APPENDICES TO THE PETITION

Appendix A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-12094
Non-Argument Calendar

D.C. Docket No. 0:18-cv-61662-FAM

CAROLYN HICKS-WASHINGTON,

Plaintiff-Appellant,

versus

THE HOUSING AUTHORITY OF THE CITY OF FORT LAUDERDALE,

Defendant-Appellee,

TAM ENGLISH,

Defendant.

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

(February 12, 2020)

Before JORDAN, NEWSOM and FAY, Circuit Judges.

PER CURIAM:

Carolyn Hicks-Washington, an African-American woman over the age of 40, appeals *pro se* the district court's dismissal of her claims of race, color, and sex discrimination, raised pursuant to Title VII and Florida state law, and its refusal to reconsider that order. She also appeals the district court's grant of summary judgment to her former employer, the Housing Authority of the City of Fort Lauderdale (the "Authority"), as to her remaining claim of age bias under the Age Discrimination in Employment Act ("ADEA"). We affirm.

I. BACKGROUND

Hicks-Washington was employed by the Authority from 2005 to 2015. She was promoted to Assistant Director of Assisted Housing in 2010 and stayed in that position until she was terminated in November 2015. When Hicks-Washington asked why she was being terminated, she was told it was because the Authority was moving in a "different direction." Hicks-Washington learned that her supervisor, Veronica Lopez, also was terminated. Lopez, like Hicks-Washington, was over the age of 55.

Shortly after being terminated, Hicks-Washington applied for the newly created position of Director of Housing Choice Voucher Program ("Director"); however, she did not receive an interview, nor was she hired. The Authority

contracted with the Miami Beach Development Corporation to temporarily fill the position; when the Authority eventually filled the position, it hired Medina Johnson, an African-American woman over the age of 40, who was 12 years younger than Hicks-Washington.[1]

In April 2016, Hicks-Washington submitted an intake questionnaire to the Equal Employment Opportunity Commission ("EEOC") and alleged discrimination based on race, color, national origin, sex, and age. However, the Charge of Discrimination form that Hicks-Washington ultimately signed, verified, and submitted to the EEOC only alleged that she was terminated from her position and not hired as Director because of discrimination based on age. The Authority reported to the EEOC that Hicks-Washington had been terminated and not rehired because of her "harsh management style" that decreased employee morale and resulted in high employee turnover and instability. The EEOC issued Hicks-Washington a Right to Sue letter.

Hicks-Washington filed the present suit in Florida state court. She alleged, in part, claims of race, color, sex, and age discrimination, as well as state tort law

[1] After Johnson left the position in March 2017, Hicks-Washington re-applied for the position and did not get an interview. In May 2017, Barbara Baer, who is four years older than Hicks-Washington, filled the position of Director.

claims against the Authority.[2] The Authority removed the suit to federal court and filed a motion to dismiss. A magistrate judge, in a report and recommendation ("R&R"), recommended granting the motion to dismiss and characterized Hicks-Washington's complaint as a "shotgun" pleading. The district court overruled Hicks-Washington's objections to the R&R and dismissed the complaint with leave to amend. Hicks-Washington objected to the dismissal, stating that she was "aware of the [c]ourt's historical anti-black, anti-poor and pro-employer biases." She also stated that the district court judge should recuse himself if the "legal arguments and evidence presented are meaningless to [him]."

Before the district court could address the objection, Hicks-Washington filed an amended complaint. The revised counts were disparate impact on the basis of race or color, in violation of Title VII, 42 U.S.C. § 2000e-2(k) (Count 1); individual disparate treatment "on the basis of her race, color, and/or sex," and retaliation, in violation of Title VII (Counts 2 and 3); discrimination and retaliation "on the basis of her race and/or color," in violation of 42 U.S.C. § 1981 (Counts 4 and 5); discrimination on the basis of age, in violation of the ADEA (Count 6); retaliation on the basis of age, in violation of the ADEA (Count 7); and discrimination "on the basis of her race, color, sex, and/or age," in violation of the

[2] While Hicks-Washington also named the Authority's Executive Director, Tam English, as a defendant in her initial complaint; English was omitted as a defendant from her amended complaint.

Florida Civil Rights Act ("FCRA") (Count 8). She also alleged that Tam English, the Authority's Executive Director, stated, on multiple occasions, that Hicks-Washington was "getting older" and inquired about who she thought should replace her from within the Authority.

The Authority answered, denied liability, and asserted defenses as to Hicks-Washington's age discrimination claim (Count 6). With respect to the remaining counts, it moved to dismiss her amended complaint and to strike certain paragraphs. The Authority argued, in part, that Hicks-Washington's disparate impact claim (Count 1), Title VII discrimination and retaliation claims (Counts 2 and 3), ADEA retaliation claim (Count 7), and FCRA claims (Count 8) should be dismissed for failure to exhaust administrative remedies because she did not include them in her EEOC charge.

Hicks-Washington opposed the motion to dismiss and, in addition to reiterating her previous arguments, asserted that the administrative exhaustion argument was "frivolous." She admitted that her son had noticed that the EEOC had narrowed the scope of her charge to just age discrimination and had warned her that she would be barred from advancing her other claims in federal court. She stated that she had tried to put the claims back in, but the EEOC investigator verbally told her that she could "only pursue claims of age discrimination." She

stated that while she signed the EEOC charge to prevent further delay, she continued to advance her claims of race, color, and sex discrimination.

The magistrate judge issued a second R&R, recommending that the district court dismiss Counts 1, 2, 3, 7, and 8 because Hicks-Washington failed to exhaust her administrative remedies. It also concluded that Counts 4, 5, and 7 failed to state a claim upon which relief could be granted and recommended dismissing those counts. Hicks-Washington did not formally object to the second R&R; however, in a *pro se* motion and amended motion, she sought to disqualify the magistrate judge and vacate his three most recent decisions due to the appearance of, or actual, bias.

The district court adopted the second R&R after noting that it had "reviewed the entire file and record." While it stated that no objections to the second R&R were filed, it noted that Hicks-Washington's motion to disqualify the magistrate judge and the subsequent amended motion were denied. In a February 2019 order, it dismissed all counts with prejudice except the age discrimination claim (Count 6), explaining that Hicks-Washington had "again failed to allege any facts that would establish a basis for relief"; it also struck certain paragraphs from the amended complaint.

Hicks-Washington filed a motion pursuant to Federal Rule of Civil Procedure 59(e) for the court to reconsider or amend the order adopting the second

R&R. The district court denied the motion, stating that it had considered the motion, the response in opposition, the reply, and pertinent portions of record.

In the meantime, the Authority moved for summary judgment.[3] With respect to Count 6, the age discrimination claim, it argued that, under the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973), even if Hicks-Washington could establish a prima facie case for age discrimination, it had legitimate, non-discriminatory, non-retaliatory reasons for firing her, specifically a need to "reduc[e] employee turnover, improv[e] employee morale, and facilitat[e] a stable workforce," because she had an "oppressive" management style and could not keep a stable staff. It further argued that Hicks-Washington was unable to rebut its articulated reasons for terminating her, failing to prove that those reasons were pretextual and to show that age discrimination was a "but for" cause of her termination.

Hicks-Washington opposed the motion for summary judgment.[4] She argued, in relevant part, that the Authority never disclosed employee turnover

[3] The Authority filed the motion for summary judgment prior to the district court's dismissal of Counts 1, 2, 3, 4, 5, 7, and 8 and sought summary judgment as to those counts. However, because the district court ultimately dismissed those counts, we do not discuss the arguments concerning them.

[4] Hicks-Washington also moved for partial summary judgment, which the district court denied. Because she fails to challenge that ruling on appeal, any issues in that respect are abandoned. *See Timson v. Sampson*, 518 F.3d 870, 874 (11th Cir. 2008) (recognizing that although we read briefs by *pro se* litigants liberally, issues not briefed on appeal are deemed abandoned).

statistics, and it failed to distinguish between the employees that quit and the employees that were terminated from her department. She argued that the hiring process was not "fair and impartial" because women who were less qualified than her were hired as Director. She also asserted that Johnson resigned so that Barbara Baer, whom Hicks-Washington argued was English's intended replacement all along, could assume the position. She argued that she presented direct evidence of English's age discrimination in his comments about her "getting older." She argued that the Authority's reasons for firing her and not rehiring her were pretextual. Finally, in response to the Authority's argument that her age must have been a "but for" cause, she argued that the ADEA cannot be so narrowly construed that age must have been the sole factor for the adverse employment decision.

The magistrate judge filed a third R&R, recommending that the district court grant summary judgment to the Authority on Hicks-Washington's ADEA discrimination claim. The judge found that there was no direct evidence of age discrimination because English's alleged comments did not rise to the level required, and it applied the modified *McDonnell Douglas* framework for cases where a position was eliminated entirely. The judge found that Hicks-Washington presented a prima facie case of age discrimination, but the Authority proffered legitimate, non-discriminatory reasons for her termination: to reduce employee turnover, improve employee morale, and facilitate a stable workforce. Hicks-

Washington objected; however, after conducting a *de novo* review, the district court adopted the third R&R and granted the Authority's motion for summary judgment.

Following entry of a final judgment in favor of the Authority in May 2019, Hicks-Washington timely filed an amended notice of appeal identifying: (i) the February 2019 order dismissing many of her claims; (ii) the April 2019 denial of her motion for reconsideration; (iii) the grant of summary judgment to the Authority; and (iv) the judges' refusal to recuse or disqualify themselves.

II. DISCUSSION

A. Dismissal of Race, Color, and Sex Discrimination Claims

On appeal, Hicks-Washington argues that the district court erred by dismissing her claims of race, color, and sex discrimination as untimely because she failed to exhaust her administrative remedies.[5] We review *de novo* the district court's grant of a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), accepting the allegations in the complaint as true and construing them in the light most favorable to the plaintiff. *Timson v. Sampson*, 518 F.3d 870, 874 (11th Cir. 2008). We review the denial of a Federal Rule of

[5] On appeal, Hicks-Washington does not expressly challenge the district court's dismissal of Counts 4, 5, and 7; accordingly, any arguments as to those counts are considered abandoned. *See Timson*, 518 F.3d at 874. Likewise, while she argued before the district court that her FCRA age discrimination claim should not have been dismissed, she does not argue that in her initial brief; consequently, that argument also was abandoned. *See id.*

Civil Procedure 59(e) motion for abuse of discretion. *Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327, 1343 n.20 (11th Cir. 2010). The only grounds for granting a Rule 59(e) motion are newly discovered evidence or manifest errors of law or fact. *See id.* at 1344 (quoting *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007)). A Rule 59(e) motion cannot be used to relitigate old matters, raise arguments, or present evidence that could have been raised prior to the entry of judgment. *Id.* *Pro se* pleadings are held to a less-strict standard than counseled pleadings and are liberally construed. *Alba v. Montford*, 517 F.3d 1249, 1252 (11th Cir. 2008).

Title VII prohibits employers from discriminating against employees based on their "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Claims under the FCRA are analyzed in the same way as Title VII claims. *See Wilbur v. Corr. Servs. Corp.*, 393 F.3d 1192, 1195 n.1 (11th Cir. 2004).

Prior to filing a Title VII action, a plaintiff first must file a charge of discrimination with the EEOC. *Gregory v. Ga. Dep't of Human Res.*, 355 F.3d 1277, 1279 (11th Cir. 2004). The purpose of this exhaustion requirement "is that the [EEOC] should have the first opportunity to investigate the alleged discriminatory practices to permit it to perform its role in obtaining voluntary compliance and promoting conciliation efforts." *Id.* (alteration in original) (quoting *Evans v. U.S. Pipe & Foundry Co.*, 696 F.2d 925, 929 (11th Cir. 1983)).

We have "noted that judicial claims are allowed if they 'amplify, clarify, or more clearly focus' the allegations in the EEOC complaint, but [have] cautioned that allegations of new acts of discrimination are inappropriate. *Id.* at 1279-80 (quoting *Wu v. Thomas*, 863 F.2d 1543, 1547 (11th Cir. 1989)). Therefore, a "plaintiff's judicial complaint is limited by the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination," but "the scope of an EEOC complaint should not be strictly interpreted." *Id.* at 1280 (first quoting *Alexander v. Fulton Cty.*, 207 F.3d 1303, 1332 (11th Cir. 2000); then quoting *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 465 (5th Cir. 1970)).

Although we have allowed an intake questionnaire to function as a charge in limited circumstances, we also have stated that "as a general matter an intake questionnaire is *not* intended to function as a charge." *Pijnenburg v. W. Ga. Health Sys., Inc.*, 255 F.3d 1304, 1305 (11th Cir. 2001) (emphasis added). In *Bost v. Federal Express Corp.*, 372 F.3d 1233 (11th Cir. 2004), we held that the circumstances did not support a conclusion that the questionnaire should be considered a charge because the plaintiff clearly understood that the intake questionnaire was not a charge. There, the plaintiff had later filed a timely charge, the EEOC did not initiate its investigation until after the plaintiff had filed his charge, and the questionnaire form did not suggest that it was a charge. *See id.* at 1236, 1240-41.

Hicks-Washington's EEOC charge was undisputedly limited to the age discrimination claim; she admitted that she signed it knowing that doing so would bar her other claims. Similar to *Bost*, this is not a situation in which her intake questionnaire should function as a charge because she signed the charge after filing the intake questionnaire. *See id.* at 1240-41. Because she clearly failed to exhaust her administrative remedies with respect to any claims other than age discrimination, she could not bring her Title VII claims for race, color, or sex discrimination in federal court.[6] *See Gregory*, 355 F.3d at 1279. Similarly, to the extent that Hicks-Washington challenges the denial of her Rule 59(e) motion for reconsideration, the district court did not abuse its discretion by denying relief because she presented no new evidence and there were no manifest errors of law or fact. *See Jacobs*, 626 F.3d at 1344. Therefore, we affirm in this respect.

B. Grant of Summary Judgment on ADEA Claim

Hicks-Washington also argues that the district court erred by concluding that English's comments about her "getting older" did not rise to the level of direct evidence of age discrimination and that the Authority's reasons for terminating her and not rehiring her were not pretextual. We review *de novo* the district court's

[6] Hicks-Washington argues for the first time in her reply brief that her 42 U.S.C. § 1981 and retaliation claims were not subject to the same procedural requirements of administrative exhaustion. Those arguments were not properly raised and therefore are considered abandoned. *Timson*, 518 F.3d at 874 ("[W]e do not address arguments raised for the first time in a *pro se* litigant's reply brief.").

grant of summary judgment and apply the same legal standard used by the district court. *Chapman v. AI Transport*, 229 F.3d 1012, 1024 (11th Cir. 2000) (en banc). Summary judgment "is appropriate if the evidence before the court shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Id.* at 1023 (quoting *Haves v. City of Miami*, 52 F.3d 918, 921 (11th Cir. 1995)). All evidence and factual inferences reasonably drawn from the evidence are viewed in the light most favorable to the party opposing summary judgment. *Id.* The party opposing summary judgment must present more than a scintilla of evidence in support of its position so that a jury can reasonably find for it. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 2512 (1986). We "may examine *only* the evidence which was before the district court when [it] decided the motion for summary judgment" and no subsequent evidence. *Chapman*, 229 F.3d at 1026.

Under the ADEA, it is "unlawful for an employer . . . to fail or refuse to hire or to discharge any individual . . . because of [her] age." 29 U.S.C. § 623(a)(1); *Chapman*, 229 F.3d at 1024. ADEA liability depends on whether age actually motivated the employer's decision, i.e., "the plaintiff's age must have actually played a role in the employer's decisionmaking process and had a determinative influence on the outcome." *Chapman*, 229 F.3d at 1024 (quoting *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 141, 120 S. Ct. 2098, 2105

(2000)). "A plaintiff may establish a claim of illegal age discrimination through either direct evidence or circumstantial evidence." *Van Voorhis v. Hillsborough Cty. Bd. of Cty. Comm'rs*, 512 F.3d 1296, 1300 (11th Cir. 2008) (citing *Carter v. City of Miami*, 870 F.2d 578, 581 (11th Cir. 1989)).

Direct evidence of discrimination is evidence which, if believed, proved the existence of a fact without inference or presumption. *Carter*, 870 F.2d at 581-82. However, "not every comment concerning a person's age presents direct evidence of discrimination." *Id.* at 582. "Only the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of age, constitute direct evidence of discrimination." *Van Voorhis*, 512 F.3d at 1300 (alterations omitted) (quoting *Carter*, 870 F.2d at 582). For example, a supervisor's statements that he "didn't want to hire any old pilots" and was not going to interview applicants because "he didn't want to hire an old pilot" were held to be direct evidence of age discrimination. *Id.* By contrast, a decisionmaker's comments that "the company needed . . . aggressive young men . . . to be promoted" did not constitute direct evidence of age discrimination. *See Damon v. Fleming Supermarkets of Fla., Inc.*, 196 F.3d 1354, 1359 (11th Cir. 1999).

As the district court correctly found, even assuming *arguendo* that English commented that Hicks-Washington was "getting older," his comments were not among the "most blatant remarks." *See Van Voorhis*, 512 F.3d at 1300. The

Authority explained that any statements about replacing Hicks-Washington would have been in the context of succession planning. Even if viewed as evidence that may lead to an inference of age discrimination, it falls short of the direct evidence requirement. *See Carter*, 870 F.2d at 581-82; *see also Van Voorhis*, 512 F.3d at 1300.

Because Hicks-Washington's case relies on circumstantial evidence, the *McDonnell Douglas* framework applies. *See Chapman*, 229 F.3d at 1024. Under that framework, if a plaintiff establishes a prima facie case of discrimination, and the employer articulates one or more non-discriminatory reasons for its actions, the plaintiff must show that the employer's articulated reasons were pretextual. *Id.* "If the plaintiff does not proffer sufficient evidence to create a genuine issue of material fact regarding whether each of the defendant employer's articulated reasons is pretextual, the employer is entitled to summary judgment on the plaintiff's claim[s]." *Id.* at 1024-25.

A reason is pretextual only if it is false and the true reason for the decision is discrimination. *Springer v. Convergys Customer Mgmt. Grp. Inc.*, 509 F.3d 1344, 1349 (11th Cir. 2007). If the employer's 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*, 229 F.3d at 1030. We have repeatedly stated that we will not

second-guess the wisdom of an employer's decision as long as the decision is not for a discriminatory reason. *See id.*

It is undisputed that Hicks-Washington established a prima facie case for age discrimination. The Authority's articulated reason for terminating and not rehiring Hicks-Washington was her "oppressive" management style evidenced by the particularly high employee turnover in her division, negative comments in her supervisor reviews, and four exit interviews from the year in which she was terminated that stated she was a reason that those employees left. Accordingly, the Authority successfully met its burden of proffering a legitimate, non-discriminatory reason for terminating and not rehiring Hicks-Washington and the burden shifted back to Hicks-Washington to demonstrate that the articulated reason was pretextual.

