STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LAWRENCE JAMES, JR.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 00-4158
	)	
ALACHUA COUNTY DEPARTMENT OF CRIMINAL JUSTICE SERVICE,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Upon due notice, a disputed-fact hearing was held on March 5, 2001, and March 9, 2001, in Gainesville, Florida, before Ella Jane P. Davis, a duly-assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Horace N. Moore, Sr., Esquire
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Gainesville, Florida 32602

For Respondent: Arnold B. Corsmeier, Esquire
Kelly Soude, Esquire
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STATEMENT OF THE ISSUE

Whether Respondent employer is guilty of an unlawful employment practice (discrimination under Section 760.10,

Florida Statutes) against Petitioner on the basis of his race (Black/African-American), handicap, or retaliation, and if so, what is the remedy?

Although cases arising under the federal Americans With Disabilities Act (ADA) may be instructive for interpreting and applying the handicap provisions of Chapter 760, Florida Statutes, Petitioner's claim under ADA and any allegations of libel and slander are not within the jurisdiction of the Division of Administrative Hearings.

PRELIMINARY STATEMENT

This cause was initiated by an April 13, 1998, charge[1] alleging discrimination upon the basis of race, disability, and retaliation. The Florida Commission on Human Relations entered a "Determination: No Cause," on August 15, 2000.

On or about September 21, 2000, a Petition for Relief was filed with the Commission. The Commission transmitted the Petition to the Division of Administrative Hearings on or about October 6, 2000, for a hearing de novo, pursuant to Section 120.57(1), Florida Administrative Code.

After several requested continuances and a failure to reach a joint pre-hearing stipulation, the disputed-fact hearing was conducted on March 5, and March 9, 2001.

Because, contrary to the Order of Prehearing Instructions, the parties had each pre-filed a number of potential exhibits,

they were cautioned at the commencement of the disputed-fact hearing on March 5, 2001, that none of those pre-filed exhibits had been, or would be considered, unless the exhibits were marked, offered, and admitted in evidence, on the record.

Petitioner presented the oral testimony of Kim Baldry, Benjamin Little, Otis Stover, George Babula, Ronald Foxx, Greg Weeks, Alfred Dickerson, and Dr. Anthony Greene, and testified on his own behalf. Petitioner's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 14, 15, 17, 18, 19, 20, 21, 22, 23, 25, 26, 28, 29, 30, 34, 36, 37, and 38 were admitted in evidence. Petitioner's Exhibit 9 was the same as Respondent's Exhibit 21, and was not admitted. Petitioner's Exhibit 27, was marked for identification but not admitted.

Respondent presented the oral testimony of Kim Baldry and had Respondent's Exhibits 19, 21, 25, 31, and 32 admitted in evidence. Because Respondent's Exhibits 20 and 30 were the same, only R-30 was admitted.

The Transcript herein was filed on April 26, 2001, and Respondent timely filed its Proposed Recommended Order. However, due to irregularities with the copies of the Transcript which the Division and Petitioner received, Respondent stipulated, and the undersigned entered an Order, that Petitioner could file his Proposed Recommended Order on or before July 2, 2001. Petitioner's Proposed Recommended Order

was filed timely under this arrangement and has been considered simultaneously with Respondent's Proposed Recommended Order.

In making the following findings of fact concerning the chronology of events between September 1996, and Petitioner's termination, effective February 21, 1997, the undersigned has made every effort to reconcile testimony and exhibits so that each witness may be found to speak the truth, but where the following Findings of Fact diverge from the construction of events related by any witness(es), it is because a witness or witnesses were not found entirely credible. In aid of clarity, some references to specific exhibits have been included.

FINDINGS OF FACT

1. Petitioner, Lawrence James, Jr., is a Black/African-American.

2. Respondent, The Alachua County Department of Criminal Justice Service, is an "employer" within the definition in Section 760.02(7), Florida Statutes. Respondent operates the Alachua County Jail. Respondent maintains a paramilitary command, advancement, and ranking system for its employees.

3. Petitioner began his employment with Respondent as a Correctional Officer and rose to the rank of Sergeant.

4. On March 2, 1994, an inmate escaped from the Alachua County Jail during the evening shift. As a result of the inmate's escape, several correctional officers were

disciplined. Petitioner was disciplined by a reduction in rank April 26, 1994. (P-37)

5. There were allegations that harsher discipline had been meted out to the Black/African-American officers, and the matter was arbitrated, pursuant to the union collective bargaining contract. As a result of the arbitration, in the summer of 1994, it was recommended that Petitioner be returned to his position at the Jail with restoration of rank, but without any back pay. However, at the time of that recommendation, Petitioner already had been terminated for "a non-related infraction of county policy." (P-37)

6. The "non-related infraction of county policy" reason for Petitioner's 1994 termination was not established on this record, but neither was any discriminatory reason proven.[2]

7. After Petitioner's 1994 termination, further proceedings ensued, and Petitioner was ultimately restored to his rank and position at the Jail. As part of this restoration, it was agreed the Respondent employer would conduct training and re-orientation sessions for Petitioner, since he had not actively been performing his duties at the Jail for approximately two years.

8. The present case only addresses the discrimination Petitioner allegedly suffered due to race, handicap, or

retaliation concerning his leave requests in 1996, and his 1997 termination for unauthorized absence.

9. After his second successful arbitration(s) and/or grievance procedure, Petitioner was eligible to return to work on February 19, 1996. He did not return on that date.

10. Respondent ordered Petitioner back to work on March 13, 1996, at which time Petitioner requested, and was granted, leave under the Family Medical Leave Act (FMLA).

11. It is not clear if Petitioner ever made Respondent aware that he suffered from high blood pressure, but from the evidence as a whole, it is found that Petitioner notified Respondent in March 1996, that he was suffering from a prior on-the-job injury to his back, diabetes, and depression.

12. Diabetes, as experienced by Petitioner, is a "handicap" within the meaning of Section 760.10(1)(a), Florida Statutes.

13. Clinical depression, as experienced by Petitioner, is a "handicap" within the meaning of Section 760.10(1)(a), Florida Statutes.

