FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D21-1309

TAMMIE WASHINGTON,

Appellant,

v.

FLORIDA DEPARTMENT OF REVENUE,

Appellee.

On appeal from the Circuit Court for Leon County.
Angela C. Dempsey, Judge.

April 13, 2022

LEWIS, J.

Appellant, Tammie Washington, appeals a Final Judgment entered in favor of Appellee, the Florida Department of Revenue ("Department"), arguing that the trial court erred in granting summary judgment on her whistle-blower, racial discrimination, and retaliation claims. For the following reasons, we reject Appellant's arguments and affirm the judgment.

Factual Background

Appellant, an African-American, began working as a revenue specialist in the Department's Child Support Program Customer Contact Center in 2010. Her responsibilities included answering

phone calls and using the Child Support Automated System to research, evaluate, and update case information to assist parents receiving or paying child support. Revenue specialists are evaluated based on a number of objective criteria, such as calls per hour, "wrap up time," and customer service and professionalism. In order to track revenue specialists' performance, supervisors monitor calls for compliance with policies and procedures and review call data that is collected by the automated system. Supervisors then meet with the specialists for routine "one on ones" to discuss their performance and determine if any additional training, assistance, or other intervention is needed.

In June 2018, Appellant filed a Complaint in circuit court against the Department, alleging a "violation of public whistle blower act." In April 2020, Appellant filed an Amended Complaint, wherein she alleged that she reported misfeasance, malfeasance, and/or gross misconduct regarding the manner in which the Department's employees were trained to deceive, mislead, and withhold information from the public. It was after Appellant allegedly made her supervisors aware of her concerns that the Department "took no corrective action," but began to engage in a pattern of harassment, "including but not limited to placing [her] on a Corrective Action Plan (CAP), spreading rumors regarding [her] personal life, passing [her] over for raises, lying to [her] regarding employment benefits, and denying [her] use of Family Medical Leave." Appellant allegedly reported "the misconduct" to several of her supervisors.

In Count I, Appellant alleged that the Department violated the "Public Whistleblower Act" in section 112.3187, Florida Statutes. In Count II, Appellant claimed racial discrimination under chapter 760, Florida Statutes, alleging that she was treated differently than similarly situated white employees and had been subject to hostility and poor treatment on the basis, at least in part, of her race. In Count III, Appellant claimed that she was retaliated against under chapter 760, Florida Statutes, for voicing opposition to unlawful employment practices.

After filing its Answer, the Department filed a summary judgment motion along with thirty exhibits, arguing that the pleadings and record evidence showed that there was no genuine

issue as to any material fact and that it was entitled to a judgment as a matter of law because Appellant could not meet the prima facie requirements for claims under the Florida Whistle-blower's Act or the Florida Civil Rights Act.

One of the Department's exhibits was an affidavit of its Senior Management Analyst Supervisor, who explained that Appellant had been issued progressive discipline, beginning with a coaching memo in October 2013, a reminder memo in September 2014, and a decision memo in July 2017. Appellant was placed on a Corrective Action Plan ("CAP") in August 2017. She was dismissed in December 2017 because she failed to complete her CAP. According to the supervisor, the Department had no record of Appellant reporting any misconduct by its employees prior to being placed on the CAP or being dismissed.

In the 2013 coaching memo, Appellant was informed that she violated standards of conduct such as "Honesty and Confidentiality" by engaging in "Dishonesty," Disrespect," "Discourteous Behavior, Disrespect," and "Disruptive Conduct." In the 2014 reminder memo, Appellant was informed that she had violated the standards of conduct by having "Poor Performance," "Poor Quality Poor Performance," and "Low Work Output." In a 2015 performance evaluation, Appellant was informed that she failed to meet three of "the above expectations overall." In the 2017 decision memo, Appellant was informed that she violated the standards of conduct by having "Poor Performance . . . Low Work Output," "Poor Performance . . . Poor Quality," and "Disrespect . . . Insubordination." In her 2017 CAP, Appellant was informed that she had not satisfactorily performed certain job requirements and that she received a rating of "2 – Below Expectation" in the areas of communication, wrap-up, and contacts per hour. Appellant signed the form, acknowledging that if her "performance does not improve and [she does] not successfully complete this CAP during the specified period and maintain expectations in other SMART measures, disciplinary action, up to and including dismissal, may be taken." In the "Results" section of the CAP, which was signed on October 27, 2017, Appellant received two "Below Expectation" ratings and one "Meets Expectation" rating.