While some of the people hired for the Director position were indeed younger than Hicks-Washington, the person that filled the position in 2017 was four years older than she was. Furthermore, neither the other candidates' ages nor English's alleged comments showed that the Authority's reasons were pretextual. At most, this presents a mere scintilla of evidence of bias, which is insufficient. *See Anderson*, 477 U.S. at 252, 106 S. Ct. at 2512. Even if her performance reviews were mostly positive, the evidence and her conclusory assertions were insufficient to show that the Authority's proffered reasons were pretext. Hicks-

Washington's arguments on appeal would lead us to impermissibly second-guess the wisdom of the Authority's decision. *See Chapman*, 229 F.3d at 1030. Therefore, we affirm the grant of summary judgment.

C. Denial of Requests for Recusal or Disqualification

Hicks-Washington also contends that the district court judge and magistrate judge should have recused themselves or been disqualified. We review a district court's denial of a recusal motion for abuse of discretion. *Loranger v. Stierheim*, 10 F.3d 776, 779 (11th Cir. 1994). Under 28 U.S.C. § 144, a judge must recuse himself when a party "files a timely and sufficient affidavit that the judge . . . has a personal bias or prejudice either against him or in favor of any adverse party." 28 U.S.C. § 144. To warrant recusal, "the moving party must allege facts that would convince a reasonable person that bias actually exists." *Christo v. Padgett*, 223 F.3d 1324, 1333 (11th Cir. 2000). Similarly, under 28 U.S.C.§ 455(a), a judge must "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). We look to "whether an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality." *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1524 (11th Cir. 1988). A judge's rulings in the same or a related case may not serve as the basis for a recusal motion unless the movant demonstrates "pervasive bias and prejudice."

McWhorter v. City of Birmingham, 906 F.2d 674, 678 (11th Cir. 1990) (holding that allegations of bias stemming from a mere disagreement with rulings at trial did not demonstrate pervasive bias and prejudice).

Here, Hicks-Washington offered no evidence of personal bias by the judges that would sustain a doubt about their respective impartiality. Instead, her allegations of bias stemmed from a mere disagreement with their judicial rulings and her dissatisfaction with the characterization of her complaint as a "shotgun" pleading. *See id.* While the district court stated that there were no objections to the second R&R, it explained that it had reviewed the entire record and noted that Hicks-Washington had filed motions, which were denied. One of those motions contained what could be liberally construed as objections to the second R&R, but these arguments were made in the context of her motion to disqualify the magistrate judge and were not clearly objections. As such, her allegations are not sufficient to cause an objective, disinterested, lay observer to entertain a significant doubt about the court's impartiality. *See Parker*, 855 F.2d at 1524. Therefore, we affirm in this respect.

AFFRIMED.

JORDAN, Circuit Judge, concurring:

I write separately to note that in certain circumstances where the EEOC or a state agency has been negligent in filling out a plaintiff's charge, the plaintiff may be able to rely on an intake questionnaire to show that her claim was properly exhausted. *See B.K.B. v. Maui Police Dep't*, 276 F.3d 1091, 1102 (9th Cir. 2002), *as amended* (Feb. 20, 2002).

In *B.K.B.*, the Ninth Circuit concluded that the plaintiff properly exhausted her federal sexual harassment claims based on the checked boxes in her charge, the information in her pre-complaint questionnaire, and the affidavit of the state agency representative who had assisted in preparing the charge. *See id.* at 1103. The plaintiff had checked boxes in her charge indicating that she had been subject to race, national origin, and sexual discrimination as well as harassment, but the defendants argued that her charge allegations were insufficient to support her claims of sexual discrimination and sexual harassment. *See id.* at 1100–01. The Ninth Circuit concluded that the plaintiff's intake questionnaire included examples of harassment that encompassed harassment based on sex and race, and that it provided additional detail to the allegations of which the state agency was on notice. *See id.* at 1101–02. And it noted that the agency official who had assisted the plaintiff submitted an affidavit suggesting that any deficiency in the charge should be attributed to the agency and not the plaintiff. *See id.* at 1103.

B.K.B. provides some persuasive support for the proposition that a plaintiff can present the pre-complaint intake questionnaire to satisfy the exhaustion requirement when the EEOC or state agency negligently or improperly narrows her claims. *See id.* at 1102. But that case does not help Ms. Hicks-Washington here because she knowingly signed a charge that did not check boxes for or provide allegations of discrimination based on race, color, and sex. Indeed, she admits that she was informed that signing a charge of only age discrimination would preclude her from advancing her other claims in federal court.

Appendix B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-12094-CC

CAROLYN HICKS-WASHINGTON,

Plaintiff - Appellant,

versus

THE HOUSING AUTHORITY OF THE CITY OF FORT LAUDERDALE,

Defendant - Appellee,

TAM ENGLISH,

Defendant.

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

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

BEFORE: JORDAN, NEWSOM, and FAY, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. (FRAP 35, IOP2)

ORD-42

Appendix C

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Fort Lauderdale Division

Case Number: 18-61662-CIV-MORENO

CAROLYN HICKS-WASHINGTON,

Plaintiff,

vs.

THE HOUSING AUTHORITY OF THE CITY OF FORT LAUDERDALE,

Defendants.
_____/

ORDER ADOPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION, ORDER DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT, AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THE MATTER was referred to the Honorable Barry S. Seltzer, United States Magistrate Judge, for a Report and Recommendation on Plaintiff's Motion for Partial Summary Judgment and Defendant's Motion for Summary Judgment, both filed on **February 25, 2019**. The Magistrate Judge filed a Report and Recommendation **(D.E. 70)** on **May 6, 2019**. The Court has reviewed the entire file and record. The Court has made a *de novo* review of the issues that the objections to the Magistrate Judge's Report and Recommendation present, and being otherwise fully advised in the premises, it is

ADJUDGED that United States Magistrate Judge Barry S. Seltzer's Report and Recommendation is **AFFIRMED** and **ADOPTED**.

I. Analysis

This is an employment discrimination action brought by Plaintiff, Carolyn Hicks-Washington, against Defendant, The Housing Authority of the City of Fort Lauderdale. Plaintiff's

Amended Complaint alleges discrimination on the basis of age, race, and sex, as well as retaliation, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634, the Florida Civil Rights Act, Fla. Stat. §§ 760.01 -.11, and 42 U.S.C. § 1981. The Court entered an Order dismissing with prejudice Counts I, II, III, IV, V, VII, and VIII of Plaintiff's Amended Complaint. As a result, the only claim currently before the Court is Plaintiff's claim for age discrimination under the ADEA. Both parties moved for summary judgment on Plaintiff's age discrimination claim.

Plaintiff was employed by Defendant from August 10, 2005 until November 13, 2015. In 2010 she was promoted to Assistant Director of Assisted Housing. On November 15, Plaintiff was terminated and was told that the agency was moving in another direction; Plaintiff was over the age of 55 at the time. On November 23, 2015, Plaintiff applied for Director of Housing Choice Voucher Program, however she was not hired. Defendant hired Medina Johnson who was 12 years younger than Plaintiff. Plaintiff re-applied for the position once Johnson left, however they hired Barbara Bear who is 4 years older.

Plaintiff has not established direct evidence of age discrimination. Plaintiff asserts that Tam English made statements to her and her co-worker that they were "getting older" and asked who would replace them. In her objections, Plaintiff contends that these remarks are direct evidence of discrimination, however, the Court disagrees. Defendant denies that these remarks were made, however, even if they were said, they do not rise to the requisite level to establish direct evidence of discrimination. See Van Voorhis v. Hillsborough County Bd. of County Comm'rs, 512 F.3d 1296, 1300 (11th Cir. 2008).

On the date of her termination, Plaintiff was 55 years old, had been performing her

job for many years, and was qualified for the position. Within days following her termination, Plaintiff applied for the re-defined and renamed Director position held by her former supervisor, but she was not hired. Defendant ultimately hired a woman (Medina Johnson) who was over the age of 40, yet 12 years younger than Plaintiff. Through these facts, Plaintiff establishes a *prima facie* case. See Jameson v. Arrow Co., 75 F.3d 1528, 1531 (11th Cir. 1996).

Defendant submits that Plaintiff was terminated because her oppressive management style led to high rates of turnover that reached nearly 75% the year she was terminated and caused staffing problems for Defendant. Reducing employee turnover, improving employee morale, and facilitating a stable workforce are legitimate concerns. The Court holds that Defendant's proffered reason for terminating Plaintiff meets the test for being one that might motivate a reasonable employer. See Chapman v. A1 Transport, 229 F.3d 1012, 1024 (11th Cir. 2000). The Court also holds the reason is non-discriminatory.

As Defendant has met its burden, Plaintiff must "come forward with evidence, including the previously produced evidence establishing the *prima facie* case, sufficient to permit a reasonable factfinder to conclude that the reasons given by the employer were not the real reasons for the adverse employment decision." Id. at 1025. Plaintiff argues that Defendant's concerns about her management style were never addressed with her and are contradicted by the positive performance reviews. Plaintiff further argues that Defendant has never distinguished between employees who left their employment voluntarily and employees who were terminated involuntarily. Plaintiff argues, therefore, that Defendant cannot properly attribute the turnover rate to her management style. Next, Plaintiff argues that the four negative employee exit interviews proffered by Defendant constitute a small fraction of terminated employees and, therefore, are insufficient to establish that her management style contributed to or caused the alleged high

employee turnover. Finally, she argues that of the 60 employees who left during the time she was there, 58% held the occupancy specialist position. She contends that those employees were directly supervised by the occupancy specialists supervisors, and therefore Plaintiff is not responsible for the turnover; however, an organizational chart shows that the Occupancy Specialists were in Plaintiff's chain of command. She reasons, therefore, that Defendant's proffered reasons for her termination are merely pretextual. We hold and agree with Magistrate Judge Seltzer that Plaintiff has failed to establish that the reasons given by Defendant for her termination are pretextual. Plaintiff has not preferred any evidence that would call into question the geniuses of Defendant's concerns for the turnover, morale, and workforce stability in Plaintiff's department, therefore, Plaintiff cannot avoid summary judgment.

II. Conclusion

Plaintiff has failed to produce the significantly probative evidence that is required to rebut Defendant's legitimate, nondiscriminatory reasons for her termination and avoid summary judgment. Accordingly, it is **ADJUDGED** that Plaintiff's Motion for Partial Summary Judgment is **DENIED** and Defendant's Motion for Summary Judgment is **GRANTED.**

DONE AND ORDERED in Chambers at Miami, Florida, this 31st of May 2019.

FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

Copies furnished to:
United States Magistrate Judge Barry S. Seltzer
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Carolyn Hicks-Washington PRO SE
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employee turnover. Finally, she argues that of the 60 employees who left during the time she was there, 28% held the occupancy specialist position. She contends that those employees were directly supervised by the occupancy specialists supervisors, but therefore Plaintiff is not responsible for the turnover; however, as organizational chart shows that the Occupancy Specialists were in Plaintiff's chain of command. She reasons, therefore, that Defendant's proffered reasons for her termination are merely pretextual. We hold that agree with Magistrate Judge Scott that Plaintiff has failed to establish that the reasons given by Defendant for her termination are pretextual. Plaintiff has not presented any evidence that would call into question the genuiness of Defendant's concerns for the turnover, morale, and workplace discipline in Plaintiff's department; therefore, Plaintiff cannot avoid summary judgment.

II. Conclusion

Plaintiff has failed to produce the significantly probative evidence that is required to rebut Defendant's legitimate nondiscriminatory reasons for her termination and avoid summary judgment. Accordingly, it is **ADJUDGED** that Plaintiff's Motion for Partial Summary Judgment is **DENIED** and Defendant's Motion for Summary Judgment is GRANTED.

DONE AND ORDERED in Chambers at Miami, Miami-Dade County, Florida, this [illegible] day of [illegible] 2010.

UNITED STATES DISTRICT JUDGE

Copies furnished to:
United States Magistrate Judge Barry S. Seltzer
Counsel of Record
Carolyn Hicks-Washington pro se
3913 Lime Hill Road, Lauderhill, FL 33319

Appendix D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 18-61662-CIV-MORENO/SELTZER

CAROLYN HICKS-WASHINGTON,

Plaintiff,

vs.

THE HOUSING AUTHORITY OF THE CITY OF FORT LAUDERDALE,

Defendant.
_____/

REPORT AND RECOMMENDATION ON MOTIONS FOR SUMMARY JUDGMENT

THIS CAUSE has come before the Court upon Plaintiff's Motion for Partial Summary Judgment ("Plaintiff's Motion") [DE 47] and Defendant's Motion for Summary Judgment ("Defendant's Motion") [DE 44]. The District Court entered an Order of Referral [DE 6] referring all pretrial matters to the undersigned for appropriate disposition or recommendation pursuant to 28 U.S.C. § 636(b) and the Magistrate Judge Rules of the United States District Court for the Southern District of Florida. For the reasons set forth below, the undersigned RECOMMENDS that Plaintiff's Motion [DE 47] be DENIED and that Defendant's Motion [DE 44] be GRANTED.

I. BACKGROUND

A. Procedural History

This is an employment discrimination action brought by Plaintiff, Carolyn Hicks-Washington ("Plaintiff"), against Defendant, The Housing Authority of the City of Fort Lauderdale ("Defendant" or "HACFL"). Plaintiff's Amended Complaint [DE 12] alleges

discrimination on the basis of age, race, and sex, as well as retaliation, in violation of Tile VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (the "ADEA"), the Florida Civil Rights Act, Fla. Stat. §§ 760.01 -.11, and 42 U.S.C. § 1981.

Defendant filed a Motion to Dismiss [DE 14] the Amended Complaint, which the undersigned recommended be granted in part and denied in part [DE 34]. Based upon a review of Plaintiff's Amended Complaint and the relevant law, the undersigned concluded that Plaintiff had failed to state a claim upon which relief could be granted and recommended dismissal of all but Plaintiff's age discrimination claim (Count VI of the Amended Complaint). No objections to the Report and Recommendation [DE 34] were filed, and on February 26, 2019, the District Court entered an Order [DE 46] affirming and adopting the Report and Recommendation and dismissing with prejudice Counts I, II, III, IV, V, VII, and VIII of Plaintiff's Amended Complaint.[1] As a result, the only claim currently before the Court is Plaintiff's claim for age discrimination under the ADEA. Both parties have now moved for summary judgment on Plaintiff's age discrimination claim.

[1] On March 18, 2019, Plaintiff filed a Motion to Reconsider and Alter or Amend the Court's February 25, 2019 Order [DE 57], which was denied [DE 69] on April 30, 2019. Plaintiff contends that her original submission to the EEOC raised claims for race and sex discrimination but that the EEOC officer drafted a Charge of Discrimination that raised only an age discrimination claim [DE 66, p. 6]. It is undisputed that the Charge of Discrimination signed by Plaintiff and investigated by the EEOC set forth only a charge for age discrimination under the ADEA. Thus, the Court dismissed Plaintiff's claims for race and sex discrimination and for retaliation.

B. Material Undisputed Facts[2]

Plaintiff was born in December 1959 [DE 48, ¶1]. She was employed by Defendant from August 10, 2005, until November 13, 2015 [DE 48, ¶ 2]. In 2010, she was promoted to Assistant Director of Assisted Housing and held that position until her employment ended [DE 48, ¶ 3]. Plaintiff's duties included management responsibilities over Section 8 and Public Housing [DE 45-1, ¶ 13]. On November 15, 2015, Plaintiff and her supervisor, the Director of Assisted Housing, Veronica Lopez, were terminated from their respective positions [DE 45-1, ¶ 14]. Plaintiff was told that the agency was "moving in another direction" [DE 48, ¶ 12]. Both Plaintiff and Lopez were over the age of 55 at the time of their terminations [DE 48, ¶ 13]. During the months leading up to the termination of Plaintiff and Lopez, Tam English, Defendant's Executive Director, would stop by their office, remark that they were "getting older," and ask who would replace them [DE 48, ¶ 28].

On November 23, 2015, Plaintiff applied for the newly created position of Director of Housing Choice Voucher Program [DE 54, ¶ 22]; however, she did not receive an interview, nor was she hired [DE 45-1, ¶ 15]. Defendant instead contracted with the Miami Beach Development Corporation ("MBDC") to temporarily fill the role of Director of Housing Choice Voucher Program while it searched for a permanent Director [DE 45-1, ¶ 16]. The MBDC designated Beatriz Cuenca-Barberio as the interim Director, and she remained in that position until March 2, 2016 [DE 45-1, ¶ 17]. Cuenca-Barberio, however, was never

[2] Plaintiff has filed a Local Rule 56.1 Statement of Facts with numerous attachments [DE 48]. For purposes of this Motion, and in consideration of Plaintiff's pro se status, the undersigned has construed the Statement of Facts as Plaintiff's Affidavit, as well as a Rule 56.1 Statement of Facts.

an employee of Defendant. Id. On February 16, 2016, Defendant hired Medina Johnson as its Director of Housing Choice Voucher Program [DE 45-1, ¶ 20]. Johnson was 12 years younger than Plaintiff [DE 48, ¶ 63], although she was over the age of 40 [DE 45-1, ¶ 20]. Johnson held the Director position until March 24, 2017 [DE 48, ¶ 66]. Plaintiff re-applied for the Director position after Johnson left, but did not receive an interview [DE 48, ¶ 23]. On May 9, 2017, Barbara Baer assumed the position as Director [DE 48, ¶ 67]. Baer, who was the second person hired as Director, is four years older than Plaintiff [DE 48, ¶¶ 67-68].

II. RELEVANT LAW

A. Legal Standards for Summary Judgment

Summary judgment is authorized where there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The moving party bears the initial burden of demonstrating the absence of a genuine dispute of material fact. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970). The nonmoving party may not then simply rest upon mere allegations or denials of the pleadings but must establish the essential elements of its case on which it will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). The nonmovant must present more than a scintilla of evidence in support of its position. A jury must be reasonably able to find for the nonmovant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986). In deciding a summary judgment motion, the court must view the facts in the light most favorable to the nonmoving party. Davis v. Williams, 451 F.3d 759, 763 (11th Cir. 2006).

