STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LAVENDER SUAREZ,

Petitioner,

vs. Case No. 19-5889

SARASOTA COUNTY GOVERNMENT,

Respondent.
_____/

RECOMMENDED ORDER

On February 4, 2020, Hetal Desai, Administrative Law Judge of the Division of Administrative Hearings (DOAH), conducted a final hearing in this matter in Sarasota, Florida.

APPEARANCES

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For Respondent: Maria D. Korn, Esquire
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STATEMENT OF THE ISSUE

Whether Respondent, Sarasota County Government (County), violated section 760.10, Florida Statutes (2017),[1] by discriminating against Petitioner, Lavender Suarez, based on her race (African-American) and gender (female),

[1] Unless otherwise indicated, all statutory and administrative rule references are to the 2017 codifications of the Florida Statutes and Florida Administrative Code.

when it terminated her employment; and, if so, what is the appropriate remedy.

PRELIMINARY STATEMENT

On August 16, 2018, Petitioner filed a Charge of Discrimination with the Florida Commission of Human Relations (FCHR) alleging discrimination based on "Race," "Sex," and "Retaliation." Specifically, Petitioner, an African-American female, alleged she was wrongfully terminated in violation of the Florida Civil Rights Act (FCRA) without warning or a Performance Improvement Plan (PIP), whereas white males were given PIPs and an opportunity to improve.

On September 24, 2019, FCHR issued a "Determination: No Reasonable Cause" and Petitioner filed a timely Petition for Relief to contest that determination on October 29, 2019. The Petition for Relief again alleged Petitioner was wrongfully terminated due to her race and gender, but no longer alleged retaliation.[2] The Commission transmitted the Petition to DOAH, where it was assigned to the undersigned and noticed for a final hearing.

At the final hearing, Petitioner offered her own testimony and the testimony of Maria "Mary" Goldaraz, a white female and former County employee. The County offered the testimony of Michele Green, a white female and the County's Employee and Labor Relations Manager; and Robert R. Lewis, a white male and the County's Director of Government Relations. Petitioner's Exhibits P1 through P15 and Respondent's Exhibits R1 through R10 were admitted without objection. Respondent's Exhibits R11 and R12 were conditionally admitted for limited purposes.

[2] Although Respondent argues Petitioner was not subject to retaliation (Resp. PRO, ¶38), at the hearing Petitioner's counsel stated she was no longer pursuing a retaliation claim.

The Transcript of the hearing was filed on February 24, 2020. The parties requested and were granted numerous extensions to file their proposed recommended orders (PROs). Both parties filed their PROs on June 9, 2020, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

PARTIES

1. Petitioner is an African-American female who started her employment as a Manager II/Fiscal Manager with the Sarasota County Area Transit (SCAT) on November 30, 2015. She remained in that position until she was asked to resign in lieu of termination on August 17, 2017.

2. Respondent, the County, oversees SCAT. SCAT provides public transportation services within Sarasota County via a fixed route bus system. SCAT has approximately 247 employees including administrative staff, bus operators, maintenance workers, and managerial staff.

3. Rocky Burke, a white male, was the Director of SCAT during Petitioner's employment.[3] Petitioner reported directly to Mr. Burke. In addition, during the relevant time period, there were four other managers who reported to Mr. Burke: Paratransit Operations Manager Gary Speidel, Fixed Route Operations Manager Ricardo Ferris, Transit Planning Manager Chris DeAnnuntis, and Fleet Maintenance Manager Jon Russo. Except for Ms. Suarez, all the managers were white males.

4. The County's Human Resources Procedures and Guidelines Manual (P&G) provides the following policies regarding performance issues:

> **Chapter III: Compensation and Status**
>
> * * *
>
> (c) Performance appraisals shall be conducted as follows:

[3] Mr. Burke resigned on September 5, 2017, less than a month after Petitioner left the County.

* * *

> 3. Performance Improvement Plan (PIP)
> A performance Improvement Plan appraisal may be conducted at any time at the discretion of the immediate supervisor. Moreover, when an employee's performance is observed as needing improvement, the supervisor should conduct a performance appraisal for the employee as soon as possible.

* * *

> **Chapter IV: Discipline**
>
> **4.03 Corrective Counseling**
> (1) Whenever an employee's performance or conduct falls below an acceptable level, the supervisor should inform the employee promptly of the deficiency and provide counsel, instruction and assistance to the employee.

