STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARY F. GARRETT,

Petitioner,

vs. Case No. 20-2922

EASTERN FLORIDA STATE COLLEGE,

Respondent.
_____/

RECOMMENDED ORDER

On September 14, 2020, Administrative Law Judge Robert J. Telfer III, of the Florida Division of Administrative Hearings (Division), conducted an evidentiary hearing pursuant to section 120.57(1), Florida Statutes (2018), via the ZOOM web-conference platform.

APPEARANCES

For Petitioner: Mary F. Garrett, pro se
Apartment 2508
2741 Caribbean Isle Boulevard
Melbourne, Florida 32935

For Respondent: Mark E. Levitt, Esquire
Allen, Norton & Blue, P.A.
Suite 100
1477 West Fairbanks Avenue
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STATEMENT OF THE ISSUE

Whether Respondent Eastern Florida State College (EFSC) engaged in discriminatory employment practices and retaliation, in violation of the Florida Civil Rights Act (FCRA), as alleged in the Petition for Relief; and, if so, the appropriate penalty.

PRELIMINARY STATEMENT

On June 3, 2019, Petitioner Mary F. Garrett filed an Employment Complaint of Discrimination with the Florida Commission on Human Relations (FCHR), alleging that EFSC discriminated against her, on the basis of her race, sex, and age, and retaliated against her. Ms. Garrett's Complaint stated:

> Complainant, an African American Female, began her employment with Respondent in 09/2000 and holds the position of Coordinator of Undergraduate Research. Claimant was subjected to retaliation, disparate treatment, different terms and conditions of employment and was held to a different standard because of her Age (53), Race-Black, Sex-Female. Claimant performed the duties and responsibilities of her position in an exceptional manner and was not the subject of any disciplinary issues. Claimant was informed on 07/09/2018 by Ms. Darla Ferguson that her position (eLearning coordinator) with Eastern Florida State College (EFSC) was now eliminated. Ms. Ferguson further stated, there was a job offer as coordinator in the Office of Undergraduate Research (OUR) and indicated "they found this position for you." Claimant accepted the job and was told to report to the Melbourne campus to meet with Dr. Sandy Handfield and her new supervisor, on 7/10/2018. When EFSC personnel were redirected after closure of the Patrick AFB Center EFSC location, Marian Shelpman and Justin Looney were given different EFSC career opportunities. Justin Looney was given the option to select from two positions as full-time faculty or manager at his preferred campus location. Both positions offered to him were opportunities in career advancement and pay. Marian Shelpman and Claimant were not given the same consideration. When Justin Looney arrived at the Titusville campus, office personnel knew his arrival date and had his office location ready to occupy. When Claimant arrived at the Melbourne campus on 7/10/18, Dr. Handfield indicated she

> received an email the afternoon of 7/9/18 of news of her new position and impending arrival on 7/10. The OUR office space was not ready for staff to occupy. On 7/19/2018, the first meeting with Herber and Spring were held in the OUR. They discussed expectations, goals, and action plans they wanted the OUR coordinator to work on. Subsequent meetings became tenser with little collaboration due to the approach used by the two faculty members (Herber and Spring) to direct the OUR coordinator's actions and Spring's actions to build an environment for intimidation and control. When Claimant performed actions without their knowledge or consent, the working relationship became even more strenuous, especially with Spring. Dr. Handfield was made aware of the work environment issues with Herber and Spring. On 4/2/2019, Claimant met with her Supervisor,
> Dr. Handfield, to discuss the performance evaluation for the six-month probationary period of 7/9/2018 to 1/10/2019. The evaluation indicated development was needed in four areas to include productivity, written communication, team work, and valuing differences. Areas of improvement were noted as email etiquette, timely responses to students, and follow-through. She requested evidence to support reasons for the low ratings on the evaluation and no evidence was presented.
> Dr. Handfield indicated she sought input from Herber and Spring to complete the performance evaluation. She submitted a formal complaint on 4/23, met with Ms. Ferguson on 4/29, and expected the work environment to change.

