

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF FLORIDA

Case No. 0:18-CIV-62813-MOORE

CAROLINA MATAMOROS,

Plaintiff,

.

vs.

BROWARD SHERIFF'S OFFICE,

Defendant.

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**DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OF LAW  
IN SUPPORT THEREOF**

Defendant, Broward Sheriff's Office ("BSO"), pursuant to Fed. R. Civ. P. 56 and S.D. Fla. L.R. 56.1, and in compliance with the June 28, 2019 deadline in the Court's December 14, 2018 Order (CM/ECF Docket No.8), files this Motion for Summary Judgment on all Counts of the Amended Complaint (Count I FMLA Interference; Count III FRCA Retaliation; and Count IV FMLA Retaliation), Memorandum of Law and Affidavits in support. Given that discovery is closed per the December 14, 2018 Order (CM/ECF Docket No. 8), the matter is ripe for summary judgment

**I. STATEMENT OF MATERIAL FACTS TO WHICH THERE EXISTS NO  
GENUINE ISSUE TO BE TRIED**

1. In all of Plaintiff's Performance Evaluations at BSO, totaling 15, the Category of Performance Criteria for "Attendance and Punctuality" was marked as "Needs Improvement." (Affidavits of Records Custodian Pearl Richardson ¶ 3, Site Manager Latasha Elmaadawy ¶20)

2. BSO Policy ("SPM") 3.10.4 allows an appeal to challenge any performance criteria measured as "needs improvement" in the evaluation. No appeal was utilized by or on behalf of Ms. Matamoros in this regard. (Affidavits of Pearl Richardson ¶4, Latasha Elmaadawy ¶20)

3. Seven (7) Internal Affairs ("IA") Cases investigated plaintiff for her infractions of BSO's

neutral policy pertaining to attendance, promptness, sick leave, reporting illness; plaintiff's 7th

IA case also included violations of BSO policy on truthfulness & off-duty employment:

- i) IA Case # 03-12-0086 investigated plaintiff for violation of BSO Sheriff's Policy Manual ("SPM") 2.6.1 Promptness, which policy violation was sustained on June 19, 2012, and Ms. Matamoros received a Written Reprimand.
- ii) IA Case # 08-12-0086 investigated plaintiff for violations of BSO SPM 4.3.4 Sick Leave Use & 2.6.1 Promptness, which were sustained on December 4, 2012, and Ms. Matamoros received a 1-day suspension without pay.
- iii) IA Case # 03-14-0063 investigated plaintiff for violations of BSO SPM 2.6.1 Promptness, 2.8.2 Reporting Illness & 2.4 Meeting BSO Standards, which were sustained on 03/02/15, and Ms. Matamoros received a 3-day suspension without pay.
- iv) IA Case # 01-15-0015 investigated plaintiff for violations of BSO SPM 2.8.3 Absent Without Leave & 2.8.2 Reporting Illness, which were sustained on July 18, 2015, and Ms. Matamoros received a 5-day suspension without pay.
- v) IA Case # 03-16-0059 investigated plaintiff for violation of BSO SPM 2.6.1 Promptness, (10 tardiness events that plaintiff admitted) which was sustained on June 20, 2016, and Ms. Matamoros received a 10-day suspension without pay;
- vi) IA Case# 10-16-0294 (opened Oct. 2016) investigated plaintiff for violations of BSO SPM 2.6.1 Promptness, (7 tardiness events that plaintiff admitted) which was sustained on April 25, 2017, and Ms. Matamoros received a 20-day suspension without pay.
- vii) IA Case # 2018-0117 (opened May 2018) investigated plaintiff for violations of BSO SPM 4.3.4 Sick Leave Use, 2.5.2 Truthfulness, 3.16.1 Off-Duty Employment, which were all sustained on September 13, 2018, and her employment was terminated.

(See Affidavits of Suzanne Lowe, Latasha Elmaadawy, Melissa Erdelyi, and Lynda Hornsby-the investigators for these 7 IA Cases).

4. In IA Case # 2018-0117 resulting in plaintiff's termination, plaintiff in her sworn statement (pages 2,5 & 20 exhibited to Affidavit of Sergeant Lynda Hornsby), denied having any employment outside of BSO. City of North Miami and its wage reports attested that: plaintiff had been working for the City of North Miami since 2015; she had worked there 1,083 hours between July 1, 2017 through June 30, 2018; during that same period plaintiff worked at BSO for 994.25

hours; plaintiff's 2018 earnings from the City of North Miami totaled at least \$15,163.20; her 2017 gross earnings there totaled at least \$14,795.95. (Affidavit of Sergeant Lynda Hornsby ¶¶6, 7)

5. BSO Policy requires pre-approval for off-duty employment. Plaintiff, with her record and pattern of absences, tardiness, sick leave usage infractions of BSO policy, received no approval for off-duty employment nor did she report it to BSO. (Affidavits of Lisa Zarazinski ¶9, Latasha Elmaadawy ¶22, Tangila Tucker ¶14, Cynthia Rivera ¶9, Suzanne Lowe ¶¶10-11)

6. No one at BSO within plaintiff's command had any knowledge that plaintiff was working off-duty employment outside of BSO. (Affidavits of Lisa Zarazinski ¶9, Latasha Elmaadawy ¶22, Tangila Tucker ¶14, Cynthia Rivera ¶9, Suzanne Lowe ¶¶10-11)

7. IA Case # 2018-0117 also addressed Plaintiff's use of 323.75 hours of non-FMLA sick leave out of the 994.25 hours worked during the last year, wherein she was (AWOL) for 310 of those hours, had no required doctor's notes for 136.5 hours, and 116 hours were taken in conjunction with regular days off or holidays. (Affidavit of Lynda Hornsby, Exhibit 2)

8. IA Case # 2018-0117 listed 17 occurrences in which plaintiff worked for the City of North Miami and used sick leave hours from BSO on the same calendar day. *Id.*

