UNITED STATES COURT OF APPEALS
For the Eleventh Circuit

No. 17-14966

District Court Docket No.
5:16-cv-00024-JSM-PRL

SHEILA ANNETTE CUNNINGHAM,

Plaintiff - Appellant,

versus

FLORIDA CREDIT UNION,

Defendant - Appellee.

Appeal from the United States District Court for the
Middle District of Florida

JUDGMENT

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: February 20, 2019
For the Court: DAVID J. SMITH, Clerk of Court
By: Djuanna Clark

ISSUED AS MANDATE 04/29/2019

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-14966
Non-Argument Calendar

D.C. Docket No. 5:16-cv-00024-JSM-PRL

SHEILA ANNETTE CUNNINGHAM,

Plaintiff - Appellant,

versus

FLORIDA CREDIT UNION,

Defendant - Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(February 20, 2019)

Before TJOFLAT, MARCUS, and ROSENBAUM, Circuit Judges.

PER CURIAM:

Sheila Cunningham, an African-American female proceeding *pro se*, appeals the District Court's grant of summary judgment in favor of Florida Credit Union ("FCU") in her employment action. Cunningham brought discrimination and retaliation claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2(a), 2000e-3(a) ("Title VII").[1]

We affirm the District Court's grant of summary judgment in favor of Florida Credit Union ("FCU") because Cunningham has not shown a question of material fact that renders her case appropriate for trial. Because we write for the parties, we set out facts only as they are needed to support our analysis.

I.

We review *de novo* a district court's grant of summary judgment. *Alvarez v. Royal Atl. Developers, Inc.*, 610 F.3d 1253, 1263-64 (11th Cir. 2010). Summary judgment is appropriate when the record indicates "no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

II.

Because FCU has provided explanations for why Cunningham's termination was lawful, and because Cunningham has not argued before us—let alone before

[1] Cunningham also raised a claim under the Florida Civil Rights Act of 1992 ("FCRA"), Fla. Stat. §§ 760.01, 760.11, and 509.092, and the District Court granted summary judgment to FCU on that claim as well. On appeal, Cunningham concedes that her FCRA claim is barred.

the District Court—that those explanations are pretextual, both her discrimination and retaliation claims fail as a matter of law. We take each claim in turn.

A.

Using circumstantial evidence, a plaintiff may establish a Title VII discrimination claim in one of two ways. She may invoke the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973), *holding modified by Hazen Paper Co. v. Biggins*, 507 U.S. 604, 113 S. Ct. 1701 (1993). Or she may present a "convincing mosaic of circumstantial evidence that would allow a jury to infer intentional discrimination by the decisionmaker." *Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1328 (11th Cir. 2011) (quoting *Silverman v. Bd. of Educ.*, 637 F.3d 729, 734 (7th Cir. 2011), *overruled by Ortiz v. Werner Enters., Inc.*, 834 F.3d 760 (7th Cir. 2016)).

Because Cunningham fails to meaningfully argue on appeal that she presented a "convincing mosaic," we do not analyze the case under that framework. *See United States v. Ardley*, 242 F.3d 989, 990 (11th Cir. 2001) (noting "our well-established rule that issues and contentions not timely raised in the briefs are deemed abandoned").

Under *McDonnell Douglas*, a plaintiff makes out a prima facie case by establishing that she "(1) is a member of a protected class; (2) was qualified for the position; (3) suffered an adverse employment action; and (4) was replaced by

someone outside the protected class or was treated less favorably than similarly situated individuals outside the protected class." *Hornsby-Culpepper v. Ware*, 906 F.3d 1302, 1312 n.7 (11th Cir. 2018). If the plaintiff establishes these elements, the burden of production shifts to the defendant to present evidence of a "legitimate, non-discriminatory reason for the challenged action." *Id.* at 1312. If the defendant does so, the burden shifts back to the plaintiff to introduce evidence that the proffered reason was a "mere pretext for discrimination." *Id.*

FCU presented evidence that Cunningham was terminated for deficient work performance. Because Cunningham has not argued that the proffered evidence is pretextual, we do not analyze whether she has established a prima facie case.