Thereafter, on May 20, 2020, FCHR issued a "Determination: No Reasonable Cause," that determined that no reasonable cause existed to believe that an unlawful practice occurred. On June 24, 2020, Ms. Garrett filed a Petition for Relief. The Petition for Relief alleged:

> The petitioner received a negative 6-month evaluation in April 2018. Input by two faculty members without full knowledge of the work or job

tasks performed by the petitioner supported the evaluation. The subsequent corrective action plan was based on the recommendation of the two faculty members. The written plan given to the petitioner in November 2019 was a direct collaborative effort between the campus provost and the two faculty members. A reversal of the commission's determination is based on faculty are prohibited from serving in the role of supervisor over staff. The two faculty members received authority through the campus provost to serve as supervisor, make modifications to work environment, duties, and position requirements. No other Eastern Florida State College offices or departments permit faculty to have full authority to make permanent changes to a staff member's job description.

* * *

The alleged acts of discrimination were performed with malice and intent to harm the career and personal reputation of the petitioner. The persecution, undue stress, and adverse employment actions were a direct result of personal prejudices and not based on quality of petitioner's work as coordinator in the Office of Undergraduate Research. The statute stipulates individuals within the state have freedom from discrimination because of race, color, religion, sex, national origin, age, handicap, or marital status and thereby to protect their interest in personal dignity. The respondents allegedly committed public acts through electronic emails, committee meetings, and faculty meetings to disrobe the petitioner of personal dignity.

* * *

The petitioner requests 6-month employment evaluation removed and destroyed from employee records, promotion to position of director or higher, back-pay to accommodate the current pay salary for said position beginning July 8, 2018 to current

> date, and acknowledgement of completion of 6-month corrective action plan.

On June 25, 2020, FCHR transmitted the Petition to the Division and assigned the undersigned Administrative Law Judge (ALJ) to conduct an evidentiary hearing.

The undersigned conducted the final hearing on September 14, 2020. Ms. Garrett testified on her own behalf and called no additional witnesses. Because she had not timely exchanged proposed exhibits with Respondent, pursuant to the July 21, 2020, Order of Pre-hearing Instructions, and had not timely provided the proposed exhibits to the Division, pursuant to the August 28, 2020, Amended Notice of Hearing, the undersigned prohibited the introduction of any of Ms. Garrett's exhibits. EFSC called no witnesses and introduced no exhibits at the final hearing.

The one-volume Transcript of the hearing was filed with the Division on October 12, 2020. On October 22, 2020, the parties timely submitted proposed recommended orders, which the undersigned has considered in the preparation of this Recommended Order.

All statutory references are to the 2018 codification of the Florida Statutes, unless otherwise indicated.

FINDINGS OF FACT

1. Ms. Garrett is a 53-year-old African American woman. EFSC is a public college in Brevard County, Florida. For the time period relevant to this matter, EFSC is, and has been, her employer.

2. On July 9, 2018, Darla Ferguson informed Ms. Garrett that EFSC eliminated her position as e-Learning Coordinator.

3. EFSC did not fill Ms. Garrett's position in the e-Learning department; rather, the prior job duties were assigned to other members in the e-Learning department.

4. After eliminating the position of e-Learning Coordinator, EFSC offered Ms. Garrett the position of Coordinator of the Office of Undergraduate Research (OUR).

5. The OUR department supports and promotes research opportunities among undergraduate research students through EFSC's four campuses.

6. Ms. Garrett accepted EFSC's offer, and Ms. Garrett became EFSC's first employee to hold the position as Coordinator of OUR.

7. In lieu of offering Ms. Garrett the position of Coordinator of OUR, EFSC could have laid off Ms. Garrett following the elimination of her position as e-Learning Coordinator. However, rather than laying her off, EFSC found a new position for Ms. Garrett.

8. Following her transfer to the position as Coordinator of OUR, Ms. Garrett's salary and benefits remained unchanged from her prior position as e-Learning Coordinator.

9. On July 10, 2018, Ms. Garrett met with Dr. Sandra Handfield, Scott Herber, and Dr. Ashley Spring to discuss Ms. Garrett's new position as Coordinator of OUR.

10. At that meeting, Dr. Handfield—who was Ms. Garrett's new supervisor—informed Ms. Garrett that Dr. Spring and Mr. Herber were the founders of OUR. Prior to Ms. Garrett's arrival as Coordinator of OUR, Dr. Spring and Mr. Herber, who were full-time faculty members, oversaw the OUR program.

