STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PAULETTE LEWIS,

Petitioner,

vs. Case No. 19-5529

OAKMONTE VILLAGE,

Respondent.
_____/

RECOMMENDED ORDER

The final hearing in this matter was conducted before Administrative Law Judge Jodi-Ann V. Livingstone of the Division of Administrative Hearings (DOAH), pursuant to sections 120.569 and 120.57(1), Florida Statutes (2019),[1] on December 6, 2019, by video teleconference at sites in Tallahassee and Altamonte Springs, Florida.

APPEARANCES

For Petitioner: Paulette Lewis, pro se
1658 April Avenue
Deltona, Florida 32725

For Respondent: Timothy Tack, Esquire
Fisher & Phillips LLP
101 East Kennedy Boulevard, Suite 2350
Tampa, Florida 33602

STATEMENT OF THE ISSUE

The issue in this case is whether Respondent, Oakmonte Village, committed an unlawful employment practice against Petitioner, Paulette

[1] All statutory references are to Florida Statutes (2019). Relevant provisions of chapter 760 have been unchanged since 2015, prior to any allegedly discriminatory acts.

Lewis (Ms. Lewis or Petitioner), on the basis of her race, color, national origin, marital status, religion, age, and/or in retaliation for engaging in a protected activity, in violation of the Florida Civil Rights Act (FCRA).

PRELIMINARY STATEMENT

On October 3, 2018, Ms. Lewis filed an Employment Complaint of Discrimination with the Florida Commission on Human Relations (Commission), alleging that Oakmonte Village violated the FCRA by discriminating against her based on her race, color, national origin, marital status, religion, and age. Ms. Lewis also alleged that Oakmonte Village retaliated against her. On September 17, 2019, the Commission notified Ms. Lewis that no reasonable cause existed to believe that Oakmonte Village committed an unlawful employment practice.

On October 9, 2019, Ms. Lewis filed a Petition for Relief with the Commission in which she realleged a discriminatory employment practice. The Commission transmitted the Petition for Relief to DOAH to conduct a chapter 120 evidentiary hearing.

The final hearing was held on December 6, 2019, with both parties present. At the final hearing, Ms. Lewis represented herself and testified on her own behalf. Petitioner's Exhibits 1 through 8 were admitted into evidence.[2] Oakmonte Village called Ojanay Jones (Mr. Jones) and John

[2] At the final hearing, Ms. Lewis offered her Jamaica-issued passport into evidence as Petitioner's Exhibit 9. Ms. Lewis did not provide a copy of the passport to the undersigned. With no objection from Oakmonte Village, the undersigned left the record open for Ms. Lewis to submit a copy of her passport. Ms. Lewis did not submit a copy of the passport. Ms. Lewis sought to submit the Jamaica-issued passport to prove her national origin. Ms. Lewis credibly testified that she was Jamaican and the undersigned accepts this as true. In addition, the undersigned left the record open for Ms. Lewis to submit a legible copy of Petitioner's Exhibit 5. After the conclusion of the hearing, Ms. Lewis submitted a new, albeit also illegible, copy of Petitioner's Exhibit 5.

Marshall (Mr. Marshall) as witnesses at the final hearing. Respondent's Exhibits 1, 2, 4, 5, 6, and 8 through 13 were admitted into evidence.

At the close of the hearing, the parties were advised of a ten-day timeframe following DOAH's receipt of the hearing transcript to file post-hearing submittals. On December 18, 2019, Ms. Lewis filed a Proposed Letter of Recommendation, prior to the filing of the transcript. On January 10, 2020, the court reporter filed a two-volume transcript of the final hearing with DOAH. On the same day, Oakmonte Village submitted a Motion for Extension of Time to file Proposed Recommended Order. The undersigned granted the motion and the deadline for the proposed recommended orders was extended to January 31, 2020. On January 13, 2020, Ms. Lewis filed a second Proposed Recommended Order. On January 31, 2020, Oakmonte Village filed its Proposed Recommended Order. All three submissions were duly considered in preparing this Recommended Order.[3]

FINDINGS OF FACT

1. Royal Senior Care Management is a healthcare facility campus operating in Lake Mary, Florida. The campus includes an independent living facility, an assisted living facility, and Oakmonte Village, which is a stand-alone memory care facility that caters exclusively to residents suffering from Alzheimer's disease and dementia.