In September 2017, soon after she was placed on the CAP, Appellant filed a "Whistle-Blower Retaliation Charge of Discrimination" with the Florida Commission on Human Relations ("Commission") and a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC"), claiming racial discrimination.

Another exhibit to the summary judgment motion contained several emails written by various supervisors to Appellant, explaining the areas where they had seen improvement and the areas that were still deficient. The Department informed Appellant in November 2017 of its intent to terminate her employment based upon her poor performance and inefficiency or inability to perform assigned duties. The Department included a detailed summary of Appellant's actions and inactions. By letter dated December 11, 2017, Appellant was notified that she would be dismissed "at the close of business on the date this notice is delivered to you."

In January 2018, the Commission issued a Notice of Termination of Investigation, explaining that its investigation revealed that Appellant was put on a CAP due to well-documented performance problems prior to her appearance "before the Office of the Inspector General (OIG)." The investigation "did not reveal that the people responsible for putting [appellant] on her CAP were aware of her protected whistle-blower activity prior to putting her on her CAP." The Commission concluded that it was not reasonable to believe that the Department retaliated against Appellant for engaging in a protected whistle-blower activity. The Commission subsequently dismissed Appellant's June 2018 Whistle-Blower Retaliation Charge of Discrimination, which was based upon her termination. In October 2018, the EEOC issued a Dismissal and Notice of Rights, setting forth, "Based upon its investigation, the EEOC is unable to conclude that the information obtained establishes violations of the statutes." Appellant was informed that she could file a lawsuit in federal or state court.

In Plaintiff's Verified Answers to Defendant's First Set of Interrogatories, Appellant claimed that she reported misfeasance, malfeasance, and/or gross misconduct to Donna Martin, a

supervisor, but she did not have "the specific dates." Appellant claimed that the reports were made orally and via email.

In Plaintiff's Answers to Defendant's Second Set of Interrogatories, Appellant claimed that Douglas Cooke "moved to manager after only several weeks as a Revenue Spec II," Sheila Tripp "moved to Supervisor but her knowledge base and personality were awful," and Sherrie Green's "attendance was about as mine but she was not harassed."

In Plaintiff's Response to Defendant's First Request For Production of Documents, Appellant was asked to produce "[a]ll documents which support [her] claim that [she] engaged in statutorily protected activity, as alleged in [her] Complaint." Appellant replied, "There are no documents responsive to this request in Plaintiff's possession, custody, or control."

Appellant filed Plaintiff's Opposition to Defendant's Amended Motion for Summary Judgment. Included in her exhibits were depositions of some of her former co-workers, who represented that she had been vocal to her supervisors about policies she disagreed with.

During the summary judgment hearing, Appellant's counsel stated in part, "The question is, does she have copies of those emails [where she reported her concerns to her supervisors]. And the answer is no. She says that she reported the concerns and that she no longer has access to her emails."

In the Order Granting Defendant's Amended Motion for Summary Judgment, the trial court concluded that the "admissible evidence submitted by the parties shows there is no genuine issue as to any material fact and that DOR is entitled to judgment as a matter of law." The trial court detailed Appellant's "progressive discipline" and noted that while Appellant filed a written rebuttal to the decision memo, she "did not identify any violations of law or policy, or any incident of misfeasance, malfeasance, or gross misconduct" therein. Nor did she "make any reference to race or state a belief that she was unfairly evaluated because she is Black."

In the "Discussion of Plaintiff's Claims" section, the trial court, after noting that Appellant alleged in Count I that she was retaliated against, set forth:

> 15. In her interrogatory responses, Plaintiff stated she made protected disclosures . . . .
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> 16. Plaintiff did not submit any admissible evidence of a written or signed disclosure that would have triggered the protections of the Whistle-blower's Act before she was placed on a CAP. Plaintiff's rebuttal and charges were prepared and submitted *after* Plaintiff was placed on the CAP. Anti-retaliation laws "do not allow employees who are already on thin ice to insulate themselves against termination or discipline by preemptively making a discrimination complaint." *Alvarez v. Royal Atl. Developers, Inc.*, 610 F.3d 1253, 1270 (11th Cir. 2010).
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> 17. An additional reason that Plaintiff's Whistle-blower's Act claim fails, as it relates to her dismissal, is her failure to exhaust the administrative prerequisite under the Whistle-blower's Act. Plaintiff's post-dismissal Whistle-blower Charge was not filed within 60 days of her dismissal as required by Section 112.31895, Florida Statutes, and it cannot be subsumed into the complaint she filed September 12, 2017. . . .
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> 18. Summary judgment is granted as to Count I because Plaintiff did not provide any admissible evidence that she made a protected disclosure under the Whistle-blower's Act, or any causal connection, i.e., that she was placed on a CAP or dismissed in retaliation for such a disclosure.