11. Dr. Handfield also informed Ms. Garrett that should she have any questions regarding her position as Coordinator of OUR, she should consult with Dr. Spring and Mr. Herber.

12. As of the date of the final hearing, Ms. Garrett remained employed by EFSC as the Coordinator of OUR, and continues to receive the same salary and benefits that she received when she was the e-Learning Coordinator.

Allegations of Adverse Employment Action

13. EFSC originally intended for the Coordinator of OUR to be a Director, and possess a doctorate degree. However, EFSC later changed this position to Coordinator, which did not require a doctorate degree, and which had a lower salary.

14. Ms. Garrett never applied for the Director of OUR position, and she does not have a doctorate degree.

15. Ms. Garrett testified concerning her belief for the reason that EFSC transferred her to the Coordinator of OUR position, stating:

> I believe they did that because the intent was to put me in a position that was beyond my reach so that when I had issues and problems, they could use that and tie it with this position in order to say that I could not do the job.

16. On April 12, 2019, Ms. Garrett received a six-month performance evaluation covering her first six months in her position as Coordinator of OUR. Dr. Handfield provided the performance evaluation approximately four months after the performance period ended.

17. The performance evaluation indicated that Ms. Garrett was deficient in the areas of teamwork, valuing differences, and communication.

18. Following the performance evaluation, Ms. Garrett did not lose any pay or benefits, and nothing adverse happened to Ms. Garrett as a result of the performance evaluation.

19. Ms. Garrett testified that she believed Dr. Handfield gave her that evaluation "as a form of retaliation[,]" but not on the basis of her race, age, or gender. She further testified as follows:

> Q. Okay. But just to be clear, not gender, age, or race. You think it's retaliation, what she did, correct?
>
> A. Correct.
>
> Q. Okay. And what was she retaliating against you for in your view or what facts do you have that it was for retaliation?
>
> A. I believe it was retaliation based on the input from the faculty members, based on the interactions we had during the actual performance review period, which would have been July 9th, 2018, until January 9th, 2019.
>
> Q. So based on the interaction you had with Dr. Handfield, Dr. Spring and Mr. Herber for the six months before that; is that what you're saying?
>
> A. Yes

20. In January 2019, Ms. Garrett requested that she use Canvas shell computer software to enable her to build an orientation outline. EFSC denied this request, because it would not generate money.

Allegations of Comparator

21. Ms. Garrett identified Justin Looney, a 38-year-old white male, as a comparator in support of her discrimination claim.[1]

22. Ms. Garrett's testimony was that Mr. Looney was an EFSC employee working as an Academic Services Coordinator at EFSC's Patrick Air Force Base campus; upon the closing of that campus, EFSC eliminated Mr. Looney's position and, similarly to Ms. Garrett, transferred him to a newly-created position in which he received the same salary and benefits.

[1] At the final hearing, Ms. Garrett also mentioned Marian Sheltman as a possible comparator, stating that she was a white female. However, Ms. Garrett failed to introduce any additional facts or evidence concerning Ms. Sheltman's status or to explain how the undersigned could consider Ms. Sheltman as a valid comparator. The undersigned finds that Ms. Garrett failed to establish Ms. Sheltman as a comparator in this matter.

23. Ms. Garrett contends that EFSC treated Mr. Looney differently, during his transfer, in that EFSC provided Mr. Looney more notice time between the elimination of his prior position and the transfer to his new position.

24. Ms. Garrett also contends that EFSC treated Mr. Looney differently than her because Mr. Looney was Dr. Handfield's son-in-law.

Allegations of Hostile Work Environment

25. Ms. Garrett testified that at the July 10, 2018, meeting, Dr. Spring commented about the uncleanliness of the OUR office, and recommended that Ms. Garrett obtain a broom and dustpan to keep the office clean. Ms. Garrett also testified that she declined to assist Dr. Spring in hanging posters on the wall of the OUR office. Ms. Garrett also testified that Dr. Spring noticed that the OUR signage was covered up on the outside of the building, and asked Ms. Garrett to correct this.