2. Ms. Lewis is a 52-year-old black woman. She self-identifies as light-skinned. Ms. Lewis testified that her skin color is lighter than the other black employees who worked for Oakmonte Village. She was born in Jamaica. She is married and a Christian.

[3] On January 2, 2020, Oakmonte Village filed Respondent's Response to Notice of Ex Parte Communication and Motion to Strike (in part), directed to Petitioner's first post-hearing filing. The motion sought to strike/disregard all references in Petitioner's filing to a settlement agreement. The motion was granted. References to a settlement were not considered in the resolution of this case.

3. At all times relevant to Ms. Lewis's complaint, Mr. Jones was the director of Resident Care at Oakmonte Village. Mr. Jones is a 42-year-old black man. He is of American and Jamaican descent. He is currently married, but was not married at all times relevant to the allegations in Ms. Lewis's complaint. Mr. Jones's current wife, who was his then romantic companion, is half-Jamaican.

4. Mr. Jones reports directly to Mr. Marshall. Mr. Marshall is the director of Oakmonte Village.

5. Mr. Jones and Mr. Marshall conducted a joint interview of Ms. Lewis for the position of resident caregiver. Mr. Jones and Mr. Marshall, collectively, agreed to hire Ms. Lewis.[4]

6. Ms. Lewis began working for Oakmonte Village in November 2017, starting as a part-time resident caregiver. On December 10, 2017, her employment status was changed from part-time to full-time. Ms. Lewis was a resident caregiver throughout her time with Oakmonte Village. By all accounts, Ms. Lewis was an excellent caregiver, with no marked deficiencies in her job performance.

7. Oakmonte Village hires both resident caregivers and medication technicians to care for its residents. At the time Ms. Lewis was hired, resident caregivers were paid $9.00 per hour and medication technicians were paid $10.00 per hour. Ms. Lewis was hired at a rate of pay of $9.50 per hour, more than a typical resident caregiver. She was not hired as a medication technician because she did not have the required certification.

8. Oakmonte Village offers medication technician training to its resident caregivers when it has a need for more medication technicians. Oakmonte Village also offers recertification training to its certified medication technicians. These trainings are conducted at Oakmonte Village by an

[4] Ms. Lewis testified that Mr. Jones and Mr. Marshall were aware that she was Jamaican when they hired her. Ms. Lewis also testified that she believed Mr. Jones desired to be Jamaican and had an affinity for Jamaican culture. These facts offered by Ms. Lewis are inconsistent with her claim of discrimination based on her national origin.

affiliated company. If a resident caregiver successfully completes certification training, he or she is reclassified as a medication technician and given a raise. Not all resident caregivers can be trained upon request. Certification training is provided by Oakmonte Village based on facility needs. Oakmonte Village typically requires two to three medication technicians per work shift. If Oakmonte Village loses a medication technician, because of a resignation or shift change, it fills the vacancy with a new medication technician by training and certifying a resident caregiver.

9. Employees are not allowed to enroll in the medication technician certification training on their own; they must be nominated by Mr. Jones. There are no strict requirements for the nomination. Mr. Jones testified that he makes the nomination decision based on the employee's work ethic, skills, and level of responsibility, among other things. Mr. Jones also considers the facility's needs.

10. Ms. Lewis testified that, upon hire, Mr. Jones told her that in 60 days, she would be promoted to a medication technician. Mr. Jones and Mr. Marshall credibly testified that they tell all new employees that a medication technician certification is a potential means to get a pay increase, but no assurance is given, because none can be given, that certification will definitely be offered to a particular caregiver on a particular timetable. It is based on facility need and that need changes.

11. Ms. Lewis was not nominated to complete the medication technician certification. In April 2018, Ms. Lewis saw a list of caregivers who were nominated by Mr. Jones to complete the certification. She added her name to the list, which was inappropriate because she was not authorized to nominate herself. When Mr. Jones noticed the list had been revised, he removed Ms. Lewis from the list.