9. At plaintiff's October 15, 2018, pre-disciplinary conference in IA Case 2018-0117, plaintiff identified several employers (in addition to the City of North Miami) where she had been employed outside of BSO while employed at BSO and thereby reconfirmed the conclusive evidence that she lied and was untruthful in her sworn statement given in IA Case # 2018-0117 when she denied having any outside employment. (Affidavit of PSC Chairman, Daniel Losey ¶9)

10. Plaintiff did not arbitrate, appeal and/or grieve the "just cause" of any of her 5 suspensions referenced above (1-day, 3-day, 5-day, 10-day, 20-day) under the governing Collective Bargaining Agreement affecting the parties to this lawsuit. (Affidavit of PSC Chairman, Daniel Losey, ¶5)

11. As per BSO policy, plaintiff's 5th (10-day suspension), 6th (20-day suspension) & 7th (termination) IA Cases were presented to and decided by BSO's Professional Standards Committee ("PSC") which was separate and independent from plaintiff's chain of command and which had the exclusive power, subject to final approval by the Sheriff's designee, to decide and recommend whether to sustain Plaintiff's investigated policy violations and impose discipline based solely and completely on the IA Investigative Reports and documents exhibited in these IA cases and plaintiff's disciplinary history. (Affidavit of PSC Chairman, Daniel Losey, ¶¶10,12,15)

12. The PSC is comprised of 11, voting members, 4 of which are resident, community activists that were never employed by BSO and a fifth, voting member is the Union Representative for the affected employee. (Affidavit of PSC Chairman, Daniel Losey ¶12)

13. The PSC sustained all policy violations in these cases presented to it and recommended the respective disciplines of a ten-day suspension, twenty-day suspension, and termination in plaintiff's 5th, 6th & 7th IA Cases, which recommendation was approved by the Sheriff's designee in a final layer of review. (Affidavit of PSC Chairman, Daniel Losey ¶¶3,4, 6 & 9)

14. The day after the PSC convened on September 13, 2018, sustained all violations in plaintiff's IA Case # 2018-0117, and recommended her termination, BSO issued a Notice of Administrative Suspension Without Pay by memorandum to plaintiff dated September 14, 2018. (Affidavit of PSC Chairman, Daniel Losey ¶8).

15. It was not unusual for the PSC to recommend termination of employees for an additional SPM infraction committed within a 5-year period after serving a 10-day suspension, let alone a 20-day suspension that Ms. Matamoros had from Case #10-16-0294.

16. A truthfulness violation, by itself, is severe enough to warrant termination. (Affidavit of PSC Chairman, Daniel Losey, ¶13, 7)

17. The PSC as well as the investigators that conducted the investigations and authored the investigative reports in plaintiff's seven (7) IA cases were not aware of Plaintiff's EEOC complaint of discrimination against BSO dated July 18, 2017. (Affidavits of PSC Chairman Daniel Losey ¶16,18, Suzanne Lowe ¶7, Latasha Elmaadawy ¶¶9, 21, Melissa Erdelyi ¶¶6-7, Lynda Hornsby ¶¶11-12)

18. The IA investigations and investigative reports in plaintiff's 6th & 7th IA Cases (#10-16-0294, 20-day suspension & #2018-0117, termination) were conducted and authored by investigators assigned to Internal Affairs, that were outside of plaintiff's chain of command, and that did not supervise or work with plaintiff. (Aff. Erdelyi, ¶6, & Hornsby, ¶11)

19. The Site Managers & Assistant Site Managers at BSO Central Communications where plaintiff worked as well as the Director of BSO Regional Communications were not aware of Plaintiff's EEOC complaint of discrimination against BSO dated July 18, 2017 while plaintiff was employed at BSO. (Affs. of Suzanne Lowe ¶7, Latasha Elmaadawy ¶9,21, Tangila Tucker ¶¶10-11, Cynthia Rivera ¶¶7-8, Lisa Zarazinski ¶5-6)

20. No IA investigation of and discipline imposed on plaintiff by BSO in any of her 7 Internal Affairs cases was based on a belief or consideration as to any future absences or (mis)conduct by plaintiff nor based on a belief or consideration as to any issue of distraction by plaintiff. (Affidavits of Lisa Zarazinski ¶14, Suzanne Lowe ¶12, Latasha Elmaadawy ¶19, Tangila Tucker ¶15, Cynthia Rivera ¶10, Melissa Erdelyi ¶10, Lynda Hornsby ¶14, PSC Chairman, Daniel Losey ¶15)

21. Every IA investigation of and discipline imposed on plaintiff by BSO in all 7 Internal Affairs cases was based on plaintiff's demonstrated infractions of BSO's neutral policy pertaining to attendance, promptness, sick leave, reporting illness, truthfulness, and unreported and unapproved off-duty employment. (Affidavits of Lisa Zarazinski ¶4, 14, Suzanne Lowe ¶3,

Latasha Elmaadawy ¶7, Tangila Tucker ¶6, Cynthia Rivera ¶4, IA Investigator Melissa Erdelyi ¶10, IA Investigator Lynda Hornsby ¶14, PSC Chairman, Daniel Losey ¶15)

22. Within the last year, two other BSO Communications Operator IIIs (the same position as plaintiff) were terminated for sustained violations of BSO's policies on Truthfulness coupled with Absent Without Leave or Sick Leave Use: (1) Tammi Verneret terminated on April 9, 2018 for sustained violation of being absent without leave ("AWOL") on two occasions (SPM 2.8.3), and for being untruthful in her sworn statement as to the reason she was AWOL (SPM 2.5.2 Truthfulness) – her Internal Affairs history reflects written reprimands as well as 1, 5, 10 and 15-day suspensions for, *inter alia*, repeated violations of BSO policies on attendance, Reporting Illness (SPM 2.8.2) and Promptness (SPM 2.6.1); (2) Donna Ann Brimm terminated on April 14, 2018 for sustained violation of (SPM 2.8.3) Absent Without Leave, Sick Leave Use (SPM 4.3.4), and being untruthful in her sworn statement as to the reason she was absent on sick leave/AWOL (SPM 2.5.2 Truthfulness) – her IA history reflects a written reprimand and 1, 2, and 4-day suspensions for violations of BSO policies on attendance, Reporting Illness (SPM 2.8.2), Sick Leave Use (SPM 4.3.4), and Advance Leave Not Permitted (SPM 4.3.6). (Aff. of PSC Chairman, Daniel Losey, ¶14)