26. Ms. Garrett testified that in subsequent meetings with Dr. Handfield, she "shared [her] concerns regarding the work environment[,]" and stated that she did not feel comfortable with the things Dr. Spring and Mr. Herber asked of her because these things "were in violation of college policy."

27. Ms. Garrett testified that Dr. Spring micromanaged her role as the Coordinator of OUR; for example, Dr. Spring continued to process online student research forms, and coordinated the Fall 2018 OUR board meeting. Ms. Garrett also testified that Dr. Spring opened the OUR online student forms too early, which prevented Ms. Garrett from matching faculty mentors with student applicants.[2]

28. Ms. Garrett also testified that Dr. Spring made decisions concerning the OUR without consulting with her.

29. Ms. Garrett testified that Dr. Spring would send her e-mails asking if Ms. Garrett had completed the work requested of her.

[2] Ms. Garrett also testified that Mr. Herber was not involved in micromanaging her role as the Coordinator of OUR.

30. Ms. Garrett testified that Dr. Spring told Ms. Garrett what she should be doing, and would become vocal with her dissatisfaction of Ms. Garrett's job performance.

31. Ms. Garrett testified that she did not know why Dr. Spring engaged in any of these actions.

32. After a November 2018 meeting with Dr. Spring, Ms. Garrett testified that her work atmosphere became "more tense … in terms of Dr. Spring and Mr. Herber starting to make comments about allegations about my work." She further testified that after this meeting, Dr. Handfield "started issuing directives[,]" such as requiring Ms. Garrett to first ask Dr. Spring and Mr. Herber for input prior going to other EFSC campuses to host information tables.

33. Ms. Garrett claimed that she was subjected to a hostile work environment in which "in every meeting that I planned and hosted, Dr. Spring and Mr. Herber would say disparaging comments during the meeting." For example, "[t]hey would talk across me and I did not reply."

34. Although Dr. Handfield was Ms. Garrett's supervisor, Ms. Garrett testified that Dr. Handfield openly discussed supervision of the OUR with Dr. Spring and Mr. Herber.

Findings of Ultimate Fact

35. Ms. Garrett presented no persuasive action that EFSC's decisions concerning, or actions affecting, her, directly or indirectly, were motivated in any way by race-based, sex-based, or age-based discriminatory animus. There is no competent, persuasive evidence in the record, direct or circumstantial, upon which the undersigned could make a finding of unlawful race, sex, or age discrimination.

36. Ms. Garrett presented no persuasive evidence that EFSC's actions subjected her to harassment based on race, sex, or age. There is no competent, persuasive evidence in the record, direct or circumstantial, upon

which the undersigned could make a finding of unlawful race, sex, or age harassment.

37. Ms. Garrett presented no persuasive evidence that EFSC discriminated against her because she opposed an unlawful employment practice, or because she made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the FCRA. There is no competent, persuasive evidence in the record, direct or circumstantial, upon which the undersigned could make a finding of unlawful retaliation.

38. Ms. Garrett presented no persuasive evidence that EFSC's actions were sufficiently severe or persuasive to alter the terms and conditions of her employment to create a hostile work environment. There is no competent, persuasive evidence in the record upon which the undersigned could make a finding of hostile work environment.

CONCLUSIONS OF LAW

39. The Division has jurisdiction over the subject matter and the parties to this proceeding in accordance with sections 120.569, 120.57(1), and 760.11(7), Florida Statutes. *See also* Fla. Admin. Code R. 60Y-4.016 (providing upon a petition for relief from an unlawful employment practice, a hearing shall be conducted by an administrative law judge.).

40. The FCRA protects individuals from discrimination and retaliation in the workplace. *See* §§ 760.10 and 760.11, Fla. Stat. Section 760.10 states, in pertinent part:

> (1) It is an unlawful employment practice for an employer:
>
> (a) To discharge or 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.
>
> * * *
>
> (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.

41. Because the FCRA is patterned after federal anti-discrimination laws, such as Title VII of the Civil Rights Act of 1964 (Title VII), courts rely on federal Title VII cases when analyzing race discrimination and retaliation claims brought pursuant to the FCRA. *See Ponce v. City of Naples,* 2017 WL 4574649, at *4 (M.D. Fla. Oct. 13, 2017); *Harper v. Blockbuster Entm't Corp.*, 139 F.3d 1385, 1387 (11th Cir. 1998)(finding that complaint fails for the same reasons under Title VII and the FCRA); *Valenzuela v. GlobeGround N. Am., LLC,* 18 So. 3d 17, 21 (Fla. 3d DCA 2009).

