STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GLENDA BAKER,

Petitioner,

vs. Case No. 20-4117

COVENANT HOSPICE, INC.,

Respondent.
_____/

RECOMMENDED ORDER

On November 19, 2020, pursuant to notice, Administrative Law Judge Yolonda Y. Green of the Division of Administrative Hearings ("Division"), conducted a hearing, pursuant to section 120.57(1), Florida Statutes (2020), by Zoom conference.

APPEARANCES

For Petitioner: Glenda L. Baker, pro se
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Pensacola, Florida 32514

For Respondent: Russell F. Van Sickle, Esquire
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STATEMENT OF THE ISSUE

Whether Respondent subjected Petitioner to employment discrimination in violation of section 760.10, Florida Statutes.

PRELIMINARY STATEMENT

On June 20, 2019, Petitioner, Glenda Baker ("Petitioner" or "Ms. Baker"), filed a Complaint of Discrimination with the Florida Commission on Human Relations ("FCHR"), alleging that Respondent, Covenant Hospice, Inc. ("Respondent" or "Covenant"), unlawfully discriminated against her based on her race and age, and retaliated against her for engaging in a protected activity. Specifically, Petitioner alleged the following acts were discriminatory: 1) she was wrongfully suspended and demoted due to alleged workplace violations; 2) she was subject to disparate treatment in her discipline, i.e. her work badge was deactivated and she was placed on an action plan in March 2019; and 3) her supervisor subjected her to harassment in retaliation for her complaints of alleged protected activity.

On August 7, 2020, FCHR issued an Amended Notice of Determination to Ms. Baker indicating that FCHR found "no reasonable cause" to demonstrate that discrimination occurred. To dispute FCHR's findings, Petitioner filed a Petition for Relief seeking an administrative hearing. FCHR transmitted the Petition to the Division on September 16, 2020, where it was assigned to the undersigned to conduct the final hearing in this case.

The undersigned scheduled this matter for hearing on November 19, 2020, and the hearing commenced as scheduled. Petitioner testified on her own behalf and presented no other witnesses. Petitioner's Exhibits 1 through 16 were admitted into evidence. Respondent presented the testimony of two witnesses: Kara Benedict, Associate Vice President, Governance Risk & Compliance, for Covenant; and Amy Bajjaly, Vice President of Human Resources, for Covenant. Respondent's Exhibits 1 through 26 were admitted into evidence over objection.

The Transcript of the hearing was filed on December 23, 2020. Both parties timely filed Proposed Recommended Orders ("PROs"), which have been considered in preparation of this Recommended Order. After the parties filed their post-hearing submittals, Petitioner filed an Amended PRO, to which Respondent did not file any objection. The amended PRO is accepted.

Unless otherwise indicated, all references to Florida Statutes will be to the 2018 codification, which was the statute in effect at the time of the alleged violations.

FINDINGS OF FACT

Based on the exhibits and testimony offered at the final hearing, the following Findings of Fact are made.

Background

1. Ms. Baker, a then 62-year-old African-American woman, began her employment with Covenant in July 2018. She worked as a staff nurse at The Residence, which is a memory care center. As a staff nurse, Ms. Baker provided care to residents at Covenant and served as supervisor to resident assistants. Ms. Baker, a licensed practical nurse ("LPN"), had worked as an LPN for over 26 years at other facilities before working for The Residence.

2. Ms. Baker worked with Covenant until March 14, 2019, when she voluntarily resigned her position.

3. Covenant operates The Residence, a 25-bed facility that provides residential care to vulnerable patients receiving care for dementia. The facility provides 24/7 care to patients across different work shifts and is one of multiple facilities operated by Respondent. Covenant is an "employer" as defined by section 760.02(7).

4. Barbara Scheurer, a Caucasian female, supervised Ms. Baker during her employment. At all times relevant to Ms. Baker's allegations, Ms. Scheurer served as the executive director for The Residence.

5. Donna Strange, a Caucasian female, served as the senior director of human resources for The Residence at all times material to Ms. Baker's allegations. At all times material to this matter, Ms. Strange reported to Amy Bajjaly.

6. Andrew Rabon, a Caucasian male, also worked at The Residence. No evidence regarding Mr. Rabon's age was introduced into evidence at the final hearing. Mr. Rabon was assigned as the preceptor for Ms. Baker for competency skills training. Ms. Baker repeatedly indicated it was confusing to have Mr. Rabon as a preceptor, evaluating her competencies, when she had more experience than Mr. Rabon and he was younger than Ms. Baker. Mr. Rabon, Ms. Baker's peer, was assigned as preceptor because of the opportunity for peer-to-peer learning opportunities.