23. In a case not involving a truthfulness violation, Communications Operator III, Tamika Powell-Whaley was terminated on April 23, 2019 for sustained violation of BSO policy on Insubordination (SPM 2.25.4) & Absent Without Leave (SPM 2.8.3) – her Internal Affairs history reflects a written reprimand for Reporting Illness (SPM 2.8.2) & Advance Leave Not Permitted (SPM 4.3.6) as well as suspensions (up to 2 days) for Sick Leave Use (SPM 4.3.4). (Affidavit of PSC Chairman, Daniel Losey, ¶14).

24. A BSO non-Communications Operator, Iyawna Sims was terminated on March 1,

2018 for, sustained violation of BSO SPM 2.8.3 (Absent Without Leave), 4.3.4 (Sick Leave Use), Meeting BSO Standards (SPM 2.4), Conduct While Attending Training Schools (2.24), and for her Untruthfulness in her sworn statement and in the medical authorization to return to work regarding her absences (SPM 2.5.2 Truthfulness) – her Internal Affairs history reflects a written reprimand as well as 2, 4, 10, and 20-day suspensions for violations of SPM 2.6.1 Promptness, Sick Leave Use 4.3.4, Meeting BSO Standards SPM 2.4, & SPM 13.1.5, Attendance-Authorized Training Program. (Affidavit of PSC Chair, Daniel Losey, ¶14).

25. Plaintiff's July 18, 2017 Charge of Discrimination filed with the EEOC failed to claim or cite any violation of FRCA and was never amended or revised to claim BSO retaliated against plaintiff for bringing this EEOC claim (Affidavit of Marilyn Campbell ¶4, Exhibit 1)

26. Plaintiff never brought an internal charge of discrimination, retaliation, or anything related thereto, internally, with BSO's EEO Division. (Affidavit of Marilyn Campbell ¶4)

27. Not until July 25, 2018 did the EEOC issue its Notice of Dismissal of Plaintiff's July 18, 2017 EEOC Charge. (Affidavit of Marilyn Campbell ¶6, Exhibit 2)

28. The 10-month gap between plaintiff's July 2017 EEOC complaint (*Id.*) and the May 2018 opening of IA Case #2018-0117 (Affidavit of IA Investigator Sergeant Lynda Hornsby, ¶3-4) is too remote in time and too proximately long to create a causal nexus for retaliation.

29. Plaintiff exhausted her FMLA leave (approved March 22, 2016-March 21, 2017) as of August 2016 (plaintiff attested to this in her sworn statement in IA Case # 10-16-0294, Exhibit 1, p.5 to Aff. Of Melissa Erdelyi; and Aff. of Elizabeth Parker ¶¶3-5, 7 & Exhibit 2).

30. After her FMLA expired in August 2016, Plaintiff's next requested FMLA leave in August 2017, which was denied as she had not worked 1,250 hours within the twelve-months preceding that FMLA request (Aff. of Elizabeth Parker, ¶5).

31. Where plaintiff exhausted her FMLA leave by August 2016, her 20-day suspension in May 2017 (Affidavit of PSC Chairman, Daniel Losey ¶¶4 & Exhibit 2) and the opening of her 2018 IA Case #2018-0117 (Affidavit of IA Investigator Sergeant Lynda Hornsby, ¶¶3-4), 9 & 21 months later, is too remote in time and too proximately long to have a retaliatory connectivity to plaintiff's use of FMLA leave.

32. Even if Plaintiff had not been suspended 160 hours (20 day-suspension) in IA Case # 10-16-0294, she still would not have worked the required 1,250 hours to qualify for FMLA leave in August 2017, (Affidavits of Elizabeth Parker, ¶¶ 5-6, Lynda Hornsby, ¶10).

33. A written counseling at BSO is not discipline as per BSO policy. (All Affidavits)

**MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

**Count III - Retaliation for Plaintiff Bringing July 2017 EEOC Complaint Under FCRA**

Several dispositive reasons exist, individually or collectively, to warrant summary judgment:

(1) Failure to exhaust administrative remedies by bringing no administrative action against defendant that even raised a claim of retaliation for filing her July 2017 2017 EEOC Charge as required by the FCRA; (2) The relevant decisionmakers in Plaintiff's Internal Affairs Cases, and all investigators in those IA Cases as well as her supervisors were all unaware that plaintiff engaged in the protected activity of bringing her 2017 complaint filed with the EEOC; (3) Plaintiff's repeated breaches of BSO policy from 2012 through 2018 provided a legitimate, non-retaliatory reason for investigating and disciplining Plaintiff for these demonstrated violations of BSO policy (including her 20-day suspension & termination), which negates a causal nexus for FRCA & FMLA retaliation as well as FMLA interference; (4) Plaintiff did not arbitrate, appeal, and/or grieve the "just cause" of any of her suspensions from her Internal Affairs Cases that resulted in 1-day, 3-day, 5-day, 10-day, and 20-day suspensions under the governing Collective



Bargaining Agreement affecting the parties to this lawsuit and, this cannot challenge the legitimacy of her 20-day suspension, which is the basis for her retaliation claims as well as FMLA interference; (5) Any adverse employment actions following Plaintiff's filing of her July 18, 2017 EEOC Complaint were too remote in time to have a retaliatory nexus; and (6) Other communications operators with a lesser disciplinary history, and even with less serious sustained violations of BSO policy, were terminated within the last year. BSO will address each *seriatim*.