In March 2012—two years before Cunningham was terminated—FCU began giving her notice of two specific areas for improvement, both of which related to time management. She was assigned to handle various FCU accounts but began working on those accounts too close to deadlines and failed to timely submit completed loan packets to another department. The first issue placed FCU at risk of regulatory violations due to "charge offs" that occur at the 60-day mark.

The problems continued. In 2013, over a roughly two-month period, Cunningham misplaced between 26 and 42 loan packets per week, whereas others in her position misplaced only between one and six packets. Later in 2013, an audit revealed that Cunningham had begun working on only 38% of her accounts,

whereas the one other person in her position at the time had begun working on 72% of that person's accounts. In January 2014, just months after a October 2013 meeting and after Cunningham's supervisor had worked to help her with time-management skills, Cunningham was placed on probation because one of her accounts had passed the 60-day deadline; she had not begun working on it until the 58th day. Cunningham was terminated shortly after completing her probationary period because Cunningham's supervisor's supervisor had discovered errors in Cunningham's work that he believed would have caused the loans to be unenforceable. The errors included erroneous indications that clients had made certain elections. The supervisor's supervisor's supervisor ultimately directed Cunningham's termination.

Despite FCU's proffer of this evidence that Cunningham was terminated for deficient work performance, Cunningham failed to provide any evidence that FCU's decision to terminate her was pretext for discrimination. Indeed, she does not even argue on appeal that the motivation was pretextual. As such, she has failed to meet her burden of production under *McDonnell Douglas*.

B.

Cunningham's retaliation claim suffers from the same flaw. A prima facie case requires a showing that "(1) the employee was engaged in statutorily protected activity; (2) the employee suffered an adverse employment action; and

(3) a causal link exists between the protected activity and the adverse employment action." *Furcron v. Mail Centers Plus, LLC*, 843 F.3d 1295, 1310 (11th Cir. 2016). As with a discrimination claim, "[o]nce a *prima facie* case has been established, the employer may come forward with legitimate reasons for the employment action to negate the inference of retaliation." *Id.* (quoting *Goldsmith v. City of Atmore*, 996 F.2d 1155, 1163 (11th Cir. 1993) (alteration omitted)). And yes, if the employer does so, the burden of production then reverts to the employee to introduce evidence that the asserted reason is "pretextual." *Id.* at 1310–11.

Cunningham argues that she was terminated because she notified FCU that one of her colleagues had wrongfully claimed an incentive payment to which Cunningham was supposedly entitled. We need not reach whether Cunningham has established a prima facie case because as described above, FCU has produced evidence that she was terminated due to performance deficiencies, yet Cunningham has not responded with evidence that FCU's asserted reason is pretext for retaliation.

III.

For these reasons, the District Court's grant of FCU's Motion for Summary Judgment is **AFFIRMED.**

SO ORDERED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

SHEILA ANNETTE CUNNINGHAM,

Plaintiff,

v. Case No: 5:16-cv-24-Oc-30PRL

FLORIDA CREDIT UNION,

Defendant.

SUMMARY JUDGMENT ORDER

Sheila Cunningham is suing her former employer, Florida Credit Union, for racial discrimination and retaliation under Title VII of the Civil Rights Act of 1964 and the Florida Civil Rights Act of 1992. But Cunningham, proceeding *pro se*, failed to put forth any evidence that race played a role in FCU's employment decisions. So the Court concludes FCU is entitled to final summary judgment in its favor.

UNDISPUTED FACTS

FCU hired Cunningham, a black woman, in November 2007 and transferred her to the position of Courtesy Pay Credit Advisor ("CPCA") in February 2008. (Doc. 47-6, p. 105). Cunningham worked in this position until she was terminated. (Doc. 47-6, p. 105). FCU admits that Cunningham was a hard worker and displayed professionalism on the job—she even received several awards. But that is not to say that Cunningham did not have areas in which she could improve.

