IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CASE NO: 2020-025689-CA-01
SECTION: CA07
JUDGE: Maria de Jesus Santovenia

PORSCHA BELL et al

Plaintiff(s)

vs.

BAPTIST HOSPITAL OF MIAMI, INC.

Defendant(s)

_____/

ORDER GRANTING MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT AND FINAL JUDGMENT IN FAVOR OF DEFENDANT

THIS CAUSE came before the Court for hearing on Thursday, December 8, 2022, on the Motion (the "Motion") of Defendant, Baptist Hospital of Miami, Inc. ("Baptist"), to dismiss the Second Amended Complaint ("SAC") filed by Plaintiffs, Porscha Bell, Jovan Toomer, Natosha Williams and Monterio Tripplet, for lack of subject matter jurisdiction and, alternatively, for failure to state a cause of action. The Court, having reviewed the Motion, Plaintiffs' opposition thereto and the supplemental briefs filed at the Court's request by the parties in June 2022 regarding the issue of exhaustion of administrative remedies/lack of subject matter jurisdiction, having heard the arguments of counsel and having reviewed applicable case law, it is hereby

ORDERED and ADJUDGED that the Motion is GRANTED. The Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Plaintiffs filed their initial Complaint in this case on January 18, 2021. In that Complaint, Plaintiffs attempted to assert three claims against the University - - Race Discrimination in violation of the Florida Civil Rights Act ("FCRA") (Count I); Retaliation in violation of the FCRA (Count II); and Wrongful Discharge (Count III).

2. Following a specially set hearing on June 22, 2021, the Court entered an Order on June 24, 2021, dismissing all three claims *without prejudice* and providing specific guidance with respect to what must be included in an Amended Complaint in order to state a claim:

As to Count I (Plaintiffs' claim of discrimination), the Court treats Baptist's Motion as a motion for more definite statement and, as such, it is GRANTED. As to all alleged acts of discrimination based on disparate treatment, Plaintiffs shall allege ultimate facts to support a prima facie case, including the identification of one or more similarly situated comparator(s).

Baptist's Motion as to Count II (Plaintiffs' claim for retaliation), is GRANTED *without prejudice*. In amending Count II, Plaintiffs should include allegations to demonstrate that Plaintiffs' beliefs that Baptist's actions were unlawful were objectively reasonable in light of existing case law.

Baptist's Motion as to Count III of Plaintiffs' complaint is GRANTED *without prejudice*. Plaintiffs may attempt to state a claim that is recognized at common law and is not duplicative of other claims asserted in the complaint.

3. Plaintiffs filed their Amended Complaint on July 13, 2021. In their Amended Complaint, Plaintiffs eliminated Count III (their claim for wrongful discharge) and reasserted Counts I and II - - claims of discrimination and retaliation, respectively, in alleged violation of the FCRA. In so doing, however, Plaintiffs failed to comply with the Court's June 24, 2021 Order, quoted above. Counts I and II of the Amended Complaint were virtually indistinguishable from those counts as set forth in the initial Complaint, failed to identify any similarly situated comparator and failed to provide any factual basis to support their contention that they had engaged in protected conduct by complaining about conduct that was not unlawful. Accordingly, the same defects that the Court found to exist in those claims continued to exist.

4 The University moved to dismiss Plaintiffs' Amended Complaint, both for lack of subject matter jurisdiction for failure to exhaust administrative remedies and, alternatively, for failure to state a claim. A hearing thereon was held on May 31, 2022.

5. In connection with its motion to dismiss for lack of subject matter jurisdiction, Baptist submitted the Sworn Declaration of Maria Madrid who, at all times material, was Baptist's Director of Human Resources. The declaration established that, on October 30, 2018, each of the Plaintiffs received, via hand delivery, a letter confirming that, effective that day, his/her employment had been terminated due to misconduct. In pertinent part, each letter stated:

> You have the right to grieve the termination of your employment. A copy of the Resolution of Grievances Policy is attached for your reference.

The attached Policy, in turn, sets out in detail the procedural steps to be taken internally to resolve employment disputes.

6. The Policy provides that a grievance must be submitted by the employee no later than 30 calendar days after the occurrence of the circumstances giving rise to the grievance and that grievances submitted after that time will not be considered.

a) Step One of the Policy requires the employee to complete and submit to the Department Director a Grievance Form, with a copy to Human Resources. Where the Grievance involves disputed facts, the employee may submit written witness statements from other employees. The Department Director will investigate the Grievance and will respond within 15 calendar days.

b) If the employee is not satisfied with the resolution of his/her Grievance at the Step One level, he/she may proceed to Step Two, which involves the submission of a Grievance Form to Human Resources. The Human Resources Site Director will meet with the employee to discuss the grievance. Again, witness statements may be submitted to the extent the grievance involves disputed facts. The Human Resources Site Director shall investigate and shall respond to the employee no later than 15 calendar days after receipt of the grievance.

c) If the employee is not satisfied with the resolution of the Grievance at the Step Two level, he/she may proceed to Step Three, which involves submission of the Grievance to the responsible Vice President for additional review. The Vice President shall investigate and issue a written decision to the employee no later than 15 calendar days after receipt of the grievance.