14. Petitioner contended at hearing that his clinical depression in 1996 was due to his 1994 demotion and termination and the procedures to get his job back and also due to the hostile work environment he anticipated he would face if he returned to work daily in 1996 with people whom he perceived as

having lied about him and who had tried to terminate him. It should be noted that Petitioner did not clearly include "hostile work environment" in either his 1998, Charge of Discrimination or his 2000, Petition for Relief. The Florida Commission on Human Relations only considered and referred the instant case upon allegations of discrimination on the basis of race, handicap, and retaliation.

15. From Petitioner's description of his back ailment, it is found that condition also constituted a "handicap" within the meaning of Section 760.10(1)(a), Florida Statutes. From Petitioner's description of how his back injury affected his daily life and job performance, it is very doubtful that Petitioner was able to physically fulfill the requirements of being a jailor at any time in 1996 until he was terminated in 1997. No evidence was presented with regard to the workers' compensation consequences of this situation.

16. By an April 1, 1996, letter, Respondent's Interim Director of Criminal Justice Service, Richard Tarbox, informed Petitioner that he had exhausted his sick leave credits as of the pay period ending March 31, 1996; that based on Respondent's records, Petitioner would exhaust the balance of his accrued sick leave at the rate of forty hours per week during the pay period ending May 12, 1996; that he was expected to know his available accrued leave credits and to contact his immediate

supervisor at least one week prior to the expiration of the current leave period to request leave without pay if he anticipated not returning to work; and that he had been placed on FMLA leave for an indefinite period, not to exceed twelve weeks, which would expire on June 6, 1996. (R-30)

17. The April 1, 1996, letter specifically informed Petitioner that failure to come to work or contact Respondent could be considered abandonment of his position. (R-30)

18. The foregoing instructions concerning "abandonment of position" parallel Alachua County's Personnel Regulations and Disciplinary Policy, hereafter sometimes referred to collectively as "personnel regulations." (P-1).

19. Chapter XIX. 3. OFFENSES AND PENALTIES; c. Group III Offenses No. 8, at pages 5-6, of the personnel regulations had existed prior to Petitioner's 1994 termination, and was in effect at all times material. It provided,

> Absence of three consecutive work days without proper authorization at which time the employee is considered to have abandoned the position and resigned from the County's employ.

20. The personnel regulations also provided in Chapter XIX. 3. OFFENSES AND PENALTIES; a. Group I Offenses No. 8, at pages 3-4, that the following offense would subject an employee to progressive discipline:

> Absence without authorization or failure to notify appropriate supervisory personnel on the first day of absence. (Emphasis supplied).

This regulation also had remained unchanged since Petitioner's last employment with Respondent in 1994, and was in effect at all times material.

21. Progressive discipline for the first such offense was written instruction, counseling and/or one-day suspension. For the second occurrence, one to five days' suspension was specified. For the third occurrence, up to five days' suspension or discharge was specified. These provisions also had remained unchanged since Petitioner's last employment with Respondent in 1994 and were in effect at all times material.

22. Petitioner was also familiar with the long-standing progressive discipline system of Respondent's personnel regulations. Basically, this system required that discipline first be proposed in writing by a superior. The proposed discipline would go into effect and become actual discipline if the employee did not appear at a hearing to dispute the charges or the proposed discipline. If the employee prevailed at the hearing, the proposed discipline would be rescinded or altered. If the employee did not prevail, the proposed discipline would be reduced to writing in another document, and the employee then had the option of filing a grievance pursuant to the union

collective bargaining agreement or of appealing through the personnel system to a citizens' board.

23. While Petitioner had been absent in 1994-1996, a new requirement had been added to the personnel regulations, under Chapter A-299, which required that employees who planned to be absent,

> must notify their immediate supervisor no later than 30 minutes from the time they are scheduled to report for work. (Emphasis supplied)

24. The "immediate supervisor" or "appropriate supervisory personnel" in Petitioner's situation would have been the lieutenant on his shift.

25. However, Petitioner and Lt. Little, who became his supervisor, concurred that the custom at the Jail always had been to require that employees contact the shift sergeant on the shift preceding an emergency absence, or if that were not possible, to contact the employee's own shift sergeant or anyone else on that shift. Jail custom also provided that the employee who was going to be absent could rely on any person on his shift to deliver his oral message to the employee's supervising lieutenant and that approval or disapproval paperwork would be handled by that lieutenant after notification.

26. On June 6, 1996, Petitioner still had not returned to work. Instead, he requested leave without pay until June 15,

1996. Respondent granted Petitioner's request. This constituted an accommodation of Petitioner's handicap(s) in that he had no remaining earned leave or entitlement to FMLA leave, yet his employer held his position open for his return.

27. On or about June 10, 1996, Anthony F. Greene, Ph.D., a clinical psychologist at Vista Pavilion, a free-standing psychiatric facility, released Petitioner to return to work. He wrote to Respondent's Risk Manager that Petitioner continued to have problems with depression, which might prove "volatile" in a work environment with superiors Petitioner believed had harassed him by terminating and blaming him for the 1994 escape.

28. At approximately the same time, Richard Greer, M.D., medical specialty unexplained, also released Petitioner to return to work, upon the conditions that Petitioner continue to see Dr. Greene on a weekly basis and continue to take his prescriptive medications.

29. By a July 17, 1996, letter (P-4), Interim Director Richard Tarbox notified Petitioner to report for work at the Jail on the evening shift of July 22, 1996. The letter required Petitioner to continue his sessions with Dr. Greene; to continue to take his prescriptive medications; and to take the re-training and re-orientation specified as a result of the resolution of his 1994 termination and return to work. (See Finding of Fact 7.)

30. The July 17, 1996, letter also included the sentence,

> We are in the process of contacting Dr. Greene to establish a procedure to verify that you continue your sessions with him.

Petitioner interpreted this sentence as the employer's promise

> "[T]o get all my leave slips, find out when I was going to the doctor, my mental condition, and also my medical condition." (TR-Vol.II, pages 175-176)

31. Petitioner's interpretation of this sentence was unreasonable in light of its express language, the context of the remainder of the July 17, 1996, letter, the instructions of the April 1, 1996, letter (See Findings of Fact 16-17), and what Petitioner already knew of the County's personnel regulations and/or the Jail custom requiring him to call in and/or apply for leave to be subsequently approved or disapproved by his supervisor.