12. As Ms. Lewis was not nominated to attend the training, she was, essentially, prevented from getting a raise. Ms. Lewis testified that

Oakmonte Village's failure to nominate her for the medication technician training in April 2018 was based on a discriminatory act.

13. Ms. Lewis offered no evidence to prove that she was treated differently, with respect to a nomination to complete a medication technician certification training, than any other similarly situated employee outside of her protected classes, or that she was not nominated because of her race, color, national origin, marital status, religion, and/or age.

14. Newly hired Oakmonte Village employees are on probation for 90 days. Oakmonte Village directors are strongly encouraged, but are not required, to formally discuss an employee's job performance after the 90-day probationary period. After employees successfully complete the 90-day probationary period, they are considered permanent employees.

15. Ms. Lewis testified that during her time at Oakmonte Village, she was not given a three-month or six-month evaluation. A formal evaluation is not required at the three-month mark. Oakmonte Village conducted an informal evaluation of Ms. Lewis after her 90-day probationary period (at the three-month mark). Mr. Marshall testified that he informally discussed Ms. Lewis's job performance with Mr. Jones and that they agreed that Ms. Lewis was doing a "fantastic" job and warranted permanent status. As a result, Ms. Lewis was removed from probationary status and made a permanent employee. It is undisputed that Ms. Lewis continued to work at Oakmonte Village for several months after her 90-day probationary period ended. Oakmonte Village does not conduct a six-month evaluation. After the three-month (90-day) evaluation, which may be formal or informal, the next evaluation that Oakmonte Village conducts is at the one-year mark.

16. Ms. Lewis failed to offer evidence showing how Oakmonte Village's failure to provide a formal evaluation at the three-month or six-month mark adversely affected her or constituted a discriminatory act. Further, Ms. Lewis offered no evidence showing that she was treated differently, with respect to evaluations, than any other similarly situated employee outside of her

protected classes, or that Oakmonte Village's failure to provide a formal evaluation was because of her race, color, national origin, marital status, religion, and/or age.

17. Oakmonte Village employees who work 64 hours or more per pay period (or 32 hours or more per week) are considered full-time employees. Full-time employees have extra benefits, including paid time off.

18. Ms. Lewis reported directly to Mr. Jones. Mr. Jones was in charge of setting her schedule.

19. During the weeks of June 17 through 23, June 24 through 30, and July 1 through 7, 2018, Ms. Lewis was scheduled to work two days (16 hours) per week. As Ms. Lewis was a full-time employee, this amounted to a 50 percent reduction in her scheduled hours.

20. On June 15, 2018, Ms. Lewis emailed Mr. Marshall to complain about her reduced scheduled hours. Mr. Marshall was on vacation when he received the email, but agreed to discuss the matter with her when he returned. On June 16, 2018, Ms. Lewis emailed Mr. Jones to complain about her reduced scheduled hours. Mr. Jones told Ms. Lewis that he and Mr. Marshall would discuss her hours with her the following Monday. Mr. Marshall testified that upon his return to work, he discussed Ms. Lewis's reduced hours with Mr. Jones and directed him to increase her hours to at least 32 hours per week. Ms. Lewis corroborated that this was accomplished when she testified that Mr. Jones called her in to work on several days to make up her reduced hours.

21. For the week of June 17 through 23, Ms. Lewis worked and was paid for 16 hours. For the week of June 24 through 30, although she was initially scheduled to work for 16 hours, after Mr. Marshall spoke with Mr. Jones, Ms. Lewis worked and was paid for 40 hours. For the week of July 1 through 7, Ms. Lewis worked and was paid for 27.25 hours. Ms. Lewis's last day at Oakmonte Village was July 5, 2018. She was scheduled to work eight hours

on July 7, 2018. Had she worked on July 7, her total hours worked for the week of July 1 through July 7 would have been 35.25 hours.

22. Ms. Lewis testified that the reason her hours were cut in June was due to Mr. Jones's disdain for her because of her national origin, religion, color, and because she was a poet.[5] Contrary to that description, Ms. Lewis testified that, during a meeting with Mr. Jones about her reduced hours, he told her that her hours were reduced because she was confrontational and not a team player.