42. The burden of proof in an administrative proceeding is on Ms. Garrett as the complainant. *See Dep't of Banking & Fin., Div. of Sec. & Investor Prot. v. Osborne Stern & Co.,* 670 So. 2d 932, 935 (Fla. 1996)("The general rule is that a party asserting the affirmative of an issue has the burden of presenting evidence as to that issue."). To show a violation of the FCRA, Ms. Garrett must establish, by a preponderance of the evidence, a prima facie case of discrimination, retaliation, or hostile work environment. *See St. Louis v. Fla. Int'l. Univ.,* 60 So. 3d 455, 458-59 (Fla. 3d DCA 2011)(reversing jury verdict awarding damages on FCRA racial discrimination and retaliation claims where employee failed to show similarly situated employees outside his protected class were treated more favorably). A "prima facie" case means

it is legally sufficient to establish a fact or that a violation happened, unless disproved.

43. The "preponderance of the evidence" standard is the "greater weight" of the evidence, or evidence that "more likely than not" tends to prove the fact at issue. This means that if the undersigned found the parties presented equally competent substantial evidence, Ms. Garrett would not have proved her claims by the "greater weight" of the evidence, and would not prevail in this proceeding. *See Gross v. Lyons,* 763 So. 2d 276, 289 n.1 (Fla. 2000).

Race, Sex, and Age Discrimination

44. A Title VII plaintiff may establish a claim of unlawful race, sex, and age discrimination or disparate treatment through either direct or circumstantial evidence. *See Robertson v. Interactive College of Technology/Interactive Learning Sys.,* 743 Fed. Appx. 269, 275 (11th Cir. July 16, 2018). The Eleventh Circuit has defined direct evidence of discrimination as "evidence which, if believed, would prove the existence of discrimination without inference or presumption." *Holifield v. Reno,* 115 F.3d 1555, 1561 (11th Cir. 1997).

45. Ms. Garrett presented no direct evidence of discrimination based on race, sex, or age.

46. When reviewing race discrimination claims supported by circumstantial evidence, courts follow the framework set forth in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-04, 93 S. Ct. 1817, 37 L. Ed. 2d 668 (1973). This framework involves a three-step process. Ms. Garrett must first establish a prima facie case of discrimination. If Ms. Garrett does so, a presumption of discrimination arises against EFSC. Then, EFSC has the burden to articulate a legitimate, non-discriminatory reason for its action. If EFSC can articulate such a reason, Ms. Garrett's presumption of discrimination evaporates. Finally, Ms. Garrett has the burden of proving that EFSC's legitimate reason was pretext for discrimination. A "pretext" is a reason given in its justification for conduct that is not the real reason. *See*

McDonnell Douglas Corp., 411 U.S. at 802; *Scholz v. RDV Sports, Inc.,* 710 So. 2d 618, 624 (Fla. 5th DCA 1998).

47. In order to establish a prima facie case of discrimination or disparate treatment, Ms. Garrett must show that: (a) she belongs to a protected class; (b) she was subject to an adverse employment action; (c) her employer treated similarly situated employees outside of her protected class more favorably; and (d) that she was qualified to do the job. *See McDonnell Douglas Corp.,* 411 U.S. at 802-04; *Burke-Fowler v. Orange Cty.*, 447 F.3d 1319, 1323 (11th Cir. 2006).

48. Ms. Garrett belongs to a protected class: African-American female, age 53.

49. Establishing whether an "adverse employment action" occurred is a crucial component in any discrimination claim under the FCRA, because without it, there is no relief. *See Davis v. Town of Lake Park, Fla.*, 245 F.3d 1232, 1235 (11th Cir. 2001)(holding that an adverse employment action is required to obtain relief under Title VII's anti-discrimination clause). To show she suffered an "adverse employment action," Ms. Garrett must "show a serious and material change in the terms, conditions, or privileges of employment." *Id.* at 1239.

