STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RACHEL HOFER,

Petitioner,

vs. Case No. 22-1149

FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was conducted via Zoom on June 30, 2022, before Administrative Law Judge Garnett W. Chisenhall of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner: Rachel Hofer, pro se
2417 Northwest 64th Terrace
Gainesville, Florida 32606

For Respondent: Maria Shameem Dinkins, Esquire
Department of Corrections
501 South Calhoun Street
Tallahassee, Florida 32399

STATEMENT OF THE ISSUE

The issue is whether the Department of Corrections ("the Department") committed an unlawful employment practice by retaliating against Rachel Hofer by directing her former employer to not rehire her.

PRELIMINARY STATEMENT

Ms. Hofer filed an Employment Complaint of Discrimination with the Florida Commission on Human Relations ("the Commission") on September 8, 2021,[1] alleging the Department retaliated against her because she filed a complaint with the Equal Employment Opportunity Commission ("the EEOC"). After the Commission determined that there was no reasonable cause to conclude that an unlawful employment practice had occurred, Ms. Hofer filed a Petition for Relief on April 4, 2022. The Commission referred this matter to DOAH on April 14, 2022, and the undersigned issued a Notice on April 25, 2022, scheduling a final hearing for May 24, 2022.

On May 16, 2022, the Department filed a "Motion to Dismiss for Lack of Jurisdiction" ("the Motion to Dismiss"). Via the Motion to Dismiss, the Department argued that it had never employed Ms. Hofer. Instead, Ms. Hofer had been employed by Centurion, a company that contracts with the Department. Accordingly, the Department argued that it "is not the appropriate party to be the Respondent in this action and as such, DOAH does not have the jurisdiction to make any determinations affecting the interests of [the Department], as [the Department] is not responsible for any adverse employment actions taken against Ms. Hofer."

The Motion to Dismiss was addressed during a telephone conference on May 17, 2022. The undersigned issued an Order later that day denying the Motion to Dismiss without prejudice to being renewed at a later date.

[1] Ms. Hofer alleged that she was retaliated against based on her religion but did not explain that allegation or offer any evidence of such during the final hearing. Any other allegations made by Ms. Hofer were outside the statutory time frame and thus untimely. *See* § 760.11(1), Fla. Stat. (2021)(establishing that any person aggrieved by a violation of Chapter 760, Florida Statutes, has 365 days to file a complaint with the Commission).

In support thereof, the Order stated that "the undersigned is not yet persuaded that there are no material facts in dispute."

During the May 17, 2022, phone conference, Ms. Hofer stated that she needed more time to serve subpoenas on prospective witnesses. Accordingly, the undersigned issued an Order on May 17, 2022, rescheduling the final hearing for June 30, 2022.

On June 21, 2022, the Department filed a second "Motion to Dismiss for Lack of Jurisdiction" ("the Renewed Motion to Dismiss") arguing that the Department should not be a respondent in this matter because it was not Ms. Hofer's joint employer when she was employed by Centurion.

The undersigned denied the Renewed Motion to Dismiss via an Order issued on June 22, 2022. The Order stated in pertinent part that:

> The crux of Petitioner's case appears to be that one of Respondent's employees, Warden John Palmer, has mandated, or has the authority to mandate, to Petitioner's former employer that Petitioner not be rehired. In order for the undersigned to grant the Motion to Dismiss, Respondent would have to demonstrate that, even if that allegation was true, there would be no basis for finding that an unlawful employment practice has occurred. Respondent has not met that burden. Moreover, Respondent attached an affidavit to the Motion to Dismiss stating that Warden Palmer only made a "recommendation" that Petitioner not be rehired. Thus, there appears to be a disputed issue of material fact as to whether Warden Palmer mandated or recommended that Petitioner not be rehired. Accordingly, the Motion to Dismiss is DENIED without prejudice to being renewed.

The Department filed a third "Motion to Dismiss for Lack of Jurisdiction" ("the Third Motion") on June 27, 2022. On June 28, 2022, the undersigned

issued an Order denying the Third Motion and several others that had been filed by Ms. Hofer since June 23, 2022. With regard to the Third Motion, the undersigned ruled that "[t]he information currently available . . . indicates there could be a disputed issue of material fact as to how much control Respondent has over Centurion's hiring decisions."