d) Finally, if the grievance is not settled to the satisfaction of the employee by the responsible Vice President, the employee may request review and final resolution of the matter by the Adjustment Board, which is Step Four of the grievance procedure. The Adjustment Board is comprised of the Corporate Vice president and Chief Human Resources Officer, the Director of Pastoral Care, two leadership employees and three peer-level employees. Once a request for review by the Adjustment Board and supporting documentation is received, the Corporate Director, Employee Relations/Ombudsman will contact the employee to review/discuss the employee's grievance and will accompany the employee to the Adjustment Board meeting, where both sides will have an opportunity to present their case. The Adjustment Board will then meet in private to discuss the grievance

and reach a decision. A written decision will be provided within 5 business days of the hearing, setting forth the disposition of the grievance. The decision of the Adjustment Board is final.

7. The unrefuted Declaration of Maria Madrid established that none of the Plaintiffs sought to have their disputes with Baptist resolved pursuant to this available administrative remedy. Rather, each of the Plaintiffs waited at least six months following their termination and then filed his/her Charge of Discrimination with the Florida Commission on Human Relations ("FCHR"). Exhaustion of the available administrative remedy by Plaintiffs may have rendered such FCHR filing (and this lawsuit) completely unnecessary.

8. On June 1, 2022, the Court entered an Order, again dismissing both of Plaintiffs' claims *without prejudice* for failure to state a claim and reserving ruling on the motion to dismiss for lack of subject matter jurisdiction. In pertinent part, the Court's Order stated:

1. As to Count I (Plaintiffs' claim of discrimination), the Court treats Baptist's Motion as a motion for more definite statement and, as such, it is GRANTED. As to all alleged acts of discrimination based on disparate treatment, Plaintiffs shall allege ultimate facts to support a prima facie case, including the identification of one or more similarly situated comparator(s).

2. Baptist's Motion as to Count II (Plaintiffs' claim for retaliation), is GRANTED *without prejudice*. In amending Count II, Plaintiffs should include allegations to demonstrate that Plaintiffs' beliefs that Baptist's actions were unlawful were objectively reasonable in light of existing case law.

3. As to Defendant's motion to dismiss on the ground that the Court lacks subject matter jurisdiction to consider the matter because Plaintiffs failed to exhaust available internal administrative remedies to appeal their terminations, the Court takes the matter under advisement. The parties shall further brief that issue. Within ten (10) days of the date of this Order, the parties shall file their briefs with the Clerk and shall submit their briefs to the court through courtMAP.

June 1, 2022 Order. The parties complied with the Order with respect to the submission of supplemental briefs on the issue of exhaustion of administrative remedies and, on June 21, 2022, Plaintiffs filed their Second Amended Complaint.

9. In their Second Amended Complaint, Plaintiffs allege that they are all African Americans who were employed for several years in Baptist's Food Service Department as Food Service Workers and that all worked on the 6:00 p.m. to 3:00 a.m. shift. (SAC ¶¶ 6, 8). Plaintiffs allege that, commencing in the Summer of 2018, they were made the target of "continuous,

systematic, abusive and discriminatory conduct" by their newly hired supervisor, Roberto Ruiz, and senior supervisor, Hector Ortiz. (*Id.* ¶ 7). Plaintiffs allege, in conclusory fashion, that they started to be treated differently from other non-African American employees, but nowhere in their Complaint do Plaintiffs identify any allegedly similarly situated employee outside of their protected class who they contend was treated more favorably than they were. (*Id.* ¶ 8).

10. Plaintiffs allege that the disparate treatment they received consisted of the following: (a) Plaintiffs began to be micromanaged by their supervisors and managers while Hispanics were not micromanaged; (b) Plaintiffs sometimes were given less time to take lunch than non-African Americans employees; (c) Plaintiffs were required to ask permission to go to the bathroom while other employees were not; (d) Plaintiffs were told they could not talk to each other when they were at their working stations while other employees, particularly Hispanics, were allowed to talk to each other; (e) Plaintiffs were falsely accused of not completing tasks and of creating customer line back logs because of their chatting; (f) Plaintiffs were told not to use their phones while at the register while other non-African American employees were left alone. Plaintiffs also allege they were told to tuck in their shirts while others were permitted to wear their shirts untucked; (g) Plaintiffs were denied the chance to have family members apply for jobs within the department while family members of non-African American employees were allowed to work in the same department; and (h) Plaintiffs' request for more fixed hours was denied while non-African American employees had a more fixed schedule.[1]

11. Plaintiffs further allege that "[s]hortly after" the foregoing incidents of alleged disparate treatment, they advised their supervisors that they were considering filing a charge with the EEOC and then, on or about October 16, 2018, they lodged a complaint about the alleged discriminatory conduct with Human Resources. (SAC ¶ 12). Plaintiffs allege that they were terminated approximately two weeks later "for what appears was a direct response to their complaints of disparate treatment because of their race." (*Id.*). Significantly, however, Plaintiffs also allege that the termination of their employment resulted from an accusation that they were drinking in the parking lot while on the job, although they characterize that accusation as false. (*Id.* ¶ 10(i)).