5. Michele Green, who oversees employee relations for the County, testified that—with the exception of theft or something extremely serious warranting immediate termination—the County makes every effort to advise employees in advance of shortcomings so they have an opportunity to improve prior to termination. The County, she explained, trains supervisors to counsel and coach their employees to help them succeed.

MS. SUAREZ' JOB HISTORY AND DUTIES

6. As SCAT's Fiscal Manager, Ms. Suarez was responsible for providing fiscal and budgetary project management, including grants analysis and oversight of federal and state financial requirements for compliance. She also managed a staff of four direct reports including Mary Goldaraz, who served as a Procurement and Contracts Coordinator; and Barbara Garrett, who served as an Information Technology (IT) professional.

7. The unrefuted testimony establishes Mr. Burke treated Ms. Suarez differently than he treated the four white male managers. For example,

Mr. Burke would come around Petitioner's desk several times a day asking what she was doing and monitoring her whereabouts; he did not do that with the other managers. Mr. Burke also had regular one-on-one meetings with the white male managers but did not have regular meetings with Ms. Suarez. If Ms. Suarez tried to meet with him, he would brush her off and tell her everything was fine. Whereas Mr. Burke sought input from the white male managers, if Ms. Suarez made a suggestion or recommendation he would dismiss it or not respond.

8. Ms. Suarez also noted Mr. Burke allowed one of the other managers, Mr. Speidel, to belittle and berate her. Ms. Suarez testified she was afraid to go to Mr. Burke because she felt he would always take Mr. Speidel's side over hers.

9. Ms. Goldaraz regularly heard Mr. Speidel yelling at Ms. Suarez and experienced this behavior from him herself. She felt that although this was unprofessional behavior, Mr. Burke allowed it in the workplace because he was grooming Mr. Speidel for the position of Director.

10. At one point, Petitioner had a vacant position she needed to fill in her staff. Ms. Suarez wanted to hire a candidate who had been unanimously recommended by a selection committee. Mr. Burke refused to hire that candidate without any explanation. The candidate was an African American female. In contrast, when filling another position, the selection committee's recommended candidate had a felony conviction and other issues that became apparent after a background check. Mr. Burke told Ms. Suarez to hire that candidate despite his history. That candidate was a white male.

11. Ms. Suarez testified about another incident where she was in her office with the door closed with a black supervisor who worked at SCAT. When Mr. Burke found out, he questioned Ms. Suarez and asked her what they were discussing. To her knowledge, he had never done that with any of the male managers who met with employees in their offices behind closed doors.

12. Ms. Goldaraz corroborated Petitioner's testimony regarding Mr. Burke's negative attitude toward Petitioner, and women in general. Ms. Goldaraz worked next to Ms. Suarez' office and regularly witnessed the interactions between Mr. Burke and Ms. Suarez. She testified that Mr. Burke treated Ms. Suarez differently than he did the male managers. He discounted her suggestions and implemented a "good ole boy system" where he met regularly with the male managers, but not with Ms. Suarez.

13. After Ms. Suarez was forced to resign, Ms. Goldaraz took her position. Ms. Goldaraz testified Mr. Burke was dismissive with her as well. He would not give her credit for her ideas and suggestions, but would give the male managers credit.

14. The County put on no evidence contradicting the version of events or description of Mr. Burke's behavior credibly presented by Ms. Suarez and Ms. Goldaraz.

LIBERTY PASS PROGRAM AND AUDITS

15. Ms. Suarez also had responsibilities related to the Liberty Pass Program (Liberty Pass), which distributed 30-day transit passes for riders at discounted rates. The Liberty passes were offered by SCAT to low-income and/or homeless riders who provided appropriate documentation. The documentation to assess eligibility for Liberty Pass could be submitted at either the SCAT Administrative Office or one of 19 third-party agencies approved to distribute Liberty passes.

16. Liberty Pass had its challenges. In May 2015, before Petitioner began working for the County, the County's Board of County Commissioners (BCC), authorized SCAT to discontinue Liberty Pass. The Federal Transit Administration required SCAT to perform a Fare Equity Analysis and SCAT hired a consultant to assess the impact of changes in the program on certain minority and low income populations.