The court's function at this stage is not to weigh the evidence and determine the truth but to determine whether there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). "The substantive law identifies what facts are material to a claim, and only disputes over facts that might affect the outcome of the suit will preclude the entry of summary judgment." Suarez v. School Bd. of Hillsborough Cty., 638 Fed. Appx. 897, 899 (11th Cir. 2016). The non-moving party must establish, "through the record presented to the court, that it is able to prove evidence sufficient for a jury to return a verdict in its favor." Cohen v. Am. Bank of Cent. Fla., 83 F.3d 1347, 1349 (11th Cir. 1996).

B. The ADEA

Under the ADEA, it is "unlawful for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to [her] compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1); Chapman v. A1 Transport, 229 F.3d 1012, 1024 (11th Cir. 2000) (en banc). For liability to exist under the ADEA, "the plaintiff's age must have actually played a role in the employer's decisionmaking process and had a determinative influence on the outcome." Id. (quoting Reeves v. Sanderson Plumbing Products, Inc., 120 S. Ct. 2097, 2105 (2000)). "A plaintiff may establish a claim of illegal age discrimination through either direct evidence or circumstantial evidence." Van Voorhis v. Hillsborough County Bd. of County Comm'rs, 512 F.3d 1296, 1300 (11th Cir. 2008).

1. Direct Evidence of Discrimination

"Direct evidence of discrimination would be evidence which, if believed, would prove the existence of a fact without inference or presumption." Carter v. City of Miami, 870 F.2d 578, 581 (11th Cir. 1989). "[N]ot every comment concerning a person's age presents direct evidence of discrimination." Id.; Young v. General Foods Corp., 840 F.2d 825, 828 (11th Cir. 1988). "Only the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of age, constitute direct evidence of discrimination." Van Voorhis, 512 F.3d at 1300 (original quotation marks omitted). For example, a supervisor's statements that he "didn't want to hire any old pilots" and was not going to interview applicants because "he didn't want to hire an old pilot" were held to be direct evidence of age discrimination. Id. By contrast, a decisionmaker's comments that "the company needed . . . young men . . . to be promoted" did not constitute direct evidence of age discrimination. See Damon v. Fleming Supermarkets of Florida, Inc., 196 F.3d 1354, 1359 (11th Cir. 1999).

2. Circumstantial Evidence of Discrimination

The Eleventh Circuit uses the framework established in McDonnell Douglas Corp. v. Green, 93 S. Ct. 1817 (1973), "to evaluate ADEA claims that are based upon circumstantial evidence of discrimination." Chapman, 229 F.3d at 1024. Under that method, "a plaintiff must first establish a prima facie case of discrimination." Id. (citations omitted). To establish a prima facie case for an ADEA violation, a plaintiff must show that she "(1) was a member of a protected age group, (2) was subjected to adverse employment action, (3) was qualified to do the job, and (4) was replaced by or otherwise lost a position to a younger individual." Id. (citing Benson v. Tocco, Inc., 113 F.3d 1203,

1207-08 (11th Cir. 1997)). "These criteria are altered slightly in both a reduction-in-force ("RIF") case and where a position is eliminated in its entirety," as occurred in this case. Jameson v. Arrow Co., 75 F.3d 1528, 1531 (11th Cir. 1996) (emphasis added). Where, as here, a claimant's job was eliminated in its entirety,

> the plaintiff establishes a prima facie case by demonstrating (1) that she was in a protected age group and was adversely affected by an employment decision, (2) that she was qualified for her current position or to assume another position at the time of discharge, and (3) evidence by which a fact finder could reasonably conclude that the employer intended to discriminate on the basis of age in reaching that decision.

Id. at 1531-32. Because Hicks' job was eliminated following her termination, the proper analytical framework here is the modified one employed in Jameson.

If a plaintiff establishes a prima facie case of discrimination, a presumption of discrimination arises and "the defendant employer must articulate a legitimate, nondiscriminatory reason for the challenged employment action." Chapman, 229 F.3d at 1024. That "burden is merely one of production; it need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." Id. (internal citations omitted).

"If the defendant articulates one or more such reasons, the presumption of discrimination is eliminated" and the plaintiff must come forward with evidence to support a finding that the defendant's articulated reasons were pretextual. Id. "If the plaintiff does not proffer sufficient evidence to create a genuine issue of material fact regarding whether each of the defendant employer's articulated reasons is pretextual, the employer is entitled to summary judgment on the plaintiff's claim." Id. at 1025.

"In an employment discrimination case, the plaintiff must produce sufficient evidence to support an inference that the defendant employer based its employment decision on an illegal criterion." Jameson, 75 F.3d at 1531. "At the summary judgment stage, [the] inquiry is whether an ordinary person could reasonably infer discrimination if the facts presented remain unrebutted." Id. "The focus of the inquiry [is] not a determination of whether [Plaintiff] was in fact performing [her] job adequately, but rather, whether there was sufficient evidence of unsatisfactory performance to be a legitimate concern of [Defendant and] whether this was the real reason for the termination and not a pretext for age discrimination." Young v. General Foods Corp., 840 F.2d 825, 829 n. 3 (11th Cir. 1988) (quoting Halsell v. Kimberly-Clark Corp., 683 F.2d 285, 292 (8th Cir. 1982), cert. denied, 459 U.S. 1205 (1983) (internal citations omitted)). "Because the plaintiff bears the burden of establishing pretext, [s]he must present 'significantly probative' evidence on the issue to avoid summary judgment." Id. at 829.

III. DISCUSSION

A. Direct Evidence of Discrimination

Plaintiff has not established direct evidence of age discrimination. As noted, supra, "[o]nly the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of age, constitute direct evidence of discrimination." Van Voorhis, 512 F.3d at 1300 (original quotation marks omitted). Not only has Defendant denied the remarks that Plaintiff attributes to the Executive Director, but the nature of the alleged remarks do not rise to the requisite level to establish direct evidence of discrimination. Plaintiff asserts that Tam English made statements to her and Lopez that they were "getting older" and asked who would replace them [DE 48, ¶ 28]. Defendant explains that these statements

were made to ensure that all appropriate staff were being trained sufficiently in advance to become future managers [DE 53, ¶¶ 28-30]. Given the Eleventh Circuit's contrasting views of the comments in Van Voorhis, 512 F.3d at 1300 – that the decisionmaker had no interest in hiring older pilots (held to be direct evidence of discrimination) – with the comments in Damon, 196 F.3d at 1359 – that the company needed young men to be promoted (held not to be direct evidence of discrimination) – the undersigned concludes that the comments allegedly made by English do not constitute direct evidence of discriminatory intent.

B. Circumstantial Evidence of Discrimination

On the date of her termination, Plaintiff was 55 years old, had been performing her job for many years, and was qualified for the position. Within days following her termination, Plaintiff applied for the re-defined and renamed Director position held by her former supervisor, but she was not hired. Defendant ultimately hired a woman (Medina Johnson) who was over the age of 40, yet 12 years younger than Plaintiff. Through these facts, Plaintiff establishes a prima facie case under the modified framework set forth in Jameson, 75 F.3d at 1531.[3] See Carter, 870 F.2d at 583 (a plaintiff need not show she was replaced by somebody under the age of 40, only that she was replaced by a younger

[3] Although this is not a reduction-in-force ("RIF") case, Plaintiff's job was eliminated after her termination. She therefore establishes a prima facie case by demonstrating, among other things, that she was qualified "to assume another position at the time of discharge" and that the employer hired a younger person for that other position. Jameson, 75 F.3d at 1531, 1533 ("An employer's decision to transfer or to hire a younger employee for that available position is sufficient evidence to support an inference of discrimination for the limited purpose of establishing the plaintiff's prima facie case. . . .").

person).[4] "Presentation of a prima facie case by a plaintiff raises a rebuttable presumption of discrimination. . . ." Id. at 584.

The burden then shifts to Defendant to "articulate a legitimate, nondiscriminatory reason" for the termination and failure to re-hire Plaintiff. Id. According to Defendant, Plaintiff was terminated because her oppressive management style led to high rates of turnover that reached nearly 75% the year she was terminated and caused staffing problems for Defendant [DE 45-1]. Defendant has submitted the affidavit of its Executive Director, Tam English, as well as copies of exit interviews from 4 employees who complained about the way they had been treated by Plaintiff [DE 45-1B]. Defendant has also submitted years of performance reviews of Plaintiff, which Defendant claims "contained negative comments about her communication with and leadership of employees. These negative comments consistently appeared on Plaintiff's performance reviews throughout her employment." [DE 45-1, ¶ 12]. Defendant submits that it terminated "both Plaintiff and her supervisor for the legitimate, non-discriminatory purpose of reducing employee turnover, improving employee morale, and facilitating a stable workforce." [DE 44, p. 13]. The undersigned concludes that "[h]ere, the proffered reason clearly meets the test of being one that might motivate a reasonable employer." Chapman, 229 F.3d at 1031. High employee turnover harms employers, id., and it is entirely reasonable for an employer to take action to remedy such a trend. Given that the

[4] Plaintiff repeatedly refers to Medina Johnson's replacement, Barbara Baer, who was hired as the Director of Housing Choice Program in May 2017. Baer is four years older than Plaintiff and, therefore, her hiring cannot support Plaintiff's prima facie case for age discrimination, or constitute evidence of discriminatory intent. Thus, **Baer's hiring (two years after Plaintiff's termination) provides no support to Plaintiff's claims**.

employer's burden at this stage is merely one of production, id. at 1028, Defendant has proffered a legitimate, non-discriminatory reason for Plaintiff's termination.

As Defendant has met its burden, Plaintiff must "come forward with evidence, including the previously produced evidence establishing the prima facie case, sufficient to permit a reasonable factfinder to conclude that the reasons given by the employer were not the real reasons for the adverse employment decision." Id. at 1024 (citations omitted). "Provided that the proffered 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." Id. at 1030 (citing Alexander v. Fulton County, Ga., 207 F.3d 1303, 1341 (11th Cir. 2000) (Title VII case)). The Court cannot examine the wisdom of Defendant's decision; the "inquiry is limited to whether the employer gave an honest explanation of its behavior." Id. (quoting Elrod v. Sears, Roebuck & Co., 939 F.2d 1466, 1470 (11th Cir. 1991) (internal citations omitted)). Because the burden is on Plaintiff to establish pretext by Defendant, she "must present 'significantly probative' evidence on the issue to avoid summary judgment." Carter, 870 F.2d at 586 (quoting Young, 840 F.2d at 829 (internal citations omitted)).

Plaintiff has submitted a Statement of Facts [DE 54] in opposition to Defendant's proffer and has also submitted her own Statement of Facts [DE 48], along with numerous documents in support of her position [DE 43-1, 43-2, and 43-3], which the undersigned has reviewed in detail. Plaintiff argues that of the 60 employees who left HACFL between January 2007 and November 2015, approximately 58% held the Occupancy Specialist position [DE 48, ¶ 44]. In the year of Plaintiff's termination, 8 out of 14 employees (approximately 57%) who left HACFL were Occupancy Specialists [DE 48, ¶ 47].

(approximately 25%) who left HACLF were Occupancy Specialists [DE 48, ¶ 14].

position [DE 48, ¶ 44]. In the rest of Plaintiff's termination, 8 out of 14 employees January 2007 and November 2012, approximately 58% held the Occupancy Specialist

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F.3d at 282 (quoting Young, 840 F.3d at 858 (internal citations omitted)).

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Koeppel & Co., 696 F.3d 1288, 1292 (11th Cir. 1997) (internal citations omitted)).

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"Provided that the proffered reason is one that might motivate a reasonable employer, an

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not the real reasons for the adverse employment decision." Id. at 1054 (citations omitted).

including the previously proposed evidence establishing the Prima facie case, sufficient

As Defendant has met its burden, Plaintiff must "come forward with evidence,

protected & legitimate, non-discriminatory reason for Plaintiff's termination

According to Plaintiff, those employees were directly supervised by two Occupancy Specialist Supervisors [DE 48, ¶ 45]. Thus, Plaintiff argues that she was not responsible for HACFL's high rate of turnover [DE 47, p. 14], and that Defendant's proffered reasons were pretextual. Plaintiff's evidence, however, belies her argument.

Plaintiff has submitted with her Statement of Facts an organizational chart of her department [DE 48-3, p. 56] as well as a list of department employees who were terminated or resigned, sorted by year [DE 48-3, pp. 52-54]. This evidence shows that 14 department employees separated from HACFL between January and November 2015, 7 in 2014, 9 in 2013, and 12 in 2012. This same organizational chart shows that Lopez and Plaintiff were at the top of the department [DE 48-3, p. 56], and it shows that the Occupancy Specialists were in Plaintiff's chain of command. The Occupancy Specialists who left their positions were therefore subordinates of Plaintiff and her supervisor.

The affidavit of Tam English stated that the workforce instability in the department created staffing problems for HACFL [DE 45-1, ¶ 14]. English submitted copies of exit interviews from 4 employees who raised complaints about working under Plaintiff's supervision [DE 45-1, pp. 10-17]. According to English, Plaintiff's harsh and oppressive management style contributed to the high staff turnover. English cites random excerpts from Plaintiff's employee reviews that suggest improvements to her communication skills:

> The 2009 performance review noted that Plaintiff "may become frustrated in the low performance of employees" which results in her "delivering criticism that may be tinged with an opinion on the reason for the employee's failure to perform." The performance review suggested management training so that Plaintiff can improve how she delivers criticism [DE 45]. The 2010 performance review noted that Plaintiff "needs to learn to monitor her body language to avoid transmitting the wrong message" and that "she should strive to maintain control of all areas of communication." The 2011 performance review noted, that when working with

> subordinates, Plaintiff must "strive to assure when asking open ended questions she waits until the full response is obtained prior to questioning further and then giving guidance not attempting to show her frustration through body language." A second review in 2011 noted that Plaintiff must improve her delivery of criticism. In 2012, the review noted that Plaintiff would "benefit from training in Conflict Resolution and should seek the opportunity to participate in such training to assist her in mediating issues arising between employee and/or with her own subordinates. A similar recommendation was made in 2014.

These are the entirety of negative comments contained in Plaintiff's performance reviews.

Plaintiff counters that her performance reviews never addressed her management style, employee turnover rates, or overbearing demeanor [DE 45-1, pp. 10-17]. And Defendant admits that Plaintiff's employee reviews were "mostly positive." Indeed, Plaintiff asserts in her Statement of Facts [DE 48] that her performance reviews noted that she "quickly assumes a strong leadership role when action [was] needed"; that "her outlook was generally positive"; that she "[made] every effort to make herself accessible to her subordinates"; that she displayed very good verbal skills, communicating clearly and concisely"; and that she "listens and comprehends well." [DE 48, ¶¶ 36-37].

In her Reply to Defendant's Statement of Facts [DE 54], Plaintiff notes the following positive comments about her leadership and communication skills:

> From 2005: "very good verbal skills, communicating clearly and concisely"; "tolerates a great deal of pressure and she quickly assumes a strong leadership role when action is needed"; From 2007: "keeps others adequately informed and she selects appropriate methods of communication"; From 2013: "When replying to requests for guidance, Carolyn always takes a proactive approach and makes reference to regulations and/or policies and procedures which are applicable to the circumstances so contributing to the training of employees"; "Carolyn's delegation on her employees has improved, we do work in a very closed environment and it is at times hard not to 'jump in' and do it ourselves for the sake of expediency, but she has placed more emphasis on monitoring"; From 2014: "Carolyn is extremely thorough and proactive about keeping others well

> informed"; "She exhibits an appropriate level of confidence in herself as well as others and she reacts well in pressure situations." [DE 54, ¶ 12].

Plaintiff therefore argues that Defendant's concerns about her management style were never addressed with her and are contradicted by the positive performance reviews. Plaintiff further argues that Defendant has never distinguished between employees who left their employment voluntarily and employees who were terminated involuntarily. Plaintiff argues, therefore, that Defendant cannot properly attribute the turnover rate to her management style. Finally, Plaintiff argues that the four negative employee exit interviews proffered by Defendant [DE 45-1B] constitute a small fraction of terminated employees and, therefore, are insufficient to establish that her management style contributed to or caused the alleged high employee turnover. She reasons, therefore, that Defendant's proffered reasons for her termination are merely pretextual.

After carefully reviewing the evidence, and granting Plaintiff's Statement of Facts wide evidentiary leeway, the undersigned concludes that Plaintiff has failed to establish that the reasons given by Defendant for her termination were not the real reasons – stated differently, that the reasons given were merely pretextual. The undersigned notes that it is not for the court to second-guess the wisdom of an employer's decision, provided the decision is not motivated by improper reasons. Chapman, 229 F.3d at 1030; see also Nix v. WLCY Radio/Rahall Comm's, 738 F.2d 1181, 1187 (11th Cir. 1984) (An "employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason.").

Here the evidence plainly shows that Defendant was genuinely concerned about the rate of turnover among Plaintiff's own subordinates and the resulting staffing problems

> information." She explains an employee level of confidence in herself as well as others and she reacts well in pressure situations." [DE 24-18] P 15].

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After carefully reviewing the evidence and drawing Plaintiff's Statement of Facts wide evidentiary leeway, the undersigned concludes that Plaintiff has failed to establish that the reasons given by Defendant for her termination were not the real reasons – stated differently, that the reasons given were merely pretextual. The undersigned notes that it is not for the court to second-guess the wisdom of an employer's decision, provided the decision is not motivated by improper reasons. Chapman, 255 F.3d at 1026; see also Nix v. WLCY Radio/Rahall Comm'n, 738 F.2d 1181, 1187 (11th Cir. 1984) (An "employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason.").

Here the evidence plainly shows that Defendant was genuinely concerned about the rate of turnover among Plaintiff's own subordinates and the resulting disciplinary problems

in Plaintiff's department. That evidence stands unrebutted. Plaintiff's performance reviews do not diminish the genuineness of Defendant's concern for an alarmingly high turnover rate, which reached 75% in Plaintiff's department the year she was terminated. As the Eleventh Circuit noted in Young, the focus on the court's inquiry is not on whether the plaintiff was performing her job adequately, but whether there was sufficient evidence of unsatisfactory performance "to be a legitimate concern of" the defendant and whether this was the real reason for the termination and not a pretext for age discrimination." 840 F.2d at 829 n.3 (citation omitted). Here, Defendant's proffered reasons for Plaintiff's termination – reducing employee turnover, improving employee morale, and facilitating a stable workforce – were plainly legitimate employer concerns. And Plaintiff has not proffered any evidence that would call into question the genuineness of Defendant's concerns for the turnover, morale, and workforce stability in Plaintiff's department. Furthermore, aside from the fact that one of the individuals (Medina Johnson) Defendant hired to the Director's position was over 40, yet 12 years younger than Plaintiff, the record is devoid of evidence – direct or circumstantial – that would suggest that any decision-maker responsible for Plaintiff's termination was at all motivated by considerations of age. Significantly, although Plaintiff makes repeated references to the hiring of Barbara Baer to the Director's position two year's following Plaintiff's termination, such references do not even permit an inference of discrimination as Baer is four years older than Plaintiff.

