STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ANNE BOLAND, Petitioner, vs. DIVISION OF EMERGENCY MANAGEMENT, Respondent.	)	Case No. 11-5198
MICHAEL YOUNGER, Petitioner, vs. DIVISION OF EMERGENCY MANAGEMENT, Respondent,	)	Case No. 11-5199

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in these consolidated cases on December 12 and 13, 2011, in Tallahassee, Florida, before E. Gary Early, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Anne Boland, pro se
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For Petitioner: Michael Younger, pro se
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STATEMENT OF THE ISSUE

Whether the Petitioners were subject to an unlawful employment practice by Respondent, the Florida Division of Emergency Management (DEM), on account of their sex or marital status in violation of section 760.10, Florida Statutes.

PRELIMINARY STATEMENT

On March 23, 2011, Petitioner, Anne Boland (Boland), filed an Employment Claim of Discrimination with the Florida Commission on Human Relations (FCHR) which alleged that the DEM violated section 760.10, Florida Statutes, by discriminating against her on the basis of her sex and marital status. The Employment Claim of Discrimination alleged that Boland was constructively discharged from employment with the DEM based on an "inappropriate relationship" with her supervisor, Michael Younger.

On September 7, 2011, the FCHR issued a Determination: No Cause and a Notice of Determination: No Cause, by which the FCHR dismissed Boland's claim of discrimination. On October 10, 2011, Ms. Boland filed a Petition for Administrative Hearing with the Commission. On October 11, 2011, the FCHR transmitted the

Petition to the Division of Administrative Hearings to conduct a Final Hearing.

On March 23, 2011, Petitioner, Michael Younger (Younger), filed an Employment Claim of Discrimination with the Florida Commission on Human Relations (FCHR) which alleged that the DEM violated section 760.10, Florida Statutes, by discriminating against him on the basis of his sex and marital status. The Employment Claim of Discrimination alleged that Younger was constructively discharged from employment with the DEM based on an "inappropriate relationship" with his subordinate employee, Anne Boland.

On September 8, 2011, the FCHR issued a Determination: No Cause and a Notice of Determination: No Cause, by which the FCHR dismissed Younger's claim of discrimination. On October 10, 2011, Mr. Younger filed a Petition for Administrative Hearing with the Commission. On October 11, 2011, the FCHR transmitted the Petition to the Division of Administrative Hearings to conduct a final hearing.

By Orders dated October 19, 2011, the cases were consolidated, and the date of the final hearing was set for December 12 and 13, 2011. The hearing was held as scheduled.

At the final hearing, Petitioners testified on their own behalves. Petitioners' Exhibits 1-4, 7-10, 15, 19-21, 31-32, 34, and 36-37 were received into evidence. Petitioners proffered two

exhibits that were not received into evidence, and have not been considered in this Recommended Order. Those exhibits have been separately marked, and will travel with the record of this proceeding. The DEM presented the testimony of Mr. Younger, Mark Helms, the DEM Personnel Officer, and Gwen Keenan, who was, at all times pertinent to this proceeding, the Bureau Chief for the DEM Bureau of Compliance and Planning. Respondent's Exhibits 2-3, and 14-20 were received into evidence.

The four-volume Transcript was filed on January 12, 2012. Respondent timely filed its Proposed Recommended Order. Petitioners filed their Proposed Recommended Order on January 26, 2012. Both have been considered in the preparation of this Recommended Order. References to statutes are to Florida Statutes (2011) unless otherwise noted.

FINDINGS OF FACT

1. At all times relevant to this proceeding, Ms. Boland was separated from her husband, though they were not yet divorced.

2. Mr. Younger was married until he was asked by his wife to leave the marital home on February 6, 2010. Mr. Younger considered himself to be separated as of that date.

3. Mr. Younger was first employed by the DEM in 2001. On April 6, 2009, he was promoted to a Planning Manager position in the Technological Hazards Section. In that position, he oversaw employees in the Radiological Emergency Preparedness (REP)

Program and the Risk Management Planning Program. The Planning Manager position was in Select Exempt Service, which is a classification of supervisory and managerial positions that serve at the pleasure of an agency's senior management.