32. Nothing in the July 17, 1996, letter altered the requirements of the personnel regulations or the April 1, 1996, letter. Petitioner bore the responsibility to ask for medical leave sufficiently in advance of his absences.

33. On July 22, 1996, Petitioner reported for work at the Jail as instructed and was assigned to an evening shift supervised by Lt. Stover. According to Sgt. Babula, Petitioner also worked under Shift Sgt. Withey at some point in July 1996.

34. However, by July 1996, Petitioner was an insulin-dependent diabetic. He needed to self-administer a shot of insulin each morning and night. To ensure ideal spacing of these two shots, Petitioner almost immediately requested to work the day shift. Respondent accommodated this request concerning Petitioner's handicaps and assigned him to the day shift under Lt. Little and Sgt. Babula, as shift sergeant.

35. Petitioner claimed his handicaps were not accommodated by Respondent, but in addition to approving leave for him from February 19, 1996, to July 22, 1996, not replacing him during that period, and the change of shift made in July 1996, at Petitioner's request, Sgt. Babula testified to approving special shoes for Petitioner due to his diabetes.

36. By September 1996, Petitioner again had used up all of his accrued leave. Accordingly, he had to ask for leave without pay to visit his various doctors, including Dr. Greene.

37. On September 9, 1996, during a therapy session, Petitioner told Dr. Greene that he had been threatened on the job and that he was pursuing resolution of the incident through appropriate channels. The same day, Dr. Greene wrote to Lt. Little, telling him of the threat. The nature of this alleged threat or who made it was not stated in Dr. Greene's letter or at hearing. The letter cleared Petitioner to return to work September 12, 1996.

38. This out-of-court statement to his psychotherapist at that time does not establish the truth of the statement or that Petitioner's superiors made the alleged threat. Also, the threat, if one existed, could not have related to Petitioner's written leave requests, because Petitioner's earliest dispute about leave did not occur until September 13, 1996. (See Finding of Fact 41). The September 9, 1996, date was not related by testimony to any oral or written request for leave or any disciplinary matter in evidence.

39. Petitioner testified to having been threatened on the job sometime prior to September 9, 1996, but he never testified what the threat was, why the threat was made, or by whom the threat was made.

40. Petitioner's witness, Alfred Dickerson, also is African-American. He testified generally that it was "pure hell" at the Jail for anyone who, like himself and Petitioner, had been disciplined due to the 1994 escape and who had prevailed in the resultant grievance activities, but he could not remember any specific incidents involving Petitioner. Moreover, Mr. Dickerson was out of the Jail, on workers' compensation leave, from May 1996 to October 1997, the whole of the material time frame for this case.[3]

41. On September 16, 1996, Petitioner submitted an "after the fact" request for leave without pay to Lt. Little, his

supervisor, for the previous dates of September 13 and 15, stating thereon that he had been ill those days and that the request was being made because his request to work his days off to make up for the 16 hours of leave he had used on September 13 and 15 had been denied. The request does not specifically mention "flex time." (P-6)

42. "Flex time," as described by both Petitioner and Lt. Little, would have permitted Petitioner to work his days off, instead of taking time off without pay to make up time used to go to his doctors on days he was scheduled to work. However, if an employee asked to use flex time in this way, another employee had to trade days with him, and the exchange would be worked out by the supervising lieutenant.

43. On October 1, 1996, Petitioner was given a "Letter of Warning" by Lt. Little. The Warning reflected that Petitioner's advising a sergeant other than his immediate supervisor, Lt. Little, on September 24, 1996, that he was not coming to work until some personal matters were taken care of, was insufficient notice and was being treated as "absence without authorization" in violation of the personnel regulations. It also stated,

> It has been standard practice and understood that you must notify your immediate supervisor . . . please be advised that any further violations of this nature may result

> in docked pay and progressive disciplinary action . . .

Attached to this document was a Notice of Disciplinary Action, also prepared October 1, 1996, stating,

> Disciplinary action taken as a result of the Notice of Proposed Disciplinary Action dated blank not filled in. (Except for WARNING) WARNING (Reasons for warning): Violation of Alachua County Personnnel Regulations, Chapter XIX, Section 3, a., Group I, Offense No. 8 'Absence without authorization'. (P-8)

The same document notified Petitioner that he had a right to appeal the Warning pursuant to either the personnel regulations or the grievance procedure in the collective bargaining agreement, as appropriate. Petitioner did not acknowledge receipt of this latter document until October 7, 1996. (P-8/R-19)

44. Also on October 1, 1996, Petitioner submitted an "after the fact" request for leave without pay for September 23-26 and for September 29-30, to Captain King. The reason for Petitioner's absence September 23-26 was not stated on the formal request, but Petitioner did again state thereon that his request to "flex" his days off had been denied, presumably by Lt. Little. The time for September 29-30 was requested for "personal business and emergency family leave without pay" due to his mother's seeing a doctor about her detached retinas. (P-7)

45. Respondent is not obligated under Chapter 760, Florida Statutes, to accommodate Petitioner's family's handicaps.[4]

46. On October 21, 1996, a "Notice of Proposed Disciplinary Action" was issued by Lt. Little, apparently covering the same date, September 24, 1996, as his October 1, Warning, and adding other dates. The reasons for the proposed discipline given in this October 21, 1996, Notice differ slightly from the content of the October 1, Warning.

47. The October 21, 1996, Notice related that on September 23, Petitioner had spoken to Captain King and Lt. Little, and because his request for leave had been made in advance, Petitioner had been granted the day off; that on September 24, Petitioner had failed to report to work and failed to request an extension of leave, and he was therefore considered to be "absent without authorization" for September 24, 1996. The October 21, Notice further stated that on September 25, Petitioner had called Captain King, requesting leave without pay for September 25 and 26, and because Petitioner had requested leave in advance, Captain King had granted the request covering those two days, but that on his October 1, leave request (see Finding of Fact 44) Petitioner had included two more days, September 29 and 30, which had not been previously authorized. Finally, the October 21, Notice indicated that on September 30, Petitioner had called Lt. Stover

to say that he would be reporting to work as soon as he was through testifying to the Grand Jury that afternoon, and that his failure to request leave in advance was being treated as "absence without authorization and failure to request leave without pay in advance." As of this October 21, 1996, Notice, the proposed disciplinary action became suspending Petitioner without pay. Petitioner was offered an opportunity to contest the proposed disciplinary action at a hearing on November 19, 1996. Petitioner acknowledged receipt of this document on October 24, 1996. (R-21)

48. On October 22, 1996, Petitioner wrote to the Interim Director of the Jail, Richard Tarbox. In his letter, Petitioner complained that he had not yet received the agreed re-orientation and re-training. He also discussed his medical problems, including problems with recent changes in his medications and his five-year-old back injury. He requested flex time and related that his life had been threatened by employees on the job (see Findings of Fact 37-40), and that Lt. Little had been informed of the threats and flex time request, but the letter again did not indicate by whom Petitioner was threatened or why. (P-10)

49. Despite Petitioner's after-the-fact written requests for flex time, Lt. Little had no recollection of Respondent ever asking him for flex time.