Exhaustion of Administrative Remedies: FRCA (Fla. Stat. §760.01-11), at §760.07 requires that, "If the statute prohibiting unlawful discrimination provides an administrative remedy (760.11), the action for equitable relief and damages provided for in this section may be initiated only after the plaintiff has exhausted his or her administrative remedy." As per Exhibit 1 to Defendant's Answer to the Amended Complaint (and Affidavit of BSO records custodian Marilyn Campbell, Exhibit 1), plaintiff's July 2017 EEOC Charge solely charged associational disability discrimination. That Charge referenced no retaliation claim nor even cited the FRCA.

The pleadings (¶9 of Amended Complaint & Answer thereto) admit that the EEOC did not issue a finding within 180 days of the filing of this charge. It is uncontested that not until July 25, 2018 did the EEOC issue its Notice of Dismissal and, in the interim, plaintiff brought no amendment to its EEOC Charge to include any retaliation following her July 2017 EEOC Charge (Affidavit of BSO records Custodian Marilyn Campbell ¶¶4,6 & Exhibit 2; ¶¶25, 27 above).

IA Case #10-16-00294 resulting in the 20-day suspension had already been closed, and defendant had already served her 160 hour, 20-day suspension before she filed her 2017 EEOC Charge. The next IA case following her July 2017 EEOC Charge, (IA Case # 2018-0117) was opened in May 2018. (Affidavit of Lynda Hornsby) The July 2017 EEOC Charge was still pending until July 25, 2018, and yet plaintiff never revised her charge to claim that investigation

(May 2018 opening of IA Case # 2018-0117) or anything else was retaliation for her July 20017 EEOC Charge. Plaintiff never administratively complained of retaliation by Defendant-period.

Plaintiff conceded in sworn answers to defendant's interrogatory number 17 that she was not suspended in January 2018. A written counseling, such as the one in April 2018 or any other, is not considered discipline, only training, so it fails to qualify as adverse employment action (§33)

Thus, Plaintiff has failed to exhaust her administrative remedies under Count III for retaliation.

Where the protected activity (filing her 2017 EEOC Charge) was unknown to defendant, it is axiomatic that retaliation therefor cannot exist. No investigator, supervisor, and no decisionmaker in any of plaintiff's 7 IA cases knew that plaintiff brought any charge of discrimination, retaliation or any other form of harassment against BSO during her employment with BSO (§§17, 19). *Krutzig v. Pulte Home Corp.*, 602 F.3d 1231, 1236 (decisionmaker must be aware of protected activity).

**Defendant's legitimate business purpose to investigate and discipline plaintiff in her 7 IA Cases is uncontestable.**

Every single one of plaintiff's 15 performance evaluations at BSO (from 2009-2018) marked her as "needing improvement" in the performance category of "Attendance and Punctuality, which she never appealed." (§1-2 above) Plaintiff's received suspensions (1-day, 3-day, 5-day, 10-day & 20-day) in 5 of her Internal Affairs cases, but never arbitrated, appealed, or grieved the "just cause" of any of those suspensions under the CBA (§10).

The last 3 IA cases where plaintiff was given a 10-day suspension, a 20-day suspension, and termination were all presented to and decided by the autonomous PSC that is independent from plaintiff's command (§§11,13) and comprised of 11 voting members, 4 of which are residents, civic activists never employed by BSO and a 5th member was the Union Representative for plaintiff (§12). The investigation and reports in the last two, IA cases where plaintiff was

suspended for 20 days and terminated were performed by people assigned to Internal Affairs outside of plaintiff's command (§18) prior to their presentation to the PSC.

A truthfulness violation is severe enough, by itself to warrant termination at BSO (§16).

In IA Case, #2018-0117 resulting in plaintiff's termination, she lied under oath:

Q: This is an official proceeding. And, if you knowingly provide false information during this proceeding, that would constitute perjury under Florida Statutes. Do you understand?

A: Yes.

Q: Can you tell me what perjury is?"

A: Lying under oath.

...

Q: How long have you been a BSO employee?

A: Nine years.

...

Q: Do you have any other outside employment?

A: No

...

Q: Has everything you said been truthful to the best of your knowledge?

A: Yes.

(Affidavit of Lynda Hornsby, Exhibit 2, Sworn Statement at pages 2, 5 & 20 - §4 above). Plaintiff had earned more than \$30,000.00 from the City of North Miami in the prior two years, yet still denied having outside employment. The Assistant Personnel Director, City of North Miami attested that plaintiff worked there from 2015 to the present and provided wage and earning reports evidencing that over the last 12 months (July 1, 2017-June 30, 2018) plaintiff worked 1,083 hours for the City of North Miami (more than she worked at BSO during that same period) and earned at least \$30,000.00 in 2017 & 2018 (§4 above). [In her deposition, Plaintiff attested to earning even more.] Plaintiff neither reported nor gained pre-approval of this off-duty employment as required by BSO policy (§§6-7). The investigator detailed 17 instances where plaintiff worked for North Miami and used sick leave at BSO on the same calendar day as well as her 310 AWOL hours (§8, 7). During the pre-disciplinary conference, plaintiff said that she worked for even more employers outside of BSO in addition to the City of North Miami (§9).

As per the Affidavits, Plaintiff's pattern of absences persisted throughout her employment.