17. In September 2016, the County issued an audit report on SCAT's administration of Liberty Pass. The scope of this audit was from October

2014 (before Ms. Suarez was hired at the County) to June 8, 2016. The audit found there were problems with riders obtaining duplicate Liberty passes and with the third-party agencies not obtaining the necessary information before enrolling riders for the program. Eventually, SCAT eliminated the third-party distributors, and thereafter a Liberty pass could only be obtained at the SCAT headquarters or the County Health Department.

18. According to Petitioner's yearly evaluation for 2016, given in January 2017, Mr. Burke rated her as either "Successful" or "Exceeds Expectations" in all five relevant categories. Related to Liberty Pass, the evaluation listed as accomplishments: (1) successfully completing the Liberty Pass Audit, (2) obtaining approval from the BCC in September 2016 for a "Liberty Pass Increase," and (3) collaborating with the consultant to finalize the Liberty Pass Fare Equity Analysis. Mr. Burke did not give Ms. Suarez the possible rating of "Needs Improvement," nor did he provide her with any negative or constructive comments.[4]

19. In response to the issues raised in the Liberty Pass Audit, Ms. Suarez had instructed Ms. Garrett, the IT professional on her staff, to prepare a spreadsheet to track the issuance of the Liberty passes. It is unclear whether Ms. Garrett completed the spreadsheet, but at some point Mr. Burke transferred Ms. Garrett (along with her IT position) and the spreadsheet tracking project from Ms. Suarez' oversight to Mr. Speidel. This spreadsheet was never submitted to the auditor.

20. After the initial Liberty Pass Audit, Ms. Suarez was meeting regularly with Deborah Martin, the auditor, regarding the Liberty Pass issues, and other SCAT audits related to Bus Operations Cash Handling and Bus Pass Inventory and Reviews. At no time did Ms. Martin or anyone complain to Petitioner that she was not providing adequate information or that she was not addressing the issues for which she was responsible. There was no

[4] Ms. Suarez also did not receive the other possible ratings of "Outstanding" (the highest rating), or "Unsatisfactory" (the lowest rating).

evidence Ms. Martin or anyone else complained about Ms. Suarez' work on the SCAT audits.

21. On August 15, 2017, Mr. Burke asked Ms. Suarez if she would resign from the Fiscal Manager position and take a lesser position. Ms. Suarez was surprised, and asked Mr. Burke for something specific in writing regarding her performance. Mr. Burke refused to put anything in writing. When she asked if his request was related to the audits, Mr. Burke stated it was not. Rather, he told her that other departments had lost confidence in her and he had as well.

22. Two days later, on August 17, 2017, Mr. Burke advised Petitioner that if she did not resign she would be terminated. Under duress, Ms. Suarez signed and submitted a resignation letter that day.

23. At the time of her forced resignation, Ms. Suarez was actively working on issues related to the audits. Ms. Goldaraz took over as the Fiscal Manager and completed the work related to the audits. Ms. Goldaraz was able to complete all the outstanding work that needed to be done. She stated there were a few standard things that needed to be finished up and she was able to do them quickly. There was nothing "major" left on the audit. Ms. Goldaraz "met with the auditors … and kind of wrapped it up. It wasn't really a huge deal."

24. At the hearing, the County relied on an untitled spreadsheet and a follow-up audit report as grounds for Petitioner's termination.[5] The spreadsheet purportedly was a list of audits, with columns for "Opportunities for Improvement," "Management Responses," and "Updated Responses." The spreadsheet had some portions highlighted. There was no explanation by the County as to who prepared the spreadsheet, whether it was accurate, whether it was the most recent version, what its purpose was, or why it was

[5] The copy of the spreadsheet admitted into evidence is illegible due to its miniscule type and font.

relevant. The undersigned finds the spreadsheet wholly unreliably and not credible evidence.

25. The County also relies on a follow-up audit report issued December 2017, months after Ms. Suarez and Mr. Burke left the County's employment. Although this follow-up audit has numerous outstanding issues that remained "open," there is no proof Petitioner was responsible for the open items.