As for Count II and Appellant's racial discrimination claim, the trial court set forth:

> 20. In order to show that other employees are valid comparators, a Plaintiff must show they are similarly situated in all material respects. *Lewis v. City of Union*

City, Georgia, 918 F.3d 1213, 1226–1227 (11th Cir. 2019). Plaintiff's asserted comparators – Mr. Cooke, Ms. Triplett, and Ms. Green – are not similarly situated to Plaintiff. Plaintiff submitted no admissible evidence that any of them failed to meet their objective performance measures as Plaintiff did.

21. Where Plaintiff fails to show the existence of valid comparators, summary judgment is appropriate where no other evidence of discrimination is present. . . . Summary Judgment is granted as to Count II because Plaintiff did not submit any admissible evidence that she was placed on a CAP or dismissed because of her race.

As to Count III and Appellant's retaliation claim, the trial court set forth in part:

23. Plaintiff submitted no admissible evidence that she reported an unlawful employment practice under the FCRA until she submitted her first charge of discrimination on September 12, 2017. By this time, Plaintiff had been issued a coaching memo, a reminder memo, and a decision memo; she had received a poor performance evaluation; and she had been placed on a corrective action plan. As noted above, Plaintiff cannot create a retaliation claim by engaging in protected activity *after* a disciplinary process begins. . . .

24. Summary Judgment is granted as to Count III because Plaintiff did not submit any admissible evidence that she was placed on a CAP or dismissed in retaliation for reporting unlawful employment practices under the FCRA.

In its "Conclusion," the trial court set forth:

25. DOR submitted admissible evidence that Plaintiff's placement on a CAP and her dismissal were due to her failure to meet objective performance criteria. To show pretext, Plaintiff was required to show that [she] did not fail to meet her objective performance criteria, or

> that such failure was not the true reason for DOR'[s] employment decisions, but rather that discriminatory or retaliatory motive was the reason. *Flowers v. Troup Cnty., Ga. Sch. Dist.*, 803 F.3d 1327, 1341 (11th Cir. 2015) (affirming summary judgment for employer where, at most, evidence might support an inference that employer's stated reason for dismissing employee was pretext of something, but employee offered no evidence that the stated reason was pretext of discrimination on the basis of employee's race).
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> 26. Plaintiff did not submit admissible evidence to rebut DOR's stated reason for dismissing her and did not demonstrate a genuine issue of material fact to withstand DOR's Motion for Summary Judgment. . . .

The trial court subsequently entered a Final Judgment in the Department's favor. This appeal followed.

Analysis

The trial court's summary judgment ruling is reviewable on appeal de novo. *Volusia Cnty. v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000). As this Court has explained, the party moving for summary judgment must conclusively show the absence of any genuine issue of material fact, and summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law. *Feizi v. Dep't of Mgmt. Servs., State of Fla.*, 988 So. 2d 1192, 1193 (Fla. 1st DCA 2008) (citing *Moore v. Morris*, 475 So. 2d 666, 668 (Fla. 1985)).[1]

[1] As Appellant explains in her Initial Brief, this matter was decided below prior to Florida's May 1, 2021, adoption of the federal summary judgment standard found in Federal Rule of Civil Procedure 56. *See In re Amends. to Fla. Rule of Civil Pro. 1.510*, 317 So. 3d 72, 73–74 (Fla. 2021).