7. Petitioner was one of three full-time LPNs at The Residence, who were classified as staff nurses. The assignments to provide care to the patients was divided among the LPNs for each shift.

8. As a staff nurse, Ms. Baker's job duties involved maintaining a safe and secure environment for residents. One of the requirements to maintain safety included monitoring patients to prevent falls.

Fall Incident

9. On January 29, 2019, when Ms. Baker was on duty as the LPN in charge, resident T.P. fell in the dining room. Ms. Baker did not see the resident fall as she was not physically present in the dining room at the time. However, two resident assistants, who were present at the time of the fall, provided information regarding their observations. The resident assistants provided written statements regarding what they witnessed, which is hearsay. They did not testify at the final hearing. Thus, their statements may

not be used for a finding of fact, but is referenced herein to supplement and explain other testimony and evidence offered regarding the incident.

10. Sarah, a resident assistant, was cleaning a patient's room when she heard the resident fall. She signaled to Ms. Baker for assistance but Ms. Baker continued to walk down the hall. Minutes later, Ms. Baker responded to the patient, assessed her head, and attempted to sit her up. Ms. Baker instructed Sarah to obtain copies of documents to contact Emergency Medical Services ("EMS"). Ms. Baker then left to call EMS. Another assistant, Dawn, helped Sarah until Ms. Baker returned. Ms. Baker attempted to obtain vital signs but by that time EMS was present.

11. Dawn, the second assistant, also provided a statement about the fall. Dawn took the resident to the dining room to eat breakfast and then, she went to make the resident's bed. Kim, a third assistant,[1] was in the dining room watching the patient while Ms. Baker was passing out medications. Dawn heard the resident fall. She ran to the dining room and discovered the resident on the floor on her right side. Dawn notified Ms. Baker of the patient's fall, and Ms. Baker provided an ice pack for the resident's head.

12. Although Respondent argued in its PRO that Respondent's account of the incident differed, the evidence demonstrates that the versions of the incident were essentially very similar regarding the material factors.

13. On February 6, 2019, Ms. Scheurer called Ms. Baker to discuss the fall. Ms. Baker defended her actions and indicated that Kim was assigned to monitor the resident. After the discussion with Ms. Scheurer about the fall, Ms. Baker called in sick. After calling-in, Ms. Baker entered the facility unannounced and accessed the records relating to resident T.P. At the hearing, Ms. Baker explained that she entered the facility to obtain a personal item. However, she failed to explain how entering the facility for a personal item resulted in her accessing the patient's file while off duty.

[1] There was no statement offered into evidence from Kim. She also did not testify at the final hearing.

14. Also on February 6, 2019, Ms. Baker sent an email to Ms. Benedict. She wrote a list of a litany of complaints involving various areas of concern. She listed seven incidents in which patients fell and were injured. She complained that Ms. Scheurer maintained the keys to the medication cabinet in an unlocked drawer. She also complained that Ms. Scheurer did not require staff to sign-out the medication. She complained of double-billing regarding two separate patients. Ms. Baker complained that although she requested a certain shift, she was not granted the shift, and it was given to a newly-hired nurse. She complained that staff members were not being properly protected from infectious diseases. Ms. Baker asserted that Ms. Scheurer asked staff members to falsify records. She asserted that Ms. Scheurer did not ensure or repair the sensor pads that would assist with monitoring patients. She stated that she had not received a 30- or 90-day evaluation timely, and thus, needed to receive training. She ended her letter stating, "I don't know if I will be able to work today under these conditions."

15. Later that same day, Respondent deactivated Ms. Baker's badge because she accessed resident T.P.'s record while the incident investigation was ongoing.

16. Ms. Benedict, who handles all risk management matters, reviewed the surveillance video of the fall. Ms. Baker argued that Covenant treated her differently than others in that it does not review surveillance footage for all fall incidents. However, to the contrary, Kara Benedict testified that she reviews all fall-related incidents pursuant to risk management protocol. Ms. Benedict's testimony is credited.

17. After review of the video and Ms. Baker's complaints, Ms. Benedict informed Ms. Baker that she should not return to work, pending further investigation of her complaints about not wanting to return given the circumstances.

18. On or about February 18, 2019, Ms. Benedict completed the compliance investigation of Ms. Baker's complaints and prepared a report of

her findings. Ms. Benedict investigated all the complaints by speaking with other current and past employees. She found that most complaints were not substantiated. Specifically, she found Ms. Baker's complaint about retaliatory conduct was not substantiated. She did find there were sufficient findings to substantiate some of the complaints against Ms. Scheurer and recommended that Ms. Scheurer receive coaching and an action plan.