Beginning at least as far back as March 2012, FCU supervisors told Cunningham her performance needed to improve in certain areas. (Doc. 47-6, pp. 9–11; and 47-6, pp.

13–18). Among others areas, Cunningham was informed that she needed to begin working accounts assigned to her earlier in the process, which would help to avoid charge offs at 60 days and potential regulatory violations. (Doc. 47-6, pp. 14). Cunningham was also informed that there were issues with her loan packets not being submitted for review and scanned (by another department) timely. (Doc. 47-1, p. 14). After receiving these reviews, Cunningham's performance would improve for short periods of time, but the same issues returned. (Doc. 47-5, pp. 99, 106).

Following her 2013 review, Cunningham's supervisors again found issues with her loan packets. Specifically, Cunningham's missing loans consistently totaled between 26 and 42 each week from July 15, 2013, to October 1, 2013, while the other CPCAs were only missing between 1 and 6 loan packets weekly. (Doc. 47-6, pp. 58–96).

A September 30, 2013 audit also revealed that Cunningham was continuing to work many of her accounts too close to the 60-day charge off deadline. While the other CPCA at the time, Jennifer Munyan, had worked 72% of her accounts, Cunningham had only worked 38% of her accounts. (Doc. 47-5, pp. 110–11; Doc. 47-6, pp. 20–25). The issue of working her accounts too late was addressed at an October 16, 2013 CPCA meeting. (Doc. 47-6, p. 20).

Cunningham was not disciplined for either the missing loan packets or the delay in working her accounts. Rather, supervisor Jennifer Perez sat with Cunningham to help her catch up on loan paperwork and work on time management skills. (Doc. 47-5, pp. 111–12). Despite this assistance, Cunningham continued to have a high number of missing loan packets. (Doc. 47-6, pp. 58–96). But, again, no disciplinary action was immediately taken.

Although she generally alleges disparate treatment had occurred up to this point, Cunningham claims that things truly began to sour for her at work after she brought a dispute about an incentive to Perez. (Doc. 47-5, pp. 192-93). An incentive, in this context, is akin to a commission FCU paid CPCAs for opening loans. (Doc. 47-6, pp. 116, 162). Cunningham believed Munyan, the other CPCA, had improperly taken one of her incentives in November. Cunningham spoke to Perez about the issue, and Perez sent an e-mail to Cunningham and Munyan explaining who was entitled to claim incentives. (Doc. 47-5, p. 26; and Doc. 47-6, p. 48).

Cunningham claims Munyan again claimed one of her incentives in December. (Doc. 47-5, p. 26). Cunningham discussed the incentive issue in FCU's internal notes. (Doc. 47-6, p. 52). Cunningham also spoke with Perez about the issue around December 16, 2013. (Doc. 47-5, pp. 26–27).

A few days later, on December 20, 2013, Cunningham received three written warnings from the Vice President of Risk Management, Wesley Colson, who was Perez's supervisor. (Doc. 47-6, pp. 50–96). The written warnings were for the following: (1) discussing the incentive in FCU's internal notes (Doc. 47-5, pp. 121–122; and Doc. 47-6, pp. 50–52); (2) delivering a voucher to a call center employee after 5 p.m. to have a member's fees refunded without proper authorization (Doc. 47-5, pp. 130–131; and Doc. 47-6, pp. 54–56); and (3) continuing to have issues related to missing loan packets (Doc. 47-5, pp. 121–122; and Doc. 47-6, pp. 58–96).