12. In Count I, a race discrimination claim, Plaintiffs allege that the discriminatory conduct to which they were subjected consists of the above-described alleged disparate treatment, as well as the termination of their employment. (SAC ¶ 21). Plaintiffs allege that they were terminated because they were African Americans while other Hispanic workers were not exposed to such actions. (*Id.* ¶ 20). As was the case with their initial Complaint and their First Amended Complaint, nowhere in the Second Amended Complaint do Plaintiffs identify a single similarly

situated comparator outside of their protected group who was treated more favorably than they were.

13. In Count II, Plaintiffs' claim for retaliation, Plaintiffs allege that their termination was in retaliation for complaining to Human Resources about the alleged discriminatory acts delineated in ¶ 10 of the Second Amended Complaint. As discussed below, none of those alleged discriminatory acts about which Plaintiffs contend they complained constituted unlawful discrimination in violation of the FCRA. Yet, ignoring the Court's Order, Plaintiffs fail so set forth any allegations to support the notion that, in light of existing case law, they had an objectively reasonable belief that such actions were unlawful.

14. Baptist moved to dismiss Plaintiffs' Second Amended Complaint, both because Plaintiffs failed to exhaust their available administrative remedies, thereby rendering the Court without subject matter jurisdiction, and because Plaintiffs still failed to state a cause of action.

CONCLUSIONS OF LAW

I. Failure to Exhaust Administrative Remedies

1. It is well established that, before commencing a lawsuit, a plaintiff must first exhaust his/her administrative remedies. *Baude v. Terra Grp., LLC*, 259 So. 3d 219, 222 (Fla. 3d DCA 2018). Indeed, "failure to exhaust administrative remedies ... goes to the very subject matter jurisdiction of the court to hear a matter ... ." *Pushkin v. Lombard*, 279 So. 2d 79, 82 (Fla. 3d DCA 1973); *Jackson Health System v. Louis*, 314 So. 3d 628 (Fla. 3d DCA 2021), *rev. den.*, No. SC21-385, 2021 WL 2434571 (Fla. June 15, 2021); *People's Trust MGA, LLC v. Pesta*, 279 So. 3d 821 (Fla. 4th DCA 2019); *BJ's Wholesale Club, Inc. v. Bugliaro*, 273 So. 3d 1119 (Fla. 3d DCA 2019).

2. "[T]he exhaustion doctrine applies not only to state agencies, but also to voluntary associations." *Fla. High Sch. Athletic Ass'n v. Melbourne Central Catholic High School*, 867 So. 2d 1281, 1287 (Fla. 1st DCA 2004). Thus, "when a private organization has procedures for internal review of its decisions, those procedures must be exhausted before seeking redress from a court." *Id.* at 1288. "The exhaustion doctrine promotes judicial efficiency by giving the agency or association an opportunity to correct its own mistakes, thereby mooting controversies and eliminating the need for court intervention. *Id.* at 1286.

3. So, too, the exhaustion doctrine applies equally to administrative remedies provided by private corporations, both in and outside of the employment context. *See Gamma Phi*

Chapter of Sigma Chi Fraternity v. University of Miami, 718 So. 2d 910 (Fla. 3d DCA 1998); *Baptist Health Systems of Florida, Inc. v. Rae,* 753 So. 2d 752 (Fla. 3d DCA 2000). As the Fifth District explained in *Fla. High School Athletic Ass'n v. Melbourne Central Catholic High School,* 867 So. 2d 1281, 1288 (Fla. 5th DCA 2004): "As a general rule, when a private organization has procedures for internal review of its decisions, those procedures must be exhausted before seeking redress from a court. … When a method of appeal from an administrative ruling has been provided such method must generally be followed to the exclusion of any other system of review." *Id.*

4. The courts do not differentiate between cases seeking injunctive or other equitable relief and those seeking money damages when determining whether the court has subject matter jurisdiction when there has been a failure to exhaust administrative remedies. Rather, the courts look only to whether the available administrative remedy is *adequate*. *See, e.g., Montalvo v. University of Miami*, 705 So. 2d 1042 (Fla. 3d DCA 1998) (applying exhaustion requirement to administrative remedies of a private organization in suit for money damages); *Sierros v. Nova Se. Univ., Inc*., 906 So. 2d 1124 (Fla. 4th DCA 2005) (same).

5. The administrative remedy made available to Plaintiffs by Baptist was adequate to make Plaintiffs whole monetarily had they availed themselves of the internal grievance process and prevailed. As set forth in Baptist's grievance procedure, a copy of which was provided to each of the Plaintiffs, a "grievance" is "[a] dispute or complaint arising between the employee and Baptist Health in the application of Baptist Health's rules, regulations, policies and procedures that results in adverse employment action." In this case, Plaintiffs complain about the alleged disparate manner in which Baptist's rules, policies and procedures were applied to them, which resulted in an adverse employment action - - *i.e.,* the termination of their employment. The money damages Plaintiffs seek (back pay, front pay, loss of benefits, etc.) emanate solely from the termination of their employment. The whole purpose of the grievance procedure is to afford the employer the opportunity to investigate the employee's complaints about the adverse employment action and attempt to resolve the employee's grievance. Had the grievance been resolved in favor of the employee and had it been determined that the employee was wrongfully terminated, then, as a private employer, Baptist would have had the power and ability to reinstate Plaintiffs and make them whole through money damages, such as reimbursement of any compensation lost as a result of the wrongful termination.