Retaliation Claim under Florida's Whistle-blower's Act

Taking first Count I and Appellant's claim of retaliation under Florida's Whistle-blower's Act, which was intended to prevent agencies from taking retaliatory action against employees who report violations of law, section 112.3187, Florida Statutes (2019), provides in part:

> **(4) Actions prohibited.—**
>
> (a) An agency or independent contractor shall not dismiss, discipline, or take any other adverse personnel action against an employee for disclosing information pursuant to the provisions of this section.
>
> (b) An agency or independent contractor shall not take any adverse action that affects the rights or interests of a person in retaliation for the person's disclosure of information under this section.
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> . . . .
>
> **(5) Nature of information disclosed.--**The information disclosed under this section must include:
>
> (a) Any violation or suspected violation of any federal, state, or local law, rule, or regulation committed by an employee or agent of an agency or independent contractor which creates and presents a substantial and specific danger to the public's health, safety, or welfare.
>
> (b) Any act or suspected act of gross mismanagement, malfeasance, misfeasance, gross waste of public funds, suspected or actual Medicaid fraud or abuse, or gross neglect of duty committed by an employee or agent of an agency or independent contractor.
>
> . . . .
>
> **(7) Employees and persons protected.--**This section protects employees and persons **who disclose**

> **information on their own initiative in a written and signed complaint; who are requested to participate in an investigation, hearing, or other inquiry conducted by any agency or federal government entity; who refuse to participate in any adverse action prohibited by this section; or who initiate a complaint through the whistle-blower's hotline or the hotline of the Medicaid Fraud Control Unit of the Department of Legal Affairs; or employees who file any written complaint to their supervisory officials or employees who submit a complaint to the Chief Inspector General in the Executive Office of the Governor, to the employee designated as agency inspector general under s. 112.3189(1), or to the Florida Commission on Human Relations. . . .**

(Emphasis added).

The Florida Supreme Court has explained that the Whistle-blower's Act is remedial and should be given a liberal construction. *Irven v. Dep't of Health and Rehab. Servs.*, 790 So. 2d 403, 405–06 (Fla. 2001). To establish a prima facie case under the Whistle-blower's Act, a plaintiff must show that (1) prior to his or her termination, he or she made a disclosure protected by the Act; (2) he or she suffered an adverse employment action; and (3) some causal connection exists between the first two elements. *Nazzal v. Fla. Dep't of Corr.*, 267 So. 3d 1094, 1096 (Fla. 1st DCA 2019).

The second element of the pertinent test is undisputed in this case. As to the first element of whether Appellant made a disclosure protected by the Act, the trial court found that she did not submit any admissible evidence of a written or signed disclosure prior to being placed on the CAP. In *Walker v. Florida Department of Veterans' Affairs*, 925 So. 2d 1149, 1150 (Fla. 4th DCA 2006), the Fourth District explained that a protected disclosure under section 112.3187(7) "as it applies to this case" requires an "employee's 'written and signed complaint,' or a 'written complaint to [the employee's] supervisory official[].'" The purpose of the statutory requirement of a signed writing "is to document what the employee disclosed, and to whom the employee

disclosed it, thus avoiding problems of proof for purposes of the Whistle-blower's Act." *Id.*

Subsequently, in *Rustowicz v. North Broward Hospital District*, 174 So. 3d 414, 421 (Fla. 4th DCA 2015), the Fourth District explained that the language of section 112.3187(7) makes it clear that the Legislature intended whistleblower protection to be extended to employees other than those who sign a written complaint, including employees "who are requested to participate in an investigation . . .," employees "who refuse to participate in any adverse action prohibited by this section," and employees "who initiate a complaint through the whistle-blower's hotline or the hotline of the Medicaid Fraud Control Unit." The Fourth District reasoned that "[i]f the legislature intended a *writing* requirement for those three categories of employees, it could have done so, as it did for the remaining two categories." *Id.* The Fourth District rejected the appellant's argument that *Walker* supported his claim that employees who are requested to participate in an investigation must make their protected disclosures in written form. *Id.* It found *Walker* factually distinguishable from the case before it because *Walker* dealt with an employee "who asserted disclosure by way of a written complaint, rather than an employee who made a disclosure by participating in an investigation." *Id.* The Fourth District held that if an employee is requested to participate in an investigation, hearing, or other inquiry concerning governmental wrongdoing by an appropriate official, the employee qualifies for protection and his or her disclosures need not be by a signed complaint. *Id.* at 422.