**PLAINTIFF'S ATTENDANCE HISTORY NEGATES DISCRIMINATORY NEXUS**

- 2010**
- January 19 Excused tardiness. Reason given: "Child's day care center did not open on time."
  - May 1 Excused tardiness. Reason given: "a flat tire on I-95."
  - May 10 Unexcused tardiness. Reason given: "stuck in traffic on the interstate."
  - May 23 Excused tardiness. Reason given: "her daycare provider not being open."
  - July 23 Excused tardiness. Reason given: "Delay on the expressway due to rain."
  - August 8 Unexcused tardiness. No reason was given.
  - August 21 Excused tardiness. Reason given: "Day care was not open."
  - August 24 Memorandum advising Ms. Matamoros that, "Any future promptness events as the result of child care concerns will be considered unexcused and additional promptness events may result in progressive discipline."
  - September 3 Unexcused tardiness. Reason given: "she had trouble getting the family ready to leave the house."
  - September 25 Unexcused tardiness. Reason given: "lost her ID card."
  - November 2 Unexcused tardiness. No reason was given. Ms. Matamoros was advised that, "another tardiness will result in a counseling."
  - November 5 Excused tardiness. Reason given: "car overheated."
  - December 10 Excused tardiness. Reason given: "flat tire."
  - December 21 Unexcused tardiness. Reason given: "her day care provider had not opened on time."
  - December 22 Ms. Matamoros was counseled on BSO's Policy of Promptness and her pattern of tardiness and was advised to avoid further violations.
  - December 26 Excused tardiness. Reason given: "stuck in traffic on I-95." This Tardiness Record Report states that, "Ms. Matamoros received a counseling in December 2010 regarding promptness. This is now her 9th excused tardy, and the 1st occurrence since the receipt of the counseling."
- 2011**
- February 1 Excused tardiness. Reason given: "stuck in traffic on I-95."
  - March 19 Unexcused tardiness. Reason given: "just running late."
  - March 22 Unexcused tardiness. Reason given: "vehicular issue."
  - March 23 Ms. Matamoros was issued a Written Counseling Report advising that further tardiness for vehicle malfunctions may not be considered excused and stating that, "You are being provided with a final warning to report for duty on-time, as your recent activity is trending towards progressive discipline." She signed this Report on March 25, 2011.
  - September 21 Excused tardiness. Reason given: "she had not been feeling well."
  - October 2 Unexcused tardiness. Reasons given: first, "no reason," then, "gone to Dunkin Doughnuts," and finally "fallen asleep in your vehicle."
  - October 6 Memorandum to Ms. Matamoros from Duty Officer Chris Arneson stating that her patterns of tardiness "have the potential to cause undue hardship on your co-workers, and are a direct violation of SPM 2.6.1, and Division SOP 3.10

. . . Any future tardiness incidents, including breaks and tour of duty, will be considered unexcused and will result in progressive discipline.”

## 2012

March 3 Unexcused tardiness. Reason: “overslept while on break on the 3rd floor.”

March 5 Unexcused tardiness. No reason was given; Ms. Matamoros’ response to her supervisor was, “I got here when I got here.” The Tardiness Record Report states, “Based upon the memo you received on October 6, 2011, these tardy occurrences will be considered unexcused and will be referred to the Site Manager for further progressive disciplinary action.”

March 6 Unexcused tardiness. Reason given: “the day care center did not open on time.” The Tardiness Record Report states, “Based upon the memo you received on October 6, 2011, these tardy occurrences will be considered unexcused and will be referred to the Site Manager for further progressive disciplinary action.”

March 7 Internal Affairs Case # 03-12-0086 was opened addressing her infractions of BSO SPM 2.6.1 Promptness.

March 13 Memorandum to Ms. Matamoros regarding her failure to properly notify of her request to use sick leave. “Failure to make proper notifications to the center creates a hardship for the shift and your co-workers. It is suggested that you make every effort to contact the center within the above-stated guideline [no later than 2 hours before] to prevent any future infractions of this nature.”

March 18 Unexcused tardiness. Reason given: “not feeling well.” The Progressive Discipline Narrative on that report documents that, “IA Case pulled on 3/7/12.”

April 4 Internal Affairs Investigative Report completed in Case # 03-12-0086.

April 6 Ms. Matamoros was issued a Written Reprimand for her “extensive history of tardy occurrences since 2010 . . . and 25 documented instances of reporting tardy for duty . . . tardy occurrences when returning from scheduled breaks.”

April 20 Unexcused tardiness. Reason given: “traffic on her way to work.”

May 3 Written Counseling Report issued to Ms. Matamoros for SPM 2.8.2

Reporting Illness violations stating, “This counseling is being written as a result of your documented sick leave usage, accruals, and balance . . . We discussed the pattern of absenteeism that can result in disciplinary action . . . in an effort to assist you in becoming compliant with agency policy, however excessive absenteeism has continued . . . you have used a total of 411.00 hours of sick leave . . .” It further states, “It is expected that you will make an immediate attempt to improve your sick leave balance, usage, and overall accruals in order that you become compliant to agency standards. As your sick leave continues to be monitored and there is no improvement, you will be subject to disciplinary action.”

July 1 Unexcused tardiness. Reason given: “took medication and had to wait for it to take effect.”

July 2 Written Counseling Report issued to Ms. Matamoros for 7/1 tardiness, 6/30 & 7/2 untimely reporting of illness before scheduled work shift, and “excessive absenteeism has continued.” Counseling Report advised that, “Any future infractions of this or similar nature may result in progressive discipline.”

July 27 Unexcused tardiness. Reason given: “personal illness.” The Progressive Discipline Narrative on the Tardiness Record Report states that, “This tardiness will be referred to Site Manager Lowe for review.”

July 1, 2011 through July 28, 2012 Ms. Matamoros used 646.75 hours of sick leave, of which 195.75 hours were unsubstantiated by any medical documentation as required. Sick leave also violated policy where not reported within the required time frames, it evidenced a pattern of being taken in conjunction with time off and of being at the same time of the week within reviewed periods.

August 17 Internal Affairs Case # 08-12-0271 was opened regarding Ms. Matamoros' violations of SPM 4.3.4 Sick Leave Use and 2.6.1 Promptness.

September 24 Unexcused tardiness. Reason given: "vehicle trouble."

October 14 Unexcused tardiness. Reason given: "traffic."

October 21 Unexcused tardiness. Reason given: "car had overheated."