26. Robert Lewis was the interim director of SCAT from October 2017 to January 4, 2020, coming in after Mr. Burke and Ms. Suarez had left. He did not work with either of them. Although he was aware of the audit, Mr. Lewis had no personal knowledge of SCAT operations prior to October 17, 2017. Furthermore, he had no knowledge of what had been provided to the auditor by SCAT, or how the SCAT audits were conducted. Mr. Lewis could not testify which department was responsible for the open items in the follow-up audit report, and admitted he was not aware of which manager was assigned to which open item. Mr. Lewis was not aware of what items may have been left open by the white male managers. Given there was no explanation of the December 2017 follow-up audit report, the undersigned finds it unreliable and not credible evidence.

27. Because she was regularly meeting with the auditor, Ms. Suarez had personal knowledge of some of the open items listed in the follow-up audit report, even though she was not familiar with the report itself. The follow-up audit listed four open items and two partially open items. She was responsible for two of the items. The first dealt with managing the fare money on a daily basis. She testified she implemented a policy addressing this issue as there was not an existing policy when she was hired. The second open item for which she was responsible related to cash variances. Ms. Suarez testified she had finalized the reports reconciling the daily deposits; prior to her coming to SCAT, they were not done daily. She could not testify as to why these items remained listed as open or what had

happened after her departure when Ms. Goldaraz began working with the auditors.

28. The remaining open and partially open items related to "vault access" and "monitoring." Ms. Suarez testified she was not responsible for the vault or the security system that monitors the lock boxes and vault. Rather, these were items that were the responsibility of the maintenance and the bus operations departments, which were overseen by Mr. Ferris and Mr. Russo. Even though these two managers had open items in the follow-up audit report, they were not terminated.

29. Ms. Suarez testified she received no indication from Mr. Burke, the auditor, or anyone else that there were problems with her handling of these open items. Prior to August 15, 2017, Mr. Burke gave her no indication he was disappointed in her performance or that she needed to improve or change. Similarly, Ms. Goldaraz' unrefuted testimony was that Ms. Suarez was totally capable as the Fiscal Manager, worked hard, and was very dedicated. There was no evidence of actual or perceived deficiencies in Ms. Suarez' performance.

MR. DEANNUNTIS AS A COMPARATOR

30. Like Petitioner, Mr. DeAnnuntis held the position of Manager II and reported to Mr. Burke. Mr. DeAnnuntis was hired at SCAT a few months before Petitioner was hired, at a similar (albeit slightly higher) salary as Petitioner. Mr. DeAnnuntis also managed a staff of three positions. Although he did not have the identical duties of Petitioner, as the Manager of Transit Planning he had similar compliance duties as he was responsible for SCAT's planning budget and compliance with federal, regional, and local transportation planning requirements.

31. On December 29, 2016, Mr. DeAnnuntis was provided a two-page document titled "Performance Review Comments" (comments) from Mr. Burke. These comments outlined specific areas in which Mr. DeAnnuntis was to improve and suggestions as to how to make these improvements.

Mr. Burke suggested that he and Mr. DeAnnuntis have daily in-person meetings. Mr. Burke also provided a list of outside resources to help Mr. DeAnnuntis. Ms. Suarez never received any similar comments from Mr. Burke.

32. The comments document was not labeled a "Performance Improvement Plan" (PIP), nor did it set out a time frame for him to accomplish certain goals. It did not indicate that Mr. DeAnnuntis would suffer any repercussions if he did not take the advice given by Mr. Burke. As such, the undersigned does not find this document was a PIP. Rather the comments were consistent with those required by the County as described by Ms. Green and codified in P&G section 4.03 requiring supervisors counsel and coach an employee if his or her performance falls below an acceptable level.

33. Almost three months after receiving the comments, on March 23, 2017, Mr. DeAnnuntis resigned. Unlike Ms. Suarez' forced resignation, there was no evidence Mr. DeAnnuntis was asked to resign after he was provided the comments or that his eventual resignation was in lieu of termination. Furthermore, the unrebutted evidence established no one had ever discussed poor performance or any other issues with Petitioner prior to her forced resignation.

POST-RESIGNATION

34. At the time of her forced resignation in lieu of termination, Ms. Suarez was earning a salary of approximately $71,427 a year at the County.

35. After she left the County, Ms. Suarez immediately started applying for positions on various computer sites. While she attempted to find a permanent position, she worked for a temporary agency earning $10,557.

36. On February 25, 2018, Ms. Suarez began permanent employment with Community Health, Inc., at a starting salary of $64,500. Her loss of earnings during the period from her forced resignation until she found this position

was approximately $35,713. Ms. Suarez mitigated her damages. Subtracting out the amount she earned while temping, her interim losses total $25,156.