In sum, the undersigned concludes that Plaintiff has failed to produce the significantly probative evidence that is required to rebut Defendant's legitimate, nondiscriminatory reasons for her termination and avoid summary judgment. Young, 840 F.2d at 829.

in Plaintiff's department. That evidence stands unrebutted. Plaintiff's performance reviews do not diminish the genuineness of Defendant's concern for an alarmingly high turnover rate, which reached 75% in Plaintiff's department the year she was terminated. As the Eleventh Circuit noted in Young, the focus on the court's inquiry is not on whether the plaintiff was performing her job adequately, but whether there was sufficient evidence of unsatisfactory performance "to be a legitimate concern of" the defendant and whether this was the real reason for the termination and not a pretext for age discrimination." 840 F.2d at 829 n.3 (citation omitted). Here, Defendant's proffered reasons for Plaintiff's termination – reducing employee turnover, improving employee morale, and facilitating a stable workforce – were plainly legitimate employer concerns. And Plaintiff has not proffered any evidence that would call into question the genuineness of Defendant's concerns for the turnover, morale, and workforce stability in Plaintiff's department. Furthermore, aside from the fact that one of the individuals (Medina Johnson) Defendant hired to the Director's position was over 40, yet 12 years younger than Plaintiff, the record is devoid of evidence -- direct or circumstantial – that would suggest that any decision-maker responsible for Plaintiff's termination was at all motivated by considerations of age. Significantly, although Plaintiff makes repeated references to the hiring of Barbara Baer to the Director's position two year's following Plaintiff's termination, such references do not even permit an inference of discrimination as Baer is four years older than Plaintiff.

In sum, the undersigned concludes that Plaintiff has failed to produce the significantly probative evidence that is required to rebut Defendant's legitimate, nondiscriminatory reasons for her termination and avoid summary judgment. Young, 840 F.2d at 829.

IV. CONCLUSION

For the foregoing reasons, the undersigned respectfully RECOMMENDS that Plaintiff's Motion for Partial Summary Judgment [DE 47] be DENIED and that Defendant's Motion for Summary Judgment [DE 44] be GRANTED.

The parties will have fourteen (14) days from the date of being served with a copy of this Report and Recommendation within which to file written objections, if any, with the Honorable Federico A. Moreno, United States District Judge. Failure to file objections timely shall bar the parties from a de novo determination by the District Judge of an issue covered in the Report and shall bar the parties from attacking on appeal unobjected-to factual and legal conclusions contained in this Report except upon grounds of plain error if necessary in the interest of justice. See 28 U.S.C. § 636(b)(1); Thomas v. Arn, 474 U.S. 140, 149 (1985); Henley v. Johnson, 885 F.2d 790, 794 (1989); 11th Cir. R. 3-1 (2016).

DONE AND SUBMITTED in Chambers, Fort Lauderdale, Florida, this 6th day of May 2019.

BARRY S. SELTZER
United States Magistrate Judge

Copies furnished via CM/ECF to:

Hon. Federico A. Moreno
Counsel of record and unrepresented parties

Appendix E

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Fort Lauderdale Division

Case Number: 18-61662-CIV-MORENO

CAROLYN HICKS-WASHINGTON,

Plaintiff,

vs.

THE HOUSING AUTHORITY OF THE CITY OF FORT LAUDERDALE, and TAM ENGLISH,

Defendants.
_____/

ORDER ADOPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

THE MATTER was referred to the Honorable Barry S. Seltzer, United States Magistrate Judge, for a Report and Recommendation on The Housing Authority of the City of Fort Lauderdale's Motion to Dismiss Counts I, II, III, IV, VII, and VIII and Motion to Strike Paragraphs 10-15, 17-38, 45, 64-65, 67-68,75-77, 80-113, 120-124, 155-156, 158, 161-162, 183-186 and 294(J) of the Amended Complaint, filed on **October 3, 2018**. The Magistrate Judge filed a Report and Recommendation **(D.E. 34)** on **February 1, 2019**. The Court has reviewed the entire file and record. The Court also notes that no Objections to the Report and Recommendation were filed.[1] It is,

ADJUDGED that United States Magistrate Judge Barry S. Seltzer's Report and Recommendation is **AFFIRMED** and **ADOPTED**. Accordingly, it is

ADJUDGED that The Housing Authority of the City of Fort Lauderdale's Motion to Dismiss Counts I, II, III, IV, VII, and VIII and Motion to Strike Paragraphs 10-15, 17-38, 45, 64-

[1] This Court also notes that Plaintiff filed a Motion to Stay Discovery; Disqualify Magistrate Judge Seltzer; and Vacate his three most recent decisions (D.E. 37) and a Motion to Amend Motion to Stay Discovery, Disqualify Magistrate Judge Seltzer, and Vacate his three most recent decisions (D.E. 38), which were both denied.

65, 67-68, 75-77, 80-113, 120-124, 155-156, 158, 161-162, 183-186 and 294(J) of the Amended Complaint is **GRANTED**. For the reasons set forth in the Report and Recommendation, Plaintiff has again failed to allege any facts that would establish a basis for relief as alleged in Counts I, II, III, IV, V, VII and VIII, therefore those Counts are **DISMISSED** with prejudice. It is further,

ADJUDGED that paragraphs 10-15, 17-38, 45, 64-65, 67-68, 75-77, 80-113, 120-124, 155-156, 158, 161-162, 183-186 and 294(J) of the Amended Complaint are **STRICKEN**.

DONE AND ORDERED in Chambers at Miami, Florida, this 25th of February 2019.

FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

Copies furnished to:

United States Magistrate Judge Barry S. Seltzer

Counsel of Record

Appendix F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 18-61662-CIV-MORENO/SELTZER

CAROLYN HICKS-WASHINGTON,

Plaintiff,

vs.

THE HOUSING AUTHORITY OF THE CITY OF FORT LAUDERDALE and TAM ENGLISH,

Defendants.
_____/

REPORT AND RECOMMENDATION

THIS CAUSE is before the Court pursuant to The Housing Authority of the City of Fort Lauderdale's Motion to Dismiss Counts I, II, III, IV, V, VII, and VIII and Motion to Strike [Specified Paragraphs] of the Amended Complaint [DE 14]. The District Court entered an Order of Referral [DE 6] referring all pretrial matters to the undersigned for appropriate disposition or recommendation pursuant to 28 U.S.C. § 636(b) and the Magistrate Judge Rules for the United States District Court for the Southern District of Florida. For the reasons set forth below, the undersigned recommends that the Motion be granted.

I. BACKGROUND

Plaintiff Carolyn Hicks-Washington (hereinafter "Plaintiff") was employed by the Housing Authority of the City of Fort Lauderdale ("Defendant" or "HACFL") as the Assistant Director of Assisted Housing from August 10, 2005, November 13, 2015, when her employment was terminated [DE 12, ¶¶ 42, 59]. Plaintiff was told by her supervisor that "the company was moving in a 'different direction.'" No other explanation was provided [DE

12, ¶ 62]. At the time of her termination, Plaintiff also learned that the Director of Assisted Housing was being terminated as well. [DE 12, ¶ 60]. On November 23, 2015, Plaintiff applied for the position of Director of Housing Choice Voucher Program [DE 12, ¶ 179]. Plaintiff was not hired for the position although a black female over the age of 40 was hired [DE 12, ¶ 182].

On April 16, 2016, Plaintiff submitted an intake questionnaire to the Equal Employment Commission ("EEOC") in which she alleged individual disparate treatment in her employment based on her race, color, national origin, sex, and age [DE 12, ¶ 79]. Yet, the Charge of Discrimination form that Plaintiff ultimately signed, verified, and submitted to the EEOC alleged only that she was terminated from her position and not hired as a director because of discrimination based upon age [DE 12, ¶ 80]. The Charge of Discrimination does not allege discrimination based upon race, color, or sex; nor does it allege that Plaintiff was retaliated against for participating in protected activities [DE 14-1]. After an investigation into Plaintiff's claims, Defendant reported to the EEOC that Plaintiff had been terminated (and not re-hired for a different position) due to a pattern of high employee turnover attributable to Plaintiff's management style. The EEOC issued a Right to Sue letter authorizing Plaintiff to raise her age discrimination claims in court.

On August 24, 2018, Plaintiff's original Complaint [DE 1] was dismissed with leave to amend [DE 10]. On September 18, 2018, Plaintiff filed her Amended Complaint [DE 12]. Defendant filed an Answer and Affirmative Defenses [DE 15] to Count VI of the Amended Complaint (based upon the Age Discrimination in Employment Act), and it moved to dismiss the remaining counts [DE 14]. Defendant also moved to strike numerous paragraphs from the Amended Complaint as immaterial and/or impertinent. Plaintiff has

filed a memorandum in opposition [DE 19] and Defendant has filed a reply memorandum [DE 24]. The matter is now ripe for decision.

II. DISCUSSION

A. Motion to Dismiss

Defendant moves to dismiss Count I - Disparate Impact in Violation of Title VII; Count II - Individual Disparate Treatment in Violation of Title VII; Count III - Retaliation in Violation of Title VII; Count VII - Retaliation in Violation of the ADEA; and Count VIII - Discrimination in Violation of the Florida Civil Rights Act of 1992, of Plaintiff's Amended Complaint for failure to exhaust administrative remedies. Counts I, II, III, and VIII allege discrimination based upon sex, color, and race. Counts IV and VII allege retaliation in violation of Title VII and Section 1981.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). Although this pleading standard "does not require 'detailed factual allegations,' . . . it demands more than an unadorned, the defendant-unlawfully-harmed-me accusation." Id. (alteration added) (quoting Twombly, 550 U.S. at 555). Pleadings must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555 (citation omitted). Indeed, "only a complaint that states a plausible claim for relief survives a motion to dismiss." Iqbal, 556 U.S. at 679 (citing Twombly, 550 U.S. at 556). To meet this "plausibility standard," a plaintiff must "plead[ ] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. at 678 (citing Twombly, 550 U.S. at 556).

When reviewing a motion to dismiss, a court must construe the complaint in the light most favorable to the plaintiff and take the factual allegations therein as true. See Brooks v. Blue Cross & Blue Shield of Fla., Inc., 116 F.3d 1364, 1369 (11th Cir. 1997). However, pleadings that "are no more than conclusions are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." Iqbal, 556 U.S. at 678.

1. Failure to Exhaust Administrative Remedies

"Before a potential plaintiff may sue for discrimination under Title VII, she must first exhaust her administrative remedies." Wilkerson v. Grinnel Corp., 270 F.3d 1314, 1317 (11th Cir. 2001). The first step is filing a timely charge of discrimination with the EEOC. Id. Charges of discrimination "shall be in writing under oath or affirmation and shall contain such information and be in such form as the [EEOC] requires." Id. (quoting 42 U.S.C. § 2000e-5(e)(1)). The EEOC regulations require that a charge be in writing and be verified. 29 C.F.R. § 1601.9 (2018). "To be verified, a charge must be 'sworn to or affirmed before a notary public, designated representative of the Commission, or other person duly authorized by law to administer oaths and take acknowledgments, or supported by an unsworn declaration in writing under perjury of law.'" Wilkerson, 270 F.3d at 1317 (quoting 29 C.F.R. § 1601.3(a) (2000)).

"Generally, a 'plaintiff's judicial complaint is limited by the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination.'" Francois v. Miami-Dade County, 742 F. Supp. 2d 1350, 1353 (S.D. Fla. 2010) (quoting Gregory v. Georgia Dep't of Human Resources, 355 F.3d 1277, 1280 (11th Cir. 2004)). "While the scope of an EEOC charge should be liberally construed, the proper

inquiry is whether the claims in a judicial complaint are like, related to, or grow out of the allegations contained in the EEOC charge." Id.

The Charge of Discrimination submitted by Plaintiff to the EEOC marked the box labeled "Age" under the section "DISCRIMINATION BASED ON" [DE 14-1]. The factual recitation set forth the following:

> My age (56) years old. I was employed by the above named employer as an Assistant Director of Assisted Housing, until I was terminated because of my age by Executive Director, Tam English, and Chief Financial Officer, Michael Tadros. I believe the discharge was pretext and discriminatory because Mr. English on more than one occasion mentioned to my Supervisor, Veronica Lopez, and I that we were getting older and who do we have to replace us. We shared that we have trained several employees who could take over our positions. This was a pattern of practice of my employer because back in 2010 we were provided an additional workload, which included a title change (from Assistant Section 8 Director), that was previously assigned to Andrea Ayala and Scott Strawbridge. On 11/13/2015, Mr. English discharged me and my supervisor. On 11/16/2015, I was replaced by Anita Flores (under 40 years of age) who took on the responsibilities I previously held. On 11/23/2015, I was subjected to hiring discrimination after I applied for the Director of Housing Choice Voucher Program position. I was not given a callback nor interviewed for the position. I know I was qualified for the position because I had over 30 years experience in various housing authorities with over 14 years in the Housing Choice Voucher program (formerly known as Section 8).
>
> The reason given for my termination had nothing to do with the recent HUD audit or the status of the files, according to Tam English. I was told by Tam English that the agency was moving in a different direction.I believe I was discriminated against because of my age (55), when I was terminated, and not hired for the Director of Housing Voucher Program, in violation of the Age Discrimination in Employment Act of 1967, (ADEA), as amended.

[DE 14-1, p. 7]. The Charge of Discrimination stated that the earliest date of discrimination took place on November 13, 2015, and the latest date of discrimination occurred on November 23, 2015.

The Charge of Discrimination clearly states that Plaintiff's claims were based upon age discrimination and nothing else. The Charge contains no information or factual allegations from which a claim of discrimination based upon sex, race, or color could be construed to be like, related to, or growing out of the stated charges of age discrimination. Likewise, nothing alleged in the Charge of Discrimination could support a finding that Plaintiff raised a charge of retaliation with the EEOC. Plaintiff's claims of discrimination based upon sex, race, color and retaliation in violation of Title VII are, therefore, barred. Cf. Thomas v. Miami-Dade Public Health Trust, 369 Fed. Appx. 19, 22 (11th Cir. 2010) (claims of race and sex discrimination barred for failure to exhaust administrative remedies where EEOC charge asserted that failure to promote was only a result of retaliation).

Plaintiff argues that she checked boxes on her intake questionnaire raising claims for race, sex, and color discrimination, but that the EEOC nevertheless only presented a claim under the ADEA to Defendant. The Eleventh Circuit, however, has held that intake questionnaires do not satisfy the statutory requirements of an administrative charge under Title VII. Pijnenburg v. West Georgia Health System, Inc., 255 F.3d 1304 (11th Cir. 2001). Accordingly, the undersigned concludes that Counts I, II, III, VII, and VIII of Plaintiff's Amended Complaint [DE 12] should be dismissed for failure to exhaust administrative remedies.

2. Failure to State a Claim for Disparate Treatment in Violation of § 1983

Count IV of Plaintiff's Amended Complaint alleges that Defendant discriminated against her on the basis of race and/or color in violation of 42 U.S.C. § 1981 by denying her the same terms and conditions of employment available to employees who are classified as white. Defendant moves to dismiss Count IV on the ground that Plaintiff has failed to allege any facts or attach any documents to her Amended Complaint that would, if proven, establish discriminatory intent.

The undersigned agrees that Plaintiff's Amended Complaint raises nothing more than conclusory and speculative allegations concerning racial animus on the part of Defendant [DE 12, ¶ 155 - 162]. Paragraph 155 states: "Based on America's longstanding and on-going history of both blatant and subtle white racism, as well as sexism, no presumption can be made that English harbors no explicit and/or implicit biases against people of color and/or women." The Amended Complaint goes on to say that Tam English, Plaintiff's supervisor – "a male classified as 'white'" – "was born before the passage of the Civil Rights Act of 1964, during a time in America when de jure racial segregation existed in all areas of society" [DE 12, ¶ 156]. The Amended Complaint further alleges that English's hiring decisions were "consciously and/or unconsciously . . . tainted with racial bias. [DE 12, ¶ 157]. And the Amended Complaint notes that Tam English is "a proud supporter of the Republican party" who expressed his "disapproval of Obama and his administration throughout his eight-year term as the country's first mixed-race president" [DE 12, ¶ 161]. Finally, the Amended Complaint notes that five white individuals were hired by English [DE 12, ¶ 158] during his tenure at HACFL.

None of these allegations are sufficient to establish the existence of racial animus toward this Plaintiff or toward any other individual on the basis of race by Defendant. Where, as here, allegations of discriminatory intent fail to rise above the level of speculation, the complaint must be dismissed. Ridley v. VMT Long Term Care Management, 68 F. Supp. 3d 88 (D.D.C. 2014). "Without a factual basis to support an inference of discrimination based on plaintiff's race, the [amended] complaint asserts nothing more than a 'mere possibility of misconduct.'" Id. at 93 (quoting Iqbal, 556 U.S. at 679). This is not sufficient to defeat a motion to dismiss. Accordingly, the undersigned recommends that Count IV be dismissed for failure to state a claim upon which relief can be granted.

3. Failure to State a Claim for Retaliation

Counts V and VII of the Amended Complaint allege that Defendant retaliated against Plaintiff because she engaged in activities protected by Title VII and the ADEA. In addition to being barred for failing to exhaust administrative remedies (see, supra, section 1), the Amended Complaint fails to allege any facts that would support a claim for retaliation. To state a claim for retaliation, a plaintiff must show that she engaged in "statutorily protected activity," that an adverse employment action occurred, and that the adverse action was related to the plaintiff's protected activities. Coutu v. Martin County Bd. of County Com'rs, 47 F.3d 1068, 1074 (11th Cir. 1995).