50. There is no evidence that Lt. Little, Mr. Tarbox, or any other representative of Respondent contacted Petitioner concerning the alleged threat against him or specifically addressed the issues of re-orientation/re-training or flex time.

51. On October 25, 1996, Dr. Greene also wrote Mr. Tarbox. He described Petitioner as cooperative and not evidencing any inappropriate behavior. He reported that Petitioner had voiced no homicidal or vengeance ideation to him. He felt that Petitioner's supervisors' requirement that Petitioner use leave to attend the mandatory therapy sessions with him constituted a paradox and a stressor for Petitioner. He felt that other stressors were the employer's failure to offer re-orientation/ re-training to Petitioner and the employer's failure to contact him, Dr. Greene, to verify treatment purposes and schedules. Dr. Greene requested that Mr. Tarbox clarify Petitioner's treatment and work status to both him and to Petitioner in a timely manner because not doing so was exacerbating Petitioner's physical condition, headaches, and diabetes. He further stated that he could release Petitioner for work without further psychological treatment and that further psychological treatment was not necessary to ensure Petitioner's fitness for work or to prevent his being a risk to others, but that Petitioner would continue in therapy for other purposes. (P-11)

52. Neither Mr. Tarbox nor any other representative of Respondent specifically replied to Dr. Greene's October 25, 1996, letter. However, all leave disputes pending on that date were addressed in a November 22, 1996, letter to Petitioner from Captain King. (See Findings of Fact 57-59.)

53. On October 31, 1996, Petitioner submitted an "after the fact" request for eight hours leave without pay for leave he had taken on October 30, 1996, for "emergency dr. app't for work related injury, and lab work for diebetic [sic] condition." (P-14)

54. At some point, a leave form for eight hours leave without pay on November 9, 1996, was prepared. It indicates that Petitoner was "unavailable to sign." This form was disapproved by Lt. Little and by Mr. Tarbox on November 12, 1996. Apparently Petitioner only signed the request on November 26, 1996. (P-21)

55. On November 14, 1996, Petitioner submitted a request for two hours leave without pay for November 15, 1996, for "work related condition, Dr. Greene." (P-15)

56. On November 19, 1996, Petitioner submitted a request for two hours leave without pay for November 22, 1996. The request was approved by a supervisor on November 19, 1996. (P-17)

57. On November 22, 1996, Captain King issued a "Letter of Warning" to Petitioner. It stated that on November 19, 1996, a disciplinary hearing had been held (see Finding of Fact 47) regarding the October 21, Notice of Proposed Disciplinary Action, addressing Petitioner's absences on September 29-30, 1996, and that because Petitioner had proven that he had attempted to contact his supervisor in advance of his absence, the September 29 violation was being withdrawn. With regard to the September 30 violation charged, it was found that Petitioner had contacted Lt. Stover and informed him that Petitioner would return to work after testifying before The Grand Jury, and since Petitioner had not returned to work on that day after testifying, he was being found guilty as charged for violation of Alachua County Personnel Regulations, Chapter XIX, Section 3. a. Group I, Offense No. 8, "Absence without authorization and failure to request leave without pay in advance."

58. The November 22, 1996, letter went on to warn Petitioner that future violations would be more carefully scrutinized for strict adherence to the policy of notification and that failures on Petitioner's part might result in progressive disciplinary action being taken. (P-20)

59. Because prior discipline had been overturned or rescinded, the November 22, 1996, Letter of Warning was technically Petitioner's first violation/discipline.

60. Also on November 22, 1996, Petitioner submitted to Lt. Little a leave request form, dated the same day, labelled "FOR INFO.," with supporting documentation, including Dr. Hunt's certificate showing Petitioner had been treated on November 4, and November 22, 1996, had office management of HTN/NIDDM hematuria, a pending IVP and urology consult, and would need to be seen again by Dr. Hunt in 4-6 weeks. The language of one attachment showed Petitioner "is under Dr. Hunt's continual care," but nothing specified any period of time Petitioner intended to take off from work for the pending consultation or any other purpose. (P-19)

61. Petitioner testified that his November 22, 1996, leave request was not intended to request any leave at all when he submitted it, but that it should have alerted his supervisors that Petitioner had a growth between his legs that was potentially malignant and that he needed an operation sometime in the future. A reasonable person would not have concluded this from the four corners of the November 22, 1996, written request with attachments dated for past medical appointments.

62. Petitioner also testified that by submitting the November 22, 1996, leave request "in blank" and explaining orally to Lt. Little what he intended to do was his effort to comply with the requirement that he ask for leave in advance of taking it. This testimony shows that Petitioner at this point

understood the employer's prior instructions to request leave in advance.

63. Apparently, Petitioner envisioned only having to phone in to get any member of his shift to fill in the blanks on his November 22, 1996, request form, but he admitted he had never before used a blank leave request in this way.

64. Petitioner further testified that he had told Mr. Tarbox and other supervisors at a meeting (probably one of his disciplinary hearings) before Christmas 1996, that he "did not know how long he could work." While this representation of Petitioner is credible and it may be reasonably inferred that Mr. Tarbox understood Petitioner was debilitated to some degree by the growth and might need an operation sometime in the near future, it does not logically follow that all those hearing Petitioner at that time understood that his oral statement related to the November 22 blank leave request which had attached to it only information about past doctors' appointments and potential, undated, future consultations.