The final hearing was convened on June 30, 2022. In addition to her own testimony, Ms. Hofer presented testimony from Stephanie Alvarez. Petitioner's Exhibits 6 through 8, 11 through 16, 18, 20 through 23, 25, 26, 28, 32, and 33 were accepted into evidence.[2] The Department presented testimony from Ms. Alvarez, John Palmer, Marcha Beane, Jocelyn Damelio, and Patricia Linn, Respondent's Exhibits 1 through 11 were accepted into evidence.

Neither party ordered a transcript. Both parties filed timely proposed recommended orders that were considered in the preparation of this Recommended Order.

Unless stated otherwise, all statutory references shall be to the 2021 version of the Florida Statutes. *See McClosky v. Dep't of Fin. Servs.*, 115 So. 3d 441 (Fla. 5th DCA 2013)(stating that a proceeding is governed by the law in effect at the time of the commission of the acts alleged to constitute a violation of law).

[2] The undersigned noted that Petitioner's Exhibits 6, 12, 18, 22, 23, 25, and 26 contained hearsay. The undersigned also noted the Department's relevancy objection to Petitioner's Exhibit 28.

FINDINGS OF FACT

Based on the oral and documentary evidence adduced at the final hearing, the entire record of this proceeding, and matters subject to official recognition, the following Findings of Fact are made:

1. Ms. Hofer earned a bachelor's degree in Classical Studies from the University of Florida in 2006 and a master's degree in Counseling from Palm Beach Atlantic University in 2011.

2. Since completing her education, Ms. Hofer has been working in the fields of mental health counseling, exercise therapy, and personal training. She is licensed by the Florida Department of Health as a mental health counselor.

3. The Department contracts with Centurion for the provision of medical services to inmates.

4. Ms. Hofer began working for Centurion on September 12, 2016, in the position of mental health professional providing counseling services to inmates in Florida State Prison in Raiford, Florida.

5. Ms. Hofer sent an e-mail to Stephanie Alvarez on October 13, 2016, complaining about an incident or incidents that had recently occurred at Florida State Prison. Ms. Alvarez is a health services administrator for Centurion and manages Centurion's staff there. Because some of Ms. Hofer's allegations pertained to corrections officers, Ms. Alvarez forwarded that e-mail to John Palmer, who was the warden at Florida State Prison at that time.[3]

6. Ms. Hofer's refusal to write a formal incident report came to the attention of Warden Palmer. Ms. Hofer met with Warden Palmer and Ms. Alvarez in Warden Palmer's office on October 21, 2016. During the meeting, Warden Palmer explained to Ms. Hofer that an investigation of her

[3] Mr. Palmer is currently the Director of Institutions over 16 prisons in the Department's Region 2.

complaints could not begin until she wrote an incident report. Ms. Hofer continued to refuse and resigned from Centurion during the meeting.

7. Due to Ms. Hofer's refusal to write an incident report and her failure to give any notice prior to resigning, Centurion's management decided that Centurion would never rehire Ms. Hofer.

8. Warden Palmer recommended against Ms. Hofer being rehired because he considered her conduct during their meeting to be disrespectful and hostile. In addition, he was concerned about her inability or refusal to follow a simple request. Given that Florida State Prison is a maximum security prison housing death row inmates and inmates deemed to be "incorrigible," he considers it essential that people working in such an environment follow simple instructions from their superiors.

9. Ms. Hofer filed a complaint against Centurion with the EEOC in January of 2017. On September 21, 2018, the EEOC issued a letter to Ms. Hofer stating it had investigated the matter and was unable to conclude that any violations had occurred.

10. Since her resignation, Ms. Hofer has received many communications from Centurion via e-mail, social media, and U.S. Mail about working for the company.[4]

11. In June of 2021, Ms. Hofer elected to pursue employment with Centurion but learned from a recruiter in July of 2021 that she had been put on a "do not hire" list by Centurion.

12. Centurion makes its own personnel decisions, including those pertaining to hiring and firing. Centurion is under no formal obligation to follow the Department's wishes when it comes to Centurion's personnel decisions. While the Department can make recommendations, there is no persuasive evidence that the Department has any control over Centurion's personnel decisions.

[4] Ms. Hofer did not specify during her testimony if those communications were directed specifically to her or if she was one of many recipients.