19. After Ms. Benedict's investigation of the fall, she determined that Ms. Baker could return to work. A list of directives was issued to Ms. Baker including review of policies and procedures related to falls, medication management, patient safety, and skills and competency related tasks. The list of directives was commonly referred to as an action plan. The review of policies and procedures and completion of LPN skills and competencies re-training was required to be completed prior to re-entry to the Charge LPN position, within 30 days of reinstatement. The word reinstatement was used several times, but she never lost any benefits or pay.

20. Petitioner alleged that after the fall incident, she suffered adverse action when she was required to complete a corrective action plan, demoted from her position, and had her identification badge deactivated.

21. However, Ms. Baker was removed from the normal work schedule so she could focus on completion of the action plan. In fact, she was permitted to complete the competencies and review the policies and procedures during work hours. Upon completion of the action plan, she would be reinstated to the normal work schedule on the nursing floor. Moreover, Ms. Baker complained that she had not received orientation when she began working with The Residence, and she believed she would benefit from having the opportunity to review the policies and procedures before returning to the nursing floor.

22. Although Ms. Baker was removed from the normal work schedule until completion of the action plan, she did not suffer a change in pay or in

benefits. In addition, Ms. Baker did not experience a change in her job title. Thus, she was not demoted.

23. Ms. Baker's badge deactivation was also not an adverse action as she still had access to the work site to perform her work duties. Thus, based on the totality of the circumstances, there was no material change to the terms, conditions, or privileges of her position to amount to adverse action.

Complaints about Disparate Treatment

24. Ms. Baker also alleged that Ms. Scheurer and Ms. Strange treated her unfairly based on her race and age, and retaliated against her. Ms. Baker met with Ms. Scheurer regarding her progress with the action plan. In an email to Ms. Benedict regarding that meeting, Ms. Scheurer noted that Petitioner was upset that Andrew Rabon (Ms. Baker's competency skills preceptor) and Lydia Rabon (another staff member) were in the office while Ms. Baker was asking questions about policies and procedures. Ms. Baker told Ms. Scheurer that she believed the meetings regarding her being required to review policies and procedures were confidential. Thus, it was inappropriate for the two other staff members to be present during that meeting.

25. On another occasion, March 6, 2019, Ms. Baker met with Ms. Scheurer and Ms. Strange to discuss Ms. Baker's progress. Ms. Baker called Ms. Benedict after the meeting. During the conversation, Ms. Baker stated that Ms. Scheurer and Ms. Strange bullied and harassed her because of her race. This was the first time Ms. Baker made a complaint of racial discrimination. When asked for examples of discrimination, Ms. Baker indicated that Ms. Scheurer would ask her to do something and then claim to Ms. Strange that she was not instructed to do the task. Ms. Scheurer and Ms. Strange would repeatedly enter and exit the office asking questions. She complained that Ms. Scheurer made negative comments toward her progress

with the action plan. She also complained that she was forced to go to lunch earlier than she had planned.

26. Ms. Benedict advised Ms. Baker that she would address her concerns with management. Ms. Benedict scheduled a meeting for March 20, 2019. However, Ms. Baker resigned March 14, 2019, before the meeting could take place.

27. Ms. Baker contacted Jeff Mislevy, the Chief Executive Officer ("CEO") for Covenant Hospice, Inc., addressing the same or similar issues as she reported to Ms. Benedict. In addition, she expressed that she was unable to enter her paid time off ("PTO") request and Ms. Strange then took her mouse and used it to show her how to enter her PTO request. Ms. Baker considered that action to be belittling. She shared that Ms. Strange was in her face a few times and hovering over her while speaking to her. Finally, she stated that she reported Ms. Scheurer in November 2018 for placing the last four digits of social security numbers throughout the building. After considering the actions of Ms. Scheurer and Ms. Strange, such behavior does not constitute discriminatory conduct by Respondent.

28. Covenant's discrimination policy provides that it prohibits discriminatory practices of harassment based on, among other things, race and age. Any staff member of Covenant who believes they have been subjected to discrimination are instructed to contact their supervisor and the director of human resources. If the supervisor is involved or is the subject to the complaint, the next higher-level management or CEO and the director of human resources would be the next point of contact.

29. Ms. Strange was removed from oversight of Petitioner after Ms. Baker reported that Ms. Strange was involved in bullying and harassment based on race. Ms. Bajjaly, as the next higher-level of management for human resources, began handling complaints raised by Ms. Baker. Her role was to ensure the action plan was completed and to resolve Ms. Baker's complaints.