We agree with the Fourth District that certain categories of disclosure included in section 112.3187(7) require a writing. In her Amended Complaint, Appellant alleged that she "reported and disclosed violations of state rules, regulations and laws to a person who had the authority to investigate, police, manage and otherwise remedy the violations," along with "malfeasance, misfeasance, and other acts specifically outlined in [section] 112.3187(5) . . . ." She claimed that her reports "were conveyed in writing and/or were made to supervisors and/or other persons within [the Department] who could remedy the violations." In her memorandum in opposition to the Department's summary judgment motion, Appellant claimed to have notified her supervisors and "put her

concerns into email communications." Appellant made no allegations that she was requested to participate in an investigation or that she initiated a complaint through the whistle-blower's hotline. Given such, she clearly sought relief under section 112.3187(7) as an employee "who file[d] any written complaint to their supervisory officials." Yet, as the trial court found, Appellant "did not submit any admissible evidence of a written or signed disclosure that would have triggered the protections of the Whistle-blower's Act before she was placed on a CAP. Indeed, Appellant admitted below in her response to the Department's request to produce that there were "no documents . . . in [her] possession, custody, or control" that supported her claim that she engaged in statutorily protected activity. Appellant's counsel also acknowledged during the summary judgment hearing that Appellant did not have copies of the emails she claimed to have sent.

In support of her argument as to Count I, Appellant cites *King v. State of Florida, Department of Environmental Protection*, 650 F.Supp.2d 1157 (N.D. Fla. June 15, 2009), where the district court concluded in part that the plaintiff's complaint about a supervisor's alleged bias in the hiring process could certainly amount to a danger to the public's health, safety, or welfare under the Whistle-blower's Act. However, for purposes of this case, the more pertinent part of *King* is the district court's decision that because a certain complaint was not in writing or made to the appellee agency's inspector general, it did not meet the requirements of section 112.3187(7). *Id.* at 1163. Here, as stated, the record contained no evidence of a written or signed disclosure made by Appellant that would have triggered the protections of the Whistle-blower's Act.

Appellant's reliance upon *Crouch v. Public Service Commission*, 913 So. 2d 111 (Fla. 1st DCA 2005), also fails given that the case supports the trial court's ruling here. In *Crouch*, we concluded that because the appellant complained to his supervisory officials, the plain language of section 112.3187(7) required that the complaints be in writing; because they were not, the appellant was not entitled to the protection afforded by the Whistle-blower's Act. *Id.* at 111. Although Appellant submitted a written rebuttal to the decision memo in this case, the trial court

correctly found that she did not identify any violations of any law or policy or any incident of misfeasance, malfeasance, or gross misconduct therein. As such, the trial court did not err in finding that summary judgment was appropriate on Count I because Appellant failed to show that she made a disclosure protected by the Whistle-blower's Act.[2]

Racial Discrimination Claim under Florida's Civil Rights Act

Turning to Count II and Appellant's racial discrimination claim, section 760.06(5), Florida Statutes (2019), a provision in the Florida Civil Rights Act, provides that the Commission has the power to investigate and act upon complaints alleging any discriminatory practice as the term is defined in the Act. Section 760.10(1)(a), Florida Statutes (2019), makes it an unlawful employment practice for an employer to "discharge . . . any individual . . . because of such individual's race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status." Because the Florida Civil Rights Act was modeled on Title VII, Florida courts apply Title VII caselaw when interpreting the Florida Civil Rights Act. *Jones v. United Space Alliance, L.L.C.*, 494 F.3d 1306, 1309 (11th Cir. 2007).

The United States Supreme Court established the order and allocation of proof in a case alleging discrimination in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). A plaintiff who alleges intentional discrimination is able to "survive summary judgment if he or she can meet the burden-shifting framework" set forth in *McDonnell Douglas*. *Mitchell v. Young*, 309 So. 3d 280, 284 (Fla. 1st DCA 2020). To establish a prima facie case of discrimination, a plaintiff must show: (1) he or she belongs to a protected class; (2) he or she was subject to an adverse employment action; (3) he or she was qualified to perform his or her job; and (4) his or her employer treated similarly situated employees outside the protected class more favorably. *Id.*

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[2] Given our conclusion, we need not address Appellant's argument concerning a causal connection and her challenge to the trial court's alternative determination that she failed to exhaust her administrative remedies.

