing medication, and accurate documentation of all medical records.

4. In 2014, Ms. Jones had a stroke. The stroke resulted in a slowing of her mental processing and difficulty with decision making. Although Ms. Jones had taken time off of work due to the stroke, Ms. Jones requested an additional six weeks of time off in September 2014 for recovery, which Greystone granted. Her request for additional time off for therapy was also granted. Ms. Jones also requested to return to work part-time, which Greystone granted. After her time off in 2015, Ms. Jones returned to work in her same position as an LPN and with the same pay. At that time, she also

requested to work at station number three, which she considered a reasonable accommodation for her cognitive disability.

5. The facility maintained four different nursing stations. Most relevant here, Ms. Jones described station number three, which had more rehabilitation and long-term care patients, as quiet with minimal distractions. In contrast, Ms. Jones described station four as having more dementia patients and being loud.

6. Ms. Jones ultimately returned to a full-time work schedule and continued to work at station three until 2017. At some point in 2017, the administration changed at Greystone. Under the new administration, management began to schedule Ms. Jones on a rotating basis with other nurses between stations three and four.

7. Ms. Jones testified that she protested the assignment to a station other than station three because she was assigned to station three as an accommodation for her disability. However, Ms. Jones did not provide documentation to Greystone to demonstrate her disability and request for an accommodation. Despite her protest, Ms. Jones continued to work on a rotating basis at stations three and four.

8. Ms. Jones asserts she was terminated on the basis of her disability, age, and retaliation for requesting a reasonable accommodation. Greystone, however, denied the assertion. Greystone's position is that instead of discrimination, Ms. Jones was terminated for committing three medication errors within two months and failing to comply with company policy.

9. The first of the three medication errors occurred on March 1, 2018. It was documented that she gave Ambien to a resident, which should have been given at 9:00 p.m. However, the medication was administered at the wrong time and on the wrong date. Ms. Jones explained that since the Ambien was missing from the dispenser, she assumed another nurse had failed to properly document the medication administration and so she signed it out.

On March 7, 2018, Ms. Jones received a final discharge warning for the error and was removed from the schedule for three days.[2]

10. Ms. Jones' first medication error occurred two days after she attended a facility compliance training, held on February 27, 2018. The training entitled "Proper Scheduled Medication Inventory Signing Out" covered the guidelines for medication administration. Specifically, nurses were instructed to ensure that there is an active order before medication is administered and ensure the time is correct for medication administration.

11. On April 26, 2018, Ms. Jones experienced her second medication error where she administered a narcotic medication to a patient without a physician's order. As a result, Ms. Jones received a "teachable moment" counseling action for the error. Despite the compliance training in February 2018, Ms. Jones' second medication error involved a topic covered during the training.

12. The next day, April 27, 2018, Ms. Jones experienced her third and final medication error. Thereafter, Ms. Jones was terminated for having three medication errors involving narcotic medications within two months, falsifying medical records, disregarding physician's orders, and failure to follow company policy.

13. Ms. Jones claims that Greystone discriminated against her due to her age, her disability (by failing to exclusively schedule her at station number three), and by terminating her based on retaliation for requesting a reasonable accommodation for her disability.

14. Ms. Jones testified that the medication errors were caused by stress she experienced due to scheduling changes and her assignment to a station other than station three. She explained that the errors would not have occurred had Greystone continued to accommodate her. Assuming Ms. Jones' medication errors were related to her stated disability; Ms. Jones

[2] Petitioner was removed from the schedule for March 8, 9, and 12, 2018.

acknowledged that the three medication errors occurred while she was working on station number three.

15. To further support her assertion that the errors resulted from her disability, Ms. Jones stated that she never experienced any medication errors before her first error in March 2018. Furthermore, she received a rating of "outstanding" on her employee evaluation in March 2017, and she had been nominated for employee of the year on two occasions.

16. There is no dispute that Ms. Jones suffered a cardiovascular event in 2014.

17. Ms. Jones testified that when she requested a reasonable accommodation to work at station three, Debra Singleton, the RN supervisor, told her that Greystone wanted to "let the old nurses go and hire newer nurses, younger nurses." Ms. Singleton was the supervisor who terminated Ms. Jones. Although she was issued a subpoena to appear at the hearing, Ms. Singleton did not testify at the hearing.