Cunningham responded to all three write-ups. As to the first, she appears to believe that it was common for FCU employees to include notes about incentives, although FCU

disputes this.[1] Cunningham admitted to an inadvertent mistake with the voucher in the second write-up. And for the third write-up, Cunningham acknowledged that not all of her loan packets were completed, but believed that some loan packets had already been given to the department that scans them, meaning that she did not have as many outstanding loan packets as it appeared. Cunningham also said she had already spoken to Perez before she received the write-up about her plan to come to work that Saturday to get caught up on her missing loan packets, but Colson said he would have issued the write-up even if he had known of Cunningham's plan. (Doc. 47-5, pp. 29–30, 134).

A few weeks later, on January 6, 2014, Colson again gave Cunningham a written warning and placed her on 60-day probation. (Doc. 47-6, pp. 98–100). The reason for this write-up was that one of Cunningham's accounts had passed the 60-day deadline, and a review of the account showed Cunningham had not begun to work it until the 58th day. (Doc. 47-5, pp. 138–39). Cunningham again admitted to the mistake that caused the account to pass the 60-day deadline without being charged off. (Doc. 47-6, p. 99).

Cunningham completed her probationary period without any further write-ups, but was then terminated shortly thereafter. (Doc. 47-6, pp. 102–103). Cunningham's termination was related to more issues with her loan packets. (Doc. 47-6, pp. 102–103). As Colson explained, Cunningham's loan packet had to be reviewed by himself or Perez following Cunningham's December 20, 2013 write-up. (Doc. 47-5, p. 142). In reviewing the loan packets, Colson became aware of errors that he believed could cause the loans to

[1] Whether or not this was common practice is immaterial, so the dispute does not affect the Court's ability to enter summary judgment.

be unenforceable, such as indicating that members had elected insurance related to their loans when the members never made such an election. (Doc. 47-5, pp. 141–43). Colson discussed the loan packet errors and other errors with his supervisor, who advised Colson to terminate Cunningham, which he did on March 21, 2014. (Doc. 47-5, p. 143).

PROCEDURAL HISTORY

Following her termination, Cunningham filed a charge of employment discrimination with the Florida Commission on Human Relations ("FCHR") and the United States Equal Employment Opportunity Commission ("EEOC") alleging racial discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ("Title VII"), and the Florida Civil Rights Act, § 760.01 et seq., Florida Statutes, ("FCRA"). (Doc. 47-1). The FCHR investigated the complaint and issued a "no reasonable cause" determination, indicating that there was no cause to believe an unlawful employment practice occurred. (Doc. 47-2).

Cunningham then filed a petition for relief with the FCHR, which triggered a hearing before an administrative law judge. (Doc. 47-3). After a hearing, in which Cunningham and FCU provided sworn testimony and submitted exhibits, the administrative law judge provided the FCHR with a recommended order dismissing the petition with prejudice (Doc. 47-7), which was adopted by the FCHR in its final order. (Doc. 47-8). Although Cunningham had the right to seek judicial review of FCHR's final order by a Florida appellate court, she did not appeal.

Instead, Cunningham filed the instant suit *pro se*. The operative complaint (Doc. 24) contains three counts against FCU: (1) racial discrimination in violation of Title VII,

(2) employment retaliation in violation of Title VII, and (3) racial discrimination under the FCRA.

SUMMARY JUDGMENT STANDARD

Motions for summary judgment should be granted only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (internal quotation marks omitted); Fed. R. Civ. P. 56(c). The existence of some factual disputes between the litigants will not defeat an otherwise properly supported summary judgment motion; "the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The substantive law applicable to the claimed causes of action will identify which facts are material. *Id.* Throughout this analysis, the court must examine the evidence in the light most favorable to the nonmovant and draw all justifiable inferences in its favor. *Id.* at 255.

Once a party properly makes a summary judgment motion by demonstrating the absence of a genuine issue of material fact, whether or not accompanied by affidavits, the nonmoving party must go beyond the pleadings through the use of affidavits, depositions, answers to interrogatories and admissions on file, and designate specific facts showing that there is a genuine issue for trial. *Celotex*, 477 U.S. at 324. The evidence must be significantly probative to support the claims. *Anderson*, 477 U.S. at 248–49.