In granting summary judgment on Count II, the trial court focused on the element of whether similarly situated employees outside of Appellant's protected class were treated more favorably. The trial court cited *Lewis v. City of Union City, Georgia*, 918 F.3d 1213, 1218 (11th Cir. 2019) (en banc), wherein the Eleventh Circuit explained that "the proper test for evaluating comparator evidence is neither plain-old 'same or similar' nor 'nearly identical,' as [its] past cases have discordantly suggested." After setting forth that a meaningful comparator analysis must be conducted at the prima facie stage of the *McDonnell Douglas*'s burden shifting framework and should not be moved to the pretext stage, the court held that "a plaintiff asserting an intentional-discrimination claim under *McDonnell Douglas* must demonstrate that she and her proffered comparators were 'similarly situated in all material respects.'" *Id.* After noting that a plaintiff need not show that he and his comparator are identical except for his race or gender or that they held precisely the same title, the Eleventh Circuit explained that ordinarily a similarly situated comparator will have engaged in the same basic conduct (or misconduct) as the plaintiff, will have been subject to the same employment policy, guideline, or rule as the plaintiff, will have been under the jurisdiction of the same supervisor, and will share the plaintiff's employment or disciplinary history. *Id.* at 1227–28. A valid comparison will not turn on formal labels but rather on substantive likeness; in other words, a plaintiff and his comparator must be sufficiently similar, in an objective sense, such that they cannot reasonably be distinguished. *Id.* at 1228; *see also Daniel v. Bibb Cnty. Sch. Dist.*, No. 5:18-CV-417(MTT), 2020 WL 2364596, at *7 (M.D. Ga. May 11, 2020) (citing *Lewis* for the proposition that a valid comparator (1) will have engaged in the same basic conduct as the plaintiff; (2) will have been subject to the same employment policy or rule, (3) will have been under the same supervisor, and (4) will share the plaintiff's employment or disciplinary history).

In *Mac Papers, Inc. v. Boyd*, 304 So. 3d 406, 407 (Fla. 1st DCA 2020), we addressed an age discrimination case and the issue of whether the comparators met the test stated in *Lewis*. We concluded that the person whom the appellant claimed was a comparator was not a valid comparator because he and the appellant were not similarly situated in all material respects. *Id.* at 409. The appellant and the claimed comparator had different

supervisors, the conditions arising from their domestic battery claims were different, and their ongoing conduct was different in that the appellant engaged in improper conduct a second time, unlike the claimed comparator. *Id.* We set forth, "Based on the lack of similarities, and the material differences between the two employees, [the claimed comparator] was a legally inadequate comparator to [the appellant], thereby negating [the appellant's] effort to establish a prima facie case under the *McDonnell Douglas* framework." *Id.* We further explained, "Though fact-finders are typically given much deference in determining whether a comparator is similarly-situated, the absence of evidence showing a similar disciplinary record can render a discrimination claim nonactionable as a matter of law." *Id.*

Appellant contends that she identified below three white individuals who were treated more favorably than she was. According to Appellant, Mr. Cooke was promoted after a short few weeks from his position as a Revenue Specialist II to a manager role, while she had worked for the Department for six years at that point. Ms. Triplett, who was allegedly difficult to work with and lacked both knowledge and skills, was promoted to a supervisor's position. Ms. Green, who allegedly struggled with attendance issues and was placed on a "corrective plan," was not, according to Appellant, subject to the same escalating hostile treatment and discrimination that she was subjected to. In contending that the trial court erred as to Count II, Appellant focuses on the fact that comparators need not be identical under *Lewis*. However, they do, as the trial court found, have to be substantially similar in all material respects. According to the evidence submitted by Appellant, Ms. Green was the only comparator who had any negative review from her supervisor. In 2014, Green's supervisor placed her on a Leave Monitoring Plan to help her build satisfactory leave balances and prevent a "Leave Without Pay" situation. Appellant offered no evidence showing that Green received the same type of reviews, memorandums, or corrective action plans that she had received regarding the quality of her work.

In what appears to be an implicit acknowledgment on Appellant's part that she did not provide evidence to meet the pertinent test as stated in *Lewis*, she cites *Smith v. Lockheed-*

Martin Corp., 644 F.3d 1321, 1323 (11th Cir. 2011), a case decided prior to *Lewis*, where the Eleventh Circuit held that circumstantial evidence of racial discrimination prevented summary judgment. Yet, not only did Appellant fail to provide any evidence showing that her comparators were similarly situated to her in all material respects, but she also failed to provide any circumstantial evidence of racial discrimination, which distinguishes this case from *Smith*. This case is more akin to *Mac Papers, Inc.* For these reasons, we conclude that the trial court did not err in granting summary judgment on Count II.