The Amended Complaint fails to allege that Plaintiff engaged in any protected activities prior to her termination and her not being hired as a director in November 2015 and, as such, fails to state a claim for retaliation. The employment decisions about which Plaintiff complained occurred before she filed a charge with the EEOC and, therefore, they

cannot be considered retaliatory. To the extent that the Amended Complaint alleges that a retaliatory failure to hire her in 2016 and 2017 [DE 12, ¶ 179 - 188], Plaintiff's claim is outside the time period submitted to the EEOC and, therefore, is barred as well. See Lara v. Raytheon Corp., 2011 WL 3919602, at *4 (M.D. Fla. Sept. 7, 2011) (dismissing claims based on events occurring outside the scope of dates set forth in an EEOC charge). In any event, Plaintiff alleges no facts from which retaliatory behavior could be inferred. Accordingly, the undersigned concludes that Counts V and VII of the Amended Complaint fail to state a claim upon which relief can be granted and recommends that those counts be dismissed.

B. Motion to Strike

Defendant moves to strike numerous paragraphs from Plaintiff's Amended Complaint pursuant to Rule 12(f), Federal Rules of Civil Procedure. The court may strike from any pleading any "redundant, immaterial, impertinent, or scandalous matter." Nash v. O.R. Colan Group, LLC, 2012 WL 4338817, at *1 (S.D. Fla. Sept. 20, 2012). This Court has addressed this issue before, when it dismissed Plaintiff's initial Complaint [DE 8 and 10]. Like the initial Complaint, Plaintiff's Amended Complaint is replete with a recitation of the history of racial tensions in the United States, Plaintiff's unrelated community activities, and matters that occurred during the EEOC process. These are matters that are not properly included in a pleading and, therefore, the undersigned recommends that the Court strike from the Amended Complaint the following paragraphs: 12-15; 17-38; 45; 64-65; 67-68; 75-77; 82-113; 155-156; 161-162; 183-186; and 294J.

III. CONCLUSION

In light of the foregoing discussion, the undersigned RECOMMENDS that Defendant's Motion to Dismiss and Motion to Strike [DE 14] be GRANTED. In that this is Plaintiff's Amended Complaint and Plaintiff has again failed to allege any facts that would establish a basis for relief as alleged in Counts I, II, III, IV, V, VII and VIII, the undersigned recommends that those Counts be dismissed with prejudice. The undersigned further RECOMMENDS that paragraphs 12-15, 17-38, 45, 64-65, 67-68, 75-77, 83-113, 155-156, 161-162, 183-186, and 294J be STRICKEN.

The parties will have fourteen (14) days from the date of being served with a copy of this Report and Recommendation within which to file written objections, if any, with the Honorable Federico A. Moreno, United States District Judge. **Any objections that are filed shall be limited to 20 pages in length, double-spaced, with no excessive footnotes, attachments, or exhibits.** Failure to file objections timely shall bar the parties from a de novo determination by the District Judge of an issue covered in the Report and shall bar the parties from attacking on appeal unobjected-to factual and legal conclusions contained in this Report except upon grounds of plain error if necessary in the interest of

justice. See 28 U.S.C. § 636(b)(1); Thomas v. Arn, 474 U.S. 140, 149 (1985); Henley v. Johnson, 885 F.2d 790, 794 (1989); 11th Cir. R. 3-1 (2016).

DONE AND SUBMITTED in Chambers, Fort Lauderdale, Florida, this 1st day of February 2019.

BARRY S. SELTZER
United States Magistrate Judge

Copies furnished via CM/ECF to:
Hon. Federico A. Moreno
Counsel of record and unrepresented parties

Appendix G

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Fort Lauderdale Division

Case Number: 18-61662-CIV-MORENO

CAROLYN HICKS-WASHINGTON,

Plaintiff,

vs.

THE HOUSING AUTHORITY OF THE CITY OF FORT LAUDERDALE, and TAM ENGLISH,

Defendants.
_____/

ORDER ADOPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION AND DISMISSING PLAINTIFF'S COMPLAINT WITH LEAVE TO AMEND

THE MATTER was referred to the Honorable Barry S. Seltzer, United States Magistrate Judge, for a Report and Recommendation on Defendants' Motion to Strike and Motion to Dismiss, or in the Alternative, Motion for Summary Judgment, filed on **July 23, 2018**. The Magistrate Judge filed a Report and Recommendation **(D.E. 8)** on **August 21, 2018**. The Court has reviewed the entire file and record. The Court has made a *de novo* review of the issues presented in the Magistrate Judge's Report and Recommendation, and being otherwise fully advised in the premises, it is

ADJUDGED that United States Magistrate Judge Barry S. Seltzer's Report and Recommendation is **AFFIRMED** and **ADOPTED**. Accordingly, it is

ADJUDGED as follows:

(1) Defendants' Motions to Dismiss and Strike are GRANTED,

(2) Defendants' Motion for Summary Judgment is DENIED, and

(3) Plaintiff's Complaint is DISMISSED with leave to amend.

DONE AND ORDERED in Chambers at Miami, Florida, this 24 of August 2018.

FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

Copies furnished to:

United States Magistrate Judge Barry S. Seltzer

Counsel of Record

Appendix H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 18-61662-CIV-MORENO/SELTZER

CAROLYN HICKS-WASHINGTON,

Plaintiff,

vs.

THE HOUSING AUTHORITY OF THE CITY OF FORT LAUDERDALE and TAM ENGLISH,

Defendants.
_____/

REPORT AND RECOMMENDATION

THIS CAUSE is before the Court pursuant to the Motion to Strike and Motion to Dismiss, or in the Alternative, Motion for Summary Judgment [DE 4] filed by Defendants The Housing Authority of the City of Fort Lauderdale ("HACFL") and Tam English ("English"). The District Court entered an Order of Referral [DE 6] referring all pretrial matters to the undersigned for appropriate disposition or recommendation pursuant to 28 U.S.C. § 636(b) and the Magistrate Judge Rules for the United States District Court for the Southern District of Florida. After review of the pro se Plaintiff's Complaint, Defendants' Motion and the relevant case law, the undersigned recommends that Defendants' Motion to Dismiss and Motion to Strike be GRANTED, that the alternative Motion for Summary Judgment be DENIED, and that Plaintiff's Complaint be DISMISSED with leave to amend.

I. BACKGROUND

Plaintiff, Carolyn Hicks-Washington ("Hicks-Washington"), filed a Pro Se Complaint [DE 1-4] in the Circuit Court for Broward County, Florida. Defendants removed the case

to this Court on the basis of federal question jurisdiction [DE 1]. The Complaint alleges violations of Section 1981 of the Civil Rights Act of 1866, 42 U.S.C. § 1981 ("Section 1981"), Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e to 2000e-17 ("Title VII"), the Age Discrimination in Employment Act, 29 U.S.C. § 626, et seq., ("ADEA"), the Florida Civil Rights Act of 1992, Fla. Stat. Ann. § 760.01-11, and common law claims for defamation and intentional infliction of emotional distress.

Hicks-Washington is a black American woman who is over the age of forty. She alleges that she was terminated from her job as the Assistant Director of Assisted Housing at the HACFL without warning and because of her race, color, perceived national origin and/or gender, that Defendants retaliated against her for engaging in protected activities, that defendants committed defamation against her in comments made in their filings and arguments to the EEOC, and that Defendants' statements were intentional and caused her emotional distress. The Complaint raises ten counts regarding her termination: (1) disparate treatment in violation of Title VII; (2) disparate treatment in violation of Section 1981; (3) age discrimination in violation of the ADEA; (4) discrimination on the basis of race, color, perceived national origin, gender and/or age in violation of the Florida Civil Rights Act; (5) retaliation in violation of Section 1981; (6) retaliation in violation of Title VII; (7) retaliation in violation of the ADEA; (8) defamation per se; (9) general defamation; and (10) intentional infliction of emotional distress. She seeks $35 million in damages against Defendants.

On page 28 of the Complaint, Plaintiff sets forth a second set of factual allegations that pertain to Defendants' failure to rehire her. She raises ten counts regarding the failure to rehire: (1) disparate treatment in violation of Title VII; (2) disparate treatment in violation

of § 1981; (3) discrimination in violation of the ADEA; (4) discrimination in violation of the Florida Civil Rights Act of 1992; (5) retaliation in violation of § 1981; (6) retaliation in violation of Title VII; (7) retaliation in violation of the ADEA; (8) common law defamation "per se"; (9) common law general defamation; and (10) intentional infliction of emotional distress.

Defendants have moved to dismiss the Complaint in its entirety, to strike portions of the Complaint, or in the alternative, for summary judgment [DE 4]. Plaintiff filed a responsive memorandum on August 2, 2018 [DE 5]. No reply was filed, and this matter is now ripe for consideration.

II. DISCUSSION

Defendants move to strike certain paragraphs in Plaintiff's Complaint because they recite confidential mediation statements made by Defendants at the EEOC mediation in violation of 5 U.S.C. § 574(c). Defendants also move to dismiss the common law claims for defamation and intentional infliction of emotional distress for failure to state a claim upon which relief can be granted, as well as on grounds of absolute and sovereign immunity. Further, Defendants argue that despite the shotgun nature of Plaintiff's Complaint, the allegations of the Complaint fail to state claims for race or color, national origin, gender or age-based disparate treatment, or retaliation. Finally, English argues that the Complaint fails to indicate whether he is being sued in his individual or official capacity and, if he is being sued in his individual capacity, the claims are barred by the doctrine of qualified immunity. He also argues that the Title VII and ADEA claims against him are barred because an individual is not a proper party to Title VII or ADEA claims.

The undersigned notes that Hicks-Washington is appearing pro se. "Pro se pleadings are held to a less stringent standard than pleadings drafted by attorneys" and are to be liberally construed. Bingham v. Thomas, 654 F.3d 1171, 1175 (11 th Cir. 2011). However, the leniency afforded pro se litigants neither authorizes nor requires the Court "to serve as de facto counsel or to rewrite an otherwise deficient pleading in order to sustain an action." Shuler v. Ingram & Assocs., 441 F. App'x 712, 717 n.3 (11th Cir. 2011). Pro se litigants are subject to the rules of court and the relevant law. Moon v. Newsome, 863 F.2d 835, 837 (11th Cir. 1989).

A. Motion to Strike

"A 'court may strike from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.' " Nash v. O.R. Colan Group, LLC, 2012 WL 4338817, at *1 (S.D.Fla. Sept. 20, 2012) (citing Fed. R. Civ. P. 12(f)). A motion to strike is intended to clean up the pleadings, removing irrelevant or otherwise confusing materials. See 700 Liberty Media Holdings, LLC v. Wintice Group, Inc.,2010 WL 2367227, at *1 (M.D.Fla. June 14, 2010) (noting that motions to strike are used to avoid unnecessary forays into immaterial matters).

Defendants move to strike those allegations in the Complaint that reference statements Defendants made during the EEOC mediation [DE 1-4, ¶ 81-86]. Hicks-Washington does not object to those allegations being stricken [DE 5, n.2]. Accordingly, the undersigned recommends that paragraphs 81-86 be stricken.

In addition, the undersigned notes that the Complaint contains a large amount of redundant and immaterial matter. For example, paragraphs 13 to 26 set forth a history of the civil rights laws and the circumstances that led to their enactment. These allegations

are more in the nature of argument and are not elements of Plaintiff's claims. The undersigned, therefore, recommends that paragraphs 13 to 26 be stricken as well.

In her opposition memorandum [DE 5, p. 20], Washington-Hicks asks the Court for leave to amend her Complaint to bring claims against the attorneys who represented Defendants before the EEOC. She intends to name these attorneys "as parties to this action so the Court can use its inherent power to issue disciplinary and monetary sanctions against the Defendants' former legal counsel – for intentional violations under the Florida Rules of Professional Conduct." Id. The undersigned recommends that Plaintiff not be permitted to name Defendants' former attorneys as parties to this case. This Court is unable to sanction lawyers for conduct that did not occur in this Court. Accordingly, any allegations concerning Defendants' former attorneys are immaterial and impertinent and subject to being stricken.

B. Motion to Dismiss

Several matters raised in Defendants' Motion to Dismiss can be resolved without lengthy discussion, and those matters are addressed immediately below. Other issues pertaining to Plaintiff's civil rights claim and the pleading itself are addressed in greater length, infra.

1. Common law claims

Defendants move to dismiss the common law defamation and intentional infliction of emotional distress claims (Counts 8, 9, and 10). Plaintiff agrees that these counts fail to state a claim and should be dismissed [DE 5, p. 3]. Accordingly, the undersigned recommends that Counts 8, 9, and 10 be dismissed with prejudice.

2. Claims Against Defendant English

Defendant English moves to dismiss the civil rights claims against him because (1) it is unclear whether he is being sued in his individual or official capacity, and (2) he is not individually subject to suit for Title VII and ADEA claims. Plaintiff asks the court to dismiss the claims against English in his official capacity [DE 5, p. 21] but seeks leave to file an amended complaint against English to raise a claim under 42 U.S.C. § 1983. The undersigned cannot evaluate a claim that has not yet been made, but does recommend that Plaintiff's claims against English for violations of § 1981, Title VII, the ADEA, and the Florida Civil Rights Act be dismissed with prejudice.

3. Claims for National Origin Discrimination

Hicks-Washington alleges national origin discrimination in violation of Title VII and the Florida Civil Rights Act. Yet, she admits that she was born and raised in North Carolina [DE 1-4, ¶ 34]. The undersigned is not aware of any legal basis for claiming national origin discrimination on the basis of state of birth:

> National origin discrimination does not encompass discrimination against someone because of their origin in a particular state or region of the United States. See Storey v. Burns Int'l Sec. Services, 390 F.3d 760, 766 (3d Cir.2004) ("Following Espinoza, the few courts that have considered the issue directly have rejected 'national origin' claims based on Confederate or Southern American heritage."); Fowler v. Visiting Nurse Serv. of N.Y., 06 CIV. 4351(NRB), 2007 WL 3256129 (S.D.N.Y. Oct. 31, 2007) ("the regional differences among the people of this country do not create protected classes"); Langadinos v. Appalachian Sch. of Law, 1:05CV00039, 2005 WL 2333460, at *8 (W.D.Va. Sept.25, 2005) (plaintiff's background in the Northeastern part of the United States was not a protected trait).

Gottschalk v. City & Cty. of San Francisco,2013 WL 557010, at *8 (N.D. Cal. Feb. 12, 2013). Accordingly, the undersigned recommends that Plaintiff's claims for national origin discrimination be dismissed with prejudice.

4. Plaintiff's Complaint

In her opposition memorandum, Plaintiff explains that she "wrote her detailed and highly organized complaint as if it were a motion for summary judgment" [DE 5, p. 17]. Therein lies the problem.

Federal Rule of Civil Procedure 8(a)(2) requires that a pleading contain a "short and plain statement of the claim" showing that the pleader is entitled to relief. Fed. R. Civ. P. 8(a)(2). Thereunder, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (200() (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). Consequently, "to state a plausible claim for relief, the plaintiff[] must plead 'factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1268 (11th Cir. 2009) (alteration added) (quoting Iqbal, 556 U.S. at 678).

The opposite of a short and plain statement of the claim is what is known as a "shotgun" pleading. "'Shotgun' pleadings are cumbersome, confusing complaints that do not comply with these pleading requirements. We have repeatedly condemned shotgun pleadings." See Weiland v. Palm Beach Cty. Sheriff's Office, 792 F.3d 1313, 1321–23 nn. 11–15 (11th Cir. 2015). There are four basic types of shotgun pleadings: (1) those in which each count adopts the allegations of all preceding counts; (2) those that do not re-allege all preceding counts but are replete with conclusory, vague, and immaterial facts not

obviously connected to any particular cause of action; (3) those that do not separate each cause of action or claim for relief into a different count; and (4) those that assert multiple claims against multiple defendants without specifying which applies to which. Id. at 1321–23 (quotations omitted). "The unifying characteristic of all types of shotgun pleadings is that they fail to . . . give the defendants adequate notice of the claims against them and the grounds upon which each claim rests." Id. at 1323. Yeyille v. Miami Dade Cty. Pub. Sch., 643 F. App'x 882, 884 (11th Cir. 2016).

Plaintiff's Complaint is a shotgun pleading in the first sense: each count repeats and re-alleges all of the preceding paragraphs and counts. In addition, having admittedly been drafted as a motion for summary judgment, the Complaint is also a shotgun pleading in the second sense: it is replete with conclusory, vague and immaterial facts not obviously connected to a particular cause of action. For these reasons, the undersigned recommends that the Complaint be dismissed with leave to amend.

To state a claim for discrimination on the basis of race, age, or gender, Plaintiff must allege facts showing that she (1) belongs to a protected class; (2) was qualified to do the job; (3) was subjected to an adverse employment action; and (4) was replaced by or treated differently than somebody outside the protected class. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (race); Hinson v. Clinch County, Ga. Bd. of Educ., 231 F.3d 821, 828 (11th Cir. 2000) (gender); Burke-Fowler v. Orange County, 447 F.3d 1319 (11th Cir. 2006) (age). Given the shotgun nature of the Complaint, it is unclear whether Plaintiff has, or indeed can, allege the elements of a discrimination claim based upon race, age, or gender. Although Defendants move for summary judgment, the undersigned recommends that Plaintiff be afforded the opportunity to submit an amended complaint that

contains a short and plain statement her claims with sufficient factual detail to allow the Court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678.

III. CONCLUSION

As set forth above, Plaintiff's Complaint is a shotgun pleading that contains a large amount of irrelevant and immaterial allegations. In addition, certain claims raised by Plaintiff fail as a matter of law. Accordingly, the undersigned RECOMMENDS that Defendants' Motion to Strike and Motion to Dismiss, or in the Alternative, Motion for Summary Judgment [DE 4] be GRANTED IN PART and DENIED IN PART, as follows:

1. That the allegations contained in paragraphs 13 to 26 and 81 to 86 be STRICKEN and not re-alleged;
2. That Plaintiff's claims for defamation per se, common law defamation, and intentional infliction of emotional distress (Counts 8, 9, and 10) be DISMISSED WITH PREJUDICE;
3. That Plaintiff's claims for national origin discrimination be DISMISSED WITH PREJUDICE;
4. That the disparate treatment and retaliation claims against Tam English (Counts 1, 2, 3, 4, 5, 6, and 7) be DISMISSED WITH PREJUDICE;
5. That the remainder of Plaintiff's Complaint be dismissed without prejudice and that Plaintiff be afforded the opportunity to file an Amended Complaint consistent with the analysis set forth in this Report and Recommendation;
6. That Plaintiff not be permitted to file a claim against Defendants' EEOC attorneys; and

7. That Defendants' Motion for Summary Judgment be DENIED WITHOUT PREJUDICE to renew, if appropriate, after Plaintiff files an Amended Complaint.