This Court may not decide a genuine factual dispute at the summary judgment stage. *Fernandez v. Bankers Nat'l Life Ins. Co.*, 906 F.2d 559, 564 (11th Cir. 1990). "[I]f factual

issues are present, the Court must deny the motion and proceed to trial." *Warrior Tombigbee Transp. Co. v. M/V Nan Fung*, 695 F.2d 1294, 1296 (11th Cir. 1983). A dispute about a material fact is genuine and summary judgment is inappropriate if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson*, 477 U.S. at 248; *Hoffman v. Allied Corp.*, 912 F.2d 1379, 1383 (11th Cir. 1990). However, there must exist a conflict in substantial evidence to pose a jury question. *Verbraeken v. Westinghouse Elec. Corp.*, 881 F.2d 1041, 1045 (11th Cir. 1989).

DISCUSSION

The Court concludes FCU is entitled to judgment. Cunningham's FCRA claim is barred because the FCHR made a no reasonable cause determination. And Cunningham failed to produce any evidence—direct or circumstantial—that she was discriminated against based on her race or that FCU retaliated based on a protected activity, which means FCU is entitled to judgment on Cunningham's Title VII claims.

A. FCRA Claim Is Barred Because FCHR Found No Reasonable Cause

Cunningham's FCRA claim is barred because the FCHR found that there was no reasonable cause to believe an unlawful employment action occurred. Unlike claims under Title VII, "a 'no cause' determination precludes a civil suit under the FCRA...." *Woodham v. Blue Cross & Blue Shield of Florida, Inc.*, 829 So. 2d 891, 895 (Fla. 2002). Where, like here, "the Commission determines ... that there is no reasonable cause, the claimant is limited to review before an administrative law judge under Chapter 120, Florida Statutes, and cannot file a civil action unless that review is successful." *Sheridan v. State, Dep't of Health*, 182 So. 3d 787, 792 (Fla. Dist. Ct. App. 2016). Because the administrative law

judge also concluded there was no reasonable cause—and the FCHR adopted that recommendation in its final order—FCU is entitled to summary judgment as to Cunningham's FCRA claim.

B. Cunningham Failed to Provide Evidence of Racial Discrimination

Cunningham's first Title VII claim is that she was treated differently from other employees based on her race. Cunningham alleges many ways in which she was treated differently, but only a few are relevant because many of the allegations occurred outside the applicable timeframe in which she brought her claim.[2] Specifically, she alleges she was written up multiple times in a single day, that she was denied an incentive, and that she was terminated. For the reasons below, FCU is entitled to summary judgment on Cunningham's disparate treatment claim.

To prove her claim that she was treated differently because of her race, Cunningham may rely on direct or circumstantial evidence. *Maynard v. Bd. of Regents of Div. of Universities of Florida Dep't of Educ. ex rel. Univ. of S. Florida*, 342 F.3d 1281, 1288–89 (11th Cir. 2003). Cunningham offered no direct evidence of racial discrimination, so she must rely on circumstantial evidence. To succeed on a Title VII racial discrimination claim

[2] Cunningham filed her FCHR and EEOC charge on May 15, 2014. (Doc. 47-1). Under Title VII, any unlawful employment practice had to occur no more than 300 days from when she filed the charge—here, after July 19, 2013. *Maynard v. Pneumatic Prod. Corp.*, 256 F.3d 1259, 1262 (11th Cir. 2001) ("the period for filing a charge with the EEOC may be extended to 300 days if the complainant first files a timely charge in a state or local agency in a 'deferral state.'"). While Cunningham alleges she was treated differently by not being allowed to train employees, being asked to move to another table at a work event, being excluded from some meetings, and not being promoted, Cunningham fails to provide any evidence that these events occurred on or after July 19, 2013. So those acts cannot properly give rise to a Title VII disparate treatment claim. *E.E.O.C. v. Joe's Stone Crabs, Inc.*, 296 F.3d 1265, 1271 (11th Cir. 2002) ("Accordingly, only those claims arising within 300 days prior to the filing of the EEOC's discrimination charge are actionable.").