4. In his position as Planning Manager, Younger was supervised by Shanti Smith, Administrator of the Technological Hazards Section. Ms. Smith was supervised by Gwen Keenan, Bureau Chief for the Bureau of Compliance and Planning.[1/]

5. Shortly after Younger began as Planning Manager, the DEM determined that there was a need to hire a Planner II in the REP Program. A three-member interview panel, which included Younger, was established to make a recommendation for the position. The panel interviewed 5 or 6 applicants, including Boland, and recommended the hiring of Terry Chasteen to the position.

6. After Ms. Chasteen was hired, the DEM determined that there was a need for a second Planner II in the REP Program, and authorized the position to be selected from the existing pool of interviewed applicants. Younger recommended Boland for the position, and she was thereupon hired as a Planner II under Younger's direct supervision, effective June 19, 2009.

7. At the time he recommended that she be hired as a Planner II, Younger was well-acquainted with Boland. Beginning in 2008, while employed in the DEM Mitigation Planning Unit, Boland began communicating with Younger via Twitter. In the fall

of 2008, Boland attended a seminar at which Younger was a presenter. On December 12, 2008, Boland was hired to a position in the Technological Hazards Section, and was assigned a desk about ten feet from Younger's office. They interacted in April 2009, regarding flooding in Hamilton County, Florida. There is no evidence that, at the time of Younger's hiring recommendation of Boland, their familiarity with one another was anything but work related.

8. The Planner II position to which Boland was hired was classified as a career service position. As such, Boland was subject to a one-year probationary period during which the employee may be separated without the right to appeal through the career service process.

9. In late June 2009, shortly after Boland was hired, she and Younger attended a social dinner together. The dinner was held in conjunction with an Incident Management Team meeting in Crystal River.

10. By September 2009, Boland was having personal discussions with Younger about details of her private life, including that she was separated from her husband and was thinking about starting to date other men. Ms. Boland testified that her separation was, by that time, common knowledge around the DEM.

11. By early November, 2009, Younger and Boland had begun walking together during their lunch breaks. During those walks, Younger and Boland discussed, among other things, private conversations Younger had been having with his wife.

12. In November 2009, Younger and Boland traveled to the Crystal River area for business related to the Crystal River nuclear power plant and a proposed Levy County nuclear power plant. They drove down together the day before scheduled activities, and stayed the night at a hotel in the area. They dined together that evening. Ms. Chasteen, who was also scheduled to attend the meetings, chose to drive separately the following morning.

13. At some point in November 2009, Mrs. Younger picked Younger up from work, and proceeded to drive through the DEM parking lot. Younger testified, unconvincingly, that Mrs. Younger's drive through the parking lot was merely to give his son a better look at some emergency vehicles parked nearby. In any event, Boland expressed concern over her action, perceiving it as threatening, and discussed "tactical actions" with Younger in the event Mrs. Younger showed up at their workplace.

14. On November 30, 2009, Younger and Boland drove to Orlando, Florida to attend a series of training programs, task force meetings, and a FEMA Region IV Conference. The activities

spanned a period of two weeks, from November 30, 2009 to December 11, 2009. Ms. Chasteen, who was involved in parts of the scheduled activities, stayed in Tallahassee for the first part of the trip. Younger and Boland elected to stay in Orlando over the intervening weekend.

15. During the intervening weekend, Mrs. Younger discovered a series of Twitter messages from Younger directed to Boland. Some of the messages included the abbreviated term "IAU," which Mrs. Younger took to mean "I adore you," but which Younger testified meant "in another universe." The tweets are not in evidence, and their context cannot be ascertained. Regardless, Mrs. Younger proceeded to send a series of three tweets to Boland from Younger's Twitter account. Boland took the first two tweets as harassment, and the third as a threat. Later that evening, Mrs. Younger called Younger and demanded that he return to Tallahassee. He did not.

16. The next morning, Sunday, December 6, 2009, Younger and Boland were driving from a meeting back to their hotel. Mrs. Younger was waiting for them in the parking lot with the couple's children. Having parked away from Mrs. Younger so as to avoid a confrontation between her and Boland, Younger went to speak with his wife. She expressed concerns over the messages exchanged between Younger and Boland, and "felt compelled" to say that she was attempting to save their marriage. She shouted at

Boland from across the parking lot, but made no other attempts to engage her.