50. Ms. Garrett did not establish that EFSC subjected her to an adverse employment action. Ms. Garrett's testimony is devoid of any allegation that EFSC's transfer of Ms. Garrett from e-Learning Coordinator to Coordinator of OUR was because of her race, sex, or age. Further, Ms. Garrett did not lose salary or benefits as a result of this transfer. *See Collins v. Miami-Dade Cty.*, 361 F. Supp. 2d 1362, 1371-72 (S.D. Fla. 2005)(finding that an employee's transfer without any evidence that she suffered a loss in salary or other tangible benefits is insufficient to qualify as an adverse employment action).

51. Ms. Garrett also did not establish that EFSC subjected her to an adverse employment action when it denied her request to use the Canvas shell software to build an orientation outline. Ms. Garrett's own testimony

reflected that this request was denied "based on the fact that the college will not generate money and by not generating money they didn't have the means in order to pay the faculty." Not only did Ms. Garrett fail to establish that EFSC's decision was because of her race, sex, or age, she additionally failed to establish that this denial resulted in "a serious and material change in the terms, conditions, or privileges of [her] employment." *Davis,* 245 F.3d at 1239.

52. Additionally, Ms. Garrett did not establish that EFSC treated any similarly-situated employees outside of her protected class more favorably. If a petitioner fails to identify similarly-situated employees outside of her protected class who the employer treats more favorably, her "case must fail because the burden is on [her] to establish his prima facie case." *Jones v. Bessmer Carraway Med. Ctr.,* 137 F.3d 1306, 1311 (11th Cir.), *modified on other grounds,* 151 F.3d 1321 (11th Cir. 1998); *Mac Papers v. Boyd,* No. 1D19-2008, 2020 WL 6110622, at *2 (Fla. 1st DCA Oct. 16, 2020)(holding that the plaintiff's prima facie case under the *McDonnell Douglas* framework was negated when the plaintiff only presented evidence of a legally inadequate comparator). Ms. Garrett's argument that Mr. Looney, a 38-year-old white male, was treated more favorably than Ms. Garrett upon the elimination of his position and transfer to a new position, fails for the following reasons: (a) Ms. Garrett's testimony about Mr. Looney was hearsay, and cannot form the basis for such a finding; and (b) Ms. Garrett's hearsay testimony actually revealed that Mr. Looney was treated similarly, in that he was transferred to a newly-created position at the same salary and benefits as his previous position, and the potentially additional notice time between the elimination of his prior position and transfer to his new position is not a "serious and material change" in the terms, conditions, or privileges of employment.

53. Ms. Garrett failed to establish a prima facie case of unlawful discrimination or disparate treatment based on her race, sex, or age.

Retaliation

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

55. In order to satisfy the "statutorily protected expression or conduct" requirement, Ms. Garrett must establish that her opposition to unlawful employment practices was sufficient to communicate to EFSC that she believed that EFSC was engaged in unlawful discriminatory conduct. *See Murphy v. City of Aventura,* 616 F. Supp. 2d 1267, 1279 (S.D. Fla. 2009); *Webb v. R&B Holding Co., Inc.,* 992 F. Supp. 1382, 1389 (S.D. Fla. 1998).

56. If Ms. Garrett establishes a prima facie case of retaliation, the burden then shifts to EFSC to articulate a legitimate, non-discriminatory reason for its action. *See Addison v. Fla. Dep't of Corr.,* 683 Fed. Appx. 770, 774 (11th Cir. 2017); *Sierminski v. Transouth Fin. Corp.,* 216 F.3d 945, 950 (11th Cir. 2000). This burden is a very light one. *See Holifield,* 115 F.3d at 1564.

57. If EFSC meets this burden, the burden then shifts back to Ms. Garrett, to show that EFSC's proffered reason is mere pretext. *See James v. Total Sols., Inc.,* 691 Fed Appx. 572, 574 (11th Cir. 2017); *Quigg v. Thomas Cty. Sch. Dist.*, 814 F.3d 1227, 1237 (11th Cir. 2016).

58. Ms. Garrett contends that Dr. Handfield's six-month performance evaluation was in retaliation for the interactions that Ms. Garrett had with Dr. Handfield, Dr. Spring, and Mr. Herber during the previous six months after her transfer to the position of Coordinator of OUR.