based on circumstantial evidence, Cunningham must show that (1) she is a member of a protected class; (2) she was qualified for the position; (3) she suffered an adverse employment action; and (4) she was treated less favorably than a similarly-situated individual outside her protected class. *Maynard v. Bd. of Regents of Div. of Universities of Florida Dep't of Educ. ex rel. Univ. of S. Florida*, 342 F.3d 1281, 1289 (11th Cir. 2003) (citing *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)).

Assuming that Cunningham can satisfy the first three prongs, Cunningham failed to identify any similarly-situated employees of another race who were treated more favorably. Vicki Martello and Munyan, the other two CPCAs who worked at FCU with Cunningham, are the only similarly-situated employees whom Cunningham identified. But Cunningham never offered any evidence that either Martello or Munyan were treated more favorably.[3]

The closest Cunningham comes to alleging that Munyan was treated more favorably is when Cunningham discussed the incentive issues she had with Munyan during her administrative law hearing. It appears the second time there was a dispute, Munyan was permitted to keep the incentive that Cunningham believes should have been hers. But the records admitted by FCU show that Munyan had already started a loan for the member, which would have entitled her to the incentive under FCU's policies. So the Court cannot say that Munyan was treated more favorably than Cunningham when it appears FCU merely followed its policy for determining which CPCA would get incentives.

[3] Cunningham also never identifies Martello or Munyan's race, so it is impossible for the Court to determine whether they are in the same protected class as Cunningham.

But even assuming Cunningham had proved a prima facie case of racial discrimination, FCU articulated a legitimate, non-discriminatory reason for its actions that Cunningham has not shown was pretextual. Under the *McDonnell Douglas* framework:

> "Once the plaintiff has made a prima facie case, a rebuttable presumption arises that the employer has acted illegally." "The employer can rebut that presumption by articulating one or more legitimate non-discriminatory reasons for its action." "If it does so, the burden shifts back to the plaintiff to produce evidence that the employer's proffered reasons are a pretext for discrimination."

Trask v. Sec'y, Dep't of Veterans Affairs, 822 F.3d 1179, 1191 (11th Cir. 2016) (quoting *Alvarez v. Royal Atl. Developers, Inc.*, 610 F.3d 1253, 1264 (11th Cir.2010)).

Here, FCU documented Cunningham's performance issues for years, specifically as it related to missing loan packets and delays in working her accounts. These performance issues provide a legitimate, non-discriminatory reason for FCU's adverse employment actions. And Cunningham has failed to provide any evidence that the performance issues are a pretext for discrimination; in fact, Cunningham admitted to many of the issues being mistakes that she made. So FCU would be entitled to summary judgment even if Cunningham had met her initial burden of proving a prima facie case.

C. Cunningham Failed to Provide Evidence of Retaliation for a Protected Activity

Cunningham's second Title VII action is a retaliation claim based on allegations that FCU retaliated against her after she raised the issue of Munyan claiming an incentive to which Cunningham believed she was entitled.[4] More specifically, Cunningham claims

[4] Although not entirely clear, Cunningham appears to focus on the second discussion in December as the impetus for the retaliation. But because it is unclear, the Court will consider both discussions Cunningham had Perez about the incentive issues—the discussion in November that led to a team meeting and the discussion in December.

she was retaliated against because she was written up three times in one day after bringing the issue to Perez, she was written up a few weeks later and placed on probation, and then she was terminated more than 60 days later. As explained below, FCU is entitled to summary judgment on the retaliation claim.