65. Petitioner's vague statement at the meeting/hearing did not comply with the letter of the personnel regulations nor the custom at the Jail for requesting leave.

66. The blank November 22, 1996, leave request marked "FOR INFO" also did not comply with the letter of the personnel regulations nor the custom at the Jail.

67. There is no requirement that Respondent grant Petitioner an open-ended request for leave or one that specifies no time period at all.

68. Petitioner's November 22, 1996, blank leave request was never approved.

69. On November 26, 1996, Petitioner also acknowledged receipt of a "Notice of Proposed Disciplinary Action," by which Lt. Little and Mr. Tarbox recommended that Petitioner be suspended without pay.[5] Petitioner was again offered an opportunity to contest this proposed disciplinary action at a hearing on December 3, 1996. (P-18)

70. The record is silent as to whether a disciplinary hearing was actually held on December 3, 1996.

71. Petitioner submitted a leave form on December 6, 1996, for 2.5 hours "vacation" leave without pay on December 3, 1996, for a "Conference with doctor to try an [sic] stop continued disciplinary action because of illness doctor approved." (P-23) On December 3, 1996, Petitioner had telephoned Lt. Little to ask if his message had been received. He then reported to work at 10:00 a.m.

72. Respondent's business records (P-22) show the following: Petitioner worked December 4-5, some of December 6, and all of December 7, 1996. He was not required to be at work on December 8-9. He called in sick on December 10-11. On

December 12, he reported for work and attended five hours of drug policy training. Then he left for medical reasons and later called in to say he was too sick to return to work. On Friday, December 13, Petitioner called in sick, saying he was going to the doctor for a cut foot. He later called in again and was told that he needed to do his timesheet and it was agreed he would do it and have it in the following Monday. Petitioner was absent on Saturday, December 14. He was not required to be at work on December 15-16, 1996. On Monday, December 17, Petitioner did not phone or appear for work. On December 18, Petitioner phoned in, saying he had to wear bedroom slippers and had domestic problems. On December 19, Petitioner called in late and left a voice message on the Jail phone. On Friday, December 20, Petitioner called in on time but said he would not be in until Tuesday of the following week. He gave no reason. He was not required to be at work on December 22-23. On December 24, 1996, Petitioner did not come to work or call in. On Christmas Day, Petitioner called in before shift and stated he would not be in that day or the following day, December 26, 1996, until 10:00 a.m. On December 26, December 27, and December 28, Petitioner did not report for work or call in. Petitioner was not required to work December 29 or 30, 1996. On December 31, Petitioner called and said that he would not be in that day but would call back to talk to the

shift lieutenant. He did not do so. Also, Petitioner did not report for work or call in for January 1 through 4, 1997. Most of this business record was substantiated by the direct testimony of Sgt. Babula and Lt. Little who observed the events and wrote most of the business record. The matters that were not confirmed in their direct testimony were supported by the type of hearsay that explains or supplements direct evidence and is admissible in this type of proceeding.

73. Petitioner acknowledged that the business record was essentially correct as to days he was absent in December 1996, and January 1997. Petitioner's testimony only varies the foregoing business record to the effect that on December 10, 1996, not December 13, 1996, Petitioner called and spoke with Sgt. Withey, stating that he would not "be back [to work] until [he had] seen and heard from [his] doctors," and related to Withey that he had some problem with his foot. Petitioner assumed that his superiors would get this message and would understand that he meant he was exercising the blank November 22, 1996, leave request. (See Findings of Fact 60-66). His superiors did not infer from this message what Petitioner had hoped they would. A reasonable person would not infer all that from the information Petitioner says he provided Sgt. Withey.

74. It is uncontested that Petitioner did have an injury to his foot at this time and that such injuries can be particularly hazardous to persons who, like Petitioner, suffer from diabetes.

75. From December 4, 1996, onward, Petitioner did not speak directly with his lieutenant, although he had been repeatedly instructed to do so in order to request advance leave. Petitioner did not return to work after December 7, 1996.

76. Despite the personnel rules, custom at the Jail, and prior direct orders by warning and disciplinary action letters, Petitioner submitted no leave slips directly to his superiors after December 6, 1996. Instead, he submitted them to his union shop steward and to a County Commissioner, although he had no reason to believe the Commissioner had any authority over Jail personnel matters.

77. Respondent never authorized leave for Petitioner after December 13, 1996.

78. Petitioner's extended absence without authorization was in violation of Respondent employer's long-standing "three day abandonment rule."

79. There had been no word from Petitioner since December 31, 1996, so between January 17 and January 24, 1997, a

"Notice of Disciplinary Action" was issued against Petitioner for

> [V]iolation of Alachua County Personnel Rules and Regulations, Chapter XIX, Section 3, c., Group III, Offense No. 8 'Absence of three (3) consecutive work days without proper authorization at which time the employee is considered to have abandoned the position and resigned from the County's employ.'

The proposed discipline was termination, and again, Petitioner was offered the opportunity to contest the proposed final agency action at a hearing to be convened on February 18, 1997. (P-25)

80. Sometime in January 1997, Petitioner saw a Master of Social Work, because Dr. Greene was on educational leave. Petitioner was so upset that the social worker advised him to focus on his medical problems. Apparently, Petitioner leapt to the conclusion that meant his doctors would handle all his leave-related problems.

81. Sometime in January 1997, Petitioner had successful surgery on the growth between his legs.

82. On January 27, 1997, Dr. Greene saw Petitioner in therapy and notified Mr. Tarbox in writing that,

> Mr. Lawrence James was seen for an appointment today in my office. He is apparently unable to continue working in what is perceived to be a hostile work environment at the jail. Compounded by his medical problems and what seems to be a lack of responsivity and accommodation by the

> administration, Mr. James' level of emotional distress has considerably increased since our last communication. It is strongly recommended that he take a leave of absence from the workplace until his condition is improved. He is scheduled to return next week for continued intervention.
>
> Thank you for your time and attention. (Emphasis supplied) (P-26)

83. Dr. Greene testified that it was Petitioner's combined mental and physical circumstances which caused him to recommend the leave of absence.

84. The January 24, 1997, Notice of Proposed Disciplinary Action was mailed to the last address Petitioner had given Respondent.