December 3 Ms. Matamoros was issued a 1-day suspension without pay for the sustained violations in Case # 08-12-0271.

## 2013

March 3 Unexcused tardiness. Reason given: "overslept." The Progressive Discipline Narrative on the Tardiness Record Report states that, "Any additional infractions of an unexcused nature will result in a counseling."

May 20 Ms. Matamoros was issued a Counseling for tardiness.

June 9 Unexcused tardiness. BSO's Tardiness Report expresses that, "This extended break caused four operators to be off the desk at the same time . . . Ms. Matamoros would not provide a reason, she just stamped back in and sat down."

July 1 Unexcused tardiness. Reason given: "road being wet from the rain."

September 11 Unexcused tardiness. Reason given: "thought you canceled your pre-scheduled overtime but cannot find your copy."

September 11 Written Counseling Report issued to Ms. Matamoros regarding her pattern of tardiness and advising that, "Any further infractions of this nature will result in progressive discipline."

September 13 Unexcused tardiness. Reason given: "mechanical problems" with her vehicle requiring it to be towed. Although instructed to furnish documentation of towing from the towing company, she failed to comply with the directive.

October 3 Unexcused tardiness. Reason given: "lane closures on I-95." The Progressive Discipline Narrative on the Tardiness Record Report states that, "It is necessary for Ms. Matamoros to comply with SPM 2.6.1."

October 5 Unexcused tardiness. No reason given when asked by her Duty Officer.

October 18 Excused tardiness. Reason given: "flat tire."

October 30 Ms. Matamoros failed to report to work for a scheduled shift exchange, meaning someone else already worked her shift in exchange for her working the other person's shift. The Duty Officer was unable to contact Ms. Matamoros when this happened. Despite a formal memorandum of warning, Ms. Matamoros did not return the Duty Officer's call. It caused the shift to work below minimum staffing. October 30 Memorandum issued to Ms. Matamoros documenting her absence from work on 10/30 and advising of suspending her from submitting any shift "exchanges for the next 30 days."

December 13 Unexcused tardiness. Reason given for tardiness in returning from break: "an extended phone call." The tardiness Record Report for this incident provides, "As a result of the tardiness, the 911 complaint desk was working at below minimum staffing."



- 2014**
- February 22 Ms. Matamoros was issued a Written Counseling for “Failure to Report for Duty” for her scheduled shift exchange and her inaccessibility to be reached.
- March 2 Unexcused tardiness. Reason given: “there was no reason.”
- March 15 Absence from shift without properly notifying supervisor
- March 20 Memorandum documenting 3/15 absence and warning of progressive discipline for any future infractions of same nature
- March 25 Internal Affairs Case # 03-14-0063 was opened addressing the eleven (11) infractions of tardiness identified above spanning from 3/03/13-3/02/14, her pattern of absenteeism, and continuing pattern of reporting illness.
- July 13 Ms. Matamoros failed to report for duty in a shift swap and was AWOL.
- July 17 Memorandum documenting 7/13/14 absence and warning that, “Due to the repeated violations of this nature, you are being recommended for progressive discipline through Internal Affairs.”
- July 31 Internal Affairs Investigative Report in Case # 03-14-0063 was completed.
- November 13 Ms. Matamoros was issued a 3-day suspension for sustained violations of BSO Policy in PC Case # 03-14-0063.
- 2015**
- January 9 Ms. Matamoros failed to report to work and did not report the absence to the Duty Officer as required rendering her Absent Without Leave or AWOL.
- January 23 Internal Affairs Case # 01-15-0015 was opened regarding Ms. Matamoros’ violations of BSO SPM 2.8.2 (Absent Without Leave) and 2.8.2 (Reporting Illness)
- February 5 Ms. Matamoros failed to report to work and did not report the absence to the Duty Officer as required rendering her Absent Without Leave or AWOL.
- March 2 Ms. Matamoros failed to report to work and did not report the absence to the Duty Officer as required rendering her Absent Without Leave or AWOL.
- March 6 Ms. Matamoros failed to report to work and did not report the absence to the Duty Officer as required rendering her Absent Without Leave or AWOL.
- March 30 Ms. Matamoros failed to report to work and did not report the absence to the Duty Officer as required rendering her Absent Without Leave or AWOL.
- April 20 Unexcused tardiness. Reason given: “overslept.”
- April 25 Unexcused tardiness. Reason given: “she did not have her access card.”
- May 1 Unexcused absence. Reason given: “babysitter was ill.”
- July 3 Unexcused absence. Reason given: “overslept.”
- July 10 Excused tardiness. Reason given: “babysitter had not shown up.”
- July 11 Unexcused tardiness. Reason given: “no access card.”
- July 17 Unexcused tardiness. Reason given: “sick child.”
- July 18 Ms. Matamoros’ violations of Absent Without Leave & Reporting Illness were sustained and Ms. Matamoros received a 5-day suspension without pay.
- August 1 Unexcused tardiness. Reason given was “overslept.”
- August 12 Unexcused tardiness. Ms. Matamoros “was unable to provide a reason” when questioned by the Duty Officer.
- August 16 Unexcused tardiness. Reason given: “a flat tire, a phone that was not working, and no access card.”
- October 5 Excused tardiness for vehicle problems

October 20 Unexcused tardiness. Reason given: "overslept."

October 31 Excused tardiness. Reason given: "traffic backed up on I-95."

November 8 Unexcused tardiness. Reason given: "she just woke up."

November 2 Ms. Matamoros was issued a Written Counseling Report regarding her refusal to work mandatory overtime which "caused the Bravo shift to work short staffed, and also placed a burden on your co-workers."

November 25 Unexcused tardiness. Reason given: "overslept."

December 5 Unexcused tardiness. Reason given: "overslept." In the Progressive Discipline Narrative of the Tardiness Record Report, it states that, "Referring to Internal Affairs."

December 22 Unexcused tardiness. No notification provided. Reason given: "overslept."

