UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

DR. EARL J. CROSSWRIGHT,

Plaintiff,

v. **CASE NO. 3:20cv5963-MCR-HTC**

ESCAMBIA COMMUNITY CLINICS, d/b/a COMMUNITY HEALTH NORTH WEST FLORIDA,

Defendant.
_____/

ORDER

Pending before the Court is Defendant Escambia Community Clinics's Motion for Summary Judgment on all of Plaintiff Dr. Earl J. Crosswright's claims. ECF No. 79. After careful review, the motion will be granted.

Escambia Community Clinics ("ECC") is a community health center located in Pensacola, Florida. ECC is a Florida not-for-profit corporation and is designated as a Federally Qualified Health Center. ECC's Chief Executive Officer is Shandra Smiley, and its Chief Medical Officer is Dr. George Smith.

Dr. Earl Crosswright is a medical doctor who operated his own family medical practice in Pensacola for twenty-four years. In 2017, Crosswright inquired of ECC about selling his practice to ECC. ECC declined to buy the practice but offered Crosswright a position as a family medical physician instead. Crosswright

accepted the offer, and the parties entered into a formal employment contract on March 29, 2017. In pertinent part, the employment contract states that Crosswright's principal duty was "to provide professional services to patients of ECC and to perform the normal and customary duties of a [f]amily [p]ractice [p]hysician." ECF No. 78-8 at 1. The contract required Crosswright to meet the following three qualifications to maintain his employment: (1) the physician must have "a valid, unrestricted Florida license to practice medicine;" (2) the physician "must be Board Certified or eligible and receive[] Board Certification within two years of [the] state date of employment;" and (3) the physician "[m]ust meet all [ECC] credentialing and privileging criteria." *Id*. at 7. The Board Certification provision allowed ECC "to shorten or lengthen the time frame and/or the requirement for Board Certification based upon operational needs." *Id*. Under Section 6 of the contract, Crosswright could be terminated with or without cause. In the event Crosswright was fired for cause, the termination would occur immediately on delivery of written notice, at which point his salary would end. Grounds for a cause termination included, among other things, a failure to perform the duties and obligations within the contract. The contract also provided for termination without cause at any time on ninety (90) days' written notice, and Crosswright would be entitled to his salary during this ninety day

period. *Id*. at 4. Absent termination by either party, the contract automatically renewed each year. *Id*. at 4.

During Crosswright's employment, Smith was his direct supervisor and administered his performance evaluations. In 2019, Crosswright was given his 2018 performance evaluation, which stated that he failed to meet performance expectations for the number of patients served, failed to meet expectations for patient satisfaction, failed to meet peer-reviewed quality standards, and failed to adequately function as part of the team. Crosswright provided written comments in response, stating that his low performance was attributable to the administration's policies that substantially increased patient wait times and blaming the administration for being retaliative since he had raised concerns about excessive narcotics prescriptions at ECC. ECF No. 42-10. On July 15, 2019, Smiley provided a formal written memo addressed to Crosswright's concerns in which she explained to Crosswright that all physicians are evaluated under the same contractual performance standards. She noted that Crosswright's "team player score" was low due to "issues [they] have discussed throughout the year," which included "reports of staff crying because they were made to feel inadequate" by Crosswright, "repeated complaints from [Crosswright's] co-workers" that led to his some of co-workers choosing to transfer, and comments from employees that Crosswright contributed to "a toxic work

environment." ECF No. 42-4. Regarding Crosswright's concerns about narcotics prescription practices at ECC, Smiley reiterated that ECC physicians are responsible for their own DEA licenses but beyond that ECC had implemented best practices for its physicians who prescribe narcotics. Later that year, in September 2019, the administration put Crosswright on a performance improvement plan. The plan identified the following issues: (1) low patient numbers; (2) lack of board certification; (3) inconsistent work hours below the required forty hours per week; (4) violation of the code of conduct through his "words, tone, actions, and behaviors [that] have . . . created an uncomfortable, intimidating and demeaning atmosphere for staff;" (5) conflicts of interest; and (6) "demonstrat[ing] through actions and behaviors a disregard and disrespect for ECC policies and procedures." ECF No. 78-13. The plan provided performance expectations corresponding with each issue and warned that if Crosswright continued to miss these expectations he could be terminated.