6. Florida law is clear that "where adequate administrative remedies are available, it is improper to seek relief in the circuit court before those remedies are exhausted." *State Dept. of*

Environmental Protection v. PZ Const. Co., Inc., 633 So. 2d 76, 78 (Fla. 3d DCA 1994) (quoting *Communities Fin. Corp. v. Dept. of Environmental Regulation*, 416 So. 2d 813, 816 (Fla. 1st DCA 1982)). A plaintiff must "establish that the administrative review process would afford no meaningful relief. A court should not infer that an administrative remedy is not adequate in the absence of a showing that the party seeking relief has pursued the administrative without success." *Id.* at 78-79. In the *PZ Const.* case, the Third District Court remanded the case with instructions to dismiss, stating that, because he plaintiff "opted not to pursue its administrative avenues of relief, we cannot conclude that the remedies of the administrative process were inadequate." *Id*. at 79 (internal quotations and citation omitted). Here, Plaintiffs have made no attempt to establish that the administrative remedy provided to them by Baptist would have afforded no meaningful relief and their failure to exhaust such an available administrative remedy deprives the Court of subject matter jurisdiction.

7. In considering Baptist's Motion, the Court was permitted to consider the declaration of Ms. Madrid, submitted by Baptist, which was uncontroverted by Plaintiffs. It is well established that, in considering a motion to dismiss for lack of subject matter jurisdiction, the Court properly may consider matters outside of the four corners of the complaint. *See, e.g., Gallego v. Wells Fargo Bank, N.A.*, 276 So. 3d 989 (Fla. 3d DCA 2019) ("a court is permitted to consider evidence outside the four corners of the complaint when the motion to dismiss challenges subject matter jurisdiction") (quoting *Steiner Transocean Ltd. v. Efremova,* 109 So. 3d 871, 873 (Fla. 3d DCA 2013)).

8. In addition, any argument that Baptist failed to timely raise the issue of the Court's lack of subject matter jurisdiction is without merit. Fla. R. Civ. P. 1.140(h)(2)(b) provides that "[t]he defense of lack of jurisdiction of the subject matter may be raised at any time." *See 84 Lumber Company v. Cooper*, 656 So. 2d 1297, 1298 (Fla. 2d DCA 1994) ("It has been the historic law of this state that '[s]ubject matter jurisdiction cannot be created by waiver, acquiescence or agreement of the parties, or by error or inadvertence of the parties or their counsel, or by the exercise of power by the court; it is a power that arises solely by virtue of law.'") (quoting *Fla. Export Tobacco Co. v. Dep't of Revenue,* 510 So. 2d 936, 943 (Fla. 1st DCA), *rev. denied,* 519 So. 2d 986-987 (Fla. 1987)). "Subject matter jurisdiction is so vital to a court's power to adjudicate the rights of individuals, that its absence can be questioned at any time, even after the entry of a final judgment or for the first time on appeal." *Id. See also State v. Williams*, 260 So. 3d 472 (Fla. 1st DCA 2018) ("the question of subject-matter jurisdiction can be raised for the first time on appeal… because a court acting beyond its jurisdiction may be committing fundamental error"); *Tabb v. Fla. Birth-Related Neurological*

Injury Compensation Ass'n, 880 So. 2d 1253, 1256 (Fla. 1st DCA 2004) ("subject matter jurisdiction cannot be waived and can be raised at any time").

9. Plaintiffs have argued that the United States Supreme Court's decision in *Fort Bend Cty., Texas v. Davis*, 139 S. Ct. 1843 (2019), operates to bar dismissal of their claims based on their failure to exhaust Baptist's internal administrative remedies. The Court disagrees. As the District Court for the Western District of North Carolina explained in *Abadi v. Mecklenburg Cty. Government*, No. 3:17-CV-00435-FDW-DCK, 2019 WL 2546732, at *3 (W.D.N.C. June 20, 2019), the Supreme Court in *Fort Bend* held that Title VII's administrative procedures were not jurisdictional in nature and, thus, the defendant in that case was not permitted to raise the argument, for the first time after several years of litigation, that plaintiff had failed to exhaust administrative remedies. Here, unlike in *Fort Bend*, Plaintiffs are not challenging exhaustion under Title VII. Moreover, the fact that Plaintiffs failed to exhaust Baptist's internal administrative remedies was raised immediately after Plaintiffs filed their Amended Complaint. Further, it is well-established that "[s]tate courts, not federal courts, should be the final arbiters of state law." *Baggett v. First Nat. Bank of Gainesville*, 117 F.3d 1342, 1353 (11th Cir. 1997) (citing *Hardy v. Birmingham Bd. of Educ.*, 954 F.2d 1546, 1553 (11th Cir.1992)). Thus, the Florida appellate courts' unanimous treatment of exhaustion as a matter of subject matter jurisdiction is controlling.