37. Ms. Suarez received an annual increase a year later on February 4, 2019, raising her salary to approximately $68,275. Her annual salary for 2017 with the Respondent would have been $71,427, a difference of $6,927.18 annually for the first year (2018) and $3,152.64 annually thereafter.

CONCLUSIONS OF LAW

38. 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* Fla. Admin. Code R. 60Y-4.016.

39. Pursuant to section 760.10(1)(a), 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."[6]

40. As there is no direct evidence in this case, Ms. Suarez must rely on circumstantial evidence of discriminatory intent to prove her discrimination claim. Using the shifting burden of proof pattern established in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973), first, Petitioner has the burden of proving a prima facie case of discrimination. Second, if Petitioner sufficiently establishes a prima facie case, the burden shifts to Respondent to "articulate some legitimate, nondiscriminatory reason" for its action. Third, if Respondent satisfies this burden, Petitioner has the opportunity to prove that

[6] Florida courts have held that because the FCRA is patterned after Title VII of the Civil Rights Act of 1964, as amended, federal case law dealing with Title VII is applicable. *See, e.g., Valenzuela v. GlobeGround N. Am., LLC,* 18 So. 3d 17, 21-22 (Fla. 3d DCA 2009)(gender); *Thompson v. Baptist Hosp. of Miami, Inc.*, 279 F. App'x 884, 888 n.5 (11th Cir. 2008) (race).

the legitimate reasons asserted by Respondent are really a pretext. *See Valenzuela*, 18 So. 3d at 22 (gender discrimination claim).

41. "Demonstrating a prima facie case is not onerous; it requires only that the plaintiff establish facts adequate to permit an inference of discrimination." *Holifield v. Reno*, 115 F.3d 1555, 1562 (11th Cir. 1997). Petitioner must establish a prima facie case by a preponderance of the evidence. *Id.*; *see also* § 120.57(1)(j), Fla. Stat. ("Findings of fact shall be based upon a preponderance of the evidence, except in penal or licensure proceedings or except as otherwise provided by statute and shall be based exclusively on the evidence of record and on matters officially recognized."). It simply requires evidence that more likely than not tends to prove a certain proposition.

DISPARATE TREATMENT

42. Ms. Suarez points to the fact she was treated differently than Mr. DeAnnuntis, a white male, as evidence of discrimination. This "disparate treatment" claim is the most easily understood type of discrimination. *See Schultz v. Royal Caribbean Cruises, Ltd.*, 2020 WL 3035233, at *23 (S.D. Fla. June 5, 2020) (citations and quotations omitted). Disparate treatment occurs when an employer treats an employee less favorably than others because of his or her race, color, religion, sex, or national origin. *Id.* To establish a prima facie case of disparate treatment, Ms. Suarez must demonstrate that she:

> (1) belongs to a protected class;
> (2) suffered an adverse employment action;
> (3) was qualified to do her job; and
> (4) was treated less favorably than similarly situated employees outside of the protected class.

Alvarez v. Lakeland Area Mass Transit Dist., 2020 WL 3473286, at *10 (M.D. Fla. June 25, 2020).

43. Recently the U.S. Supreme Court revisited the general meaning of gender discrimination and specifically addressed the standard for disparate treatment cases:

> [T]he question becomes: What did "discriminate" mean in 1964? As it turns out, it meant then roughly what it means today: "To make a difference in treatment or favor (of one as compared with others)." Webster's New International Dictionary 745 (2d ed. 1954). To "discriminate against" a person, then, would seem to mean treating that individual worse than others who are similarly situated. *See Burlington N. & S. F. R. Co. v. White*, 548 U.S. 53, 59, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006). In so-called "disparate treatment" cases like today's, this Court has also held that the difference in treatment based on sex must be intentional. *See*, *e.g., Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988). So, taken together, *an employer who intentionally treats a person worse because of sex—such as by firing the person for actions or attributes it would tolerate in an individual of another sex—discriminates against that person in violation of Title VII*. (emphasis added).

Bostock v. Clayton Cty., Ga., No. 17-1618, 2020 WL 3146686, at *5 (U.S. June 15, 2020)(holding sexual identity discrimination is actionable under Title VII).