As ECC made clear both in Crosswright's employment contract and his performance plan, Crosswright was required to obtain board certification within two years of his employment start date. In fact, ECC required all physicians hired after 2015 to become board certified within two years of their start date. At the beginning of his employment, Crosswright was board eligible but not board certified. Based on

the terms of his contract with ECC, he had until March 29, 2019 to become board certified. This deadline passed without Crosswright becoming board certified. On April 3, 2019, ECC granted Crosswright an extension to obtain board certification until December 31, 2019, and warned that if he did not obtain board certification by that date, ECC "will offer no further extensions and will separate you from employment effective January 1, 2020." ECF No. 78-21. This deadline also passed without Crosswright receiving his board certification. In February 2020, Smiley offered Crosswright a physician in residence position at S.S. Dixon Elementary School because the position did not require *immediate* board certification; however, the offer was conditioned on Crosswright receiving board certification by December 31, 2020. Before Crosswright accepted or rejected the position, the COVID-19 pandemic, which reached the Pensacola area around March 2020, disrupted the physician in residence position at the elementary school. As such, Crosswright continued to work at ECC without board certification during this period and never accepted the elementary school position.

On March 19, 2020, in a meeting with ECC administrators and several other ECC medical staff, Crosswright expressed serious concerns regarding ECC's COVID-19 policies. Specifically, Crosswright objected to what he claims was an ECC policy prohibiting physicians from wearing masks and gloves around patients

because it would create too much fear. According to ECC, Crosswright's tone and mannerisms during this meeting were inappropriate and insubordinate. As a result, Smiley directed Crosswright to leave the building and placed him on administrative leave. On April 1, 2020, Smiley sent Crosswright an official termination letter. The letter advised Crosswright that if he obtained future employment as a physician, ECC "will gladly refer" his patients to his new location. ECF No. 78-9. The letter reflects that Crosswright's termination was without cause, meaning his salary was paid through July 1, 2020, which was ninety days from the termination letter. Nonetheless, ECC states in this lawsuit that Crosswright was terminated for poor performance, insubordination, and his failure to obtain board certification.

After terminating Crosswright, ECC sent a letter to the ECC patients who sought medical care from Crosswright during his employment, notifying them that Crosswright was no longer practicing medicine at ECC but that ECC had other qualified physicians who could continue to provide them care. The letter acknowledged that some patients may choose to change their primary care provider and, in that case, ECC would forward their medical records to the new provider on request. ECC also called the patients who received these letters to further communicate this information. The ECC employee who called the patients stated that, if asked, she told patients about Crosswright's new location. Additionally, as

part of its normal termination procedure, ECC waited thirty days from the termination date to terminate Crosswright's credentials in order to ensure that all outstanding insurance claims had time to be processed. *See* ECF No. 42-5. Crosswright claims this procedure made it difficult for him to see patients during this period because insurance companies would not allow him to submit claims under different credentials at his new location without ECC's release.

In September 2020, Crosswright dual-filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") and the Florida Commission on Human Relations ("FCHR"), claiming that ECC terminated his employment for retaliatory and discriminatory purposes in violation of state and federal law.[1] *See* ECF No. 78-18. The EEOC dismissed the charge based on its determination that there was no reasonable cause to believe that a violation of the law had occurred. *See* ECF No. 78-18 at 2–3. Subsequently, on November 4, 2020, Crosswright filed a civil suit in the Circuit Court of the First Judicial Circuit in and for Escambia County, Florida, raising claims for breach of contract, tortious interference, civil theft and unjust enrichment, restraint of trade, racial discrimination in violation of both state and federal law, and retaliation in violation

[1] Crosswright is black.