10. The record herein is clear that Plaintiffs failed to exhaust their available administrative remedies before filing this lawsuit and, thus, this Court lacks subject matter jurisdiction. This defect is not subject to cure. Accordingly, dismissal of this case *with prejudice* is appropriate.

II. **Failure to State a Claim**

10. Alternatively, despite having had three attempts to properly state a claim, Plaintiffs' Second Amended Complaint continues to fail to do so.

11. When ruling on a motion to dismiss, a trial court must accept well-pled factual allegations as true. *Williams Island Ventures, LLC v. de la Mora*, 246 So. 3d 471, 475 (Fla. 3d DCA 2018). To state a viable claim, a complaint must allege a *prima facie* case that is supported by sufficient ultimate facts. *Alvarez v. E & A Produce Corp.*, 708 So. 2d 997, 999 (Fla. 3d DCA 1998). *See also Edwards v. Landsman*, 51 So.3d 1208, 1213 (Fla. 4th DCA 2011). However, "[l]egal conclusions unsupported by ultimate facts are not enough to state a cause of action." *Miami-Dade County v. Deerwood Homeowners' Ass'n*, 979 So. 2d 1103, 1104 (Fla. 3d DCA 2008). Accordingly, the trial court "need not accept internally inconsistent factual claims, conclusory allegations, unwarranted deductions, or mere legal conclusions made by a party."

Gallego v. Wells Fargo Bank, N.A., 276 So. 3d 989, 990 (Fla. 3d DCA 2019) (quoting *W.R. Townsend Contracting, Inc. v. Jensen Civil Const., Inc.*, 728 So. 2d 297, 300 (Fla. 1st DCA 1999)). *See also Turnberry Vill. N. Tower Condo. Ass'n, Inc. v. Turnberry Vill. S. Tower Condo. Ass'n, Inc.*, 224 So. 3d 266, 267 (Fla. 3d DCA 2017) ("a mechanical recitation of the elements of the cause of action" and "conclusory allegations" are "insufficient to withstand a motion to dismiss").

12. "The FCRA is modeled after Title VII, so that federal case law regarding Title VII is applicable to construe the Act." *Byrd v. BT Foods, Inc.,* 948 So. 2d 921, 925 (Fla. 4th DCA 2007) (citing *Castleberry v. Edward M. Chadbourne, Inc.,* 810 So. 2d 1028, 1030 (Fla. 1st DCA 2002)). "Claims of race discrimination are analyzed under the same framework whether they are brought under Title VII or the FCRA." *Jolibois v. Fla. Int'l Univ. Bd. of Trustees*, 92 F. Supp. 3d 1239, 1243 (S.D. Fla, 2015). So, too, "[b]ecause retaliation claims under the FCRA are substantively similar to Title VII retaliation claims, [courts] use the same analysis for both claims." *Howard v. Walgreen Co.,* 605 F. 3d 1239, 1244 n. 4 (11th Cir. 2010).

13. Even at the motion to dismiss stage, Florida courts routinely "follow federal case law when examining FCRA ... claims." *Carter v. Health Mgmt. Associates*, 989 So.2d 1258, 1262 (Fla. 2d DCA 2008) (citing *Hinton v. Supervision Int'l, Inc.*, 942 So.2d 986, 989 (Fla. 5th DCA 2006) and *Russell v. KSL Hotel Corp.*, 887 So. 2d 372, 377 (Fla. 3d DCA 2004)). "Thus, where a plaintiff is unable to maintain a claim under Title VII, she cannot maintain a claim based on the same conduct under the FCRA." *Arnold v. Heartland Dental, LLC*, 101 F. Supp. 3d 1220, 1225 (M.D. Fla. 2015).

14. In their Second Amended Complaint, Plaintiffs proceed under a disparate treatment theory of discrimination. However, Plaintiffs merely allege, in conclusory fashion, that non-African American employees received more favorable treatment than they did. In order to state a claim for disparate treatment, a plaintiff must allege a *prima facie* case and plead the following elements: "(1) [she] belongs to a protected class; (2) [she] was qualified to do the job; (3) [she] was subjected to an adverse employment action; and (4) similarly situated employees outside the employee's protected class were treated more favorably." *Valenzuela v. GlobeGround N. Am., LLC*, 18 So. 3d 17, 22 (Fla. 3d DCA 2009). *Carter v. Bowman*, 172 Fed. Appx. 915, 917 (11th Cir. 2006) (citing *Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1087 (11th Cir. 2004)).