30. On March 7, 2019, Ms. Bajjaly explained to Ms. Baker that she wanted to meet with her to update her on the plan going forward. The meeting was scheduled for March 12, 2019. At that time, Ms. Bajjaly instructed Ms. Baker to report work related concerns to Ms. Scheurer, and report all other questions and concerns to her.

31. On March 12, 2019, Ms. Bajjaly met with Ms. Baker as planned. They discussed Ms. Baker's complaints about operation of the facility that she had reported previously. Ms. Baker also raised her complaint that Ms. Strange bullied and harassed her. During the meeting with Ms. Bajjaly, Ms. Baker did not offer any remarks regarding race or age.

32. On March 14, 2019, Ms. Baker voluntarily resigned her position with Covenant after she found a new job.

Ultimate Findings of Fact

33. At no time prior to the fall incident on January 29, 2019, did Petitioner contact Respondent's human resources department, file a complaint, discuss with management, or otherwise raise a complaint that she was subject to discrimination because of her race or age.

34. When Ms. Baker made complaints about Ms. Scheurer and her actions, another level management became involved. When Ms. Baker made a complaint about Ms. Strange, Ms. Bajjaly, the vice president of human resources for Respondent, became involved and took action.

35. Ms. Baker worked with Covenant hospice until March 14, 2019, when she voluntarily resigned her position.

36. There was no competent, substantial evidence offered at the hearing to support a finding that Petitioner was subjected to any adverse employment action. Instead the evidence supports a finding that Ms. Baker voluntarily resigned from Covenant after she found a different job. There was no competent, substantial evidence that any person who was not African

American and of the same age, were treated differently from Petitioner, or were not subject to the same or similar policies and procedures.

37. In response to Petitioner's complaints regarding Ms. Scheurer and later, Ms. Strange, Ms. Bajjaly communicated with the two of them, in person and by email, to remind them of policies and procedures for the facility.

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).

39. Petitioner filed this action alleging Covenant discriminated against her in violation of the Florida Civil Rights Act ("FCRA"). Specifically, Petitioner's Complaint focuses on her allegation that Covenant discriminated against her based on her race and age. The FCRA protects employees from age and race discrimination in the workplace. *See* § 760.10, Fla. Stat. Section 760.10 states, in pertinent part:

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

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

affirmative relief from the effects of the practice, including back pay." § 760.11(7), Fla. Stat. Petitioner has the burden of proving by a preponderance of the evidence that Respondent committed an unlawful employment practice. *See St. Louis v. Fla. Int'l Univ.*, 60 So. 3d 455 (Fla. 3d DCA 2011); *Fla. Dep't of Transp. v. J.W.C. Co.*, 396 So. 2d 778 (Fla. 1st DCA 1981).

41. There is no dispute that Covenant is an "employer" as that term is defined in section 760.02(7), which defines an employer as "any person employing 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person."

42. To show a violation of the FCRA, Ms. Baker must establish, by a preponderance of the evidence, a prima facie case of discrimination. *See St. Louis v. Fla. Int'l Univ.*, 60 So. 3d at 458-59 (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; finding prima facie case not established).

43. "Preponderance of the evidence" 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. Baker 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).

Establishing Discrimination

44. Discrimination may be proven by direct, statistical, or circumstantial evidence. *See Valenzuela v. GlobeGround N. Am., LLC*, 18 So. 3d 17, 22 (Fla. 3d DCA 2009). Direct evidence is evidence that, if believed, would prove the existence of discriminatory intent behind the employment decision

without any inference or presumption. *Denney v. City of Albany*, 247 F.3d 1172, 1182 (11th Cir. 2001); *see also Holifield v. Reno*, 115 F.3d 1555, 1561 (11th Cir. 1997), *abrogated on other grounds by*, *Lewis v. City of Union City, Ga.*, 918 F. 3d 1213, 1218 (11th Cir. 2019)(en banc). "Only the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of [age or race] constitute direct evidence of discrimination. . . .For statements of discriminatory intent to constitute direct evidence of discrimination, they must be made by a person involved in the challenged decision." *Bass v. Bd. of Cty. Comm'rs, Orange Cty., Fla.*, 256 F.3d 1095, 1105 (11th Cir. 2001)(citations omitted).

45. Petitioner presented no direct evidence of discrimination based on race or age on the part of Covenant. Similarly, the record in this proceeding contains no statistical evidence of discrimination by Covenant in its personnel decisions related to Petitioner.