17. Mrs. Younger stayed at the hotel that evening. She again indicated to Younger that she was trying to save their marriage. Mrs. Younger returned to Tallahassee the next day. Younger and Boland remained in Orlando for the conclusion of the events.

18. Mrs. Younger returned to Orlando at the scheduled conclusion of the training and picked up Younger. Younger testified that he did not ask Mrs. Younger to pick him up, and stated his belief that it was a waste of fuel for her to drive to Orlando and back. He further testified that Mrs. Younger did not say why she returned to Orlando to pick him up, and he apparently did not ask.

19. Although Boland felt threatened by Mrs. Younger's actions, neither Younger nor Boland reported the threatening communications or actions to anyone at DEM. The reasons given were that there was no reason to believe Boland's fears at the time were "substantiated," that Younger's supervisor, Shanti Smith, was a "gossip," and that based on Younger's previous training and experience as a law enforcement officer, he perceived there to be no imminent threat arising from any of the events.

20. In mid-December, 2009, Younger advised his wife that he was attending an office party at the home of Ms. Keenan. Younger did not attend the party. He instead had dinner with Boland, during which they discussed matters pertaining to his personal life.

21. On or about January 6, 2010, Younger travelled with a co-worker, Lou Ritter, to a task force, training, and response team meeting in West Palm Beach. They returned on the evening of January 8, arriving in Tallahassee after dark. Younger asked Mr. Ritter to drop him off at Boland's residence, rather than at his own house. His professed -- but unconvincing -- reason for being dropped off at Boland's after a three-day out-of-town trip was that he needed to return a book to her.

22. During the month of January, 2010, Younger spent "a couple of nights" at Boland's residence. One of those overnight visits occurred while Mrs. Younger was hospitalized for suicidal thoughts. Mrs. Younger's mother was taking care of Younger's children that evening, though Younger did not know where they were staying. There was no explanation as to why Mrs. Younger's hospitalization was a reason for Younger to sleep over at Boland's house. The reason for the second January sleepover was not revealed.

23. On January 19, 2010, Younger asked to meet with Mr. Helms, the DEM Personnel Officer. The purpose of the meeting

was to determine how one might accommodate a hypothetical situation where a supervisor is interested in dating a subordinate employee. Younger indicated that it was an "exploratory meeting" designed merely to inquire about possibilities "down the road." Younger testified that when he arranged the meeting, he had not considered whether he wanted to engage in a relationship with Boland. However, he knew that it would be improper for a supervisor to have a relationship with a subordinate in the chain of command.

24. Younger and Boland discussed the meeting and its purpose beforehand, and discussed the substance of the meeting at length after it occurred, though neither claimed to have specific recollection of their discussions. Boland understood that there would have to be a restructuring of the DEM organizational chart to accommodate a relationship with Younger.

25. During the meeting with Mr. Helms, Younger asked, as a "hypothetical question," what options were available to a supervisor who wanted to date a subordinate employee. He testified that he did not reveal that his inquiry was directed towards a relationship with Boland, because at the time it was not something he was pursuing. Given the circumstances and events leading up to the January 19 meeting, and the fact that he and Boland had prior discussions about the meeting and its

purpose, Younger's testimony that the meeting was entirely hypothetical seems contrived.

26. Mr. Helms identified the problems associated with a supervisor having a relationship with a subordinate. Those problems included ethical issues, issues of judgment, implications as to the fairness of evaluations and assignments, the perceptions of other employees regarding preferential treatment, and the possibility that the agency could be exposed to liability for sexual harassment if the relationship soured. Mr. Helms indicated in no uncertain terms that if a relationship with a subordinate was a possibility, Younger should "get out in front of the situation." By that, Mr. Helms meant that Younger should disclose the relationship before it started, and seek accommodation within the DEM organizational structure. Mr. Helms stressed that waiting until the relationship commenced would entail serious consequences. Mr. Helms memorialized the meeting on his calendar, but had no intention to reveal the meeting unless it subsequently came to light that Younger was engaged in a relationship that was not disclosed.