15. Factual allegations regarding "similarly situated," non-African American employees are

critically important to state a viable claim for disparate treatment. Indeed, a plaintiff must identify a specific comparator and allege sufficient ultimate facts to show that he/she and the identified comparator "are similarly situated in all relevant respects." *Valenzuela*, 18 So. 3d at 22. For example, similarly situated employees "must have reported to the same supervisor as the plaintiff, must have been subject to the same standards governing performance evaluation and discipline, and must have engaged in conduct similar to the plaintiff's, without such differentiating conduct that would distinguish their conduct or the appropriate discipline for it." *Id*. (citing *Gaston v. Home Depot USA, Inc.,* 129 F.Supp.2d 1355, 1368 (S.D. Fla. 2001)). In other words, a proffered comparator "must be nearly identical to the plaintiff." *Id*. *See also Mitchell v. Young,* 309 So. 3d 280, 284 (Fla. 1st DCA 2020) ("a comparator who is 'similarly situated in all material respects' 'will have engaged in the same basic conduct (or misconduct) as the plaintiff' … 'and will share the plaintiff's employment or disciplinary history.'") (quoting *Lewis v. City of Union Cnty., Ga.,* 918 F. 3d 1213, 1220-1221 (11th Cir. 2019)).

16. The failure to identify and factually support the existence of a valid, similarly situated comparator is "fatal to establishing a prima facie case." *Corbin v. Town of Palm Beach*, 996 F. Supp. 2d 1275, 1285-86 (S.D. Fla. 2014) (citing *Silvera v. Orange Cty. School Bd.*, 244 F.3d 1253, 1259 (11th Cir. 2001)). *See also Jackson v. BellSouth Telecomms.*, 372 F.3d 1250, 1274 (11th Cir. 2004) (affirming dismissal of Section 1981 claim because plaintiffs "failed to identify any specific nonminority employees . . . who were treated differently in other similar cases"); *Arafat v. School Bd. of Broward Cty.,* 549 Fed. Appx. 872, 874 (11th Cir. 2013) ("The district court properly determined that her allegations were too 'tenuous' and 'conclusory' to support her claims. … [N]owhere in her complaint does she identify any valid comparators to undergird her disparate treatment claims. Her allegations, therefore, do not plausibly suggest intentional discrimination, and her disparate treatment claims fail as a result."); *Bryant v. City of Deland*, No. 6:16-cv-937-Orl-40KRS, 2016 WL 3511761, at *2 (M.D. Fla. June 3, 2016) ("She has not identified any specific comparator she contends was treated differently or presented any facts indicating how that individual is similarly situated. In the absence of further factual allegations, Plaintiff has not adequately stated a race discrimination claim, and that claim is due to be dismissed."). Despite the Court's admonition that, in a Second Amended Complaint, "Plaintiffs shall allege ultimate facts to support a *prima facie* case, including the identification of one or more similarly situated comparator(s)," Plaintiffs have failed to do so.

17. In addition, Plaintiffs' Second Amended Complaint fails to allege ultimate facts to state a

viable claim for disparate treatment. Other than to allege, in conclusory fashion, that non-African American co-workers, mostly Hispanic, were treated more favorably than they were, the Second Amended Complaint contains no ultimate facts regarding Plaintiffs' alleged comparators. *See Uppal v. Hosp. Corp. of Am.*, 482 Fed. Appx. 394, 396 (11th Cir. 2012) (affirming dismissal of disparate treatment claim where, like here, the plaintiff "never once supplemented [conclusory] allegations of disparate treatment with any factual detail"). Plaintiffs further fail to allege any ultimate facts to establish that their identified comparators are similarly situated in all relevant respects to them - - *i.e.,* that identified individuals outside of their protected class engaged in the same conduct (misconduct) as they did but were treated more favorably.

18. Accordingly, Plaintiffs have failed to state a claim for disparate treatment discrimination based on their race.

19. Plaintiffs' claim for retaliation under the FCRA also is deficient. Fla. Stat. § 760.10(7) provides that "[i]t is an unlawful employment practice for an employer … to discriminate against any person because that person has ***opposed any practice which is an unlawful employment practice under this section***." (emphasis added). Regarding the first element (protected activity), as the FCRA itself unambiguously states, retaliation is prohibited against an employee who, *inter alia*, "has opposed any [unlawful employment] practice" defined by the Act. *Hinton v. Supervision Intern., Inc.*, 942 So. 2d 986, 989 (Fla. 5th DCA 2006) (citing 42 U.S.C. § 2000e-3(a)).

20. "To state a claim for retaliation under the FCRA, a plaintiff must allege that: '(1) he engaged in a statutorily protected expression; (2) there was an adverse employment action; and (3) there was a causal connection between the participation in the protected expression and the adverse action.'" *Buade v. Terra Group, LLC,* 259 So. 3d 219, 222 (Fla. 3d DCA 2018) (quoting *St. Louis v. Fla. Int'l Univ.*, 60 So. 3d 455, 460 (Fla. 3d DCA 2011)). As to the element of causation, the law is clear that a plaintiff must "establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer." *Palm Beach Cty. Sch. Bd. v. Wright*, 217 So. 3d 163, 165 (Fla. 4th DCA 2017) (emphasis removed) (quoting *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S.338 (2013)).