## 2016

February 9 Unexcused tardiness. Reason given: "alarm was not set and she overslept." The Progressive Discipline Narrative on the Tardiness Record Report states that, "Written Counseling Completed-See attached."

February 9 Ms. Matamoros was issued a Written Counseling for her pattern of unexcused tardiness from August 1, 2015 through February 9, 2016 (9) as identified above. The Counseling Report states, Ms. Matamoros is placed on notice that from this point forward, any additional violations, be it excused or unexcused, will result in an Internal Affairs investigation."

February 10 Ms. Matamoros signed her Written Counseling Report.

March 11 Excused tardiness. Reason given: "child was in need of possible urgent medical assistance."

March 18 Internal Affairs Case # 03-16-0059 was opened regarding Ms. Matamoros violations of BSO SPM 2.6.1 Promptness.

April 19 Internal Affairs Investigative Report in PC Case # 03-16-0059 completed.

May 11 BSO's Professional Standards Committee sustained the infractions of Promptness in PC Case # 03-16-0059 and recommended a 10-day suspension without pay, which was affirmed by the Sheriff.

May 17 Unexcused tardiness in returning from break. Reason given: "fell asleep in her vehicle in the parking lot." The Tardiness Record states that, "Any further instances of this nature can be subject to discipline."

May 18 Unexcused tardiness. Reason given: "overslept."

May 31 Ms. Matamoros was issued a Written Counseling Report for refusal to work mandatory overtime in violation of BSO SPM 2.4 Meeting BSO Standards for "unwillingness or inability to perform assigned duties or satisfy standards of performance established for the position."

June 7 Ms. Matamoros was issued a Written Counseling Report for refusal to work mandatory overtime in violation of BSO SPM 2.4 Meeting BSO Standards for "Unwillingness or inability to perform assigned duties or satisfy standards of performance established for the position."

July 5 Unexcused tardiness. Reason given: "fell asleep on her break." The Tardiness Record states that, "Any further instances of this nature can be subject to progressive discipline."

August 17 Ms. Matamoros requested consideration for a part time schedule.



September 29 Unexcused tardiness. Reason given: “traffic on I-95.”

October 2 Unexcused tardiness. Reason given: “overslept.”

October 16 Unexcused tardiness. Reason given: “did not have access card.” The Progressive Discipline Narrative on the Tardiness Record Report states that, “IA Case will be generated.”

October 24 Internal Affairs Case #10-16-0294 was opened to address the string of unexcused tardiness infractions from May 17, 2016 through October 16, 2016 following her 10-day suspension for Promptness infractions (SPM 2.6.1).

November 11 Ms. Matamoros was issued a Notice of Improvement advising her that she must make improvement to “Improve sick leave accruals (SPM 2.8.2-Reporting Illness) Improve attendance (SPM 2.8.3-A.W.O.L) Improve punctuality (SPM 2.6.1 Promptness)”

November 22 Unexcused tardiness. Ms. Matamoros failed to answer calls from her Duty Officer. Twenty minutes after her shift started, Ms. Matamoros called her Duty Officer and advised that, “she didn’t realize the time and was on her way.”

December 28 Excused tardiness. Reason given: “administering medication to her son.” This tardiness was excused.

## **2017**

January 20 Commenced part-time schedule.

February 2 Internal Affairs Investigative Report in Case # 10-16-0294 completed.

March 15 BSO’s Professional Standards Committee sustained Ms. Matamoros’ infractions for Promptness and recommended the progressive discipline of a 20-day suspension without pay.

April 25 Twenty (20) day suspension was approved and affirmed by Sheriff.

May 6 Unexcused absence. Reason given: “getting the access card from in between her car seats.”

October 23, 2017 Three-month sick leave analysis where a total of 44 hours of sick leave was used by plaintiff was discussed with plaintiff by her duty officer. Plaintiff only had a balance of 8.532 hours of sick accrual left.

October 23, 2017 Plaintiff received training in regards to sick leave usage that cited her utilization of 164 hours of sick leave over the last nine-month period and BSO’s expectation that she show improvement in her attendance in her sick leave usage under monthly review.

## **2018**

April 23, 2018 A sick leave review/analysis was completed covering a three-month period 01/01/18 through 03/30/18 in which plaintiff used 92.50 hours of sick leave, leaving a balance of 0.032 hours. The Duty Officer served and reviewed it with plaintiff. During April 2018, plaintiff utilized another 12 hours of sick leave; in May she used 24 hours of sick leave, leaving her with a zero balance of sick leave.

May 28, 2018 Internal Affairs Case # 2018-0117 was opened to address the excessive sick leave use and infractions of sick leave policy, such as lack of medical documentation, using sick leave in conjunction with other time off, etc.

August 16, 2018 Plaintiff’s Sworn Statement given to Internal Affairs Investigator in which Plaintiff denied having any off-duty employment outside of BSO.

August 24, 2018 Internal Affairs Investigator takes the Sworn Statement of Assistant Personnel Director, City of North Miami who attested that plaintiff

worked there from 2015 to the present and provided wage and earning reports.

August 27, 2018 Internal Affairs Case # 2018-0117 was revised to include charges of Truthfulness & Off-Duty Employment revealed during the investigation.

September 13, 2018 The Professional Standards Committee sustained Ms. Matamoros' infractions for Sick Leave Usage, Truthfulness, and Off-Duty Employment Promptness and recommended termination.

September 14, 2018 Following the Professional Standards Committee decision to sustain all charges and terminate plaintiff, plaintiff was suspended without pay pending a pre-disciplinary hearing as per BSO policy.

September 24, 2018 BSO sent plaintiff a certified letter, return receipt requested notifying her of her termination and right to a pre-disciplinary conference.

October 1, 2018 Plaintiff signed the return receipt confirming delivery of the September 24, 2018 letter to her.