46. In the absence of direct or statistical evidence of discriminatory intent, Petitioner must rely on circumstantial evidence of discrimination to prove her case. For discrimination claims involving circumstantial evidence, Florida courts follow the three-part, burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and its progeny, *Valenzuela*, 18 So. 3d at 21-2; *see also St. Louis v. Fla. Int'l Univ.*, 60 So. 3d at 458. Under this well-established framework, a petitioner bears the initial burden of establishing, by a preponderance of the evidence, a prima facie case of discrimination.

47. When the charging party is able to make out a prima facie case, the burden to go forward shifts to the employer to articulate a legitimate, nondiscriminatory explanation for the employment action. *See Dep't of Corr. v. Chandler*, 582 So. 2d 1183 (Fla. 1st DCA 1991)(court discusses shifting burdens of proof in discrimination cases). The employer has the burden of production, not one of persuasion, and as a result, it is not required to

persuade the finder of fact that the decision was non-discriminatory. *Id.*; *Alexander v. Fulton Cty., Ga.*, 207 F.3d 1303, 1335 (11th Cir. 2000).

48. The employee must then come forward with specific evidence demonstrating that the reasons given by the employer are a pretext for discrimination. *Schoenfeld v. Babbitt*, 168 F.3d 1257, 1267 (11th Cir. 1999). The employee must satisfy this burden by showing directly that a discriminatory reason more likely than not motivated the decision, or indirectly by showing that the proffered reason for the employment decision is not worthy of belief. *Chandler*, 582 So. 2d at 1186; *Alexander v. Fulton Cty., Ga.*, 207 F.3d at 1336.

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

50. Under the *McDonnell Douglas* framework, a petitioner bears the initial burden of establishing, by a preponderance of the evidence, a prima facie case of discrimination. To establish a prima facie case, Petitioner must demonstrate that: (1) she is a member of 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 Cty.*, 447 F.3d 1319, 1323 (11th Cir. 2006). Demonstrating a prima facie case is not difficult, but rather only requires the "plaintiff to establish facts adequate to permit an inference of discrimination." *Holifield v. Reno*, 115 F.3d at 1562 (11th Cir. 1997).

Age Discrimination

51. To prevail on her age discrimination claim, Petitioner must prove by a preponderance of the evidence that: (1) she is a member of a protected class; (2) she was qualified for the position; (3) she was subjected to an adverse employment action; and (4) Respondent treated employees of a different age more favorably than she was treated. Moreover, she must show that she suffered from an adverse employment action that would not have occurred "but for" her age. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 180, 129 S. Ct. 2343, 2352, 174 L. Ed. 2d 119 (2009); *King v. HCA*, 825 F. App'x 733, 736 (11th Cir. 2020) ("For age and disability discrimination, the plaintiff must prove that his age or disability was a 'but-for' cause of the adverse employment action— meaning it had a 'determinative influence on the outcome' of the employer's decision"); *see also Cap. Health Plan v. Moore*, 281 So. 3d 613, 616 (Fla. 1st DCA October 23, 2019)(the "'but-for cause' does not mean 'sole cause . . . an employer may be liable under the ADEA if other factors contributed to its taking the adverse action, as long as age was the factor that made a difference' . . . 'age must be determinative.'")*(citing Leal v. McHugh*, 731 F.3d 405, 415 (5th Cir. 2013)).

52. Regarding the first element, the FCRA differs from the American Discrimination in Employment Act ("ADEA") in that the ADEA specifically protects employees aged 40 and older, and the FCRA does not set a minimum age for a protected class. Although under the ADEA an employee must be 40 years old and the comparator must be significantly younger, under the FCRA a petitioner can simply show that similarly-situated individuals of a

"different" age were treated more favorably.[2] Thus, for the purposes of the FCRA, being any different age than Petitioner satisfies the "protected class" requirement for age discrimination.

Race Discrimination

53. To establish a prima facie case of race discrimination, the burden is on Ms. Baker to show: (1) she belongs to a protected class; (2) she is qualified to perform the job; (3) she suffered an adverse employment action; and (4) [Covenant] treated similarly situated employees outside the employee's protected class more favorably. *Holifield v. Reno*, 115 F.3d at 1562.

54. Petitioner established the first two prongs: (1) she is a member of a protected class as she is African American; and (2) it is undisputed that she was qualified for the position as she possessed the requisite licensure and 26 years of experience as an LPN.