21. Plaintiffs allege that they engaged in protected activity by making complaints to Human Resources about being micromanaged by their supervisors who, *inter alia*, did not allow them to use their phones while at the cash register, required them to report back after their lunch breaks, required that they tuck in their shirts and allegedly engaged in other similar acts

as set forth in paragraph 10 of their SAC. Because none of the alleged discriminatory acts about which Plaintiffs allege they complained constitutes an unlawful employment practice under the FCRA, Plaintiffs have failed to allege that they engaged in protected activity and, thus, they have failed to state a viable claim of retaliation.

22. To demonstrate that she participated in protected activity, a plaintiff must allege that (1) she complained about alleged discrimination, (2) her complaint was based on her subjective belief that her employer was engaged in unlawful employment practices; and (3) her belief was objectively reasonable in light of the circumstances. *Saffold v. Special Counsel, Inc.*, 147 Fed. Appx. 949, 951 (11th Cir. 2005) (citing *Weeks v. Harden Mfg. Corp.*, 291 F.3d 1307, 1311 (11th Cir. 2002)). Thus, the third element of a *prima facie* case requires that the employee "have a good faith, objectively reasonable belief that his activity is protected by the statute." *Dominguez v. Circle K Stores, Inc.*, No. 11-23196-CIV, 2012 WL 13013079, at *5 (S.D. Fla. Aug. 7, 2012) (quoting *Standard v. A.B.E.L. Servs. Inc.*, 161 F.3d 1318, 1328 (11th Cir. 1998)).

23. "The objective reasonableness of a plaintiff's belief that an employer's action is unlawful is 'measured against existing substantive law.'" *Garcia v. Nachon Enters., Inc.*, 223 F. Supp. 3d 1257, 1270–71 (S.D. Fla. 2016) (quoting *Clover v. Total Sys. Servs., Inc.*, 176 F.3d 1346, 1351 (11th Cir. 1999)). "In applying this 'objective reasonableness' test, the Eleventh Circuit has held that, where courts have concluded that an employer's conduct is lawful, a plaintiff's belief that his employer engaged in an unlawful employment practice was not 'objectively reasonable,' and the plaintiff's complaints therefore did not qualify as 'protected activity'" to satisfy the third element of a *prima facie* case. *Id*. (quoting *Baker v. Supreme Beverage Co.*, No. 13–0222, 2014 WL 7146790, at *7 (N.D. Ala. Dec. 15, 2014)).

24. It is well established that "[a]n employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience." *Moore v. City of Philadelphia,* 461 F. 3d 331, 346 (3d Cir. 2006). "Title VII … does not set forth a general civility code for the American workplace." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006). Indeed, "the protections of Title VII simply do not extend to 'everything that makes an employee unhappy.'" *MacLean v. City of St. Petersburg,* 194 F. Supp. 2d 1290, 1298 (M.D. Fla. 2002) (quoting *Davis v. Town of Lake Park*, 245 F. 3d 1232, 1239 (11th Cir. 2001)). As the court explained in *LaSalle v. Port Auth. of N.Y. & N.J.,* No. 12-2532 (FSH) (MAH), 2013 WL6094339, at *12 (D.N.J. Nov. 19, 2013), "[c]ourts have routinely rejected claims based on these types of micromanagement or work criticisms."

25. In other words, complaints about negative workplace evaluations or other generic job grievances do not qualify as protected activity. *Bicknell v. City of St. Petersburg,* No. 8:03-cv-1045-T-27, 2006 WL 560167, at *7 (M.D. Fla. Mar. 7, 2006) (rejecting that complaints regarding work issues such as negative performance evaluations constitute protected activity and stating that "[c]omplaints or grievances made in the absence of some allegation of conduct proscribed by Title VII do not constitute statutorily protected activity"); *Coutu v. Martin Cty. Bd. of Cty. Comm'rs,* 47 F.3d 1068, 1074-75 (11th Cir. 1995) (allegation of "unfair treatment" is not an unlawful employment practice under Title VII); *Negron v. Auto Club Group, Inc.,* No. 16-cv-14156-MIDDLEBROOKS, 2016 WL 11686455, at *9 (S.D. Fla. Dec. 21, 2016) (employee's complaint that his supervisor micromanaged him and used the racial slur "spic" did not constitute protected activity for purposes of a retaliation claim); *Howard v. Walgreen Co*., 605 F. 3d 1239 (11th Cir. 2010) (plaintiff's complaint that his supervisor was acting less than cordial; speaking only to the white employees, but not to plaintiff; directing the phrase "you people" at plaintiff; and leaving a message on plaintiff's answering machine that his job was in jeopardy was *not* conduct that a reasonable person would believe constituted an unlawful employment practice); *Freese v. Wuesthoff Health Sys., Inc.*, No. 6:06-cv-175-Orl-31, 2006 WL 1382111, *7 (M.D. Fla. May 19, 2006) ("A complaint about treatment or discipline, unrelated to statutorily-protected matters, does not constitute protected activity, and thus cannot serve as the basis for a retaliation claim.").