44. There is no dispute as to the first element: Ms. Suarez is female and African-American. Regarding the second element, she provided she suffered an adverse action when she was forced to resign from her position.[7]

[7] Although not argued by the County, generally a resignation does not qualify as an adverse action, but an employee may show she suffered an adverse action if her resignation was involuntary. *See Borden v. Birmingham Heart Clinic, P.C.*, 2020 WL 2557918, at *5 (N.D. Ala. May 20, 2020) (citing *Hargray v. City of Hallandale*, 57 F.3d 1560, 1568 (11th Cir. 1995)). Two situations can make a resignation involuntary: "(1) where the employer forces the resignation by coercion or duress; or (2) where the employer obtains the resignation by deceiving or misrepresenting a material fact to the employee." *Hargray*, 57 F.3d at 1568. Here, Mr. Burke told Ms. Suarez that if she did not resign she would be terminated, and thus the resignation was involuntary. *Id.*

Additionally, she put on more than sufficient evidence regarding the third element: she was qualified for her position.

45. To meet the fourth "comparator" element of a disparate treatment claim, Petitioner must show she is similarly situated in all relevant respects to Mr. DeAnnuntis, the employee she claims as given preferential treatment. *See Woods v. Cent. Fellowship Christian Acad.*, 545 F. App'x 939, 945 (11th Cir. 2013). More specifically, to be valid comparators for disparate discipline, such as termination, they must have "(1) dealt with the same supervisor, (2) been subject to the same standards, and (3) engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it." *Sanguinetti v. United Parcel Serv., Inc.*, 114 F. Supp. 2d 1313, 1317 (S.D. Fla. 2000).

46. Here, Petitioner established both she and Mr. DeAnnuntis were supervised by Mr. Burke and were subject to the same policies regarding evaluations. They were hired around the same time. Both eventually had the same amount of direct reports and similar salaries. Although there was insufficient evidence to establish what job-related deficiencies, if any, Ms. Suarez had, there was no evidence of distinguishing circumstances that would warrant the different treatment between Mr. DeAnnuntis and Ms. Suarez. Thus, Petitioner established Mr. DeAnnuntis as a true comparator.

47. Mr. DeAnnuntis was similarly situated to Ms. Suarez, but was given constructive comments and was not forced to resign; whereas she was given no warning of any performance issues, and was forced to resign with one day's notice. Again, the County gave no reason justifying this difference in treatment. Therefore, Ms. Suarez established the fourth and final element of her disparate treatment claim.

48. But the analysis does not stop there. Not only does there need to be differential treatment, the treatment must also be intentionally based on her

gender and/or race. There is more than a preponderance of the evidence that Mr. Burke's treatment of Ms. Suarez was deliberate and that it was based on her gender. As discussed above, the unrebutted testimony of both Ms. Suarez and Ms. Goldaraz established Mr. Burke treated women differently than men in substantial ways. He provided professional support through one-on-one meetings and performance comments to his male managers; he did not do the same with female managers. He valued his male managers and was dismissive to Ms. Suarez and Ms. Goldaraz.

49. There is not enough evidence, however, that would establish his treatment toward Ms. Suarez was based on race. Although there was anecdotal evidence about being questioned when she spoke with a black supervisor and Ms. Suarez was replaced by Ms. Goldaraz, who is white, this is not enough to establish Mr. Burke was racially motivated in his actions. Ms. Goldaraz testified that once she became a manager, she also was treated differently than the other male managers. Consequently, although Ms. Suarez has met her burden of establishing a prima facie case of disparate treatment based on her gender, she has not met her burden of establishing racial discrimination.

COUNTY'S REASON FOR TERMINATION[8]

50. Regardless, having met her burden of establishing a prima facie gender discrimination claim under *McDonnell Douglas*, the burden now shifts to the County to provide a legitimate non-discriminatory reason for the adverse employment action, Ms. Suarez' termination. The employer's burden, at this stage, is an "exceedingly light" one of production, not persuasion, which means the employer "need only produce evidence that could allow a

[8] Without any citations to statute or case law, Respondent simply argues Petitioner, an at-will employee, was separated because Mr. Burke and others had lost confidence in her. (Resp. PRO, ¶36). The County does not argue Petitioner did not suffer an adverse action or that Mr. DeAnnuntis is not similarly situated. Therefore, the County has waived these defenses. They are addressed above to offer a complete analysis.

rational fact finder to conclude that [the employee's] discharge was not made for a discriminatory reason." *Schultz*, 2020 WL 3035233, at *28.