55. Here, Ms. Baker complains of several actions against her. However, not everything that makes an employee upset is an actionable adverse action. *See Davis v. Town of Lake Park*, 245 F.3d 1232, 1238 (11th Cir. 2001). To constitute an actionable "adverse employment action," the action must impact the terms, conditions, or privileges of the job in a real or demonstrable way. *See Henderson v. City of Birmingham, Alabama*, 826 F. App'x 736 (11th Cir. 2020) (adverse employment actions must have a "real and demonstrable" negative impact on terms, conditions, or privileges of employment, typically affecting continued employment or pay). *See also Crawford v. Carroll*, 529

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

F.3d 961 (11th Cir. 2008); *Town of Lake Park*, 245 F.3d at 1239. In other words, the action must require a material change in terms and conditions of employment. *See McCaw Cellular Comm. v. Kwiatek*, 763 So. 2d 1063, 1066 (Fla. 4th DCA 1999).

56. In the instant case, Petitioner established that her badge was deactivated and she was required to complete the preceptorship and corrective action plan before she returned to work. At no point did Ms. Baker experience any pay decrease or loss of privileges. Other than being dissatisfied with the Respondent's actions, Ms. Baker has not established that any of those measures negatively impacted the terms, conditions, or privileges of her employment. Thus, Petitioner failed to prove there was adverse action against her.

57. Even if Petitioner had proved that she suffered an adverse employment decision, she could not identify a similarly situated person outside her protective class to meet the fourth "comparator" element of her claim. Petitioner must show she is similarly situated in all material respects to the employee she claims Covenant gave preferential treatment. *See Woods v. Cent. Fellowship Christian Acad.*, 545 F. App'x 939, 945 (11th Cir. 2013).

58. As recently explained in *Mac Papers, Inc. v. Boyd*, 304 So. 3d 406, 409 (Fla. 1st DCA 2020):

> Picking a single comparator with inadequate, irrelevant, or superficial similarities falls short of what the law requires. Courts require that comparators be meaningful, which explains why the Eleventh Circuit—which reviewed the oftentimes discordant caselaw on the topic—recently decided en banc that comparators must be "similarly situated in all material respects." *Lewis v. City of Union City, Georgia*, 918 F.3d 1213, 1218 (11th Cir. 2019) (rejecting "nearly-identical standard" as too rigid and rejecting "not useless" as too lax).
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> * * *

> With Lewis and its progeny as our guideposts, Swift fails as a valid comparator. Consistent with Lewis, a "comparator's misconduct must be similar in all material respects." *McPhie v. Yeager*, 819 Fed. Appx. 696, 698–99 (11th Cir. 2020) (*applying Lewis*).

59. Regarding comparators, Ms. Baker essentially argues she was wrongfully disciplined for the fall incident. The investigation against her, an African-American, was allegedly treated differently than the investigation of white nurses. However, Ms. Baker did not offer sufficient evidence of any complaints against her co-workers that were comparable to her actions. In other words, Ms. Baker did not offer a comparator where a patient suffered a fall, and then, that nurse later surreptitiously accessed the patient's file while off-duty. She also complained that she needed additional training because she did not receive orientation when she began working with The Residence. As such, Covenant's actions related to Ms. Baker cannot be based on similar conduct. Thus, Ms. Baker fails to prove a prima facie case of discrimination based on race because she has not identified any similarly situated employees outside her protected class who were treated more favorably for similar conduct. Because she failed to establish a prima facie case of discrimination under the *McDonnell Douglas* burden-shifting framework, it is unnecessary to discuss the other burdens relating to non-discriminatory reasons or pretext.

60. Even though Ms. Baker believes Covenant should have done more to address her complaints about the perceived inappropriate behavior, it responded to her complaints with "immediate and appropriate corrective action" that was "reasonably likely to prevent any perceived misconduct from recurring." *See Watson v. Blue Circle, Inc.*, 324 F.3d 1252, 1260-61 (11th Cir. 2003); *Kilgore v. Thompson & Brock Mgmt., Inc.*, 93 F.3d 752, 754 (11th Cir. 1996). Thus, the undersigned finds that Ms. Baker's claim of discrimination based on her race and age is not supported by the evidence. *See Gadling Cole*

v. Bd. of Trs. of the Univ. of Ala., 2015 U.S. Dist. LEXIS 127161, at *2 (N.D. Ala. Sep. 23, 2015) (granting employer summary judgment in race discrimination case even though employee testified about negative behavior from co-workers and microaggressions).

Hostile Work Environment

61. Ms. Baker also alleges Covenant caused her to be subject to working in a hostile workplace. The FCRA protects an employee from a hostile workplace. *See Webb v. Worldwide Flight Serv.*, 407 F.3d 1192 (11th Cir. Fla. 2005).