13, Even if Ms. Hofer had carried her burden of establishing the elements of a prima facie retaliation case and that the Department controlled Centurion's personnel decisions, the greater weight of the evidence demonstrates that Centurion had a valid, non-pretextual reason for not rehiring Ms. Hofer. That reason was Ms. Hofer's refusal to write an incident report and her failure to give any notice prior to resigning. Ms. Hofer has not presented any evidence demonstrating that Centurion's justification for not rehiring her was a pretext for discrimination or retaliation.

CONCLUSIONS OF LAW

14. DOAH has jurisdiction over the parties and the subject matter of this proceeding pursuant to sections 120.569 and 120.57, Florida Statutes, and Florida Administrative Code Rule 60Y-4.016(1).

15. The legislative scheme contained in sections 760.01 through 760.11, Florida Statutes, is known as the Florida Civil Rights Act of 1992 ("the FCRA").

16. The FCRA incorporates and adopts the legal principles and precedents established in the federal anti-discrimination laws specifically set forth under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et. seq*.

17. Florida courts have determined that federal discrimination law should be used as guidance when construing the FCRA. *See Valenzuela v. GlobeGround N. Am., LLC*, 18 So. 3d 17, 21 (Fla. 3d DCA 2009); *Brand v. Fla. Power Corp.*, 633 So. 2d 504, 509 (Fla. 1st DCA 1994).

18. In the instant case, Ms. Hofer has the burden of proving by a preponderance of the evidence that the Department committed an unlawful employment practice. *See EEOC v. Joe's Stone Crabs, Inc.*, 296 F.3d 1265, 1273 (11th Cir. 2002)(noting that a claimant bears the ultimate burden of persuading the trier of fact that the employer intentionally discriminated against the employee); § 120.57(1)(j), Fla. Stat.

19. As for Ms. Hofer's claim that her failure to be rehired by Centurion was unlawful retaliation by the Department, the burden of proof in Title VII retaliation cases is governed by the framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). A plaintiff establishes a prima facie case by demonstrating the following: (a) that she engaged in a statutorily protected activity; (b) she experienced an adverse employment action; and (c) a causal link between the protected expression and the adverse action.[5] *Coles v. Post Master Gen. U.S. Postal Serv.*, 711 Fed. Appx. 890, 896 (11th Cir. 2017). The burden then shifts to the defendant to negate the inference of retaliation by presenting legitimate reasons for the adverse employment action. If the defendant is successful, then the plaintiff bears the burden of proving that the reasons offered by the defendant are pretextual. *Id.*

20. With regard to the causal link element, the Eleventh Circuit construes "the causal link element broadly so that a plaintiff merely has to prove that the protected activity and the adverse action are not completely unrelated." *Williams v. Ala. Dep't of Indus. Rels.*, 684 Fed. Appx. 888, 894 (11th Cir. 2017). "A plaintiff satisfies this element (for the purpose of making a prima facie case) if he provides evidence that (1) the defendant was aware of his protected expression or activity; and (2) there was a close temporal proximity between this awareness and the adverse action." *Id.* at 894. "A close temporal proximity between the protected expression and an adverse action is sufficient circumstantial evidence of a causal connection for purposes of a prima facie case." *Higdon v. Jackson*, 393 F.3d 1211, 1220 (11th Cir. 2004). *See Donnellon v. Fruehaud Corp.*, 794 F.2d 598, 601 (11th Cir. 1986)(stating that "[t]he short period of time [one month] between the filing of the discrimination complaint and the plaintiff's discharge belies any assertion by

[5] In the instant case, the first and second factors of a prima facie case do not appear to be in dispute. Ms. Hofer engaged in a protected activity by filing an EEOC complaint, and she suffered an adverse employment action when Centurion declined to rehire her.

the defendant that the plaintiff failed to prove causation."). However, "[i]f there is a substantial delay between the protected expression and the adverse action in the absence of other evidence tending to show causation, the complaint of retaliation fails as a matter of law." *Dexter v. Amedisys, Home Health of Ala.*, 965 F. Supp. 2d, 1280, 1295 (N.D. Ala. 2013).[6]