The parties will have fourteen (14) days from the date of being served with a copy of this Report and Recommendation within which to file written objections, if any, with the Honorable Federico A. Moreno, United States District Judge. Failure to file objections timely shall bar the parties from a de novo determination by the District Judge of an issue covered in the Report and shall bar the parties from attacking on appeal unobjected-to factual and legal conclusions contained in this Report except upon grounds of plain error if necessary in the interest of justice. See 28 U.S.C. § 636(b)(1); Thomas v. Arn, 474 U.S. 140, 149 (1985); Henley v. Johnson, 885 F.2d 790, 794 (1989); 11th Cir. R. 3-1 (2016).

DONE AND SUBMITTED in Chambers, Fort Lauderdale, Florida, this 21st day of August 2018.

BARRY S. SELTZER
United States Magistrate Judge

Copies furnished via CM/ECF to:

Hon. Federico A. Moreno
Counsel of record via CM/ECF and to:

Carolyn Hicks-Washington
3613 Lime Hill Road
Lauderhill, FL 33319

Appendix I

AO 245B (Rev. 10/15) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

Western District of Arkansas

UNITED STATES OF AMERICA
v.
BARBARA LOUISE BAER

JUDGMENT IN A CRIMINAL CASE

Case Number: 6:15CR60017-001
USM Number: 12592-010
Sal Intagliata
Defendant's Attorney

THE DEFENDANT:

X pleaded guilty to count(s) One of the Information on May 22, 2015.

☐ pleaded nolo contendere to count(s) which was accepted by the court.

☐ was found guilty on count(s) after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U. S. C. 641	Theft of Public Funds (Class C Felony)	03/29/2014	I

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

March 31, 2016
Date of Imposition of Judgment

/s/ Susan O. Hickey
Signature of Judge

The Honorable Susan O. Hickey, U. S. District Judge
Name and Title of Judge

April 1, 2016
Date

DEFENDANT: BARBARA LOUISE BAER
CASE NUMBER: 6:15CR60017-001

PROBATION

The defendant is hereby sentenced to probation for a term of: two (2) years

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of placement on probation and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*

X The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*

X The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*

☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*

☐ The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or restitution, it is a condition of probation that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A X Lump sum payment of $ 6,143.90 due immediately, balance due

☐ not later than _____, or
X in accordance ☐ C, ☐ D, ☐ E, or X F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F X Special instructions regarding the payment of criminal monetary penalties:

During probation, payments shall be made in monthly installment amounts of not less than 10% of the defendant's net monthly household income, or $100 per month, whichever is greater.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

MEMORANDUM

To: Honorable J. Thomas Marten
Chief U.S. District Judge

From: Annelies M. Snook
U.S. Probation Officer Assistant

Reviewed: Chris S. McNiel
Supervisory U.S. Probation Officer

Re: Barbara Louise Baer
Case No. 1083 6:16CM60023-001
SUSPENSION OF SUBSTANCE ABUSE TREATMENT CONDITION

Date: May 4, 2016

On 03/31/2016, the above referenced defendant was sentenced by the Honorable Susan O. Hickey, U.S. District Judge, for the offense of Public Money - Property Or Records. As a condition of the defendant's supervised release, she was ordered by the Court to participate in a program for substance abuse treatment. Jurisdiction for this case has been transferred to the District of Kansas.

The defendant commenced supervised release on 03/31/2016, and has been subject to random urine testing for illegal substances by the probation office. All tests have been negative and there are no indications the defendant has used illegal drugs. Therefore, she does not appear to be in need of substance abuse treatment and this officer respectfully recommends that the substance abuse treatment condition be suspended at this time. Suspending the condition does not remove it but allows the probation officer to hold off on referring the defendant to a treatment or drug testing program unless warranted. If treatment is indicated in the future, the officer can implement the condition and make the appropriate referral. If you have questions regarding this request or require additional information, please feel free to contact this officer.

COURT CONCURS X

COURT DOES NOT CONCUR _____

s/ J. Thomas Marten
U.S. District Judge

May 5, 2016
Date

U.S. Probation and Pretrial Services / District of Kansas / Wichita
401 N. Market, 3rd Floor - Wichita KS 67202-2011 - 316.315.4400 - FAX: 316.315.4401 or 4402 - 1.888.224.1458

Appendix J

BLUEROCK
LEGAL, P.A.
A PRIVATE LAW FIRM

Direct Dial: (305) 981-4300
Facsimile: (305) 981-4304
dgonzalez@bluerocklegal.com

February 2, 2017

Via: U.S. Mail
Katherine Gonzalez, Investigator
Equal Employment Opportunity Commission
100 S.E. 2nd Street, Suite 1500
Miami, FL 33131

Re: Carolyn Washington v. The Housing Authority of the City of Ft. Lauderdale, Florida
EEOC Charge No. 510-2016-02801

Dear Ms. Gonzalez:

As you file will reflect, this law firm represents The Housing Authority of the City of Ft. Lauderdale, Florida ("Respondent") in defense of the charge of employment discrimination filed by Carolyn Washington ("Charging Party"). This letter and the attached documents will serve as the Respondent's position statement in response to the charge.

Preliminary Statement

Respondent is a municipal agency that provides housing opportunities to qualifying individuals. Respondent administers public housing programs sponsored by the federal, state and local governments. The Respondent receives partial funding from the U.S. Department of Housing and Urban Development ("HUD"), and is required to follow HUD's strict regulations in managing communities.

The Charging Party worked for Respondent as the Assistant Director of Section 8 from 2005 to 2010, and as the Assistant Director of Assisted Housing from 2010 to 2015. The Respondent's "Section 8" Department is a subsidized housing program in which participants receive housing subsidies for the rental of housing in the private marketplace. The Housing Authority administers that program with an internal staff of trained employees who accept applications, supervise the process of awarding housing subsidies to applicants, monitor the quality and care of the living units available to participants, and every other aspect of the program. It is a busy office performing important work.

10800 Biscayne Boulevard | Suite 410 | Miami, FL 33161
www.bluerocklegal.com

The Charging Party and her supervisor were terminated from employment at the same time and for the same reasons. The Charging Party could not keep a stable staff of competent personnel in the department. Ms. Washington had an oppressive management style and, for several years, employees had resigned from the department citing the way that they had been treated by her. Employee turnover in the department was extreme during the last year of her employment. The Charging Party was terminated on November 13, 2015. Since then, turnover has moderated.

The present charge is for alleged "age" discrimination. The Charging Party alleges that she was employed by the Respondent as an Assistant Director of Assisted Housing until she was "terminated because of [her] age by Executive Director, Tam English, and Chief Financial Officer, Michael Tadros." She alleges that Mr. English "on more than one occasion mentioned to my Supervisor, Veronica Lopez, and I that we were getting older and who do we have to replace us." She claims that "[t]his was a pattern or practice" because "in 2010, we were provided with an additional workload that included a title change, that was previously assigned to" two other employees. The Charging Party claims that she was discharged on November 16, 2015, and that she was replaced "by Anita Flores," who she alleges is "under 40 years of age." The Charging Party also claims that she was subjected to hiring discrimination after she applied to the Director of Housing Choice Voucher Program position and was not given an interview for the position. She alleges that the reason she was given for her termination was that the Respondent "was moving in a different direction."

We have conducted an investigation and we have determined that the charge is entirely without merit. The Charging Party was terminated for legitimate reasons that had nothing to do with age discrimination. The Charging Party had a harsh management style that created a difficult and uncomfortable work environment, increased workplace stress, and decreased employee morale. The Charging Party's harsh management style drove many employees away over the years. The Charging Party's department had extreme levels of employee turnover and resulting instability. The Respondent terminated the Charging Party in order to improve its work environment and maintain a stable workforce.

Background Information

The Charging Party was hired by the Respondent in October, 2005, as the Assistant Director of Section 8. The Respondent had then and has now three departments, "Section 8," "Public Housing," and "Affordable Housing." "Section 8" is housing voucher program in which the Respondent provides financial assistance to qualifying residents to aid the residents with their housing rental costs in the private marketplace. The Respondent does not own any of the residential properties that are part of Section 8. The residential properties are owned by private landlords, and qualifying residents use the Housing Authority's financial assistance to pay rent to private landlords.

Conversely, in "Public Housing," the Respondent owns and manages residential properties and rents out property units to qualifying low-income residents. The Housing Authority operates and maintains its own properties with local managers and maintenance staff. Rental payments are made by participants in the program to the Housing Authority, not a private landlord. The Respondent also has a third department, "Affordable Housing," in which the Respondent also

provides affordable housing owned and is managed by the Respondent for qualifying low-income residents.

The Charging Party was initially employed in Section 8, not Public Housing or Affordable Housing. As the Assistant Director of Section 8, the Charging Party's job duties entailed assisting the Director of Section 8 with running the whole department. This included directly supervising Section 8 staff, ensuring compliance with federal, state, and local laws and regulations that govern the Respondent, preparing reports to agencies such as the U.S. Department of Housing and Urban Development ("HUD"), reviewing applications for Section 8 assistance, training staff members, and many other duties. The Charging Party worked at an administrative office that has a staff of approximately 20 employees, though the number of employees working in the department tended to fluctuate under the Charging Party's supervision. The Charging Party was directly supervised by Ms. Veronica Lopez, the Director of Section 8.

The Charging Party was knowledgeable about Section 8. She had strong knowledge of housing regulations and how the department was supposed to function. However, a very important issue with the Charging Party was apparent for some time. She exhibited a harsh and overbearing management style and inability to get along with the subordinate employees in the department. She was known to berate employees, make sarcastic and demeaning comments, and deliver criticism harshly.

The Charging Party received annual performance reviews from her supervisor, Ms. Lopez. While the reviews were mostly positive, they contained negative comments about the Charging Party's communication with and leadership of employees. The performance reviews are attached as Exhibit A. These negative comments consistently appeared on her performance reviews throughout her employment. The Charging Party was continually reminded of her mistreatment of employees. The Housing Authority tolerated this part of her performance for years because of her valuable knowledge of Section 8 programs, but she continually failed to improve.

The Charging Party's 2007 performance review noted a complaint by one of the Charging Party's subordinates that the Charging Party responded to inquiries "indicating impatience" or "sarcastic comments" such as "well you guys think you know everything" and "were you not listening when I explained this to you." In 2009, her performance review noted that the Charging Party "may become frustrated in the low performance of employees" and which results in her "delivering criticism that may be tinged with an opinion on the reason for the employee's failure to perform." The performance review recommended management training so that the Charging Party can improve how she delivers criticism. Her 2010 performance review noted that the Charging Party "needs to learn to monitor her body language to avoid transmitting the wrong message" and that "she should strive to maintain control of all areas of communication."

These performance evaluations were completed by the Charging Party's supervisor, Veronica Lopez. Ms. Lopez was terminated along with the Charging Party and for the same reasons as the Charging Party, fomenting instability in the staff in the department.

In 2010, the Charging Party's title was changed to Assistant Director of Assisted Housing, which included management responsibilities over both Section 8 and Public Housing. She retained

her management responsibilities in Section 8, but the new title added limited supervisory duties over two community managers in the Public Housing department. Community managers are on-site managers of the residential properties in Public Housing Department, whose duties include collecting rent, attending to the needs of residents, inspecting property units, scheduling and performing maintenance, among other duties. With the title change, the Charging Party supervised two community managers and several residential properties in the Public Housing Department. She continued to be directly supervised by Ms. Lopez, who was given the new title of Director of Assisted Housing. The Respondent added these additional supervisory duties to the Charging Party and Ms. Lopez because the Respondent was shrinking its Public Housing Department, and the Charging Party and Ms. Lopez were able to take on management duties of the smaller department.

The Charging Party's management style did not improve. A performance review dated February 2, 2011, noted that, when working with subordinates, she must "strive to assure that when asking open questions she waits until the full response is obtained prior to questioning further and then giving guidance attempting not to show her frustration through body language." A second performance review from 2011, dated September 8, 2011, noted that "she becomes frustrated at time with some employees' failure to discharge their duties" and that her frustration "influence[s] her own delivery of expectations" and that she must improve her delivery of criticism. Her 2012 performance review noted that she must "understand that" employees "are to be evaluated against performance standards not against each other." Her 2014 performance review noted that she would "benefit from training in Conflict Resolution and should seek the opportunity to participate in such training to assist her in mediating issues arising between employee and/or with her own subordinates."

The Charging Party's management style created a difficult and uncomfortable work environment that drove many employees away. This created considerable turnover and instability in the Respondent's workforce for several years. We have attached as Exhibit B a list of the employees that abandoned employment with the Respondent over the years. It is important to note that Respondent only employs approximately 20 employees at the office where the Charging Party worked, and the Charging Party also supervised an additional two employees Community Managers that worked at other locations. In 2012, 12 employees (more than half) terminated employment. In 2013, 9 employees left (nearly half). In 2014, 7 employees left.

And finally, in 2015, the year that the Charging Party was terminated from employment, 14 employees left the department. In the year of her termination, nearly 75% of the employees working for the Charging Party left their jobs. In a few cases over the years, an employee in the department had been terminated from employment usually because the employee did not have the skills necessary to do the job. The overwhelming majority of these employees, however, quit their jobs. The Respondent was consistently turning over an average of greater than 50% of its staff every year.

Many of the employees who left specifically cited the Charging Party's management style issues as the reason for leaving. One employee, a Community Manager named Felix Mercedes, would not even speak to the Charging Party when he resigned. He had started in June, 2013, and resigned in November, 2014. He went to the Respondent's Human Resources Manager, Ms.

Andrea Ayala, and resigned abruptly. He returned his assigned mobile phone and keys to Ms. Ayala. Ms. Ayala informed him that he must return his phone and keys to his supervisor, the Charging Party. Mr. Mercedes refused to be in the same room with the Charging Party. He did not want to see or speak to the Charging Party. Mr. Mercedes's resignation was sudden and he was so emotional that he did not complete an exit interview, which is the Respondent's standard procedure for exiting employees.

Several employees who resigned did provide Exit Interviews, and they cited the Charging Party's harsh management and the uncomfortable work environment as a reason for their resignation. Those Exit Interview Forms are attached as Exhibit C. In each attached Exit Interview, the resigning employee rated the work environment as "Poor" and stated, in response to a question about whether the employee would want to work for the same supervisor (the Charging Party) if they returned, that they would not. One employee who resigned, Ms. Anita Flores, in response to the question of how the Respondent could have prevented her from leaving, stated "removed me from the supervision of Carolyn Hicks Washington [the Charging Party]." Ms. Flores resigned in June, 2012.

Other resigning employees had similarly negative comments. Ms. Barbara Colas complained of a poor work environment that included "yelling across the office" and complained of the "way clients and coworkers were spoken to." Ms. Raquel Brutus-Thomas stated that her feelings changed about her position after she was first hired due to "environment and management" and that the work environment was "stressful and burdensome due to high turnover" and "decrease in morale. She rated her supervisor (the Charging Party) as "Poor" in the areas of "showing fairness," "providing appropriate recognition," "solving problems promptly," "following policies and procedures," "communicating with staff," "encouraging feedback," and "knowing how to do her job." She also reported feeling "harassed" by her supervisor "in a manner to suggest" that employees "are taking questionable measures to get their work done or required to go beyond the scope of what is required and/or necessary."

The instability caused by the Charging Party created staffing problems for the Respondent. The work in the Section 8 Department can be, at times, stressful and can require long hours. But the staff shortages occasioned by the Charging Party made matters much worse. The Respondent was continuously understaffed, which forced other employees to take on extra work. Employees were often required to work late into the night and occasionally on weekends to complete the work. This dynamic had the effect of further reducing employee morale.

The Respondent's Executive Director, Mr. Tam English, had been concerned about the excessive turnover for some time by the time he made the decision to terminate the Charging Party. While he realized that any employer will have some natural turnover, he was concerned that the turnover in Section 8 was far greater than any other agency in the area. The Housing Authority of Broward County, for example, had a staff of employees that reportedly enjoyed working for them and that there was very little turnover.

Mr. English decided that a change needed to be made to improve employee morale and to maintain a stable workforce. He decided that the Charging Party and Ms. Lopez needed to be

terminated and new management hired. Thus, on November 13, 2015,[1] Mr. English met with the Charging Party and informed her of her termination from employment. Mr. English told the Charging Party that the Respondent was "moving in another direction." The Respondent reorganized its management structure, which included eliminating the Charging Party's position after she was terminated. Mr. English declined to discuss the details with the Charging Party for two reasons. First, the Charging Party was well aware of her overbearing management style, the low employee morale, and excessive turnover in her department. The second reason was to protect the Charging Party's future employment prospects. As the Respondent is a government agency, Mr. English knew that the reason for the Charging Party's termination would become part of the public record. Mr. English did not desire to limit the Charging Party's future job prospects by unnecessarily discussing the negative details in the public record.

The Charging Party's claim in the charge that she was replaced by Anita Flores is false. The Respondent did not replace the Charging Party. Instead, the Respondent eliminated her position and only hired a new Director of Assisted Housing to replace Ms. Lopez. The person who was hired as the Director of Assisted Housing was Ms. Medina Johnson-Jennings. It is also false that the Charging Party was replaced by someone "under 40 years of age," as alleged in the charge. Ms. Johnson was 43 years of age at the time she was hired.

Ms. Flores was rehired by the Respondent shortly before the Charging Party was terminated. She was rehired as a Community Manager in the Affordable Housing department. She was placed at a residential property in the Public Housing department taking care of maintenance, collecting rent, inspecting units, and performing other managerial duties at the property. She was rehired into that position because she expressly refused to work with the Charging Party. She was not rehired to the Charging Party's position.

Ms. Flores had previously been employed as an "Intake Coordinator" under the supervision of the Charging Party, and her job duties included reviewing and processing applications for Section 8 assistance and supervising intake staff. She resigned in January, 2015, and her Exit Interview is attached. She resigned because she said that she could no longer stand working under the Charging Party. Ms. Flores applied to be a Community Manager in the Affordable Housing department because that position placed her at a residential property and away from the Charging Party and Ms. Lopez. At the time that she was rehired, Ms. Flores was not aware that the Charging Party and Ms. Lopez might be terminated.

After the Charging Party had been terminated, Ms. Flores was offered a transfer to her prior position of Intake Coordinator in Section 8. She accepted the transfer, as she knew that she would no longer have contact with the Charging Party and Ms. Lopez in that position. Ms. Flores is still currently employed as an Intake Coordinator by the Respondent. She was never employed as Assistant Director of Assisted Housing, the Charging Party's former role.