62. To be hostile, the workplace must be so "permeated with discriminatory intimidation, ridicule, and insult, that [it] is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21, 114 S. Ct. 367, 370, 126 L. Ed. 2d 295 (1993)(citations and quotations omitted). The requirement that the harassment be "severe or pervasive" contains both a subjective and objective component. *Id*. (citations omitted). Thus, to be actionable, the behavior must result in both an environment that a reasonable person would find hostile or abusive, and an environment that the victim subjectively perceives to be abusive. *Id*.

63. If a protected group suffered unwelcome harassment, which was based on a protected characteristic and was sufficiently severe or pervasive to alter the terms and conditions of employment and created a discriminatorily abusive environment, the employer is responsible for that environment under a theory of direct liability or vicarious liability. *See Fernandez v. Trees, Inc.*, 961 F.3d 1148, 1153 (11th Cir. 2020).

64. Factors to be considered when determining the objective standard include the frequency of the conduct; the severity of the conduct; whether the conduct was physically threatening or humiliating, or a mere offensive utterance; and whether the conduct unreasonably interfered with the

employee's performance. *Id*. Behavior amounts to a hostile work environment when instances are repetitive or escalate in frequency. *See Jones v. UPS Ground Freight*, 683 F.3d 1283, 1303 (11th Cir. 2012). Though all of these factors should be taken into account, "no single factor is required." *Id*. Finally, but equally important, in making this determination, the court can only consider instances of harassment that were based on a protected class. *See Zhou v. Intergraph Corp.*, 2019 U.S. Dist. LEXIS 2438, at *18 (N.D. Ala. Jan. 7, 2019)(finding harassment was too infrequent where it occurred 15 times over a three-to-four-year period, but was severe in that they were indirect propositions for sex).

65. Here, Ms. Baker complains that Ms. Scheurer and Ms. Strange's conduct in asking about her progress and asking her to return to work was harassment. However, there is no evidence that these actions were motivated by Ms. Baker's race or age.

Retaliation

66. To establish a prima facie case of retaliation, Petitioner must demonstrate by a preponderance of the evidence: "(1) that [she] engaged in statutorily protected expression; (2) that [she] suffered an adverse employment action; and (3) there is some causal relationship between the two events." (citations omitted). *Holifield v. Reno*, 115 F.3d at 1566; *see also Muhammad v. Audio Visual Servs. Grp.*, 380 F. App'x 864, 872 (11th Cir. 2010); *Tipton v. Canadian Imperial Bank*, 872 F.2d 1491 (11th Cir. 1989).

67. Petitioner's claim of retaliation is in part based on her allegation that she was retaliated against as a result of her complaint about failure to safeguard social security numbers of employees. That is simply not a statutorily protected expression. She also argued that Ms. Scheurer retaliated against her because she reported complaints of discrimination. She argued Ms. Scheurer asked her many questions about her progress with the skill competencies and made negative comments toward her progress with

the action plan. Her allegations have nothing to do with whether the alleged wrongful conduct was based on her race.

68. The FCRA's retaliation provision comes in two forms--opposition-based or participation-based conduct. With regard to those forms of conduct, it is established that "[a]n employee is protected from discrimination if (1) 'he has opposed any practice made an unlawful employment practice by this subchapter' (the opposition clause) or (2) 'he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter' (the participation clause)." *Clover v. Total Sys. Servs.*, Inc., 176 F.3d 1346, 1350 (11th Cir. 1999).

69. "Section 760.10(7), Florida Statutes, is virtually identical to its Federal Title VII counterpart, 42 U.S.C. § 2000e-3(a). The FCRA is patterned after Title VII; federal case law on Title VII applies to FCRA claims." *Hinton v. Supervision Int'l, Inc.*, 942 So. 2d 986, 989 (Fla. 5th DCA 2006)(*quoting Guess v. City of Miramar*, 889 So. 2d 840, 846 n.2 (Fla. 4th DCA 2005)).

70. In construing 42 U.S.C. § 2000e-3(a), the Eleventh Circuit has held that:

> [t]he statute's participation clause "protects proceedings and activities which occur in conjunction with or after the filing of a formal charge with the EEOC." . . . The opposition clause, on the other hand, protects activity that occurs before the filing of a formal charge with the EEOC, such as submitting an internal complaint of discrimination to an employer, or informally complaining of discrimination to a supervisor. (citations omitted).