23. Ms. Lewis testified that she was the only Jamaican working at Oakmonte Village and that no other employees experienced a reduction in hours during this time. Ms. Lewis did not present any evidence at the final hearing, outside of her own assertions, that she was treated differently, with respect to scheduling of hours, than any other similarly situated employee outside of her protected classes, or that the reduction in work hours was because of her race, color, national origin, marital status, religion, and/or age. In fact, except for one week in June 2018, Ms. Lewis worked and was paid for more than 32 hours each week.

24. Oakmonte Village operates continuously with three employee shifts: 6:00 a.m. to 2:30 p.m.; 2:00 p.m. to 10:30 p.m.; and 10:00 p.m. to 6:30 a.m. On July 4, 2018, Mr. Jones asked Ms. Lewis to come in to work the 10:00 p.m. to 6:30 a.m. shift (the night shift). She was not initially scheduled to work that day, and generally did not work the night shift, but in an effort to provide her more hours, she was asked to come in.

25. During the July 4 to 5 night shift, Ms. Lewis worked alongside Monica Nurse (Ms. Nurse), Adrianna Rivera (Ms. Rivera), and Shanece Newman (Ms. Newman). Ms. Lewis testified that shortly after she arrived, she noticed Ms. Newman asleep at a desk, where she remained asleep for approximately two hours. Ms. Rivera asked Ms. Lewis to provide care to one of

[5] Ms. Lewis testified at length that Mr. Jones disliked her because she was a poet and a writer. Writer/poet is not a protected class under the FCRA.

Ms. Newman's assigned residents. After tending to the resident, Ms. Lewis complained to Ms. Rivera about having to help Ms. Newman while also carrying out her own duties. This complaint instigated a verbal altercation between Ms. Lewis and Ms. Rivera. Ms. Nurse and Ms. Newman quickly joined the argument. Ms. Lewis testified that all three coworkers began screaming at her. Feeling threatened, Ms. Lewis called 9-1-1. As Ms. Lewis spoke to the 9-1-1 operator, Ms. Rivera contacted Mr. Marshall by telephone. A police officer arrived at the scene. Ms. Lewis testified that, by speaker phone, Mr. Marshall told her to return her emergency keys (which allowed her entrance to the building) and told her that she was fired. Mr. Marshall disputes this testimony. Mr. Marshall credibly testified that, by phone, Ms. Lewis told him that she could no longer work under those conditions and that she resigned. The persuasive and credible evidence presented at the hearing demonstrated that Ms. Lewis resigned because of the conflict with her coworkers.

26. On July 5, 2018, Mr. Marshall emailed Ms. Lewis stating: "Thank you for your service I will mail your final check[.]" In response, Ms. Lewis emailed: "John my safety comes first. Sorry you didn't see it that way. May God bless Oakmonte Village[.]"

27. Ms. Lewis asserted during the final hearing that the events of the July 4 to July 5 night shift were planned by Mr. Jones and Mr. Marshall. Ms. Lewis testified that she was "set up" by Mr. Jones and Mr. Marshall so that the other three employees working that night would "jump" her. Mr. Jones and Mr. Marshall denied these allegations.

28. Ms. Lewis presented no credible evidence that Mr. Jones and Mr. Marshall orchestrated the alleged "set up." Further, even if this allegation were true, Ms. Lewis presented no evidence to prove that the "set up" was because of her race, color, national origin, marital status, religion, and/or age.

29. Ms. Lewis asserts that during her time at Oakmonte Village, she experienced persistent discrimination.[6] Ms. Lewis generally complained that Oakmonte Village had a hostile work environment. Ms. Lewis described an incident in November 2017, during her interview for the position for which she was hired, when Mr. Jones seemed taken aback by her non-existent criminal history. Ms. Lewis also testified that Mr. Jones once asked her "who the F do you think you are that your coworkers have to say please and thank you?"

30. Ms. Lewis also had other personal conflicts with a few of her coworkers. Ms. Lewis complained, specifically, about her relationship with Ms. Debbie Perry (Ms. Perry). Ms. Perry is a 53-year-old black woman. Ms. Lewis testified that Ms. Perry frequently cursed at her and once intentionally bumped into her. Ms. Lewis complained to Mr. Marshall about her interactions with Ms. Perry. Mr. Marshall met with Ms. Lewis to discuss the issue and directed her to speak to him should the issue arise again. Mr. Marshall testified that he also spoke to Ms. Perry. Mr. Marshall indicated that after he met with them separately, Ms. Lewis presented no additional complaints about Ms. Perry.