18. Ms. Jones did not offer a comparator to demonstrate she was treated differently than someone else of a different age.

19. Ms. Jones placed her LPN license in retirement status because she believed that she should not continue working and administering medication.

CONCLUSIONS OF LAW

20. The Division has jurisdiction over the parties and the subject matter of this cause pursuant to sections 120.569, 120.57(1), and 760.11(7).

21. Petitioner brings this action charging that Greystone discriminated against her in violation of the Florida Civil Rights Act ("FCRA"). Petitioner's claim centers on her allegation that Greystone terminated her based on her age and disability. The FCRA protects employees from age and disability. discrimination in the workplace. *See* §§ 760.10-.11, Fla. Stat. Section 760.10 states, in pertinent part:

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

22. Section 760.11(7) permits a party for whom FCHR determines that there is not reasonable cause to believe that a violation of the FCRA has occurred to request an administrative hearing before the Division. Following an administrative hearing, if the Administrative Law Judge ("ALJ") finds that a discriminatory act has occurred, the ALJ "shall issue an appropriate recommended order to FCHR prohibiting the practice and recommending affirmative relief from the effects of the practice, including back pay." § 760.11(7), Fla. Stat.

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

24. There is no dispute that Greystone is an "employer" as that term is defined in section 760.02(7), which defines an employer as "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 person."

Establishing Discrimination

25. Discrimination may be proven by direct, statistical, or circumstantial evidence. *See Valenzuela v. GlobeGround N. Am., LLC*, 18 So. 3d 17, 22 (Fla. 3d DCA 2009). Direct evidence is evidence that, if believed, would prove

the existence of discriminatory intent behind the employment decision without any inference or presumption. *Denney v. City of Albany*, 247 F.3d 1172, 1182 (11th Cir. 2001); *see also Holifield v. Reno*, 115 F.3d 1555, 1561 (11th Cir. 1997). "Only the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of [age] constitute direct evidence of discrimination. . . . For statements of discriminatory intent to constitute direct evidence of discrimination, they must be made by a person involved in the challenged decision." *Bass v. Bd. of Cty. Comm'rs, Orange Cty, Fla.*, 256 F.3d 1095, 1105 (11th Cir. 2001)(citations omitted).

26. In the absence of direct or statistical evidence of discriminatory intent, Petitioner must rely on circumstantial evidence of discrimination to prove her case. For discrimination claims involving circumstantial evidence, Florida courts follow the three-part, burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and its progeny, *Valenzuela*, 18 So. 3d at 21, 22; *see also St. Louis v. Fla. Int'l Univ.*, 60 So. 3d 455, 458 (Fla. 3d DCA 2011). Under this well-established framework, a petitioner bears the initial burden of establishing, by a preponderance of the evidence, a prima facie case of discrimination.

27. When the charging party is able to make out a prima facie case, the burden to go forward shifts to the employer to articulate a legitimate, non-discriminatory explanation for the employment action. *See Dep't of Corr. v. Chandler*, 582 So. 2d 1183 (Fla. 1st DCA 1991)(court discusses shifting burdens of proof in discrimination cases). The employer has the burden of production, not persuasion, and need only persuade the finder of fact that the decision was non-discriminatory. *Id.*; *Alexander v. Fulton Cty., Ga.*, 207 F.3d 1303, 1335 (11th Cir. 2000).

28. The employee must then come forward with specific evidence demonstrating that the reasons given by the employer are a pretext for discrimination. *Schoenfeld v. Babbitt*, 168 F.3d 1257, 1267 (11th Cir. 1999). The employee must satisfy this burden by showing directly that a

discriminatory reason more likely than not motivated the decision, or indirectly by showing that the proffered reason for the employment decision is not worthy of belief. *Chandler*, 582 So. 2d at 1186; *Alexander v. Fulton Cty., Ga.*, 207 F.3d at 1336.

29. "Although the intermediate burdens of production shift back and forth, the ultimate burden of persuading the trier of fact that the employer intentionally discriminated against the [Petitioner] remains at all times with the [Petitioner]." *EEOC v. Joe's Stone Crabs, Inc.*, 296 F.3d 1265 (11th Cir. 2002); *see also Byrd v. RT Foods, Inc.*, 948 So. 2d 921, 927 (Fla. 4th DCA 2007)("The ultimate burden of proving intentional discrimination against the plaintiff remains with the plaintiff at all times.").