After terminating the Charging Party, the Respondent saw an immediate improvement in its retention of employees. In 2016, the year after the Charging Party was terminated, there were only 5 employees turned over in the Section 8 office, a remarkable decrease from the 14 that were

[1] Although the charge alleges that her termination was on November 16, 2015, the Charging Party was actually terminated on November 13, 2015.

turned over in the prior year of 2015. This was the Respondent's lowest number of employee turnover since 2011.

The Charging Party applied after her termination for a vacancy as Director of Assisted Housing. She was not given an interview. The position that she applied for as Director of Assisted Housing had more responsibility than her prior position as Assistant Director of Assisted Housing. In other words, the Charging Party was applying for her boss' former job as the head of the Department.

The Respondent had just terminated the Charging Party for all of the reasons set forth above. The Respondent was certainly not going to "promote" her by rehiring her to an even higher management position after just having terminated her. The Charging Party was essentially asking for a promotion to her former supervisor's job after having just been terminated from her own job. The reasons for not having granted her an interview for this position are obvious.

The Charging Party's claim in the charge that that Mr. English ever said to the Charging Party that she was "getting older" or anything to that effect is a simple falsehood. The Charging Party simply fabricated that claim. There is absolutely no evidence that Mr. English ever considered the Charging Party's age.

It is worth noting that the Charging Party has claimed on prior occasions that her termination was premised on a variety of protected status. On December 4, 2015, after the Charging Party was terminated, she sent a letter to the Respondent where she made outlandish and unsupported accusations claiming that she was terminated because of her "race, color, gender, and age discrimination." The letter is attached as Exhibit D.

The present charge is for age discrimination. That claim has no more merit than the other claims for race, color and gender discrimination that have now been implicitly abandoned by the Charging Party.

The present charge should be dismissed.

Sincerely,

Daniel Eric Gonzalez

the Appellant of her constitutional right to due process and equal protection under the V and XIV Amendments to the U.S. Constitution:

- Allowed the HACFL to file an Answer and Affirmative Defenses only responding to the Appellant's federal claim of age discrimination (Count VI).
- Struck paragraphs concerning the EEOC's investigation per the Appellee's request, knowing that those facts demonstrated that the Appellee's counsel were raising frivolous defenses in violation of Fed. R. Civ. P. 11.
- Refusing to allow for Fed. R. Civ. P. 26(f) conference.
- Denying Appellant's January 30, 2019 Motion for Clarification/More Definite Statement after Appellee and counsel refused to admit or deny facts supporting claims of race, color and sex discrimination. Dkt. 33.
- Turning a blind eye to the Appellee's numerous, undisputed discovery abuses of HACFL and their counsel.

  1. Failed submit Initial Disclosures pursuant to Fed. R. Civ. P. 26. and never responded to Mrs. Washington's preliminary discovery questions;

  2. Failed to provide information about the issuance of a litigation hold, resulting in possible spoliation of evidence;

  3. Failed to produce electronically stored information ("ESI"). Although the Defendant scanned all physical documents, this does not constitute ESI; and

  4. Refused the Plaintiff to inspect documents: Rule 34(a) provides you with the right to inspect and copy documents and electronically stored information; to inspect, copy, test, and sample tangible things; to enter and to inspect, measure, survey, photograph, test, or sample land and property; and to observe machinery or manufacturing, production, distribution, and other business processes.
- Two days after issuing Order denying Appellant's Motion for Clarification, Judge Seltzer issued second Report "recommend[ing]" that seven of the Appellant's claims of discrimination be dismissed.
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- Falsely claiming to conduct a *de novo* review while falsely stating that the Appellant had not submitted an objection to Judge Seltzer's second Report.
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J. Scott Kirk
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Lincoln Plaza, Suite 1400
300 South Orange Avenue
Orlando, Florida 32801
skirk@rumberger.com
(Attorney for Defendant)

via United States Postal Service and I further certify that I e-mailed a copy of the foregoing document to the following:

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ljackson@rumberger.com
(Attorney for Defendant)

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February 2, 2017

Via: U.S. Mail
Katherine Gonzalez, Investigator
Equal Employment Opportunity Commission
100 S.E. 2nd Street, Suite 1500
Miami, FL 33131

Re: Carolyn Washington v. The Housing Authority of the City of Ft. Lauderdale, Florida
EEOC Charge No. 510-2016-02801

Dear Ms. Gonzalez:

As you file will reflect, this law firm represents The Housing Authority of the City of Ft. Lauderdale, Florida ("Respondent") in defense of the charge of employment discrimination filed by Carolyn Washington ("Charging Party"). This letter and the attached documents will serve as the Respondent's position statement in response to the charge.

Preliminary Statement

Respondent is a municipal agency that provides housing opportunities to qualifying individuals. Respondent administers public housing programs sponsored by the federal, state and local governments. The Respondent receives partial funding from the U.S. Department of Housing and Urban Development ("HUD"), and is required to follow HUD's strict regulations in managing communities.

The Charging Party worked for Respondent as the Assistant Director of Section 8 from 2005 to 2010, and as the Assistant Director of Assisted Housing from 2010 to 2015. The Respondent's "Section 8" Department is a subsidized housing program in which participants receive housing subsidies for the rental of housing in the private marketplace. The Housing Authority administers that program with an internal staff of trained employees who accept applications, supervise the process of awarding housing subsidies to applicants, monitor the quality and care of the living units available to participants, and every other aspect of the program. It is a busy office performing important work.

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The Charging Party and her supervisor were terminated from employment at the same time and for the same reasons. The Charging Party could not keep a stable staff of competent personnel in the department. Ms. Washington had an oppressive management style and, for several years, employees had resigned from the department citing the way that they had been treated by her. Employee turnover in the department was extreme during the last year of her employment. The Charging Party was terminated on November 13, 2015. Since then, turnover has moderated.

The present charge is for alleged "age" discrimination. The Charging Party alleges that she was employed by the Respondent as an Assistant Director of Assisted Housing until she was "terminated because of [her] age by Executive Director, Tam English, and Chief Financial Officer, Michael Tadros." She alleges that Mr. English "on more than one occasion mentioned to my Supervisor, Veronica Lopez, and I that we were getting older and who do we have to replace us." She claims that "[t]his was a pattern or practice" because "in 2010, we were provided with an additional workload that included a title change, that was previously assigned to" two other employees. The Charging Party claims that she was discharged on November 16, 2015, and that she was replaced "by Anita Flores," who she alleges is "under 40 years of age." The Charging Party also claims that she was subjected to hiring discrimination after she applied to the Director of Housing Choice Voucher Program position and was not given an interview for the position. She alleges that the reason she was given for her termination was that the Respondent "was moving in a different direction."

We have conducted an investigation and we have determined that the charge is entirely without merit. The Charging Party was terminated for legitimate reasons that had nothing to do with age discrimination. The Charging Party had a harsh management style that created a difficult and uncomfortable work environment, increased workplace stress, and decreased employee morale. The Charging Party's harsh management style drove many employees away over the years. The Charging Party's department had extreme levels of employee turnover and resulting instability. The Respondent terminated the Charging Party in order to improve its work environment and maintain a stable workforce.

Background Information

The Charging Party was hired by the Respondent in October, 2005, as the Assistant Director of Section 8. The Respondent had then and has now three departments, "Section 8," "Public Housing," and "Affordable Housing." "Section 8" is housing voucher program in which the Respondent provides financial assistance to qualifying residents to aid the residents with their housing rental costs in the private marketplace. The Respondent does not own any of the residential properties that are part of Section 8. The residential properties are owned by private landlords, and qualifying residents use the Housing Authority's financial assistance to pay rent to private landlords.

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The Charging Party was knowledgeable about Section 8. She had strong knowledge of housing regulations and how the department was supposed to function. However, a very important issue with the Charging Party was apparent for some time. She exhibited a harsh and overbearing management style and inability to get along with the subordinate employees in the department. She was known to berate employees, make sarcastic and demeaning comments, and deliver criticism harshly.

The Charging Party received annual performance reviews from her supervisor, Ms. Lopez. While the reviews were mostly positive, they contained negative comments about the Charging Party's communication with and leadership of employees. The performance reviews are attached as Exhibit A. These negative comments consistently appeared on her performance reviews throughout her employment. The Charging Party was continually reminded of her mistreatment of employees. The Housing Authority tolerated this part of her performance for years because of her valuable knowledge of Section 8 programs, but she continually failed to improve.

The Charging Party's 2007 performance review noted a complaint by one of the Charging Party's subordinates that the Charging Party responded to inquiries "indicating impatience" or "sarcastic comments" such as "well you guys think you know everything" and "were you not listening when I explained this to you." In 2009, her performance review noted that the Charging Party "may become frustrated in the low performance of employees" and which results in her "delivering criticism that may be tinged with an opinion on the reason for the employee's failure to perform." The performance review recommended management training so that the Charging Party can improve how she delivers criticism. Her 2010 performance review noted that the Charging Party "needs to learn to monitor her body language to avoid transmitting the wrong message" and that "she should strive to maintain control of all areas of communication."

These performance evaluations were completed by the Charging Party's supervisor, Veronica Lopez. Ms. Lopez was terminated along with the Charging Party and for the same reasons as the Charging Party, fomenting instability in the staff in the department.

In 2010, the Charging Party's title was changed to Assistant Director of Assisted Housing, which included management responsibilities over both Section 8 and Public Housing. She retained

her management responsibilities in Section 8, but the new title added limited supervisory duties over two community managers in the Public Housing department. Community managers are on-site managers of the residential properties in Public Housing Department, whose duties include collecting rent, attending to the needs of residents, inspecting property units, scheduling and performing maintenance, among other duties. With the title change, the Charging Party supervised two community managers and several residential properties in the Public Housing Department. She continued to be directly supervised by Ms. Lopez, who was given the new title of Director of Assisted Housing. The Respondent added these additional supervisory duties to the Charging Party and Ms. Lopez because the Respondent was shrinking its Public Housing Department, and the Charging Party and Ms. Lopez were able to take on management duties of the smaller department.

The Charging Party's management style did not improve. A performance review dated February 2, 2011, noted that, when working with subordinates, she must "strive to assure that when asking open questions she waits until the full response is obtained prior to questioning further and then giving guidance attempting not to show her frustration through body language." A second performance review from 2011, dated September 8, 2011, noted that "she becomes frustrated at time with some employees' failure to discharge their duties" and that her frustration "influence[s] her own delivery of expectations" and that she must improve her delivery of criticism. Her 2012 performance review noted that she must "understand that" employees "are to be evaluated against performance standards not against each other." Her 2014 performance review noted that she would "benefit from training in Conflict Resolution and should seek the opportunity to participate in such training to assist her in mediating issues arising between employee and/or with her own subordinates."

The Charging Party's management style created a difficult and uncomfortable work environment that drove many employees away. This created considerable turnover and instability in the Respondent's workforce for several years. We have attached as Exhibit B a list of the employees that abandoned employment with the Respondent over the years. It is important to note that Respondent only employs approximately 20 employees at the office where the Charging Party worked, and the Charging Party also supervised an additional two employees Community Managers that worked at other locations. In 2012, 12 employees (more than half) terminated employment. In 2013, 9 employees left (nearly half). In 2014, 7 employees left.

And finally, in 2015, the year that the Charging Party was terminated from employment, 14 employees left the department. In the year of her termination, nearly 75% of the employees working for the Charging Party left their jobs. In a few cases over the years, an employee in the department had been terminated from employment usually because the employee did not have the skills necessary to do the job. The overwhelming majority of these employees, however, quit their jobs. The Respondent was consistently turning over an average of greater than 50% of its staff every year.

Many of the employees who left specifically cited the Charging Party's management style issues as the reason for leaving. One employee, a Community Manager named Felix Mercedes, would not even speak to the Charging Party when he resigned. He had started in June, 2013, and resigned in November, 2014. He went to the Respondent's Human Resources Manager, Ms.

Andrea Ayala, and resigned abruptly. He returned his assigned mobile phone and keys to Ms. Ayala. Ms. Ayala informed him that he must return his phone and keys to his supervisor, the Charging Party. Mr. Mercedes refused to be in the same room with the Charging Party. He did not want to see or speak to the Charging Party. Mr. Mercedes's resignation was sudden and he was so emotional that he did not complete an exit interview, which is the Respondent's standard procedure for exiting employees.

Several employees who resigned did provide Exit Interviews, and they cited the Charging Party's harsh management and the uncomfortable work environment as a reason for their resignation. Those Exit Interview Forms are attached as Exhibit C. In each attached Exit Interview, the resigning employee rated the work environment as "Poor" and stated, in response to a question about whether the employee would want to work for the same supervisor (the Charging Party) if they returned, that they would not. One employee who resigned, Ms. Anita Flores, in response to the question of how the Respondent could have prevented her from leaving, stated "removed me from the supervision of Carolyn Hicks Washington [the Charging Party]." Ms. Flores resigned in June, 2012.

Other resigning employees had similarly negative comments. Ms. Barbara Colas complained of a poor work environment that included "yelling across the office" and complained of the "way clients and coworkers were spoken to." Ms. Raquel Brutus-Thomas stated that her feelings changed about her position after she was first hired due to "environment and management" and that the work environment was "stressful and burdensome due to high turnover" and "decrease in morale. She rated her supervisor (the Charging Party) as "Poor" in the areas of "showing fairness," "providing appropriate recognition," "solving problems promptly," "following policies and procedures," "communicating with staff," "encouraging feedback," and "knowing how to do her job." She also reported feeling "harassed" by her supervisor "in a manner to suggest" that employees "are taking questionable measures to get their work done or required to go beyond the scope of what is required and/or necessary."

The instability caused by the Charging Party created staffing problems for the Respondent. The work in the Section 8 Department can be, at times, stressful and can require long hours. But the staff shortages occasioned by the Charging Party made matters much worse. The Respondent was continuously understaffed, which forced other employees to take on extra work. Employees were often required to work late into the night and occasionally on weekends to complete the work. This dynamic had the effect of further reducing employee morale.

The Respondent's Executive Director, Mr. Tam English, had been concerned about the excessive turnover for some time by the time he made the decision to terminate the Charging Party. While he realized that any employer will have some natural turnover, he was concerned that the turnover in Section 8 was far greater than any other agency in the area. The Housing Authority of Broward County, for example, had a staff of employees that reportedly enjoyed working for them and that there was very little turnover.

Mr. English decided that a change needed to be made to improve employee morale and to maintain a stable workforce. He decided that the Charging Party and Ms. Lopez needed to be

terminated and new management hired. Thus, on November 13, 2015,[1] Mr. English met with the Charging Party and informed her of her termination from employment. Mr. English told the Charging Party that the Respondent was "moving in another direction." The Respondent reorganized its management structure, which included eliminating the Charging Party's position after she was terminated. Mr. English declined to discuss the details with the Charging Party for two reasons. First, the Charging Party was well aware of her overbearing management style, the low employee morale, and excessive turnover in her department. The second reason was to protect the Charging Party's future employment prospects. As the Respondent is a government agency, Mr. English knew that the reason for the Charging Party's termination would become part of the public record. Mr. English did not desire to limit the Charging Party's future job prospects by unnecessarily discussing the negative details in the public record.

The Charging Party's claim in the charge that she was replaced by Anita Flores is false. The Respondent did not replace the Charging Party. Instead, the Respondent eliminated her position and only hired a new Director of Assisted Housing to replace Ms. Lopez. The person who was hired as the Director of Assisted Housing was Ms. Medina Johnson-Jennings. It is also false that the Charging Party was replaced by someone "under 40 years of age," as alleged in the charge. Ms. Johnson was 43 years of age at the time she was hired.

Ms. Flores was rehired by the Respondent shortly before the Charging Party was terminated. She was rehired as a Community Manager in the Affordable Housing department. She was placed at a residential property in the Public Housing department taking care of maintenance, collecting rent, inspecting units, and performing other managerial duties at the property. She was rehired into that position because she expressly refused to work with the Charging Party. She was not rehired to the Charging Party's position.

Ms. Flores had previously been employed as an "Intake Coordinator" under the supervision of the Charging Party, and her job duties included reviewing and processing applications for Section 8 assistance and supervising intake staff. She resigned in January, 2015, and her Exit Interview is attached. She resigned because she said that she could no longer stand working under the Charging Party. Ms. Flores applied to be a Community Manager in the Affordable Housing department because that position placed her at a residential property and away from the Charging Party and Ms. Lopez. At the time that she was rehired, Ms. Flores was not aware that the Charging Party and Ms. Lopez might be terminated.

After the Charging Party had been terminated, Ms. Flores was offered a transfer to her prior position of Intake Coordinator in Section 8. She accepted the transfer, as she knew that she would no longer have contact with the Charging Party and Ms. Lopez in that position. Ms. Flores is still currently employed as an Intake Coordinator by the Respondent. She was never employed as Assistant Director of Assisted Housing, the Charging Party's former role.

After terminating the Charging Party, the Respondent saw an immediate improvement in its retention of employees. In 2016, the year after the Charging Party was terminated, there were only 5 employees turned over in the Section 8 office, a remarkable decrease from the 14 that were

[1] Although the charge alleges that her termination was on November 16, 2015, the Charging Party was actually terminated on November 13, 2015.

turned over in the prior year of 2015. This was the Respondent's lowest number of employee turnover since 2011.

The Charging Party applied after her termination for a vacancy as Director of Assisted Housing. She was not given an interview. The position that she applied for as Director of Assisted Housing had more responsibility than her prior position as Assistant Director of Assisted Housing. In other words, the Charging Party was applying for her boss' former job as the head of the Department.

The Respondent had just terminated the Charging Party for all of the reasons set forth above. The Respondent was certainly not going to "promote" her by rehiring her to an even higher management position after just having terminated her. The Charging Party was essentially asking for a promotion to her former supervisor's job after having just been terminated from her own job. The reasons for not having granted her an interview for this position are obvious.

The Charging Party's claim in the charge that that Mr. English ever said to the Charging Party that she was "getting older" or anything to that effect is a simple falsehood. The Charging Party simply fabricated that claim. There is absolutely no evidence that Mr. English ever considered the Charging Party's age.

It is worth noting that the Charging Party has claimed on prior occasions that her termination was premised on a variety of protected status. On December 4, 2015, after the Charging Party was terminated, she sent a letter to the Respondent where she made outlandish and unsupported accusations claiming that she was terminated because of her "race, color, gender, and age discrimination." The letter is attached as Exhibit D.

The present charge is for age discrimination. That claim has no more merit than the other claims for race, color and gender discrimination that have now been implicitly abandoned by the Charging Party.