of both state and federal law. *See* ECF No. 1-1. On November 30, 2020, ECC removed the case to this Court pursuant to the Court's federal question jurisdiction. ECF No. 1. After the pleadings stage, in which Crosswright amended his complaint and the Court dismissed certain claims with prejudice, *see* ECF Nos. 19, 35, & 71, the following claims remain: breach of contract (Count I); tortious interference with a business relationship during employment (Count II); tortious interference with a business relationship after termination (Count III); discrimination in violation of the Florida Civil Rights Act ("FRCA") (Count VII); retaliation in violation of the FCRA (Count VIII); and retaliation in violation of the Florida Public Whistleblower's Act ("FPWA") (Count IX). Defendants move for summary judgment on each of Crosswright's claims. *See* ECF No. 79.

Summary judgment is appropriate where there are no genuine disputes of material fact, and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56; *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). A fact is "material" if, under the applicable substantive law, it might affect the outcome of the case. *Hickson Corp. v. N. Crossarm Co.*, 357 F.3d 1256, 1259–60 (11th Cir. 2004). A dispute of fact is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The burden of demonstrating the absence of a genuine dispute of material fact rests with the moving party. *Celotex*, 477 U.S. at 323. In determining whether the moving party has carried its burden, a court must view the evidence and factual inferences drawn therefrom in the light most favorable to the non-moving party. *Liberty Lobby*, 477 U.S. at 255; *Allen v. Tyson Foods*, 121 F.3d 642, 646 (11th Cir. 1997).

I. Discussion

Crosswright's breach of contract claim is based on his termination without cause pursuant to his employment contract with ECC. *See* ECF No. 42 at 4–9. ECC argues that this claim fails as a matter of law because Crosswright breached the contract himself by failing to obtain board certification and, even absent Crosswright's breach, ECC complied with the contractual terms that allowed ECC to fire Crosswright without cause. ECF No. 79 at 10–12. In response, Crosswright argues that ECC waived the board certification requirement by offering him extensions and that ECC breached the implied duty of good faith by firing him without cause. ECF No. 82 at 14–21. The Court agrees with ECC.

Generally, under Florida law, "[t]he interpretation of a written contract, including the question of whether a contract is ambiguous, is a matter of law." *Disa v. Ashley Furniture Indus., Inc.*, 131 F. Supp. 3d 1316, 1320 (M.D. Fla. 2015) (citing

DEC Elec., Inc. v. Raphael Constr. Corp., 558 So.2d 427, 428 (Fla. 1990)). "[T]he cardinal rule of contractual construction is that when the language of a contract is clear and unambiguous, the contract must be interpreted and enforced in accordance with its plain meaning." *Crapo v. Univ. Cove Partners, Ltd.*, 298 So.3d 697, 700 (Fla. 1st DCA 2020) (citation omitted). "However, where the terms of the written instrument are disputed and reasonably susceptible to more than one construction, an issue of fact is presented as to the parties' intent which cannot properly be resolved by summary judgment." *Strama v. Union Fidelity Life Ins. Co.*, 793 So.2d 1129, 1132 (Fla. 1st DCA 2001) (internal marks and citation omitted).

Additionally, Florida law recognizes an implied covenant of good faith and fair dealing in every contract. *See, e.g., Cox v. CSX Intermodal, Inc.*, 732 So.2d 1092, 1097 (Fla. 1st DCA 1999) (collecting cases). However, this covenant is a "gap-filling default rule" that applies when an issue "is not resolved by the terms of the contract or when one party has the power to make a discretionary decision without defined standards." *Publix Super Markets, Inc. v. Wilder Corp. of Del.*, 876 So.2d 652, 654 (Fla. 2d DCA 2004) (citations omitted). In other words, since the duty is a gap-filling default rule, "the implied covenant cannot override an express contractual term." *Ernie Haire Ford, Inc. v. Ford Motor Co.*, 260 F.3d 1285, 1291 (11th Cir. 2001) (citing *Ins. Concepts and Design, Inc. v. Healthplan Servs., Inc.*, 785 So.2d