Age Discrimination

30. Regarding age discrimination, the FCRA was derived from two federal statutes, Title VII of the Civil Rights Act of 1964 and 1991, 42 U.S.C. § 2000e, et seq.; and the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623. *See Brown Distrib. Co. of W. Palm Beach v. Marcell*, 890 So. 2d 1227, 1230 n.1 (Fla. 19 4th DCA 2005). Florida courts apply federal case law interpreting Title VII and the ADEA to claims arising out of the FCRA. *Id.*; *see also City of Hollywood v. Hogan*, 986 So. 2d 634, 641 (Fla. 4th DCA 2008); and *Sunbeam TV Corp. v. Mitzel*, 83 So. 3d 865, 867 (Fla. 3d DCA 2012).

31. To establish a prima facie case of age discrimination, Petitioner must demonstrate that: "1) [s]he is a member of a protected class, i.e., at least forty years of age; 2) [s]he is otherwise qualified for the position; 3) [s]he was subjected to an adverse employment action; and 4) h[er] position was filled by a worker who was substantially younger than Petitioner." *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308 (1996); *Kragor v. Takeda Pharm.*

Am., Inc., 702 F.3d 1304, 1308 (11th Cir. 2012); and *Hogan*, 986 So. 2d at 641.[3]

32. Florida and federal case law further instruct that, to prevail on an ADEA (and FCRA) claim, the employee must prove, by a preponderance of the evidence, that the employer's adverse employment action would not have occurred "but-for" the employee's age. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 180, 129 S. Ct. 2343, 2352, 174 L. Ed. 2d 119 (2009); *Rodriguez v. Cargo Airport Servs. USA, LLC*, 648 F. App'x 986, 989 (11th Cir. 2016). The petitioner's age must have "actually played a role in [the employer's decision-making] process and had a determinative influence on the outcome." *Hogan*, 986 So. 2d at 641; *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610, 113 S. Ct. 1701, 1706 (1993); *see also Cap. Health Plan v. Moore*, 281 So. 3d 613, 616 (Fla. 1st DCA October 23, 2019)(the "'but-for cause' does not mean 'sole cause . . . an employer may be liable under the ADEA if other factors contributed to its taking the adverse action, as long as age was the factor that made a difference' . . . 'age must be determinative.'") (*citing Leal v. McHugh*, 731 F.3d 405, 415 (5th Cir. 2013)).

33. Petitioner offered a statement made by Ms. Singleton that, "they want to let the old nurses go and hire newer nurses, younger nurses." Petitioner's testimony about the statement was not rebutted by any other testimony or evidence offered at the hearing. However, the unsubstantiated hearsay, alone, is not sufficient to support a finding of fact. Thus, Petitioner offered no direct evidence of age discrimination.

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[3] The Fourth District Court of Appeal has indicated that, consistent with Federal precedent, the protected class is defined as being a person at least 40 years of age. *Hogan*, 986 So. 2d at 641. Nonetheless, FCHR has determined "[w]ith regard to element (1), Commission panels have concluded that one of the elements for establishing a prima facie case of age discrimination under the [FCRA] is a showing that individuals similarly-situated to Petitioner of a "different" age were treated more favorably, and Commission panels have noted that the age "40" has no significance in the interpretation of the [FCRA]." *Johnny L. Torrence v. Hendrick Honda Daytona*, Case No. 14-5506 (DOAH Feb. 26, 2015; FCHR May 21, 2015). Given that this Recommended Order will be subject to the Commission's Final Order authority, the undersigned will apply the standard described in *Johnny L. Torrence v. Hendrick Honda Daytona*.

34. Similarly, there was no statistical evidence of discriminatory intent.

35. In the absence of direct or statistical evidence, Petitioner must rely on circumstantial evidence of discrimination to prove her case.

36. Petitioner established the first three elements: (1) she is a member of a protected class (66 years of age); (2) she was qualified for the position as she possessed an LPN license and had been trained for the position; and (3) she was subject to an adverse employment action because she was terminated from employment.