85. On January 30, 1997, Petitioner's mother signed the certified mail receipt for the January 24, 1997, Notice of Proposed Disciplinary Action. Sometime thereafter, she delivered the Notice to Petitioner, who no longer lived with her. He refused to deal with it.

86. Dr. Brient removed a suture from Petitioner's leg on February 4, 1997. This seems to have related to Petitioner's post-surgery release after removal of the growth between his legs.

87. Petitioner did not then return to work.

88. Because Respondent's principals had not recognized Petitioner's mother's name on the certified mail receipt, they

caused the January 24, 1997, Notice of Proposed Disciplinary Action to be served on Petitioner by a Deputy Sheriff. Petitioner received this personal service on February 5, 1997, and told the Deputy that he would not deal with the Notice of Disciplinary Action, but his doctors would.

89. Having been released as a result of his operation, there was no physical reason Petitioner could not have appeared for the February 18, 1997, hearing to present any opposition to his proposed termination based on "the three day abandonment rule." He did not appear.

90. On February 21, 1997, Petitioner was mailed a "Notice of Dismissal," effective that date and signed by Harry Sands, a new Interim Director, for abandoning his position, in violation of the personnel regulations. The Notice of Dismissal gave Petitioner the option of appealing his termination through the employee appeal system or the collective bargaining grievance procedure.

91. Petitioner did not take either appeal route.

92. However, Petitioner did suggest to another Jail officer that those who had done this to him might need to get a pine box, i.e. coffin. The threat was not deemed worthy of prosecution by the State Attorney's Office.

93. Petitioner testified, without corroboration, that he never received the promised re-orientation or re-training associated with re-instatement to his job.

94. No witness gave any clear indication of what the re-orientation and re-training, as contemplated by the re-instatement agreement (see Finding of Fact 7) or as contemplated by Mr. Tarbox's July 17, 1996, letter (see Finding of Fact 29), was supposed to include.

95. Lt. Stover did not remember any specific training he gave Petitioner, nor did Lt. Little, but Lt. Little testified that he was present when, before Petitioner first arrived on Lt. Stover's shift in July 1996, the Captain had ordered them both to "bring [Petitioner] up to speed."

96. Petitioner suggested that failure to re-orient and retrain him evidenced Respondent's discrimination against him. His post-hearing proposal also asserts that due to Respondent's failure to train him in "new" personnel regulations, combined with Respondent's requirement that he adhere to those regulations which Jail custom did not normally follow, constituted disparate treatment and/or discrimination against him on the basis of his race or due to retaliation, and/or failure to accommodate his handicap. This perception is

unpersuasive in light of the employer's repeated correspondence urging him to take the training, whatever that training might have been.

97. Despite Mr. Tarbox's failure to reply to Petitioner's October 22, 1996, inquiry about training (See Finding of Fact 48), Petitioner's perception of discrimination was not established as fact. From the evidence as a whole, it is more probable that any failure to train Petitioner was the result of his request to change shifts, and thus, lieutenant-supervisors in July or his frequent absences. The record does not make clear whether the re-orientation/re-training requirement was unique to Respondent, who returned in 1996, or applied to all four of the returning African-American officers restored in 1994, but Petitioner did not demonstrate that any White/Caucasian or non-handicapped employee ever got any more re-orientation/re-training than he did. He did not establish that any White/Caucasian or non-handicapped employee ever got any more re-orientation/re-training than the other restored African-American officers, handicapped or otherwise. He also did not establish that any other restored African-American officer, handicapped or otherwise, received more re-orientation/re-training than he did.

98. Moreover, contrary to Petitioner's testimony, Sergeant Babula testified credibly that he had at least instructed

Petitioner with regard to the new payroll forms when Petitioner changed shifts in July 1996. Payroll forms include calculating hours worked and monies owed. Testimony and business records also show Petitioner had five hours of drug policy training. (See Finding of fact 72).

99. Also, Respondent did not discipline Petitioner for his failure to request leave of specific personnel as required by the only new personnel regulation, until after Petitioner had been instructed in writing to do so. These written instructions may not have constituted complete "re-orientation" or "re-training," but they were direct orders sufficient to instruct Petitioner what was expected of him. (See Findings of Fact 16, 29, 43, 46-47, 57-59).

100. Lastly, based on Petitioner's testimony that even if he had known he was required by a new regulation to request leave from his lieutenant-supervisor he would not have followed that regulation but instead would have considered himself bound by his union contract and by the custom of asking for leave of anyone on his shift at the Jail, it appears that any failure of Respondent to specifically "train" Petitioner concerning new personnel regulations had no effect on his subsequent failure to comply with the employer's expectations concerning its leave policy.

101. Petitioner had admitted in evidence a certified copy of a "Second Superceding Indictment" issued by a federal Grand Jury on February 27, 2001. It was not established that this was the same Grand Jury before which Petitioner testified in 1996. (See Finding of Fact 47). The indictment (which is only a charging document, not a conviction) named Nate Caldwell, Respondent's former Director; Samuel Krider, Respondent's former Assistant Director; Garry M. Brown, a former Captain with Respondent; and Charles Scott Simmons, a former Lieutenant with Respondent, for conspiracy to obstruct justice by violating 18 USC Section 1503, by hindering the court and jury in a federal civil rights action brought by Mr. Dickerson against the Alachua County Board of County Commissioners. Mr. Dickerson's federal case arose out of Mr. Dickerson's demotion in rank with Petitioner in connection with the 1994 escape. It was not established that any of the indicted officials held office during the time material to Petitioner's instant case, 1996-1997, or that any of them had anything to do with Petitioner's 1996 leave disputes or 1997 termination. Indeed, it was established that Sands or Tarbox was Interim Director at all times material. The indictment mentions Petitioner and Captain King, a superior of Petitioner at all times material, but neither Petitioner nor Captain King were indicted. Despite the lack of clarity of Petitioner's and Mr. Dickerson's testimony,

the undersigned infers from their testimony and the indictment that Petitioner testified concerning the same matters before the Grand Jury in 1996 and that prior to 1996 Petitioner had been a witness in Mr. Dickerson's federal discrimination case against the County Commissioners. However, Petitioner testified that his retaliation allegation herein is not based on his 1996 testimony before the Grand Jury. Rather, Petitioner asserted at hearing that he believed he had been retaliated against by his superiors in 1996-1997 for speaking at 1993 meetings of the County Commission concerning structural and staffing problems at the Jail, and otherwise he did not know why he had been retaliated against. (TR-Vol. I pp. 229-233).