1232, 1234 (Fla. 4th DCA 2001)). Further limiting its application, "[b]ecause the implied covenant is not a stated contractual term, to operate it attaches to the performance of a[n] . . . express contractual provision." *Snow v. Ruden, McClosky, Smith, Schuster & Russell, P.A.*, 896 So.2d 787, 791 (Fla. 2d DCA 2005). Thus, under Florida law, "[t]here can be no cause of action for a breach of the implied covenant 'absent an allegation that an express term of the contract has been breached.'" *Id*. (quoting *Ins. Concepts*, 785 So.2d at 1234); *see also White v. Fort Meyers Beach Fire Control Dist.*, 302 So.3d 1064, 1071–72 (Fla. 2d DCA 2020) (citations omitted).

Here, the employment agreement's material terms are unambiguous and required that Crosswright "receive[] board certification within two years of [his] start date of employment." ECF No. 78-8 at 7. ECC "reserves the right to shorten or lengthen the time frame and/or the requirement for [b]oard [c]ertification based upon operational needs." *Id*. Further, pursuant to Section 6 of the contract, the contract could be terminated with or without cause. *Id*. at 3–4. Under the contract, termination for cause could occur for a number of reasons, including a "material violation" of the obligations under the employment agreement, "failure by Employee to perform the duties described in Section 2 . . . including the minimum assigned [patient] encounters" after written warning has been given, and "insubordination after written

warning" has been given. *Id*. at 3–4. Termination without cause was expressly provided for in the contract so long as 90 days written was given and ECC continued to pay the employee during this period. *Id*. at 4.

ECC chose to terminate Crosswright's employment contract without cause, providing him ninety days' notice prior to termination of the contract and compensating him during this period. *See* ECF No. 78-9. By doing so, ECC followed the requirements for termination under Section 6 of the contract and, therefore, did not breach any express provision of the contract. *See* ECF No. 78-8 at 4. Because ECC followed the express terms of the agreement, the Court strains to see room to imply the "gap-filling default" duty of good faith. *See Publix*, 876 So.2d at 654; *see also Snow*, 896 So.2d at 791. Even if such a duty was implied due to the discretion given to ECC to terminate Crosswright's employment agreement without cause, *see Publix*, 876 So.2d at 654, the Court finds that ECC exercised this discretion in good faith since it had multiple grounds to terminate Crosswright with cause yet chose to terminate him without cause and continued to pay him for ninety days after his termination.

Beyond that, Crosswright did not obtain board certification within two years of the start date of his employment, as plainly required by the contract. *See* ECF No. 78-10 (Crosswright testifying that he still has not received his board certification nor

did he have such certification during his employment with ECC). Although ECC extended the deadline in writing to December 31, 2019, this extension expressly did not waive the board certification requirement. *See* ECF No. 78-21 ("If you are unable to complete the requirements in order to obtain board certification by December 31, 2019, [ECC] will offer no further extensions and will separate you from employment . . . ."). Furthermore, since Crosswright never accepted the position at S.S. Dixon Elementary School, the second extension of the board certification requirement, which was contingent on his acceptance of this new position that did not require *immediate* board certification, *see* ECF No. 42-17 (unexecuted offer letter for the S.S. Dixon Elementary position explaining that the offer is contingent on Crosswright receiving board certification by December 31, 2020) is not effective. Because Crosswright failed to obtain his board certification even after ECC extended the deadline to do so, Crosswright breached the contract, giving ECC grounds to terminate his employment agreement for cause. *See* ECF No. 78-8 at 3 (employment contract explaining that ECC can terminate the agreement for cause because of a "material violation" of his obligations under the contract). Additionally, Crosswright's well-documented performance issues and insubordination gave ECC grounds to terminate the contract for cause since ECC provided written warning of these issues to Crosswright on at least three separate occasions. *See* ECF No. 78-8