27. On January 22, 2010, Younger testified that Shanti Smith approached him in the breezeway between their office buildings and asked him if he knew about Boland's "freaky sex life." The context in which the statement was made was not described. Younger testified that the comment made him

uncomfortable, and that he did not respond. Younger did not disclose the comment to anyone at the DEM until March 23, 2010, when he was faced with dismissal. He testified that he feared retaliation if he complained, but identified no instance of that having occurred previously.

28. On January 24, 2010, Younger and Ms. Smith travelled to Miami for work related to the Haiti earthquake relief. At no time during the drive to Miami or back to Tallahassee did Younger make any exploratory inquiries as to how Ms. Smith, his direct supervisor, might respond to a potential desire by a member of her staff to date a subordinate because, according to Younger, "that was not on the radar at that time." However, Younger did reveal that he and his wife were having marital difficulties.

29. At some point prior to February 6, 2010, Mrs. Younger directly confronted Younger with her suspicion that he was carrying on an intimate relationship with Boland. On Saturday, February 6, 2010, Mrs. Younger asked Younger to leave the marital home, which he did. Younger testified that he was not financially capable of staying at a hotel. Although Younger had lived in Tallahassee his entire life, he apparently had no friends or family that he could turn to for temporary lodging. Thus, despite Mrs. Younger's belief that Boland was a cause of the marital collapse, and despite the fact that Boland was his direct subordinate, Younger determined that the only viable place

for him to stay was at Boland's house. He arrived at her house on the evening of February 6. She immediately took him in, and he ended up staying full-time.

30. Upon returning to work on February 8, 2010, Younger told no one at DEM of his new living arrangement, his reason being that he did not "believe there was a policy that required [him] to do that." Younger also testified that because of his busy travel schedule, it was difficult to get everyone involved in the same place to relate the information regarding his moving to Boland's house. He did not want to discuss the matter over the telephone, as the telephone is "sometimes less than reliable."

31. Younger, as Boland's direct supervisor, was charged with completing her performance evaluation. Boland's evaluation covered her period of employment from her June 19, 2009, hire date to February 28, 2010. The evaluations were due 60 days from February 28, 2010. Younger testified that, at some time prior to March 15, 2010, he decided that he would not evaluate Boland's performance because of fears that his objectivity could be compromised. He did not relate that decision to anyone at the DEM until questions about his relationship with Boland began to surface.

32. On or about March 15, 2010, it came to the attention of Ms. Smith and Ms. Keenan that Petitioners were regularly driving

to work together. Ms. Keenan instructed Ms. Smith to discuss whether Younger could find someone else to car-pool with, as regularly car-pooling with a subordinate created an appearance to other employees of impropriety and potential favoritism.

33. Ms. Smith asked Younger about the car-pooling arrangement with Boland. On direct inquiry from Ms. Smith, Younger denied that he and Boland were "living together." He testified that he believed his answer to be accurate since he maintained that his living arrangement with Boland was as friends and, in his mind, "living together" connoted co-habitation. Approximately one hour later, and having had second thoughts about his answer, Younger came to Ms. Smith's office and admitted that he was living at Boland's house. Ms. Smith indicated that the arrangement was unacceptable, and that Younger should move to another location. It was at or about that time that Younger revealed his intent to decline to evaluate Boland's job performance.

34. When Ms. Smith reported back to Ms. Keenan, it was with the information that Petitioners were living under the same roof. Ms. Keenan determined that, even if the relationship were strictly platonic, it served to cloud the supervisor/subordinate relationship. Therefore, she asked Ms. Smith to discuss the matter with Petitioners to ask that they make alternate accommodations.

35. On March 17, 2010, Younger made a travel request to Ms. Keenan for Boland to attend REP training on nuclear regulation from March 22-26, 2010. The travel request was made by telephone. The travel request did not go through Ms. Smith, which would have been the normal protocol. Younger testified that Ms. Smith was out of the office that day, that he did not know where she was, and that he did not know if he could make the travel request to her by telephone. No explanation was provided as to why it was acceptable to make a telephonic travel request to Ms. Keenan, but not to Ms. Smith.