CONCLUSIONS OF LAW

102. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this cause, pursuant only to Section 120.57(1) and Chapter 760, Florida Statutes.

103. Under the provisions of Section 760.10, Florida Statutes, it is an unlawful employment practice for an employer:

> (1) (a) . . .to discharge or to fail or refuse to hire an individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.

> (7) . . .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 any manner in an investigation, proceeding, or hearing under this section.

104. The burdens of proof and persuasion for purposes of handicap and racial discrimination are essentially the same.

105. The United States Supreme Court set forth the procedure essential for establishing claims of discrimination in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed 2d 668 (1973), which was then revisited in detail in Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). Pursuant to the Burdine formula, the employee has the initial burden of establishing a prima facie case of intentional discrimination, which, once established, raises a presumption that the employer discriminated against the employee. The pre-eminent case in Florida remains Department of Corrections v. Chandler, 582 So. 2d 1183 (Fla. 1st DCA 1991).

106. When an individual alleges he has been subjected to "disparate treatment," the standards of proof require that the Petitioner show the existence of "actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were based on

a discriminatory criterion illegal under the Act." See McCosh v. City of Grand Forks, 628 F.2d 1058 (8th Circuit 1980), and Furnco Const. Co. v. Waters, 438 U.S. 567, 98 S. Ct. 2943, 57 L. Ed. 2d 957 (1978), citing Teamsters v. United States, 431 U.S. 324, 358, 97 S. Ct. 1843, 1866, 52 L. Ed. 2d 396 (1977). Once a Petitioner establishes this prima facie case, the burden shifts to the employer to rebut the adverse inference by articulating "some legitimate nondiscriminatory reason for the employee's rejection." See McCosh v. City of Grand Forks and McDonnell Douglas Corp. v. Green, both supra. But even if the employer meets this burden, the complaining party is given the opportunity to show that the proffered evidence is merely a pretext for discrimination, Id. at 804-805, 93 S. Ct. at 1025. See generally, Kirby v. Colony Furniture Co., 613 F.2d 696 (8th Circuit 1980).

107. Florida has placed the burden upon the employee in handicap discrimination cases under Chapter 760, Florida Statutes, to establish a prima facie case by showing (1) that he or she has a physical impairment which substantially limits one or more of his or her major life activities; (2) that he or she is otherwise qualified for the position; and (3) that he or she was excluded from the position sought, solely by reason of his or her handicap. Only "reasonable accommodation" of handicapped applicants or employees is required. Kelly v. Bechtel Power

Corp., 633 F. Supp 927 (S.D. Fla. 1996); Brand v. Florida Power Corp., 633 So. 2d 504 (Fla. 1st DCA 1994); Cabany v. Hollywood Memorial Hospital, 12 FALR 2020 (FCHR 1990).

108. Because Petitioner was successful in using the employer's progressive disciplinary review and hearing process so that, despite all leave discrepancies, he prevailed in every instance except for one Letter of Warning (see Findings of Fact 57-59), Petitioner's disapproved leaves and the resultant discipline process between September and December 1996 is only significant as it relates to the issues of "accommodation of a handicap" and "discriminatory retaliation."

109. Cases arising under legislation similar in intent to Chapter 760, Florida Statutes, are instructive. Under the ADA, a "qualified" individual is an individual with a disability who, without unreasonable accommodation, can perform the essential functions of the employment position. Petitioner's description of the effects of his multiple ailments suggests he was not physically "qualified" to perform his job duties. Likewise, his failure to routinely be on the job rendered him not "qualified." Tyndall v. National Educ. Centers, Inc. of California., 31 F.3d 209 (4th Cir. 1997). An employee who cannot meet the attendance requirements of a job is not a "qualified individual" under the Rehabilitation Act if he cannot meet the attendance requirements or be present on a routine basis. Jackson v. Veterans

Administration, 22 F.3d 277 (11th Cir. 1994). Even if the employee's failure to meet the attendance requirements is due entirely to the employee's disability, he is "not qualified" per the ADA. See Matthews v. Commonwealth Edison Co., 128 F.3d 1194 (7th Cir. 1997).

110. However, assuming this Petitioner was able to do something when he did come to work, he was reasonably accommodated by the employer. Petitioner was eligible to return to work in February 1996, but the employer did not require him to begin working until July 22, 1996. Throughout that period, Respondent employer repeatedly accommodated his requests for leave. In July, he requested and received a shift change. Sometime later, the employer granted his request to wear special shoes. Beginning in September, his attendance became sporadic and unreliable. As a result of Petitioner's failure to follow direct orders as to when and how to request leave, his absences also became unpredictable. His theory that Respondent's failure to retrain him was both discriminatory and caused his failure to properly request leave is rejected for all the reasons listed in Findings of Fact 96 through 100. Petitioner is in error in assuming that the employer was required to give him time off just because he or a family member was sick or had a doctor's appointment, but in this case, Petitioner seems to have been granted all leave requests made in advance and repeatedly warned

that in the future he should request leave in advance from his immediate supervisor. The only requested accommodation not granted by the employer was authorizing "after the fact" leave requests and requests to arrange "flex time" for Petitioner. An employer is not required to provide every accommodation, only reasonable accommodations. The fact that an employer could have provided a different set of reasonable accommodations or more accommodations does not establish that the accommodations provided were unreasonable or that the additional accommodations were necessary. Brand v. Florida Power Corp., supra. Petitioner asserted that all other employees were permitted to flex their days, but he presented no comparators, and accordingly his proof fails.

111. Petitioner has established as a prima facie case that he is a member of the Black/African-American race, and handicapped, two of the statutorily protected classes, and that he was terminated. See Gordon v. E. L. Hamm and Associates, 100 F.3d 1029, 1032 (11th Cir. 1996); Thomas v. Floridin Company, 8 FALR 5457, at 5458 (1986). Cf. Maynard v. Pneumatic Products Corp., 233 F.3d 1344 (11th Cir. 2000), vacated at 256 F.3d 1259 (11th Cir. 2001).