(employment contract explaining that ECC can terminate Crosswright for cause after written warning of his failure perform "the minimum assigned encounters" and his "insubordination"); ECF No. 78-12 (2018 performance evaluation recounting Crosswright's performance issues and inability to work with others); ECF No. 42-4 (memo from Smiley to Crosswright similarly recounting Crosswright's performance issues and "remind[ing]" him of the "repeated complaints from [his] co-workers," leading to some co-workers asking to be transferred); ECF No. 78-13 (performance improvement plan detailing further performance issues, lack of board certification, and actions and behaviors that demonstrate "a disregard and disrespect for [ECC] policies and procedures").For all of these reasons,, Crosswright's breach of contract claim fails as a matter of law.

Crosswright also brings two tortious interference claims, one based on conduct during Crosswright's employment and the other based on conduct after his employment. ECF No. 42 at 10–15. Crosswright's claim for tortious interference during his employment is based on allegations that ECC's administration undermined his ability to perform in accordance with his employment contract; thus, according to Crosswright, ECC intentionally "interfered with its own business relationship" with Crosswright. *See id*. at 10–12. Crosswright's claim for tortious interference after his employment is based on allegations that ECC intentionally

interfered with his relationship with his patients by sending them letters after his termination and by failing to release his credentials for thirty days after his termination, which prevented him from submitting insurance claims after re-establishing himself as a solo practitioner. *Id*. at 12–15. ECC argues that Crosswright's first claim fails because ECC cannot interfere with its own business relationship and that his second claim fails because Crosswright's patients became ECC's patients once Crosswright became employed by ECC. *See* ECF No. 79 at 13–16. The Court agrees with ECC that both claims fail as a matter of law.

Under Florida law, the elements of tortious interference with a business relationship are: "(1) the existence of a business relationship[;] (2) knowledge of the relationship on the part of the defendant; (3) an intentional and unjustified interference with the relationship by the defendant; and (4) damage to the plaintiff as a result of the breach of the relationship." *Ethan Allen, Inc. v. Georgetown Manor, Inc.*, 647 So.2d 812, 814 (Fla. 1994) (quoting *Tamiami Trail Tours, Inc. v. Cotton*, 463 So.2d 1126, 1127 (Fla. 1985)). To show that a protected business relationship exists, a contract is not required as long as the plaintiff has a sufficient expectancy that a business relationship would have been entered into absent the defendant's interference. *See id.* (citing *Tamiami Trail Tours*, 463 So.2d at 1127); *see also Charles Wallace Co. v. Alternative Copier Concepts, Inc.*, 583 So.2d 396, 397 (Fla.

2d DCA 1991) ("[A]n action for intentional interference with a business relationship or expectancy will lie if the parties' understanding would have been completed if the defendant had not interfered."). In the medical context, the plaintiff must show that the defendant "*actually* interfered with a particular doctor/doctor or doctor/patient relationship," and "[i]t is not sufficient to show that there was an interference with such relationships as an *indirect* consequence of the [plaintiff's] termination." *Lake Hosp. & Clinic, Inc. v. Silversmith*, 551 So.2d 538, 545 (Fla. 4th DCA 1989) (citing *Lawler v. Eugene Wuesthoff Mem'l Hos. Ass'n*, 497 So.2d 1261, 1263 (Fla. 5th DCA 1986)) (emphasis in original). Furthermore, and as relevant here, a plaintiff cannot have a tortious interference claim "where the alleged interference is directed at a business relationship to which the defendant is a party." *Romika-USA, Inc. v. HSBC Bank USA, N.A.*, 514 F. Supp. 2d 1334, 1338 (S.D. Fla. 2007) (collecting cases applying Florida law); *see also Salit v. Ruden, McClosky, Smith, Schuster & Russell, P.A.*, 742 So.2d 381, 386 (Fla. 4th DCA 1999) (explaining that to have a viable tortious interference claim "the interfering defendant must be a third party, a stranger to the business relationship"). "Likewise, there can be no claim where the action complained of is undertaken to safeguard or promote one's financial or economic interest." *Genet Co. v. Annheuser-Busch, Inc.*, 498 So.2d 683, 684 (Fla. 3d DCA 1986) (citing *Bruce v. Am. Dev. Corp.*, 408 So.2d 857 (Fla. 3d DCA 1982)).