37. Petitioner did not establish the fourth element, i.e., that the position was filled by a person of a "different age" than herself. Petitioner did not offer any evidence of any comparator to demonstrate that she was treated less favorably than someone outside of her protected class.

38. Assuming Petitioner established a prima facie case of age discrimination, Greystone articulated legitimate, non-discriminatory reasons for the adverse employment action Petitioner raised in her discrimination complaint. Greystone's burden to refute Petitioner's prima facie case is light. However, Greystone met this burden. Petitioner was terminated for making three medication errors involving narcotic medications within two months. One of the medication errors involved her falsifying the medical records of a resident by documenting that she administered medication when she had not administered that medication. Petitioner also administered medication to a resident without a physician's order.

39. Thus, concerning pretext, Petitioner did not prove, by a preponderance of the evidence, that Greystone's stated reasons for firing her were merely a "pretext" for unlawful discrimination. The record in this proceeding supports a finding and legal conclusion that Greystone's proffered explanations were worthy of credence.

Disability Discrimination

40. Petitioner also bears the ultimate burden in this proceeding to prove that Respondent unlawfully discriminated against her on the basis of disability. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993); *Valenzuela*, 18 So. 3d at 22.

41. The FCRA is patterned after Title VII of the Civil Rights Acts of 1964 and 1991, codified as 42 U.S.C. § 2000, *et seq*. The FCRA is construed in conformity with the federal Americans with Disabilities Act of 1990, as amended (ADA), when addressing claims of discrimination based upon a disability or handicap. *Byrd v. BT Foods, Inc.*, 848 So. 2d 921, 925 (Fla. 4th DCA 2007).

42. Section 760.10 uses the term "handicap." That term is construed as equivalent to the term "disability" as used in the ADA. *Byrd*, 948 So. 2d at 926.

43. In order to prove a prima facie case of disability discrimination, Petitioner must show that: "1) [s]he is disabled; 2) [s]he was a 'qualified individual'; and 3) [s]he was discriminated against because of h[er] disability." *See Frazier-White v. Gee*, 818 F.3d 1249, 1255 (11th Cir. 2016); *Lucas v. W.W. Grainger, Inc.*, 257 F.3d 1249, 1255 (11th Cir. 2001). The employee may satisfy the third prong through showings of intentional discrimination, disparate treatment, or failure to make reasonable accommodations. *Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1212 n.6 (11th Cir. 2008).

44. Petitioner demonstrated that she is qualified to perform the job.

45. To establish the first element of a prima facie case, Petitioner must prove either that she has a disability, or that Respondent perceived her as having a disability. *Savage v. Secure First Credit Union*, 107 F. Supp. 3d 1212, 1217 (N.D. Ala. 2015).

46. The ADA defines "disability" as follows:

> (1) Disability. The term "disability" means, with respect to an individual:
>
> (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment (as described in paragraph (3)).
>
> (2) Major life activities.
>
> (A) In general. For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.
>
> (B) Major bodily functions. For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.
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> (3) Regarded as having such an impairment. For purposes of paragraph (1)(C):
>
> (A) An individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.
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> (B) Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A

> transitory impairment is an impairment with an actual or expected duration of 6 months or less.

42 U.S.C. § 12102.

47. Petitioner did not prove that she is disabled as contemplated by the ADA. The record establishes that Petitioner experienced a stroke in 2014, which resulted in some slow cognitive functioning. Operation of the brain is considered a major bodily function under the ADA. Petitioner testified that her physician (who did not testify at hearing) initially restricted her from returning to work full-time within a six-week timeframe. Without more information from her physician indicating that she would have limitations after that the six-week timeframe, it cannot be assumed from this record that any limitations related to her cognitive abilities would last longer than six weeks after the stroke. Further, Petitioner's testimony that she was able to change her work status from part-time to full-time and perform her job indicates that at the time of her employment her condition was transitory. The undersigned concludes that Petitioner failed to prove that she had, or was perceived as having, a "disability" under the ADA.

48. In addition, the evidence does not establish that Petitioner's supervisors or managers, who were in a position to make employment decisions, perceived Petitioner as having a disability. Although Petitioner presented unrefuted evidence that she experienced some cognitive impairment and that she had requested a reduced schedule at one point, the evidence does not establish that Respondent knew of her alleged continued health problems, or that Respondent perceived her as disabled. In 2015, she was returned to her same position as an LPN with the same pay, received an "outstanding" employee evaluation in 2017, and was nominated for employee of the year. Accordingly, there is insufficient evidence to establish that at the time Petitioner was employed by Respondent, she was "disabled" as that term is defined under the ADA.