The present charge should be dismissed.

Sincerely,

Daniel Eric Gonzalez

District Court allowed the Appellee and its counsel to avoid producing any evidence that would impeach their defense, and **before** deciding two of the Plaintiff's Motions to Compel, Judge Seltzer recommended dismissing all of the Plaintiff's claims.

Neither of the judges' "final decisions" on the merits discuss the actual language contained in the federal antidiscrimination laws cited in this case.[26] Since every case is unique, the "McDonnell Douglas *prima facie* case does not account for every act of discrimination that Title VII seeks to redress."[27] The tripartite formula is also not an "inflexible rule" nor meant to be applied rigidly. Teamsters at 358. Although the judges relied solely on the McDonnell Douglas tripartite formula to determine whether or not the Appellant was discriminated against, they should have looked at Title VII's statutory language. The finder of fact had to begin there, when making a determination of whether or not race, color, sex and/or age motivated the adverse employment decisions taken against an employee.

The bullet points below contain a list of the additional procedural decisions made by Judges Seltzer and Moreno, which have intentionally obstructed justice and deprived

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[26] Section 703(a) of Title VII states that it is a violation of this law for an employer:
(1) **to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his...terms, conditions, or privileges of employment, because of such individual's race, color...[or] sex**; or
(2) **to limit...employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.** (emphasis added) 42 U.S.C. § 2000e-2(a).

[27] Zac Pestine. "Securing Title VII's Purpose: Ensuring That We Have All of the Puzzle Pieces to Solve Employment Discrimination Claims." 2016. https://www.laborandemploymentcollege.org/images/pdfs/October2016newsletter/UnconsciousBiasDiscrimination.pdf.

the Appellant of her constitutional right to due process and equal protection under the V and XIV Amendments to the U.S. Constitution:

- Allowed the HACFL to file an Answer and Affirmative Defenses only responding to the Appellant's federal claim of age discrimination (Count VI).
- Struck paragraphs concerning the EEOC's investigation per the Appellee's request, knowing that those facts demonstrated that the Appellee's counsel were raising frivolous defenses in violation of Fed. R. Civ. P. 11.
- Refusing to allow for Fed. R. Civ. P. 26(f) conference.
- Denying Appellant's January 30, 2019 Motion for Clarification/More Definite Statement after Appellee and counsel refused to admit or deny facts supporting claims of race, color and sex discrimination. Dkt. 33.
- Turning a blind eye to the Appellee's numerous, undisputed discovery abuses of HACFL and their counsel.

  1. Failed submit Initial Disclosures pursuant to Fed. R. Civ. P. 26. and never responded to Mrs. Washington's preliminary discovery questions;

  2. Failed to provide information about the issuance of a litigation hold, resulting in possible spoliation of evidence;

  3. Failed to produce electronically stored information ("ESI"). Although the Defendant scanned all physical documents, this does not constitute ESI; and

  4. Refused the Plaintiff to inspect documents: Rule 34(a) provides you with the right to inspect and copy documents and electronically stored information; to inspect, copy, test, and sample tangible things; to enter and to inspect, measure, survey, photograph, test, or sample land and property; and to observe machinery or manufacturing, production, distribution, and other business processes.
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A Professional Association
Lincoln Plaza, Suite 1400
300 South Orange Avenue
Orlando, Florida 32801
skirk@rumberger.com
(Attorney for Defendant)

via United States Postal Service and I further certify that I e-mailed a copy of the foregoing document to the following:

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February 2, 2017

Via: U.S. Mail
Katherine Gonzalez, Investigator
Equal Employment Opportunity Commission
100 S.E. 2nd Street, Suite 1500
Miami, FL 33131

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The Charging Party was initially employed in Section 8, not Public Housing or Affordable Housing. As the Assistant Director of Section 8, the Charging Party's job duties entailed assisting the Director of Section 8 with running the whole department. This included directly supervising Section 8 staff, ensuring compliance with federal, state, and local laws and regulations that govern the Respondent, preparing reports to agencies such as the U.S. Department of Housing and Urban Development ("HUD"), reviewing applications for Section 8 assistance, training staff members, and many other duties. The Charging Party worked at an administrative office that has a staff of approximately 20 employees, though the number of employees working in the department tended to fluctuate under the Charging Party's supervision. The Charging Party was directly supervised by Ms. Veronica Lopez, the Director of Section 8.

The Charging Party was knowledgeable about Section 8. She had strong knowledge of housing regulations and how the department was supposed to function. However, a very important issue with the Charging Party was apparent for some time. She exhibited a harsh and overbearing management style and inability to get along with the subordinate employees in the department. She was known to berate employees, make sarcastic and demeaning comments, and deliver criticism harshly.

The Charging Party received annual performance reviews from her supervisor, Ms. Lopez. While the reviews were mostly positive, they contained negative comments about the Charging Party's communication with and leadership of employees. The performance reviews are attached as Exhibit A. These negative comments consistently appeared on her performance reviews throughout her employment. The Charging Party was continually reminded of her mistreatment of employees. The Housing Authority tolerated this part of her performance for years because of her valuable knowledge of Section 8 programs, but she continually failed to improve.

The Charging Party's 2007 performance review noted a complaint by one of the Charging Party's subordinates that the Charging Party responded to inquiries "indicating impatience" or "sarcastic comments" such as "well you guys think you know everything" and "were you not listening when I explained this to you." In 2009, her performance review noted that the Charging Party "may become frustrated in the low performance of employees" and which results in her "delivering criticism that may be tinged with an opinion on the reason for the employee's failure to perform." The performance review recommended management training so that the Charging Party can improve how she delivers criticism. Her 2010 performance review noted that the Charging Party "needs to learn to monitor her body language to avoid transmitting the wrong message" and that "she should strive to maintain control of all areas of communication."

These performance evaluations were completed by the Charging Party's supervisor, Veronica Lopez. Ms. Lopez was terminated along with the Charging Party and for the same reasons as the Charging Party, fomenting instability in the staff in the department.

In 2010, the Charging Party's title was changed to Assistant Director of Assisted Housing, which included management responsibilities over both Section 8 and Public Housing. She retained

her management responsibilities in Section 8, but the new title added limited supervisory duties over two community managers in the Public Housing department. Community managers are on-site managers of the residential properties in Public Housing Department, whose duties include collecting rent, attending to the needs of residents, inspecting property units, scheduling and performing maintenance, among other duties. With the title change, the Charging Party supervised two community managers and several residential properties in the Public Housing Department. She continued to be directly supervised by Ms. Lopez, who was given the new title of Director of Assisted Housing. The Respondent added these additional supervisory duties to the Charging Party and Ms. Lopez because the Respondent was shrinking its Public Housing Department, and the Charging Party and Ms. Lopez were able to take on management duties of the smaller department.

The Charging Party's management style did not improve. A performance review dated February 2, 2011, noted that, when working with subordinates, she must "strive to assure that when asking open questions she waits until the full response is obtained prior to questioning further and then giving guidance attempting not to show her frustration through body language." A second performance review from 2011, dated September 8, 2011, noted that "she becomes frustrated at time with some employees' failure to discharge their duties" and that her frustration "influence[s] her own delivery of expectations" and that she must improve her delivery of criticism. Her 2012 performance review noted that she must "understand that" employees "are to be evaluated against performance standards not against each other." Her 2014 performance review noted that she would "benefit from training in Conflict Resolution and should seek the opportunity to participate in such training to assist her in mediating issues arising between employee and/or with her own subordinates."

The Charging Party's management style created a difficult and uncomfortable work environment that drove many employees away. This created considerable turnover and instability in the Respondent's workforce for several years. We have attached as Exhibit B a list of the employees that abandoned employment with the Respondent over the years. It is important to note that Respondent only employs approximately 20 employees at the office where the Charging Party worked, and the Charging Party also supervised an additional two employees Community Managers that worked at other locations. In 2012, 12 employees (more than half) terminated employment. In 2013, 9 employees left (nearly half). In 2014, 7 employees left.

And finally, in 2015, the year that the Charging Party was terminated from employment, 14 employees left the department. In the year of her termination, nearly 75% of the employees working for the Charging Party left their jobs. In a few cases over the years, an employee in the department had been terminated from employment usually because the employee did not have the skills necessary to do the job. The overwhelming majority of these employees, however, quit their jobs. The Respondent was consistently turning over an average of greater than 50% of its staff every year.

Many of the employees who left specifically cited the Charging Party's management style issues as the reason for leaving. One employee, a Community Manager named Felix Mercedes, would not even speak to the Charging Party when he resigned. He had started in June, 2013, and resigned in November, 2014. He went to the Respondent's Human Resources Manager, Ms.

Andrea Ayala, and resigned abruptly. He returned his assigned mobile phone and keys to Ms. Ayala. Ms. Ayala informed him that he must return his phone and keys to his supervisor, the Charging Party. Mr. Mercedes refused to be in the same room with the Charging Party. He did not want to see or speak to the Charging Party. Mr. Mercedes's resignation was sudden and he was so emotional that he did not complete an exit interview, which is the Respondent's standard procedure for exiting employees.

Several employees who resigned did provide Exit Interviews, and they cited the Charging Party's harsh management and the uncomfortable work environment as a reason for their resignation. Those Exit Interview Forms are attached as Exhibit C. In each attached Exit Interview, the resigning employee rated the work environment as "Poor" and stated, in response to a question about whether the employee would want to work for the same supervisor (the Charging Party) if they returned, that they would not. One employee who resigned, Ms. Anita Flores, in response to the question of how the Respondent could have prevented her from leaving, stated "removed me from the supervision of Carolyn Hicks Washington [the Charging Party]." Ms. Flores resigned in June, 2012.

Other resigning employees had similarly negative comments. Ms. Barbara Colas complained of a poor work environment that included "yelling across the office" and complained of the "way clients and coworkers were spoken to." Ms. Raquel Brutus-Thomas stated that her feelings changed about her position after she was first hired due to "environment and management" and that the work environment was "stressful and burdensome due to high turnover" and "decrease in morale. She rated her supervisor (the Charging Party) as "Poor" in the areas of "showing fairness," "providing appropriate recognition," "solving problems promptly," "following policies and procedures," "communicating with staff," "encouraging feedback," and "knowing how to do her job." She also reported feeling "harassed" by her supervisor "in a manner to suggest" that employees "are taking questionable measures to get their work done or required to go beyond the scope of what is required and/or necessary."

The instability caused by the Charging Party created staffing problems for the Respondent. The work in the Section 8 Department can be, at times, stressful and can require long hours. But the staff shortages occasioned by the Charging Party made matters much worse. The Respondent was continuously understaffed, which forced other employees to take on extra work. Employees were often required to work late into the night and occasionally on weekends to complete the work. This dynamic had the effect of further reducing employee morale.

The Respondent's Executive Director, Mr. Tam English, had been concerned about the excessive turnover for some time by the time he made the decision to terminate the Charging Party. While he realized that any employer will have some natural turnover, he was concerned that the turnover in Section 8 was far greater than any other agency in the area. The Housing Authority of Broward County, for example, had a staff of employees that reportedly enjoyed working for them and that there was very little turnover.

Mr. English decided that a change needed to be made to improve employee morale and to maintain a stable workforce. He decided that the Charging Party and Ms. Lopez needed to be

terminated and new management hired. Thus, on November 13, 2015,[1] Mr. English met with the Charging Party and informed her of her termination from employment. Mr. English told the Charging Party that the Respondent was "moving in another direction." The Respondent reorganized its management structure, which included eliminating the Charging Party's position after she was terminated. Mr. English declined to discuss the details with the Charging Party for two reasons. First, the Charging Party was well aware of her overbearing management style, the low employee morale, and excessive turnover in her department. The second reason was to protect the Charging Party's future employment prospects. As the Respondent is a government agency, Mr. English knew that the reason for the Charging Party's termination would become part of the public record. Mr. English did not desire to limit the Charging Party's future job prospects by unnecessarily discussing the negative details in the public record.

The Charging Party's claim in the charge that she was replaced by Anita Flores is false. The Respondent did not replace the Charging Party. Instead, the Respondent eliminated her position and only hired a new Director of Assisted Housing to replace Ms. Lopez. The person who was hired as the Director of Assisted Housing was Ms. Medina Johnson-Jennings. It is also false that the Charging Party was replaced by someone "under 40 years of age," as alleged in the charge. Ms. Johnson was 43 years of age at the time she was hired.

Ms. Flores was rehired by the Respondent shortly before the Charging Party was terminated. She was rehired as a Community Manager in the Affordable Housing department. She was placed at a residential property in the Public Housing department taking care of maintenance, collecting rent, inspecting units, and performing other managerial duties at the property. She was rehired into that position because she expressly refused to work with the Charging Party. She was not rehired to the Charging Party's position.

Ms. Flores had previously been employed as an "Intake Coordinator" under the supervision of the Charging Party, and her job duties included reviewing and processing applications for Section 8 assistance and supervising intake staff. She resigned in January, 2015, and her Exit Interview is attached. She resigned because she said that she could no longer stand working under the Charging Party. Ms. Flores applied to be a Community Manager in the Affordable Housing department because that position placed her at a residential property and away from the Charging Party and Ms. Lopez. At the time that she was rehired, Ms. Flores was not aware that the Charging Party and Ms. Lopez might be terminated.

After the Charging Party had been terminated, Ms. Flores was offered a transfer to her prior position of Intake Coordinator in Section 8. She accepted the transfer, as she knew that she would no longer have contact with the Charging Party and Ms. Lopez in that position. Ms. Flores is still currently employed as an Intake Coordinator by the Respondent. She was never employed as Assistant Director of Assisted Housing, the Charging Party's former role.

After terminating the Charging Party, the Respondent saw an immediate improvement in its retention of employees. In 2016, the year after the Charging Party was terminated, there were only 5 employees turned over in the Section 8 office, a remarkable decrease from the 14 that were

[1] Although the charge alleges that her termination was on November 16, 2015, the Charging Party was actually terminated on November 13, 2015.

turned over in the prior year of 2015. This was the Respondent's lowest number of employee turnover since 2011.

The Charging Party applied after her termination for a vacancy as Director of Assisted Housing. She was not given an interview. The position that she applied for as Director of Assisted Housing had more responsibility than her prior position as Assistant Director of Assisted Housing. In other words, the Charging Party was applying for her boss' former job as the head of the Department.

The Respondent had just terminated the Charging Party for all of the reasons set forth above. The Respondent was certainly not going to "promote" her by rehiring her to an even higher management position after just having terminated her. The Charging Party was essentially asking for a promotion to her former supervisor's job after having just been terminated from her own job. The reasons for not having granted her an interview for this position are obvious.

The Charging Party's claim in the charge that that Mr. English ever said to the Charging Party that she was "getting older" or anything to that effect is a simple falsehood. The Charging Party simply fabricated that claim. There is absolutely no evidence that Mr. English ever considered the Charging Party's age.

It is worth noting that the Charging Party has claimed on prior occasions that her termination was premised on a variety of protected status. On December 4, 2015, after the Charging Party was terminated, she sent a letter to the Respondent where she made outlandish and unsupported accusations claiming that she was terminated because of her "race, color, gender, and age discrimination." The letter is attached as Exhibit D.

The present charge is for age discrimination. That claim has no more merit than the other claims for race, color and gender discrimination that have now been implicitly abandoned by the Charging Party.

The present charge should be dismissed.

Sincerely,

Daniel Eric Gonzalez

Appendix K

District Court allowed the Appellee and its counsel to avoid producing any evidence that would impeach their defense, and **before** deciding two of the Plaintiff's Motions to Compel, Judge Seltzer recommended dismissing all of the Plaintiff's claims.

Neither of the judges' "final decisions" on the merits discuss the actual language contained in the federal antidiscrimination laws cited in this case.[26] Since every case is unique, the "McDonnell Douglas *prima facie* case does not account for every act of discrimination that Title VII seeks to redress."[27] The tripartite formula is also not an "inflexible rule" nor meant to be applied rigidly. Teamsters at 358. Although the judges relied solely on the McDonnell Douglas tripartite formula to determine whether or not the Appellant was discriminated against, they should have looked at Title VII's statutory language. The finder of fact had to begin there, when making a determination of whether or not race, color, sex and/or age motivated the adverse employment decisions taken against an employee.

The bullet points below contain a list of the additional procedural decisions made by Judges Seltzer and Moreno, which have intentionally obstructed justice and deprived

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[26] Section 703(a) of Title VII states that it is a violation of this law for an employer:
(1) **to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his...terms, conditions, or privileges of employment, because of such individual's race, color...[or] sex,**; or
(2) **to limit...employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.** (emphasis added) 42 U.S.C. § 2000e-2(a).

[27] Zac Pestine. "Securing Title VII's Purpose: Ensuring That We Have All of the Puzzle Pieces to Solve Employment Discrimination Claims." 2016. https://www.laborandemploymentcollege.org/images/pdfs/October2016newsletter/UnconsciousBiasDiscrimination.pdf.

- Falsely claiming to conduct a *de novo* review while falsely stating that the Appellant had not submitted an objection to Judge Seltzer's second Report.
- Refusing to allow the parties an opportunity to have a hearing and/or to speak under oath
- Refusing to issue ethical judicial opinions. The concept of stare decisis was thrown out the window and decisions are not grounded in fact or law. Over the course of nine months, Judge Moreno's two substantive Orders which denied all eight of the Appellant's claims of discrimination, amount to no more than 5 pages in total while the magistrate judge's decisions total more than 35 pages.
- Waiting 10 days before trial was scheduled to commence to conclude that English's "getting old" comments did not constitute direct evidence of discrimination.
- Granting summary judgment in favor of HACFL, despite Appellee's failure to respond to facts surrounding claims of race, color and sex discrimination and without deciding Appellant's Request to Submit More Sufficient Responses, Dkt. 56.
- Closing the case with more than 8 procedural motions awaiting a decision.

Even a blind man could see that Judges Seltzer and Moreno harbored a pro-employer bias. In an attempt to prevent this outcome from happening, the Appellant, on numerous occasions throughout the litigation, sought for Judges Seltzer and Moreno to disqualify themselves pursuant to 28 U.S.C. §455. Each request was denied, Dkt. 21, while the finders of fact continued to violate Canons 1, 2 and 3 of the Judicial Code of Conduct, their Oaths of Office, the U.S. Constitution and various laws. The totality of their wrongdoing constitutes "fraud upon the Court by the Court."

As this case demonstrates, plaintiffs, especially those unrepresented by counsel and/or African Americans, are at a "distinct disadvantage at virtually every stage of the