31. Ms. Lewis did not claim that either Ms. Perry's alleged harassment, or Oakmonte Village's response to Ms. Lewis's complaint, was because of Ms. Lewis's race, color, national origin, marital status, religion, and/or age.

32. On or about July 3, 2018, a state agency conducted an investigation of Oakmonte Village. The nature of the investigation is unknown as no evidence about the type of or reason for the investigation was offered at the hearing. Ms. Lewis testified that rumors swirled at Oakmonte Village about a possible "informant." Ms. Lewis testified that she was not the informant and she

[6] Ms. Lewis offered several anecdotal circumstances, in addition to the ones provided in paragraph 29, such as whether Oakmonte Village's work schedule listed her as a caregiver or medication technician, which she suggested were somehow discriminatory. None of her examples were persuasive. None could reasonably be considered evidence of discrimination because of her race, color, national origin, marital status, religion, and/or age.

presented no evidence that her coworkers or supervisors believed she was the informant.

33. Ms. Lewis suggested that Oakmonte Village retaliated against her for participating in a protected activity, but she did not identify a protected activity on which she is relying to make this claim, nor did she specify what action was taken in retaliation for the unidentified protected activity.

34. Ms. Lewis alleged several bases for discrimination, including race, color, national origin, marital status, religion, and age, but did not present a persuasive case of discrimination based on any of those protected classes. Information related to claims based on her marital status and religion was not mentioned in any relevant detail at the hearing.

35. Ms. Lewis failed to prove that Oakmonte Village's reduction of her work hours, its decision to not nominate her for the medication technician certification training, and its failure to formally evaluate her were based on race, color, national origin, marital status, religion, and/or age discrimination, nor did she prove that any other similarly situated employees outside her protected classes were treated more favorably. Accordingly, Ms. Lewis failed to meet her burden of proving that Oakmonte Village committed an unlawful employment action against her in violation of the FCRA.

CONCLUSIONS OF LAW

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

37. Ms. Lewis initiated this proceeding, alleging that Oakmonte Village discriminated against her based on her race, color, national origin, marital status, religion, and age in violation of the FCRA. She also alleges that she was retaliated against for participating in a protected activity.

38. The FCRA prohibits discrimination in the workplace. *See* §§ 760.10 and 760.11, Fla. Stat. Section 760.10(1)(a) states that it is an unlawful employment practice for an employer:

> 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.

39. Section 760.11(7) permits a party for whom the Commission determines that there is no reasonable cause to believe that a violation of the FCRA has occurred to request an administrative hearing before DOAH. 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 the commission prohibiting the practice and recommending affirmative relief from the effects of the practice, including back pay." § 760.11(7), Fla. Stat.

40. The burden of proof in an administrative proceeding, absent a statutory directive to the contrary, is on the party asserting the affirmative of the issue. *Dep't of Transp. v. J.W.C. Co.*, 396 So. 2d 778 (Fla. 1st DCA 1981); *see also Dep't of Banking & Fin., Div. of Sec. & Investor Prot. v. Osborne Stern & Co.*, 670 So. 2d 932, 935 (Fla. 1996).

41. Oakmonte Village is an "employer" within the meaning of the FCRA. § 760.02(7), Fla. Stat.

42. The FCRA is patterned after Title VII of the Civil Rights Act of 1964, as amended. Accordingly, Florida courts hold that federal decisions construing Title VII are applicable when considering claims under the FCRA. *Harper v. Blockbuster Entm't Corp.*, 139 F.3d 1385, 1387 (11th Cir. 1998); *Valenzuela v. GlobeGround N. Am., LLC*, 18 So. 3d 17, 21 (Fla. 3d DCA

2009); and *Fla. State Univ. v. Sondel*, 685 So. 2d 923, 925 n.1 (Fla. 1st DCA 1996).