Muhammad v. Audio Visual Servs. Grp., 380 F. App'x at 872 (11th Cir. 2010). The division of section 760.10(7) into the "opposition clause" and the "participation clause" is recognized by Florida state courts. *See Blizzard v. Appliance Direct, Inc.*, 16 So. 3d 922, 925-26 (Fla. 5th DCA 2009). In

explaining the difference between the two clauses, the Second District Court of Appeal has held that:

> FCRA's "opposition clause [protects] employees who have opposed unlawful [employment practices]." . . . However, opposition claims usually involve "activities such as 'making complaints to management, writing critical letters to customers, protesting against discrimination by industry or by society in general, and expressing support of coworkers who have filed formal charges.'" . . . Cases involving retaliatory acts committed after the employee has filed a charge with the relevant administrative agency usually arise under the participation clause.

Carter v. Health Mgmt. Assoc., 989 So. 2d 1258, 1263 (Fla. 2d DCA 2008).

71. Regarding the broad coverage afforded under the participation clause, the Eleventh Circuit has explained:

> Congress chose to protect employees who "participate[ ] in any manner" in an EEOC investigation. The words "participate in any manner" express Congress' intent to confer "exceptionally broad protection" upon employees covered by Title VII . . . . "the adjective 'any' is not ambiguous . . . . [It] has an expansive meaning, that is, one or some indiscriminately of whatever kind . . . . [A]ny means all." Because participation in an employer's investigation conducted in response to a notice of charge of discrimination is a form of participation, indirect as it is, in an EEOC investigation, such participation is sufficient to bring the employee within the protection of the participation clause.

Clover v. Total Sys. Servs., Inc., 176 F.3d at 1353.

72. In order to establish a prima facie claim of retaliation under the participation clause, a petitioner must, "in addition to filing formal charges with the Equal Employment Opportunity Commission (EEOC) or its designated representative, [a petitioner] was required to demonstrate:

(1) a statutorily protected expression; (2) an adverse employment action; and, (3) a causal connection between the participation in the protected expression and the adverse action." *Hinton v. Supervision Int'l, Inc.*, 942 So. 2d at 990.

73. As addressed in the Findings of Fact herein, Petitioner's complaint to the director of human resources of race discrimination was predicated on allegations that non-African-American nurses were treated differently when a patient experienced a fall. That reason is insufficient, alone, to establish that Petitioner was subjected to retaliation as a result of her opposition or participation in a lawful employment practice as defined in section 760.10. Moreover, she did not file formal charges with the EEOC before the alleged retaliatory action.

74. Claims under the opposition clause are not subject to the same degree of "expansive protection" that arises after a claim of discrimination is filed with the appropriate civil rights agency. Rather:

> Opposition clause acts, however, are taken outside of the context of a government review and, instead, are taken in the context of the ordinary business environment and involve employers and employees as employers and employees. As in this case, whether to fire an employee for lying to the employer in the course of the business's conduct of an important internal investigation is basically a business decision; this decision, as with most business decisions, is not for the courts to second guess as a kind of super-personnel department.

EEOC v. Total Sys. Servs., 221 F.3d at 1176 (*citing Damon v. Fleming Supermarkets of Fla., Inc.*, 196 F.3d at 1361).

75. Overall, the crux of Ms. Baker's dispute in this matter is that she has being treated poorly by Respondent, and the actions taken against her were unfair. Even if the undersigned agreed that Covenant handled the fall incident and subsequent action plan poorly, it did not violate the FCRA. *See Sunbeam TV Corp. v. Mitzel*, 83 So. 3d 865, 872 (Fla. 3d DCA 2012)("bad business decisions do not necessarily correlate with decisions that violate the

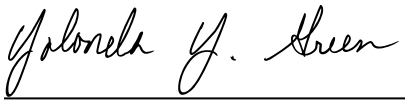
law."); *see also Damon*, 196 F.3d at 1361 ("We have repeatedly and emphatically held that a defendant may terminate an employee for a good or bad reason without violating federal law. . . . We are not in the business of adjudging whether employment decisions are prudent or fair."); *Alexander v. Fulton Cty., Ga.*, 207 F.3d at 1341 ("[I]t is not the court's role to second-guess the wisdom of an employer's decisions as long as the decisions are not racially motivated.").

76. Consequently, Ms. Baker did not meet her burden of proving by a preponderance of the evidence that Covenant's actions were discriminatory based on her race, age, or retaliation. Thus, there has been no violation of the FCRA found in this matter. Accordingly, the 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 finding that Petitioner, Glenda Baker, did not prove that Respondent, Covenant Hospice, Inc., committed an unlawful employment practice against her; and dismissing her Petition for Relief from an unlawful employment practice.

DONE AND ENTERED this 22nd day of February, 2021, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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this 22nd day of February, 2021.

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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.