Retaliation Claim under Florida's Civil Rights Act

With respect to Count III and Appellant's retaliation claim filed under Florida's Civil Rights Act, the trial court found that Appellant submitted no admissible evidence that she reported an unlawful employment practice until she submitted her first charge of discrimination on September 12, 2017. The court noted, as it did with respect to Count I, that, by that time, Appellant had been issued a coaching memo, a reminder memo, and a decision memo, she had received a poor performance evaluation, and she had been placed on a CAP. The court cited *Alvarez v. Royal Atlantic Developers, Inc.*, 610 F.3d 1253, 1270 (11th Cir. 2010), for the proposition that anti-retaliation laws "do not allow employees who are already on thin ice to insulate themselves against termination or discipline by preemptively making a discrimination complaint." The Eleventh Circuit found in *Alvarez* that the appellee had legitimate non-discriminatory reasons to fire the appellant before she complained, and it remained free to act on those reasons afterward. *Id.* It explained that the "one thing [the appellee] could not lawfully do is fire her earlier than it otherwise would have *because* she complained about discrimination, at least not unless something in her complaint or the manner in which she made it gave the company an objectively reasonable basis to fear that unless [she] was fired she would sabotage its operations or endanger others." *Id.* (emphasis in original).

Appellant argues that the trial court ignored a critical distinction in this case – that the record does not establish that the Department had legitimate non-retaliatory reasons to fire her before she complained. Contrary to Appellant's contention,

however, the record is replete with evidence of her disciplinary history, which began in 2013. It could certainly be said that Appellant was on "thin ice" when she filed her complaints against the Department. Therefore, the trial court did not err in granting summary judgment on Count III.

Trial Court's Pretext Inquiry

Lastly, Appellant asserts that the trial court erred by stopping its analysis at the prima facie stage and by not considering whether the Department's actions were a pretext for illegal workplace conduct. The pretext inquiry asks whether the Department was dissatisfied with Appellant for the given reasons, even if mistakenly or unfairly so, or instead used the reasons as a cover for discrimination. *See James v. Total Solutions Inc.*, No. 5:14-cv-01687-AKK, 2016 WL 1719673, at *4 (N.D. Ala. Apr. 29, 2016) (noting that a court's sole concern is whether unlawful discriminatory animus motivated an employee's discharge and that the relevant inquiry "is whether the Defendants were dissatisfied with James for the articulated reasons, even if mistakenly or unfairly so, or instead merely used these reasons as cover for discrimination"); *see also Kragor v. Takeda Pharms. Am., Inc.*, 702 F.3d 1304, 1310–11 (11th Cir. 2012) ("When a plaintiff chooses to attack the veracity of the employer's proffered reason, '[the] inquiry is limited to whether the employer gave an honest explanation of its behavior.'") (citation omitted); *Chapman v. AI Transp.*, 229 F.3d 1012, 1030 (11th Cir. 2000) (noting that if "the proffered reason is one that might motivate a reasonable employer, [a] [plaintiff] must meet that reason head on and rebut it, and the [plaintiff] cannot succeed by simply quarreling with the wisdom of that reason").

Contrary to Appellant's argument, the trial court in its summary judgment order noted that, in order to show pretext, she was required to show that she did not fail to meet her objective performance criteria or that such failure was not the true reason for the Department's employment decisions, but rather that a discriminatory or retaliatory motive was the reason. In *Flowers v. Troup County, Georgia. School District*, 803 F.3d 1327, 1341 (11th Cir. 2015), which the trial court cited, the Eleventh Circuit affirmed a summary judgment in favor of the employer because the

employee offered no evidence that the stated reason was pretext of discrimination on the basis of the employee's race. Here, the trial court found in part that Appellant "did not submit admissible evidence to rebut the [Department's] stated reason for dismissing her." As the Department contends on appeal, Appellant offered no evidence of the falsity of the statements in any of the disciplinary documents. Thus, Appellant's pretext argument is meritless.

Conclusion

Based upon the foregoing, we conclude that the trial court properly granted summary judgment in the Department's favor. Accordingly, we affirm the Final Judgment.

AFFIRMED.

M.K. THOMAS, J., concurs; ROWE, C.J., concurs in result.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

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