43. Discrimination may be proven by direct, statistical, or circumstantial evidence. *Valenzuela*, 18 So. 3d at 22. 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). "[D]irect evidence is composed of 'only the most blatant remarks, whose intent could be nothing other than to discriminate' on the basis of some impermissible factor." *Schoenfeld v. Babbitt*, 168 F.3d 1257, 1266 (11th Cir. 1999).

44. Ms. Lewis presented no direct evidence of discrimination. Similarly, the record in this proceeding contains no statistical evidence of discrimination by Oakmonte Village.

45. Instead, Ms. Lewis relies 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).

46. Under the *McDonnell Douglas* framework, Ms. Lewis bears the initial burden of establishing, by a preponderance of the evidence, a prima facie case of discrimination based on her race, color, national origin, marital status, religion, and/or age. To establish a prima facie case, Ms. Lewis must show that: (1) she belongs to a protected class; (2) she was qualified for her position; (3) she was subjected to an adverse employment action; and (4) her employer treated similarly-situated employees outside of her protected class more favorably than she was treated. *See McDonnell Douglas*, 411 U.S. at 802-04; *Burke-Fowler v. Orange Cnty.*, 447 F.3d 1319, 1323 (11th Cir. 2006).

47. To establish a prima facie case of age discrimination under the federal Age Discrimination in Employment Act (ADEA), the complainant must show that: (1) she was a member of a protected age group (i.e., over 40); (2) she was

subject to an adverse employment action; (3) she was qualified for the job; and (4) she was replaced by a younger person. *See Benson v. Tocco, Inc.*, 113 F.3d 1203, 1207 (11th Cir. 1997).

48. However, in cases alleging age discrimination under section 760.10(1)(a), the Commission has concluded that unlike cases brought under ADEA, the age of 40 has no significance in the interpretation of the FCRA. The Commission has determined that to demonstrate the last element of a prima facie case of age discrimination under Florida law, it is sufficient for Petitioner to show that she was treated less favorably than similarly situated individuals of a "different" age as opposed to a "younger" age. *See Ellis v. Am. Aluminum*, Case No. 14-5355 (Fla. DOAH July 14, 2015), *modified*, Case No. 15-059 (Fla. FCHR Sept. 17, 2015).

49. Failure to establish a prima facie case of discrimination ends the analysis. If Ms. Lewis establishes a prima facie case, she creates a presumption of discrimination. At that point, the burden shifts to the employer to articulate a legitimate, non-discriminatory 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. *Dep't of Corr. v. Chandler*, 582 So. 2d 1183, 1186 (Fla. 1st DCA 1991). The employer has the burden of production, not persuasion, to demonstrate to the trier of fact that the decision was non-discriminatory. *Id.* 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 (U.S. 1993).

50. If the employer meets its burden, the presumption of discrimination disappears. The burden then shifts back to Ms. Lewis 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.

51. In order to satisfy this final step of the process, Ms. Lewis 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 (citing *Tex. Dep't of Cmty. Aff. v. Burdine*, 450 U.S. 248, 252-256 (1981)). The proffered explanation is unworthy of belief if Ms. Lewis 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). Ms. Lewis must prove that the reasons articulated were false *and* that 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.").

52. Despite the shifting burdens of proof, the ultimate burden of persuading the trier of fact that Respondent intentionally discriminated against Petitioner remains at all times with Petitioner. *See Burdine*, 450 U.S. at 253; *Valenzuela*, 18 So. 3d at 22.

53. Applying the burden-shifting framework to the facts found in this matter, Ms. Lewis failed to establish a prima facie case that Oakmonte Village discriminated against her based on her race, color, national origin, marital status, religion, and/or age.

54. Ms. Lewis established three of the four elements. Ms. Lewis sufficiently demonstrated that she belongs to one or more protected classes, was qualified to perform as a resident caregiver, and was subjected to an adverse employment action by not being nominated for medication technician

training and by a reduction of her work hours.[7] However, Ms. Lewis failed to establish the fourth element in the prima facie case—that Oakmonte Village treated similarly situated employees outside her protected classes more favorably or that the adverse actions were based on her race, color, national origin, marital status, religion, and/or age.