Crosswright's first tortious interference claim clearly fails as a matter of law because ECC is a party to the employment contract. *See Romika-USA*, 514 F. Supp. 2d. at 1338; *Salit*, 742 So.2d at 386. Similarly, Crosswright's second tortious interference claim, which is based on allegations that ECC and/or its agents interfered with Crosswright's business expectancies with former ECC patients, fails as a matter of law because ECC was not a third party "stranger to th[is] business relationship." *See Salit*, 742 So.2d at 386. Instead, ECC only contacted those patients Crosswright saw as an ECC physician. Thus, ECC had a direct relationship with these patients and was only "promot[ing its] own financial or economic interest" by sending a letter notifying them that they could continue to seek medical care at ECC despite Crosswright's termination. *See Genet*, 498 S.2d at 684. Additionally, ECC's withholding the release of Crosswright's credentials for 30 days is not an actionable interference because this was done in accordance with ECC's standard termination policies, meaning that it was an "indirect consequence of [Crosswright's] termination" rather than an intentional act done to "actually interfere with a . . . doctor/patient relationship." *See Lake Hosp. & Clinic, Inc.*, 551 So.2d at 544. Accordingly, both of Crosswright's tortious interference claims fail as a matter of law.

Crosswright also alleges that ECC terminated his employment contract due to his race. ECF No. 42 at 22–24. ECC argues that Crosswright's racial discrimination claim fails as a matter of law because Crosswright was not qualified for the position and because he failed to show a similarly situated non-black employee who was treated more favorably. ECF No. 79 at 17–20. The Court agrees.

Under the FCRA, it is an unlawful employment practice to terminate an employee based on his or her race. *See* Fla. Stat. 760.10(1)(a). "Florida courts have held that decisions construing Title VII are applicable when considering claims under the Florida Civil Rights Act." *Harper v. Blockbuster Entertainment Corp.*, 139 F.3d 1385, 1387 (11th Cir. 1998) (collecting cases applying Florida law). As such, to survive summary judgment in an intentional discrimination case brought under the FCRA, Florida courts use the burden-shifting framework set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See, e.g. Mitchell v. Young*, 309 So.3d 280, 284 (Fla. 1st DCA 2020). Under this standard, the plaintiff must first establish "a prima-facie case of discrimination by showing that: (1) he belongs to a protected class; (2) he was subject to an adverse employment action; (3) he was qualified to perform his job; and (4) his employer treated similarly situated employees outside his protected class more favorably." *Id*. (citing *Lewis v. City of Union Cnty., Ga.*, 918 F.3d 1213, 1220–21 (11th Cir. 2019)). If the plaintiff

establishes a prima facie discrimination case, then the employer has the burden to "articulate some legitimate, nondiscriminatory reason[s] for the" adverse employment action. *See McDonnell*, 411 U.S. at 802. If the employer meets this burden by producing a legitimate reason for the employment action, the burden of production shifts back to the plaintiff to "demonstrate that the defendant's proffered reason was merely a pretext for unlawful discrimination." *Lewis*, 918 F.3d at 1221 (quoting *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981)). Under this framework, the ultimate burden of persuasion to prove intentional discrimination either directly or indirectly "remains at all times with the plaintiff." *Burdine*, 450 U.S. at 253.