59. Ms. Garrett's interactions with Dr. Handfield, Dr. Spring, and Mr. Herber do not amount to protected activity under either the participation clause or the opposition clause of the FCRA. The participation clause only "protects proceedings and activities which occur in conjunction with or after the filing of a formal charge with the EEOC; it does not include participating in an employer's internal, in-house investigation, conducted apart from a

formal charge with the EEOC." *EEOC v. Total Sys. Servs., Inc.,* 221 F.3d 1171, 1174 (11th Cir. 2000). Ms. Garrett did not file her FCHR Charge until after her interactions with Dr. Handfield, Dr. Spring, and Mr. Herber, and thus, her interactions are not protected activity under the participation clause.

60. The opposition clause requires that an employee "show that she reasonably believed that she was opposing a violation of Title VII by her employer." *Allen v. Ambu-Stat, LLC,* 799 F. App'x 703, 711 (11th Cir. 2020) (internal quotations omitted). Ms. Garrett's testimony failed to establish that she opposed any unlawful employment practice by EFSC during her interactions with Dr. Handfield, Dr. Spring, and Mr. Herber. Instead, her testimony shows that these interactions consisted of personality conflicts with her supervisor and coworkers, which do not constitute unlawful employment practices. *See Faragher v. City of Boca Raton,* 524 U.S. 775, 778 (1998)(holding that "the ordinary tribulations of the workplace" do not constitute actionable harassment).

61. Additionally, Ms. Garrett's testimony failed to establish a causal connection between her interactions with Dr. Handfield, Dr. Spring, and Mr. Herber, and the performance evaluation she contends was retaliatory. Ms. Garrett testified that these interactions were six months prior to her performance evaluation. "In the absence of other evidence tending to show 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." *Thomas v. Cooper Lighting, Inc.,* 506 F.3d 1361, 1364 (11th Cir. 2007). Significantly, "[a] three to four month disparity between the statutorily protected expression and the adverse employment action is not enough," to satisfy causation. *Id.*

62. Ms. Garrett failed to establish a prima facie case of retaliation.

Hostile Work Environment

63. To establish a prima facie case of hostile work environment, Ms. Garrett must show that: (a) she is a member of a protected class; (b) she was "subjected to unwelcome harassment"; (c) the harassment was based upon a protected trait; (d) the harassment was "severe or pervasive enough to alter the terms and conditions of employment and create a hostile or abusive working environment"; and (e) the employer is liable for the hostile work environment through either vicarious or direct liability. *Jones v. UPS Ground Freight,* 683 F.3d 1283, 1292 (11th Cir. 2012). To be clear, "[i]t is a bedrock principle that not all objectionable conduct or language amounts to discrimination under Title VII." *Id.* at 1297 (internal quotations omitted). Rather, "only conduct that is 'based on' a protected category, such as race, may be considered in a hostile work environment analysis." *Id.* Accordingly, "[i]nnocuous statements or conduct, or boorish ones that do not relate to the [protected trait] of the actor or of the offended party (the plaintiff), are not counted." *Id.*

64. Ms. Garrett failed to establish that any actions and conduct she experienced at EFSC were based on her protected status, *i.e.,* race, sex, or age. Her testimony never established this critical element (and, as noted previously, she presented no additional evidence beyond her testimony).

65. Ms. Garrett's testimony failed to establish that "the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter conditions of the victim's employment and create an abusive working environment." *Harris v. Forklift Sys., Inc.,* 510 U.S. 17, 21 (1993) (internal quotations and citations omitted).

66. Ms. Garrett's failure to establish that the alleged hostile work environment was based on her race, sex, or age, and that the alleged harassment was sufficiently severe or pervasive to alter the terms of her employment, creating a hostile work environment, ends the undersigned's analysis of her hostile work environment claim. The undersigned concludes

that Ms. Garrett has failed to establish a prima facie case of hostile work environment.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby RECOMMENDS that the Florida Commission on Human Relations issue a final order dismissing Mary F. Garrett's Petition for Relief.

DONE AND ENTERED this 12th day of November, 2020, in Tallahassee, Leon County, Florida.

ROBERT J. TELFER III
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of November, 2020.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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