To state a claim for retaliation under Title VII, "a plaintiff must prove that [s]he engaged in statutorily protected activity, [s]he suffered a materially adverse action, and there was some causal relation between the two events." *Goldsmith v. Bagby Elevator Co.*, 513 F.3d 1261, 1277 (11th Cir. 2008). If a plaintiff establishes a prima facie case of retaliation, the burden then shifts to the employer to state a legitimate, non-retaliatory reason for the adverse action, after which the plaintiff has the burden to show the so-called legitimate reason is really just pretext for the retaliatory conduct. *Id.*

Cunningham failed to establish a prima facie case of retaliation because (1) she cannot show that she was engaged in a statutorily protected activity or (2) that there was any causal relationship between the write-ups and her speaking to Perez about Munyan claiming an incentive. But even if she had, FCU articulated a legitimate, non-retaliatory reason for the adverse employment actions that Cunningham has not shown were pretextual.

1. No statutorily protected activity

The first issue with Cunningham's claim is that she fails to identify a statutorily protected activity. To establish that she engaged in a statutorily protected activity, Cunningham had to show that she "had a good faith, reasonable belief that the employer was engaged in unlawful employment practices." *Weeks v. Harden Mfg. Corp.*, 291 F.3d

1307, 1311 (11th Cir. 2002) (quoting *Little v. United Tech., Carrier Transicold Div.*, 103 F.3d 956, 960 (11th Cir. 1997)). This requires showing that Cunningham subjectively believed that she was opposing an unlawful employment practice, and that her belief was objectively reasonable. *Id.*

Cunningham has offered no objectively reasonable evidence that her discussions with Perez equated to her opposing an unlawful employment practice. Cunningham's testimony was that she believed Munyan was improperly claiming incentives. This means that the discussions were not in opposition to any employment practice by FCU. Rather, the discussions were Cunningham's way of bringing the actions of another employee, which she believed to be in violation of FCU policy, to the attention of her supervisor. Because Cunningham has not shown she was engaged in a statutorily protected activity, the Court concludes FCU is entitled to summary judgment.

2. No causal connection between protected activity and adverse actions

Even if Cunningham had shown that the discussions with Perez constituted a statutorily protected activity, Cunningham failed to establish a causal connection between those discussions and the adverse employment actions. "To establish a causal connection, a plaintiff must show that the relevant decisionmaker was 'aware of the protected conduct, and that the protected activity and the adverse actions were not wholly unrelated.'" *Kidd v. Mando Am. Corp.*, 731 F.3d 1196, 1211 (11th Cir. 2013). As noted above, Cunningham discussed incentive issues with Perez in November and then again on December 16, 2013. Cunningham then received three write-ups—for performance issues—on December 20, 2013, one on January 6, 2014, and one on March 21, 2014. None of the evidence presented

to the Court connects the two discussions with Perez to the write-ups, and Cunningham's speculation that the two must be related is insufficient to satisfy this requirement. So FCU would also be entitled to summary judgment on this basis.

3. No showing that legitimate, non-discriminatory reason was pretextual

But assuming that Cunningham had shown she was engaged in a protected activity and was able to draw a causal connection between the adverse employment action and protected activity, the Court concludes FCU would still be entitled to summary judgment because it offered a legitimate reason for the adverse actions that Cunningham has not shown was pretextual. FCU documented Cunningham's performance issues for years before the write-ups. FCU, therefore, had a valid basis to write up Cunningham for continued performance issues even if she had not spoken to Perez about the incentives. And, given the bases for the write-ups, the Court concludes FCU provided a legitimate reason for each adverse employment action about which Cunningham complains. In response, Cunningham only speculates that she is being treated differently based on her race, without providing any evidentiary support. So the Court concludes FCU would be entitled to summary judgment even if Cunningham had stated a prima facie case for retaliation under Title VII because Cunningham failed to show FCU's reasons were pretextual.