It is undisputed that Crosswright, an African American, belongs to a protected class and that he was subject to an adverse employment action through his termination. Crosswright's racial discrimination claims fails, however, because he has failed to provide evidence showing that he was qualified for his position and has failed to provide evidence that ECC treated similarly situated employees outside his protected class more favorably. The required "[q]ualifications" for Crosswright's position clearly included "[b]oard [c]ertification within two years of [the] start date of employment." ECF No. 78-8 at 7. Because Crosswright failed to obtain board certification after two years from the start date of his employment and failed to

obtain certification even after ECC provided an extension, Crosswright did not meet the qualifications for his position at the time of his termination. Furthermore, Crosswright has failed to identify a similarly situated nonblack ECC employee—that is an insubordinate and underperforming physician who failed to receive board certification—who was treated more favorably by ECC. *See Wills v. Walmart Assocs., Inc.*, 592 F.Supp.3d 1203, 1245 (S.D. Fla. 2022) (citing *Earle v. Birminghamd Bd. of Educ.*, 843 F. App'x 164, 166 (11th Cir. 2021) (explaining that qualifying comparators include those employees who "have engaged in the same basic conduct as the plaintiff," "have been subject to the same employment polic[ies] . . . as the plaintiff," "have been under . . . the same supervisor as the plaintiff," and "share the plaintiff's employment history"); *see also* ECF No. 78-12 (2018 performance evaluation recounting Crosswright's performance issues and inability to work on a team); ECF No. 42-4 (memo from Smiley to Crosswright similarly recounting Crosswright's performance issues and "remind[ing]" him of the "repeated complaints from [his] co-workers," leading to some co-workers asking to be transferred); ECF No. 78-13 (performance improvement plan detailing further performance issues, lack of board certification, and actions and behaviors that demonstrate "a disregard and disrespect for [ECC] policies and procedures"). Accordingly, Crosswright's FCRA discrimination claim fails as a matter of law.

Crosswright also claims that ECC retaliated against him by terminating him for raising concerns about excessive narcotic prescription practices and unsafe COVID-19 policies at ECC. *See* ECF No. 42 at 24–28. ECC argues, among other things, that Crosswright's retaliation claim fails as a matter of law because Crosswright did not engage in protected activity for purposes of the FCRA. ECF No. 79 at 21–33. The Court agrees.

Under the FCRA, "[i]t is an unlawful 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*, or because that person has made a charge, testified, assisted, or participated in an investigation, proceeding, or hearing *under this section*." Fla. Stat. § 760.10(7) (emphasis added). Unlawful employment practices under the FCRA include discriminating against an employee due to his or her "race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status." *See* Fla. Stat. § 760.10(1)(a). "Because this provision of the FCRA is almost identical to its federal counterpart, Florida courts follow federal [employment discrimination] case law when examining FCRA retaliation claims." *Carter v. Health Mgmt. Assocs.*, 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)) (internal citation omitted). "In order to establish a prima facie retaliation case, the plaintiff

must demonstrate the following elements: (1) a statutorily protected expression; (2) an adverse employment action; and (3) a causal connection between the participation in the protected expression and the adverse action." *Russell v. KSL Hotel Corp.*, 887 So.2d 372, 379 (Fla. 3d DCA 2004) (citation omitted). Once the plaintiff has presented a prima facie case, "the burden then shifts to the defendant to proffer a legitimate reason for the adverse employment action." *Id*. at 379–80. If the defendant does so, "then the burden shifts back to the plaintiff to prove by a preponderance of the evidence that the employer's 'legitimate reason' was merely a pretext for the prohibited retaliatory conduct." *Orange Cnty. v. McLean*, 308 So.3d 1058, 1063 (Fla. 5th DCA 2020) (citing *Sierminski v. Transouth Fin. Corp.*, 216 F.3d 945, 950 (11th Cir. 2000)). "Importantly, throughout this entire process, the ultimate burden of persuasion remains on the employee." *Gogel v. Kia Motors Mfg. of Georgia, Inc*., 967 F.3d 1121, 1135 (11th Cir. 2020) (quoting *Sims v. MVM, Inc*., 704 F.3d 1327, 1333 (11th Cir. 2013)).