49. Assuming Petitioner was able to prove that she is disabled for purposes of the ADA, and is entitled to an accommodation, Petitioner must show that she was discriminated against as a result of Respondent's failure to provide a reasonable accommodation. Petitioner bears the burden both to identify an accommodation and show that it is "reasonable." *Lucas*, 257 F.3d at 1255. "[T]he duty to provide a reasonable accommodation is not triggered unless a specific demand for an accommodation has been made." *Gaston v. Bellingrath Gardens & Home, Inc.*, 167 F.3d 1361, 1363 (11th Cir. 1999).

50. A qualified individual is not entitled to the accommodation of her choice, but rather only to a "reasonable" accommodation. *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278, 1286 (11th Cir. 1997). An accommodation is "reasonable" and, therefore, required under the ADA, only if it enables the employee to perform the essential functions of the job. *LaChance v. Duffy's Draft House*, 146 F.3d 832, 835 (11th Cir. 1998). An employer need not accommodate an employee in any manner the employee desires, nor reallocate job duties to change the essential functions of the job. *Earl v. Mervyns, Inc.*, 207 F.3d 1361, 1367 (11th Cir. 2000). The intent of the ADA is that "'an employer needs only to provide meaningful equal employment opportunities' . . . '[t]he ADA was never intended to turn nondiscrimination into discrimination' against the nondisabled." *U.S. EEOC v. St. Joseph's Hosp. Inc.*, 842 F.3d 1333, 1346 (11th Cir. 2016)(quoting *Terrell v. USAir*, 132 F.3d 621, 627 (11th Cir. 1998)).

51. Petitioner asserts, without providing supporting records, that she requested an accommodation. It appears from the record, by Petitioner's own admission that Greystone attempted to accommodate her by assigning her to station three on a rotating basis. Here, considering all facts in favor of Petitioner, Petitioner has not proven that her employer did not provide a reasonable accommodation. Thus, her claim of discrimination on the basis of disability must fail.

Pretext

52. If Petitioner establishes a prima facie case of discrimination, she creates a presumption of discrimination. At that point, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for taking the adverse action. *Valenzuela*, 18 So. 3d at 22. The reason for the employer's decision should be clear, reasonably specific, and worthy of credence. *Chandler*, 582 So. 2d at 1186 (Fla. 1st DCA 1991).

53. The employer has the burden of production, not the burden of persuasion, to demonstrate to the finder of fact that the decision was non-discriminatory. *Flowers v. Troup Cty.*, 803 F.3d 1327, 1336 (11th Cir. 2015). This burden of production is "exceedingly light." *Holifield*, 115 F.3d at 1564. The employer only needs to produce evidence of a reason for its decision. It is not required to persuade the trier of fact that its decision was actually motivated by the reason given. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993).

54. If the employer meets its burden, the presumption of discrimination disappears. The burden then shifts back to the petitioner to prove that the employer's proffered reason was not the true reason but merely a "pretext" for discrimination. *Combs v. Plantation Patterns*, 106 F.3d 1519, 1538 (11th Cir. 1997); *Valenzuela*, 18 So. 3d at 25.

55. To establish "pretext," the petitioner must show "directly that a discriminatory reason more likely than not motivated the decision, or indirectly by showing that the proffered reason for the . . . decision is not worthy of belief." *Chandler*, 582 So. 2d at 1186; *Kogan v. Israel*, 211 So. 3d 101, 109 (Fla. 4th DCA 2017). The proffered explanation is unworthy of belief if the petitioner demonstrates "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence." *Combs*, 106 F.3d at 1538; *see also Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000). The petitioner must prove

that the reasons articulated were false and that the discrimination was the real reason for the action. *City of Miami v. Hervis*, 65 So. 3d 1110, 1117 (Fla. 3d DCA 2011) (*citing St. Mary's Honor Ctr.*, 509 U.S. at 515)("[A] reason cannot be proved to be 'a pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason.").