CONCLUSION

FCU is entitled to summary judgment. Cunningham's FCRA claim is barred because she received a "no reasonable cause" determination from the FCHR, precluding suit as a matter of law. And Cunningham failed to establish a prima facie cases under Title

VII for either racial discrimination or retaliation. But even if she had met her initial burden under the Title VII claims, FCU's documented history of Cunningham's performance issues provided a legitimate, non-discriminatory basis for its adverse employment actions that Cunningham is unable to show were merely pretextual. So regardless of how hardworking or professional Cunningham was as an employee—as documented by the many certificates and awards she received—the Court cannot say FCU's decision to terminate her was unlawful or based on her race.

Accordingly, it is ORDERED AND ADJUDGED that:

1. Defendant's Motion for Summary Judgment (Doc. 46) is GRANTED.

2. The Clerk is directed to enter Final Judgment in favor of Defendant Florida Credit Union and against Plaintiff Sheila A. Cunningham on all counts.

3. All pending motions are denied as moot.

4. The Clerk is directed to close this file.

DONE and **ORDERED** in Tampa, Florida, this 1st day of November, 2017.

JAMES S. MOODY, JR.
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Counsel/Parties of Record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

SHEILA ANNETTE CUNNINGHAM,

Plaintiff,

v. **Case No: 5:16-cv-24-Oc-30PRL**

FLORIDA CREDIT UNION

Defendant.

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came before the Court and a decision has been rendered on Defendant's Motion for Summary Judgment.

IT IS ORDERED AND ADJUDGED

Pursuant to the Court's order entered on November 1, 2017, the Court GRANTS Summary Judgment in favor of the Defendant, Florida Credit Union and against the Plaintiff, Sheila Annette Cunningham.

ELIZABETH M. WARREN,
CLERK

s/L Burget, Deputy Clerk

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

SHEILA ANNETTE CUNNINGHAM,

Plaintiff,

v. **Case No: 5:16-cv-24-Oc-30PRL**

FLORIDA CREDIT UNION

Defendant.

ORDER

The District Judge has referred this case to me to conduct a settlement conference.

Accordingly, a settlement conference has been scheduled for October 3, 2017 at 10:00 A.M. at the United States Courthouse, 207 N.W. Second Street, Ocala, Florida. It is **ORDERED** that lead counsel for the parties, representatives for the parties with full settlement authority, and any necessary claims professionals attend the in-person settlement conference.

The Court believes the parties should fully explore and consider settlement at the earliest opportunity. Early consideration of settlement can prevent unnecessary litigation. This allows the parties to avoid the substantial cost, expenditure of time, and stress that are typically a part of the litigation process. Even for those cases that cannot be resolved through settlement, early consideration of settlement can allow the parties to better understand the factual and legal nature of their dispute and streamline the issues to be litigated.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

SHEILA ANNETTE CUNNINGHAM,

Plaintiff,

v. **Case No: 5:16-cv-24-Oc-30PRL**

FLORIDA CREDIT UNION

Defendant.

REPORT

On October 3, 2017, in Ocala, Florida, I conducted a settlement conference. Plaintiff, proceeding pro se, and the Defendant's attorney of record, along with its clients or a representative with authority to settle the case, appeared. The parties reached an impasse and will proceed to trial.

Dated: October 3, 2017

PHILIP R. LAMMENS
United States Magistrate Judge

Copies furnished to:

Presiding United States District Judge
Presiding United States Magistrate Judge
Counsel of Record

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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April 19, 2019

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 17-14966-JJ
Case Style: Sheila Cunningham v. Florida Credit Union
District Court Docket No: 5:16-cv-00024-JSM-PRL

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Tiffany A. Tucker, JJ/lt
Phone #: (404)335-6193

REHG-1 Ltr Order Petition Rehearing

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-14966-JJ

SHEILA ANNETTE CUNNINGHAM,

Plaintiff - Appellant,

versus

FLORIDA CREDIT UNION,

Defendant - Appellee.

Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: TJOFLAT, MARCUS, and ROSENBAUM, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

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