Crosswright has failed to meet his initial burden because he has provided no evidence that he engaged in a FCRA protected activity while employed with ECC. Essentially, the FRCA protects activities such as opposing unlawful discriminatory practices or participating in the administrative process regarding the investigation of unlawful discriminatory practices. *See* Fla. Stat. § 760.10(7). Crosswright's action

of raising concerns about narcotic prescription practices and COVID-19 policies have nothing to do with discriminatory practices that the FCRA makes unlawful; therefore, these activities are not protected under the FRCA's retaliation provision. The only protected activity Crosswright engaged in was filing a charge of discrimination long after he was fired. *Compare* ECF No. 78-9 (Notice of Termination Letter dated April 1, 2020) *and* ECF No.78-18 (dual-filed charge of discrimination dated September 21, 2020). Because Crosswright's charge of discrimination was filed well after his termination, there is not "a causal connection between . . . the protected [activity]" and Crosswright's termination. *See Russell*, 887 So.2d at 379. Therefore, Crosswright's FCRA retaliation claim fails as a matter of law.

Crosswright also claims ECC violated the FPWA when it terminated him in retaliation for disclosing public health concerns to ECC. ECF No. 42 at 28–29. ECC argues that Crosswright's FPWA fails as a matter of law because ECC is neither a government entity nor a contractor for a government entity within the of the FPWA. ECF No. 79 at 34. The Court agrees.

Under the FPWA, "a municipal government entity [or its independent contractor] may not take an adverse personnel action against an employee in retaliation for the employee's disclosure of the municipal entity's misconduct."

Wagner v. Lee Cnty., 678 F. App'x 913, 921 (11th Cir. 2017) (citing Fla. Stat. § 112.3187). The statute defines "agency" as "any state, regional, county, local, or municipal government entity, whether, executive, judicial, or legislative . . . ." Fla. Stat. § 112.3187(3)(a). The statute further defines "independent contractor" as "a person, other than an agency, engaged in any business and who enters into a contract . . . with an agency." Fla. Stat. § 112.3187(3)(d). A FPWA claimant must show "(1) that []he engaged in statutorily protected activity, (2) that []he suffered an adverse personnel action, and (3) that there is a causal connection between the protected activity and the adverse personnel action." *Wagner*, 678 F. App'x at 921 (citing *Rice–Lamar v. City of Fort Lauderdale*, 853 So.2d 1125, 1132–33 (Fla. 3d DCA 2003)). Protected activity under the FPWA includes written disclosure of a violation or suspected violation of the law that "presents a substantial and specific danger to the public's health, safety, or welfare" to "any agency or federal government entity having authority to investigate, police, manage, or otherwise remedy the violation or act." *See* Fla. Stat. § 112.3187(5)-(7).

Crosswright's FPWA claim fails for two reasons. First, Crosswright has failed to show that ECC is a covered "agency" or "independent contractor" under the FPWA. *See* Fla. Stat. § 112.3187(3). The undisputed evidence shows that ECC is a private non-for-profit Florida corporation. While the record also reflects that ECC

receives federal funds as a Federally Qualified Health Center, it is undisputed that ECC is not a "state, regional, local, or municipal" agency or "independent contractor" of an agency. *See id*. Second, Crosswright has failed to show that he was engaged in a protected activity under the FWPA. Crosswright's vaguely described comment on his performance evaluation regarding possible excessive narcotic prescriptions, *see* ECF No. 42-10 (Crosswright's performance evaluation comments expressing concern about "the excessive amount of prescribing narcotics" but providing no further detail as to why he has this concern), and his comments regarding ECC's COVID-19 procedures are not protected activities under the FWPA because these concerns were only made to ECC staff rather than an "agency or federal government entity having authority to investigate, police, or otherwise remedy" the alleged violation of the law. *See* Fla. Stat. § 112.3187(7). Therefore, Crosswright's FPWA claim fails as a matter of law.

Accordingly, ECC's motion for summary judgment, ECF No. 79, is **GRANTED**. The Clerk is directed to enter final judgment in favor of ECC and close the case.

DONE AND ORDERED this 31st day of March 2023.

M. Casey Rodgers

M. CASEY RODGERS
UNITED STATES DISTRICT JUDGE