51. As an initial matter, the County repeatedly argues Ms. Suarez was an "at-will" employee and therefore was not entitled to any warning or constructive comments prior to her termination. The fact that Petitioner is an at-will employee does not prevent her from proving her discrimination claim. *See generally*, *Knight v. Palm City Millwork & Supply Co.*, 78 F. Supp. 2d 1345, 1348 (S.D. Fla. 1999)("we hold that an at-will employee under Florida law may maintain a [ ] cause of action for employment discrimination based on race."). This is especially so when a white male "at-will" employee is allowed to remain employed despite his performance issues, while Ms. Suarez, an African-American female was terminated.

52. The County asserts that the reason Ms. Suarez was terminated was because of performance issues. Obviously, poor job performance is a legitimate, nondiscriminatory reason for terminating an employee. *See Copley v. Bax Glob., Inc.*, 80 F. Supp. 2d 1342, 1351 (S.D. Fla. 2000). But there must be evidence of such poor performance. Here, there was none.

53. As explained above, the County relied solely upon two exhibits to show Ms. Suarez had performance issues: an unreadable spreadsheet of unknown origin, and a follow-up audit report that was issued after Ms. Suarez was no longer at the County. These documents were inherently unreliable and did not establish that Ms. Suarez had performance issues.

54. Moreover, neither of the witnesses who testified for the County had any firsthand knowledge of Ms. Suarez' alleged performance issues. There was hearsay evidence that Mr. Burke had told Ms. Green that other departments and he had lost confidence in Ms. Suarez, but this fact was not

supported by any non-hearsay evidence.[9] There was no non-hearsay evidence of who lost confidence in Ms. Suarez, why he or she might have lost confidence, or if the loss of confidence was warranted. Ms. Green, who participated in Petitioner's termination, could have shed light on this, but did not.

55. Without any credible evidence, the County has failed to meet its burden of production that the termination was based on Petitioner's poor performance (or a warranted "loss of confidence"). As such, Ms. Suarez has proven her termination was discriminatory based on her gender.

PRETEXT

56. Even if the County had met its burden of producing a legitimate non-discriminatory reason for her termination, the burden would then shift back to Petitioner to establish this reason was a pretext. To show pretext, Petitioner must identify "weaknesses, inconsistencies, or contradictions in the County's articulated legitimate reasons for its action so that a reasonable factfinder would find them unworthy of credence." *Alvarez v. Royal Atl. Developers, Inc.*, 610 F.3d 1253, 1265 (11th Cir. 2010).

57. Ms. Suarez could meet this burden by presenting evidence that employees outside her protected class were involved "in acts of comparable seriousness [but] were nevertheless retained." *See McDonnell Douglas*, 411 U.S. at 804–05. Ultimately, Ms. Suarez can show the County's proffered reason is a pretext because it (1) should not be believed, or (2) when considering all the evidence, that it is more likely that the discriminatory reason motivated the decision than the employer's proffered reason. *See Bielawski v. Davis Roberts Boeller & Rife, P.A.*, 2020 WL 2838811, at *5, n.4 (M.D. Fla. June 1, 2020).

[9] Although "[h]earsay evidence may be used for the purpose of supplementing or explaining other evidence, [] it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." § 120.57(1)(c), Fla. Stat.

58. Ms. Suarez has provided sufficient evidence for the undersigned to find that the proffered reason for her termination, poor performance or "loss of confidence, was a pretext. First, if Ms. Suarez was performing poorly, why was she not told by Mr. Burke that she needed to improve? Why was she not given counseling and coaching or performance comments? Why were there no negative comments in her performance evaluation? These weaknesses poke holes at the County's proffered reason.

59. Second, assuming the follow-up audit was evidence that Ms. Suarez was responsible for some of the outstanding issues at SCAT, it also established other managers had issues as well. Ms. Suarez, the lone female manager, was the only one fired. The County has not given *any* reason Ms. Suarez was terminated for alleged deficiencies and Mr. DeAnnuntis was not terminated despite his documented deficiencies. Nor did it explain why Ms. Suarez was terminated for open items in the follow-up audit, but Mr. Ferris and Mr. Russo were not. This difference in treatment between the male managers and Ms. Suarez certainly makes the County's reliance on the audits suspect.