26. Plaintiffs' alleged complaint to Human Resources that their supervisors were micromanaging them in a variety of trivial ways such as requiring them to report in after lunch breaks, prohibiting them from talking on their phones while at the cash register, requiring them to tuck in their shirts and criticizing their work simply does not constitute protected activity under the FCRA as a matter of law because, when measured against existing substantive law, Plaintiffs could not have had an objectively reasonable belief that such conduct was unlawful under the FCRA. Thus, Plaintiffs' retaliation claim fails as a matter of law.

27. As noted above, in dismissing Count II of Plaintiffs' original complaint with leave to amend, and in dismissing Count II of Plaintiffs' Amended Complaint with leave to amend, the Court stated, in both its June 24, 2021 Order and in its June 1, 2022 Order, that, "[i]n amending Count II, Plaintiffs should include allegations to demonstrate that Plaintiffs' beliefs that Baptist's actions were unlawful were objectively reasonable in light of existing case law." Yet, the Second Amended Complaint contains no such allegations. Accordingly, given existing law, Plaintiffs have not alleged and cannot allege that they engaged in protected activity.

28. The Court determines that Plaintiffs' Second Amended Complaint should be dismissed *with prejudice*. First, Plaintiffs failed to exhaust available administrative remedies before filing this lawsuit and that failure deprives the Court of subject matter jurisdiction to consider this matter. In addition, Plaintiffs have failed to state a claim. Where, as here, Plaintiffs have been given specific instruction by the Court as to what allegations their complaint must contain to state a claim and, yet, those instructions were not followed, dismissal should be *with prejudice*. *See, e.g.*, *Hoti v. Bank of America,* No. 9:18-CV-80657-ROSENBERG/REINHART, 2021 WL 7162239, at *5 (S.D. Fla. Nov. 18, 2021) ("Plaintiff has filed three complaints in this action, meaning that he has had three chances to get it right. Plaintiff has had two opportunities to replead his Complaint and to fix the deficiencies …. He was put on notice of these deficiencies …. [D]ismissal with prejudice is appropriate where the court gave 'specific and repeated warnings' that amendment was necessary.") (quoting *Friedlander v. Nims*, 755 F. 2d 810, 811-12 (11th Cir. 1985)). *See also Barreiro v. Leon Mgmt. Int'l, Inc*., No. 12-2133-Civ-COOKE/TURNOFF, 2013 WL 12124617, at *4 (S.D. Fla. March 19, 2013) ("Defendants put Plaintiffs on notice of their pleading deficiency … with their original Motion to Dismiss. … In filing their First Amended Complaint, Plaintiffs did nothing to address this defect. 'Because justice does not require district courts to waste their time on hopeless cases, leave [to amend] may be denied if a proposed amendment fails to correct the deficiencies in the original complaint or otherwise fails to state a claim.'") (quoting *Mizzaro v. Home Depot, Inc*. 344 F. 3d 230, 1255 (11th Cir. 2008)).

29. While leave to amend should be freely granted, "[c]ourts are not required to award plaintiffs endless bites of the same apple." *Alvarez*, 708 So. 2d at 1001 (affirming dismissal *with prejudice* where plaintiffs were given an opportunity to allege necessary elements of their negligence claim and failed to do so); *Frantz v. Walled*, 513 F. Appx. 815, 819 (11th Cir. 2013) (affirming dismissal of amended complaint *with prejudice* where plaintiff "already received one opportunity to correct his complaint's deficiencies" but failed to do so); *Feldman v. Houle*, 400 So. 2d 180 (Fla. 4th DCA 1981) (affirming lower court's dismissal of plaintiff's second amended complaint with prejudice); *Harrison v. Rambuski*, 567 So. 2d 56 (Fla. 2d DCA 1990) (same); *Walters v. Ocean Gate Phase I Condominium,* 925 So. 2d 440, 442-43 (Fla. 1st DCA 2006) (dismissing second amended complaint and finding that "[g]enerally three ineffective attempts to state the same cause of action … are enough"); *Burgess v. North Broward Hosp. Dist*., 126 So. 3d 430, 435 (Fla. 4th DCA 2013) (affirming dismissal *with prejudice* after plaintiff had two opportunities to amend).

30. Final Judgment is hereby entered in favor of Defendant, Baptist Hospital of Miami, Inc., and

against Plaintiffs, Porscha Bell, Jovan Toomer, Natosha Williams and Monterio Tripplet. Plaintiffs shall take nothing by this action, and Defendant shall go hence without day.

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[1] The Court notes that this allegation is inconsistent with the allegation in ¶ 8 of the SAC that Plaintiffs all worked the "early evening to early morning shift (6:00 p.m. to 3:00 a.m.)."

DONE and **ORDERED** in Chambers at Miami-Dade County, Florida on this 3rd day of January, 2023.

2020-025689-CA-01 01-03-2023 9:46 AM
Hon. Maria de Jesus Santovenia

CIRCUIT COURT JUDGE
Electronically Signed

Final Order as to All Parties SRS #: **12** (Other)

THE COURT DISMISSES THIS CASE AGAINST ANY PARTY NOT LISTED IN THIS FINAL ORDER OR PREVIOUS ORDER(S). THIS CASE IS CLOSED AS TO ALL PARTIES.

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