21. If an employer articulates a legitimate, non-discriminatory and non-retaliatory reason for the adverse action, as Centurion has done here, then a petitioner must establish that the non-retaliatory reason was merely a pretext by demonstrating that the stated reason was not the true reason for the employment decision. *Jackson v. State of Ala. State Tenure Comm'n*, 405 F.3d 1276, 1289 (11th Cir. 2005). "A reason is not pretext for discrimination unless it is shown both that the reason was false, and that discrimination was the real reason." *Brooks v. Cnty. Comm'n of Jefferson Cnty., Ala.*, 446 F.3d 1160, 1163 (11th Cir. 2006). A plaintiff "can meet her burden either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Dexter*, 965 F. Supp. 2d at 1296. *See Jones v. Gerwens*, 874 F.2d 1534, 1541 (11th Cir. 1989)(noting that when assessing whether an employer's proffered reason was pretextual, it is the decision-maker's motive that is at issue); *Watkins v. Sverdrup Tech., Inc.*, 153 F.3d 1308, 1314 (11th Cir. 1998)(stating that in order to discredit an employer's explanation, a plaintiff "must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find all of those reasons unworthy of credence."); *Murphree v. Comm'r*, 644 Fed. Appx. 962, 968 (11th Cir. 2016)(noting that "[i]n evaluating pretext, we ask whether the plaintiff has cast sufficient doubt on the defendant's proffered nondiscriminatory reasons to permit a reasonable

[6] In the instant case, a period of more than 4 years transpired between Ms. Hofer's unsubstantiated EEOC complaint and Centurion's decision to not rehire her.

factfinder to conclude that the employee's proffered legitimate reasons were not what actually motivated its conduct.").

22. If the stated, non-retaliatory reason is one that might motivate a reasonable employer, "an employee must meet that reason head on and rebut it, and the employee cannot succeed by simply quarreling with the wisdom of that reason." *Chapman v. AI Transp.*, 229 F.3d 1012, 1030 (11th Cir. 2000)(en banc). Pretext must be established with "concrete evidence in the form of specific facts" showing that the proffered reason was pretext; "mere conclusory allegations and assertions" are insufficient. *Bryant v. Jones*, 575 F.3d 1281, 1308 (11th Cir. 2009). A reason cannot be pretext for discrimination "unless it is shown both that the reason was false, and that discrimination was the real reason." *Fla. Stat. Univ. v. Sondel*, 685 So. 2d 923, 927 (Fla. 1st DCA 1996).

23. With regard to the instant case, Ms. Hofer has named the Department, rather than Centurion, as a respondent. Therefore, in order to maintain a case of retaliation against the Department, Ms. Hofer must first establish that the Department and Centurion were her joint employers when she worked at Florida State Prison. *See, e.g., Butler v. Drive Auto Indus. of Am., Inc.*, 793 F.3d 404, 408 (4th Cir 2015)(explaining that "two parties can be considered joint employers and therefore both be liable under Title VII if they share or co-determine those matters governing the essential terms and conditions of employment.").

24. Even if the undersigned were to find that the Department had sufficient control over the terms and conditions of Centurion employees to be considered a joint employer with Centurion, and that Ms. Hofer could satisfy the elements of a prima facie retaliation case, Centurion had a good faith non-pretextual reason for not rehiring Ms. Hofer. That reason was Ms. Hofer's refusal to write an incident report and her failure to give any notice prior to resigning.

25. Ms. Hofer has not presented any evidence demonstrating that Centurion's justification for not rehiring her was a pretext for discrimination. *See Denney v. City of Albany*, 247 F.3d 1172, 1188 (11th Cir. 2001)(noting that a court's role is not to act as a "super-personnel department" and second-guess a company's business decisions).

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 dismissing Ms. Hofer's Petition for Relief.

DONE AND ENTERED this 20th day of July, 2022, in Tallahassee, Leon County, Florida.

Garnett Chisenhall

G. W. CHISENHALL
Administrative Law Judge
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of July, 2022.

COPIES FURNISHED:

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

Stanley Gorsica, General Counsel
Florida Commission on Human Relations
4075 Esplanade Way, Room 110
Tallahassee, Florida 32399-7020

Rachel Hofer
2417 Northwest 64th Terrace
Gainesville, Florida 32606

Maria Shameem Dinkins, Esquire
Department of Corrections
501 South Calhoun Street
Tallahassee, Florida 32399

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.