60. Finally, Mr. Burke specifically told Ms. Suarez that she was not being terminated because of the audit, but rather because departments and he had lost confidence in her. He then refused to put that reason in writing or explain why he had lost confidence. The County has not presented any evidence contradicting Ms. Suarez' version of her forced resignation.

61. Considering all the evidence (and the lack thereof), the undersigned finds Petitioner has shown enough weaknesses in the County's purported reason of poor performance or "loss of confidence" to establish it was a pretext.

REMEDY

62. Having established the County discriminated against her based on her gender, Ms. Suarez seeks damages in the form of compensatory damages,

back pay, front pay, and attorney's fees. Section 760.11(6) provides, in relevant part:

> If the administrative law judge, after the hearing, finds that a violation of the Florida Civil Rights Act of 1992 has occurred, the administrative law judge shall issue an appropriate recommended order in accordance with chapter 120 prohibiting the practice and providing affirmative relief from the effects of the practice, including back pay.
>
> * * *
>
> In any action or proceeding under this subsection, the Commission, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs.

63. Unlike in a civil legal proceeding brought pursuant to section 760.11(4)(a), Petitioner cannot be awarded compensatory damages in an administrative proceeding brought pursuant to section 760.11(4)(b). *Compare* § 760.11(5) (allowing a civil court to "award compensatory damages, including, but not limited to, damages for mental anguish, loss of dignity, and any other intangible injuries, and punitive damages.").

64. Regarding back pay, "once a plaintiff has proven discrimination, back pay should be awarded 'unless special circumstances are present.'" *Lengen v. Dep't of Transp.*, 903 F.2d 1464, (11th Cir. 1990)(quotations omitted). The County has not argued that special circumstances would prevent an award of back pay in this case, nor is there any evidence that back pay should not be awarded to Ms. Suarez.

65. As such, Ms. Suarez should be awarded lost wages before finding a permanent position, plus the difference in pay from the time she began the job and the date of this Recommended Order, for a total amount of approximately $36,550.

66. Front pay is not explicitly listed in the statutory remedy language in section 760.11(6). Under federal law interpreting Title VII of the Civil Rights

Act of 1991, front pay is an equitable remedy. *See EEOC v. W&O, Inc.*, 200 F.3d 600, 619 (11th Cir. 2000)(noting that in addition to back pay, prevailing employees are presumptively entitled to either reinstatement or front pay). Even though administrative law judges have limited equitable powers, FCHR has held that front pay is an appropriate remedy under the FCRA where reinstatement is not an option. In *Whitehead v. Miracle Hill Nursing and Convalescent Home Inc.*, 1994 WL 1028127, at *10 (Fla. FCHR April 17, 1995), FCHR held

> [F]ront pay is compensation for future economic loss stemming from present discrimination that cannot be remedied by traditional rightful-place relief such as hiring, promotion or reinstatement. *Some of the factors which make rightful-place relief inappropriate include a lack of reasonable prospect that Petitioner can obtain comparable employment, the existence of an employer-employee relationship that is pervaded with hostility, and the existence of a relatively short period of time for which front pay is to be awarded*. (emphasis added).

67. Assuming front pay is an authorized remedy under the FCRA, Petitioner provided no evidence as to whether the County could reinstate her or that such reinstatement was inappropriate. To the contrary, there is no apparent reason that Ms. Suarez could not be reinstated to her former position. Mr. Burke is no longer the head of SCAT and there was no evidence that there would be a hostile environment if Petitioner returned to the County. Practically, however, Petitioner has found comparable employment and presumably the County has someone in Petitioner's former position. As such, front pay is not appropriate in this situation.

68. Petitioner is entitled to the costs incurred in pursuing this administrative proceeding, including reasonable attorney's fees. § 760.11(6), Fla. Stat.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations enter a Final Order:

1. Finding the Sarasota County Government discriminated against Lavender Suarez based on her gender;

2. Awarding Petitioner $36,550 in back pay; and

3. Awarding reasonable attorney's fees as part of the costs.

DONE AND ENTERED this 15th day of July, 2020, in Tallahassee, Leon County, Florida.

HETAL DESAI
Administrative Law Judge
Division of Administrative Hearings
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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.