56. Despite the shifting burdens of proof, "the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the [petitioner] remains at all times with the [petitioner]." *Burdine*, 450 U.S. at 253; *Valenzuela*, 18 So. 3d at 22.

57. The reasons for Petitioner's termination, improper medication administration, falsification of records, and disregard of company policy, were not only reasonable but, after the third instance and despite training, were also legitimate. Thus, Respondent articulated a rational basis for its action that was not a pretext for discrimination.

Retaliation

58. Section 760.10(7) prohibits retaliation in employment as follows:

> (7) It is an unlawful employment practice for an employer . . . 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. (emphasis added).

59. The burden of proving retaliation follows the general rules enunciated for proving discrimination. *Reed v. A.W. Lawrence & Co.*, 95 F.3d 1170, 1178 (2d Cir. 1996). As discussed above, Petitioner cannot meet her burden of proof with either direct or circumstantial evidence.

60. Petitioner did not introduce any direct or statistical evidence of retaliation in this case. Thus, Petitioner must prove her allegation of

retaliation by circumstantial evidence. Circumstantial evidence of retaliation is subject to the burden-shifting framework established in *McDonnell Douglas*.

61. To establish a prima facie case of retaliation, Petitioner must show: (1) that she was engaged in statutorily protected expression or conduct; (2) that she suffered an adverse employment action; and (3) that there is some causal relationship between the two events. *Holifield*, 115 F.3d at 1566.

62. Petitioner established the first two elements of a prima facie case: (1) she engaged in a statutorily protected activity when she requested a reasonable accommodation, and (2) she established that she suffered an adverse employment action when she was terminated.

63. Petitioner's case fails because she did not establish the third element, a causal connection between her engagement in the protected activity and the adverse employment action.

64. The U.S. Supreme Court established the causation standard for Title VII retaliation claims in *University of Texas Southwest Medical Center v. Nassar*, 570 U.S. 338 (2013). There, the Court held that "[t]he text, structure, and history of Title VII demonstrate that a [petitioner] making a retaliation claim under section 2000e-3(a) must establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer." *Nassar*, 570 U.S. at 365. "Title VII retaliation claims must be prove[n] according to traditional principles of but-for causation, not the lessened causation test" for status-based discrimination. *Id*. at 360.

65. There is no direct evidence of a causal connection in this case. Petitioner introduced no evidence that Ms. Singleton (or any other member of Greystone's management) relied upon Petitioner's request for an accommodation as a basis for her termination.

66. Proximity between the protected conduct and the adverse employment action can be offered as circumstantial evidence of causation, but "[m]ere

temporal proximity, without more, must be 'very close'." *Thomas v. Cooper Lighting, Inc.*, 506 F.3d 1361, 1364 (11th Cir. 2007).

67. Here, Petitioner established that she engaged in a protected activity by requesting an accommodation, she did not establish the time frame between when she requested the accommodation and her termination. Assuming all facts in favor of Petitioner, at least three years elapsed between Petitioner's request for an accommodation and her termination. Thus, no inference of causation can be drawn from temporal proximity. *See Jones v. Gadsden Cty. Sch.*, 2018 U.S. App. LEXIS 35176, at *4 (11th Cir. 2018)("a nine-year gap is too attenuated to establish [plaintiff] would have been hired but-for his 2008 complaint.").

68. "In the absence of other evidence of causation, if there is a substantial delay between the protected expression and the adverse action, the complaint of retaliation fails as a matter of law." *Cooper Lighting, Inc.*, 506 F.3d at 1364. Here, Petitioner introduced no other evidence of retaliatory conduct.

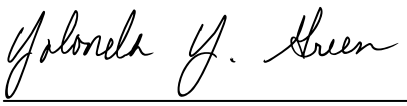
69. Assuming Petitioner had established a prima facie case of retaliation, Respondent presented persuasive evidence that its decision to terminate Petitioner was based on her three medication errors and failure to follow company policy.

70. Because Petitioner failed to either establish a prima facie case of age discrimination or demonstrate that Respondent's articulated reason was mere pretext for discrimination, her petition must be dismissed.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations issue a final order finding that Greystone did not commit any unlawful employment action as to Louise Jones, and dismissing the Petition for Relief filed in this matter.

DONE AND ENTERED this 7th day of April, 2020, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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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.