112. Concerning terminations generally, it would be ludicrous for Respondent to cling to the fiction that an employee who calls in almost daily has abandoned his valuable

property right of regular employment, but that is not what ultimately happened here. Here, Petitioner stopped phoning-in approximately December 31, 1996. Then, nearly three weeks passed with no word from him. The only word the employer got was a January 27, 1997, letter from Petitioner's therapist to the effect that Petitioner could not work anymore and needed an indefinite leave of absence. No employer is required to hold a position indefinitely. Petitioner was given every opportunity to challenge the proposed termination and failed to do so. For termination purposes, Petitioner was treated the same as any other employee by application of the personnel regulations. He was not treated differently than White/Caucasian employees or non-handicapped employees. Petitioner presented no comparator to show that the employer had, or would, treat any non-disabled person or a person of another race differently with regard to termination for an unauthorized absence of over a month.

113. To prevail on a claim of "retaliation" a petitioner must establish (1) a statutorily protected expression; (2) an adverse employment action; and (3) a causal link between the two events. Once a petitioner establishes his prima facie case, the employer must offer a legitimate, non-discriminatory reason for the adverse employment action. If the employer offers legitimate reasons for the employment action, the petitioner must then demonstrate that the employer's proffered explanation

is a pretext for retaliation. Bass v. Board of County Com., Orange County, 242 F.3d 996, 1013 (11th Cir. 2001); Berman v. Orkin Exterminating Co., Inc., 160 F.3d 697 (11th Cir. 1998); Simmons v. Camden County Bd. Of Educ., 757 F.2d 1187 (11th Cir. 1985) cert den. 474 U.S. 981, 106 S. Ct 385, 88 L.Ed. 2d 338 (1985).

114. While it is recognized by the undersigned that Petitioner and his psychotherapist notified Petitioner's superiors in September and October 1996, that Petitioner's life had been threatened on-the-job and no investigation ensued, it was never established that these threats actually occurred. The psychotherapist took Petitioner's representations as valid without investigation. Mr. Dickerson had no knowledge of such incidents. Furthermore, assuming, arguendo, but not ruling, that on-the-job threats against Petitioner actually occurred, Petitioner did not testify that the threats were made by his superiors, and he never developed any nexus between the alleged threats in 1996 and his own 1994 successful action regarding racial discrimination.

115. To the extent Petitioner testified the threat from another employee or his superiors' consistent administration of the employer's leave policy and personnel regulations constituted retaliation against his having raised concerns about a new Jail at a County Commission meeting in 1993, the year

before his successful arbitration in 1994, there is no reason to believe that his public speech before the County Commission is statutorily protected. It would be a "stretch" to equate Petitioner's testimony with retaliation based on Petitioner's own successful arbitration concerning the escape in 1994 or Mr. Dickerson's federal civil rights action, which are protected expressions. Assuming, but not ruling, that there is such a connection, Petitioner still has failed to establish that any of Respondent's actions were not permitted by its personnel regulations or that use of those personnel regulations was pretextual for retaliation against Petitioner.

116. Finally, adverse job actions remote in time to protected expressions may not support a causal connection. In Mannica v. Brown, 171 F.3d 1364, 1369 (11th Cir. 1999), a case arising under federal Title VII and Chapter 760, Florida Statutes, fifteen months was held to be too great a lapse of time to form a retaliatory nexus. Herein, Petitioner's termination was seven months after he returned to work, nearly a year after Petitioner prevailed on his last grievance of unknown cause, more than two years after he prevailed on his racial grievance, and more than three years after he spoke at a County Commission meeting. The 1996 leave disputes which did not result in termination did begin only two months after he returned to work and during a time he was participating in a

Grand Jury investigation related to a protected expression known to his superiors, but they also occurred only after he ran out of accrued leave and are still remote in time to all other possible protected expressions; Petitioner prevailed in part on a proposed leave-related discipline challenge after his Grand Jury testimony (see Findings of Fact 57-59); and Petitioner did not associate his superiors' treatment of him to this Grand Jury testimony.

117. Petitioner's cited cases, to the effect that an employer's mere awareness of the protected expression when the adverse employment action occurred is sufficient to establish retaliation, are rejected as inapplicable and unpersuasive.

118. No nexus to a discriminatory reason was shown for any of Respondent's interim actions with regard to leave or discipline, and Petitioner has not overcome Respondent's stated reasons for termination. In Florida, an employer at will may terminate for a good reason, a bad reason, or no reason at all, as long as no discriminatory intent is shown.

119. Petitioner has not borne his burden to establish a prima facie case with regard to his claims of racial, handicap, or retaliation discrimination, or if so, has not ultimately persuaded.

RECOMMENDATION

Upon the foregoing findings of fact and conclusions of law, it is

RECOMMENDED:

That the Florida Commission on Human Relations enter a final order finding that Petitioner has not proven discrimination and dismissing the Petition for Relief.

DONE AND ENTERED this 18th day of September, 2001, in Tallahassee, Leon County, Florida.

ELLA JANE P. DAVIS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 18th day of September, 2001.

ENDNOTES

1/ Neither party has raised the issue of timeliness, but based on a February 21, 1997, termination date, this cause may be time-barred pursuant to Section 760.11(1), Florida Statutes.

2/ Respondent's counsel suggested Petitioner's second successful arbitration/grievance involved charges against Petitioner for workers' compensation fraud, but there was no stipulation to this effect. Mr. Dickerson asserted he had been prosecuted for workers' compensation fraud. There is insufficient evidence concerning the reasons for Petitioner's second arbitration/grievance for a finding of fact thereon.

3/ Apparently, it was not "pure hell" for disabled for handicapped workers, regardless of race, even during Mr. Dickerson's working days, because he testified that while he was employed at the Jail, White/Caucasian employees were permitted to wear hand braces and the employer had allowed a Black/African-American female sergeant to keep her injured leg propped up during most of her shift and further provided her with an electronic cart to make her rounds.

4/ An employer may be obligated to authorize earned sick leave for family illness, but Petitioner had no accrued leave of any kind and a relative's handicap cannot be imputed to Petitioner.

5/ Apparently, the reason for this proposed discipline was on an attachment which was not offered in evidence.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.