October 15, 2018 Plaintiff's Pre-Disciplinary Conference was conducted in which plaintiff confirmed that she had engaged in unapproved, off-duty, outside employment for pay with several employers from 2015 to the present and thereby reconfirmed the conclusive evidence that she lied and was untruthful in her sworn statement given in IA Case # 2018-0117 denying any outside employment.

November 26, 2018 Effective Date of Plaintiff's Termination of BSO Employment.

BSO's legitimate purpose to investigate and discipline plaintiff for its most basic requirement of employment (attendance) and for unequivocal violations of its truthfulness and off-duty employment policies merit summary judgment on both of plaintiff's retaliation claims.

Plaintiff's July 18, 2017 EEOC Charge is the sole source of protected activity; the 10-month gap until the opening of her next IA case (May 2018 Case #2018-0117) that resulted in her termination is too remote (§28). *Wascura v. City of South Miami*, 257 F.3d 1238, 1248 (11th Cir. 2001) (3½ month delay, standing alone, lacks nexus); *Drago v. Jenne*, 453 F.3d 1301 (11th Cir. 2006) (3-month delay, standing alone, lacks nexus). Legitimate deficiencies of performance recorded in her performance evaluations and non-disciplinary counselings are not actionable.

Recent terminations of others for sustained, comparable violations of BSO policy, all with either a lesser disciplinary history or less serious infractions of BSO policy than plaintiff, negates retaliatory pretext (§§22-24).

The causation standard for retaliation claims is no longer a not completely unrelated standard. The United States Supreme Court in *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517, 186 L.Ed.2d 503 (2013) changed the causation standard for Title VII retaliation claims to require the protected activity to constitute a but-for cause of the alleged, adverse action by the employer. The Eleventh Circuit is yet to decide this issue. *Jones v. Allstate Ins. Co.*, 281 F.Supp.3d 1211 (N.D. Ala. 2016), *aff'd on other grounds*, 707 Fed. Appx. 641, 646 (11th Cir. 2017) (“Because we find that Jones failed to prove an adverse action, we need not decide whether the district court erred . . . in applying a ‘but-for’ causation standard to her FMLA retaliation claim). This Court’s June 8, 2019 Order on the motion to dismiss the amended complaint, at footnote 2, stated that, “FRCA retaliation claims are analyzed under the same framework as . . . Title VII retaliation claims.” As such, *Nassar*’s but-for causation standard for Title VII retaliation claims applies to Count III & IV’s FCRA/FMLA retaliation claims herein.

#### Counts I & IV Claims for FMLA Interference & Retaliation

The Interference Claim asserts that Plaintiff’s 20-day suspension was unjustified and that, but-for that suspension, her August 2017 FMLA request would have been granted as she would have worked the required 1,250 hours. The 20-day suspension was legitimate (see above); even without that suspension, her FMLA request would have failed as she still had not meet the 1,250 FMLA threshold (¶32, *Aff. Lynda Hornsby* ¶40). This negated FMLA Interference.

Plaintiff claims during discovery that BSO did not tell her the number of hours she worked/was below the 1,250 threshold in denying her August 2017 FMLA request. Such is not a material fact given that all her hours worked were recorded and readily discernible on BSO’s Intranet as well as its Telestaff system to which plaintiff had uninterrupted, electronic access. (Affidavit of Jennifer Blum ¶3). In her Sworn Statement given for IA Case # 01-15-0015, “Ms.

Matamoros confessed to reviewing the electronic scheduling system (Telestaff), specifically, her calendar on a weekly basis.” (Affidavit of Suzanne Lowe, Exhibit 4, page 3) In any event, the hours served in the 160-hour suspension cannot be used for the 1,250-hour, FMLA threshold.

FMLA retaliation claim likewise fails. Utilization of FMLA is the sole source of retaliation; as of October 2016 plaintiff admittedly had exhausted her FMLA leave approved through March 2017 (¶ 28 above). Thus, her May 2017, 20-day suspension (9 months later) and November 2018 termination (21 months later) are too remote to have temporal proximity (¶31) *Drago v. Jenne*, 453 F.3d 1301 (11th Cir. 2006) (3-month delay, alone, lacks nexus for FMLA retaliation).

Nevertheless, BSO’s legitimate business purpose to issue the 20-day suspension and to terminate plaintiff based on plaintiff’s demonstrated history and record of absences and her untruthfulness in denying and hiding her substantial, outside employment (1,083 hours worked in the last year) negate FMLA retaliation. *Earl v. Mervyn’s, Inc.*, 2017 F.3d 1361, 1368 (11th Cir. 2000) (termination for “repeated and numerous punctuality infractions” not FMLA retaliation). *Loveland v. Employers Mut. Cass. Co.*, 674 F.3d 806 (8th Cir. 2006) (three-year pattern of excessive, unscheduled absences/leave negated FMLA retaliation claim); *Dilpiaz v. Carbon County, Utah*, 760 F.3d 1126, 1132-33 (10th Cir. 2014) (dismissal for breach of employer’s absence-notification policy not related to use of FMLA leave). The additional reasons warranting summary judgment on Count III, FCRA retaliation claim (e.g., comparable disciplines for other employees & plaintiff’s failure to arbitrate, appeal, and/or grieve the legitimacy of her 20-day suspensions), apply equally to Count IV’s FMLA retaliation claim.

WHEREFORE, Defendant seeks Summary Judgment on all Counts of the Amended Complaint.

Dated: June 10, 2019  
Fort Lauderdale, Florida

s/Gale Ciceric Payne, Esq  
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#### CERTIFICATE OF SERVICE

I hereby certify that on June 10, 2019, I electronically filed the foregoing Defendant's Motion for Summary Judgment and Memorandum of Law in Support with the Court by CM/ECF. I also certify that the foregoing document is being served on June 10, 2019 on all counsel of record identified on the Service List below in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

s/ Gale Ciceric Payne

#### SERVICE LIST

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Case No. 0:18-CIV-62813-MOORE  
United States District Court, Southern District of Florida

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