55. Accordingly, Ms. Lewis failed to establish a prima facie case under the *McDonnell Douglas* framework. Because she failed to establish a prima facie case of discrimination, it is unnecessary to discuss burdens related to pretext. Ms. Lewis did not prove that the workplace troubles she experienced were in any way because of her race, color, national origin, marital status, religion, and/or age.

56. Ms. Lewis also failed on the claim of retaliation. Section 760.10(7) provides the following, in relevant part:

> 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.

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[7] To prove an "adverse employment action," Ms. Lewis "must show a *serious and material* change in the terms, conditions, or privileges of employment." *Davis v. Town of Lake Park,* 245 F.3d 1232, 1239 (11th Cir. 2001). "The employer's action must impact the 'terms, conditions, or privileges' of the plaintiff's job in a real and demonstrable way." *Id.* An employment action "is considered 'adverse' only if it results in some tangible, negative effect on the plaintiff's employment." *Lucas v. W. W. Grainger, Inc.*, 257 F.3d 1249, 1261 (11th Cir. 2001) (negative performance evaluations that did not result in any effect on the employee's employment did not constitute "adverse employment action."). The challenged employment action must be "materially adverse as viewed by a reasonable person in the circumstances." *Davis*, 245 F.3d at 1239*; see also Butler v. Ala. Dep't of Transp.,* 536 F.3d 1209, 1215 (11th Cir. 2008). Oakmonte Village's reduction of Ms. Lewis's work hours and its decision to not nominate her for the medication technician training were adverse actions. Both negatively affected her pay. Oakmonte Village's failure to provide an evaluation to Ms. Lewis did not amount to an adverse action. Likewise, Ms. Lewis did not prove that she was terminated. Her voluntary resignation was not an adverse employment action.

57. Because the *McDonnell Douglas* analysis also applies in employment retaliation cases, Ms. Lewis has the initial burden of establishing, by a preponderance of the evidence, a prima facie case of unlawful retaliation. *See Burlington N. & Santa Fe Ry Co. v. White*, 548 U.S. 53 (2006).

58. In order to prove a prima facie case of unlawful employment retaliation, Ms. Lewis must establish that: (1) she engaged in a protected activity; (2) she suffered an adverse employment action; and (3) there was a causal relationship between the two events. *Pennington v. City of Huntsville*, 261 F.3d 1262, 1266 (11th Cir. 2001). To establish this causal relationship, Ms. Lewis must prove "that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer." *Univ. of Tex. SW Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013). This standard has also been called "but-for causation." *Frazier-White v. Gee*, 818 F.3d 1249, 1258 (11th Cir. 2016).

59. Ms. Lewis established that she suffered adverse employment actions by not being nominated to take the medication technician training and by the reduction of her work hours, but she failed to establish that she engaged in a protected activity or that the adverse actions were caused by unlawful retaliation. Uncontradicted testimony at the hearing demonstrated that Ms. Lewis complained to Mr. Marshall and Mr. Jones about Ms. Perry's behavior; however, there is no evidence that Ms. Perry's behavior towards Ms. Lewis was caused by Ms. Lewis's race, color, national origin, marital status, religion, and/or age or that she complained of such. Similarly, there was testimony concerning a state investigation of the facility, but there was no evidence on what the alleged informant complained about or that Oakmonte Village believed Ms. Lewis was the informant.

60. Ms. Lewis failed to establish that she was discriminated against based on her race, color, national origin, marital status, religion, age, or that she was retaliated against for engaging in a protected activity. Accordingly, Ms. Lewis's Petition for Relief must be dismissed.

RECOMMENDATION

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

DONE AND ENTERED this 18th day of February, 2020, in Tallahassee, Leon County, Florida.

JODI-ANN V. LIVINGSTONE
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 18th day of February, 2020.

COPIES FURNISHED:

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

Paulette Lewis
1658 April Avenue
Deltona, Florida 32725

Timothy Tack, Esquire
Fisher Phillips
Suite 2350
101 East Kennedy Boulevard
Tampa, Florida 33602
(eServed)

Cheyanne Costilla, General Counsel
Florida Commission on Human Relations
4075 Esplanade Way, Room 110
Tallahassee, Florida 32399
(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.