36. The DEM was under travel restrictions, which led Ms. Keenan to ask Ms. Smith if the travel request was legitimate. Ms. Smith determined that Ms. Chasteen was originally scheduled to attend the training course on her own. When Ms. Chasteen had to cancel her attendance for medical reasons, Younger contacted Ms. Keenan to amend the travel request to authorize Boland to attend. In addition, though he did not intend to go when Ms. Chasteen was scheduled to take the training, Younger decided to accompany Boland to the training in order to "audit" the course. The course was the same as that attended by Petitioners during their November 30 - December 11, 2009, Orlando trip, and attended again by Younger in January 2010. However, Younger testified that the December course was a "pilot" version of the training, and that it was sufficiently different from that being

offered in March to justify their attendance again. Why Younger believed his attendance was not warranted when Ms. Chasteen was scheduled to take the training, but was warranted when Boland was substituted for Ms. Chasteen, was not explained.

37. When advised of the circumstances surrounding Petitioners' travel, Ms. Keenan began to sort the "data points" that increasingly pointed to Petitioners being involved in a personal relationship. At that time, the points included the car-pool issue, the house-sharing issue, and now the travel issue. She thereupon requested the DEM Chief of Staff to cancel Petitioners' travel request, and to advise Mr. Helms of the situation.

38. On or about March 19, 2010, Ms. Smith met with Mr. Helms to discuss Petitioners' situation. Ms. Smith advised Mr. Helms of the car-pooling, the living arrangements, and the fact that Younger had initially denied that he was living at Boland's house. During their conversation, Mr. Helms disclosed the details of his January 19, 2010 meeting with Younger. Ms. Smith related the information regarding the January 19, 2010, meeting to Ms. Keenan.

39. Upon being advised of the January 19, 2010 meeting, which she considered to be an additional "data point," Ms. Keenan met with Ms. Smith and Mr. Helms. She determined that Petitioners would have the opportunity to meet with management

and describe the circumstances of their relationship. If Petitioners denied the existence of a personal relationship, Ms. Keenan would take that information and consider a solution. If Petitioners admitted to a relationship, Ms. Keenan determined that there were three possibilities: dismissal, demotion, or resignation. Although Ms. Keenan ultimately consulted with other persons in the DEM, including the acting Chief of Staff, Angela Peterson, and the interim Director, David Halstead, the evidence demonstrates that the selection of which option would be implemented was to be Ms. Keenan's alone.

40. Ms. Keenan developed a script that she intended to read from at the March 22, 2010, meeting so as not to leave anything out.

41. Late in the afternoon of March 22, 2010, Petitioners met with Ms. Keenan, Ms. Smith, and Mr. Helms. Ms. Keenan, reading from her script, asked Petitioners if they were engaged in a personal relationship. Boland answered immediately that they were. Younger initially remained silent, but subsequently admitted that he and Boland were in a personal relationship.[2/] Both stated that they meant to come to Ms. Keenan earlier, but that their busy schedules prevented everyone from getting together. Ms. Keenan was unimpressed with that explanation, since she had a well-understood open-door policy; since she made it clear that if any manager had an issue, they would be

accommodated; and since all managers, including Younger, had a state-issued Blackberry and Ms. Keenan's cell phone number.

42. Ms. Keenan stripped Younger of his supervisory duties, presented Petitioners with the options of resignation or dismissal, and gave them until noon on March 23, 2010, to decide.

43. After the March 22, 2010, meeting, Boland decided that she would submit her resignation. She asked to speak with Ms. Keenan and Mr. Helms on the morning of March 23, 2010, and advised them of her decision. Boland testified that it was her choice to resign. She admitted that she and Younger were in a serious relationship, but that the relationship developed after she was hired in the Planner II position. She told Ms. Keenan that she was sorry to have placed her in a bad situation as a result of her relationship with Younger, and regretted that they had not handled the situation better. She stated that she hoped the DEM would keep Younger because he was important to the program. She reiterated that it had not been her intent to deceive anyone at DEM about her relationship with Younger.

44. Ms. Keenan did not direct Boland to resign, but suggested that if resignation was her decision, she speak with Mr. Helms for assistance in drafting a letter. Ms. Keenan then left the meeting.

45. Mr. Helms and Ms. Smith determined the process for Boland to turn in her state-issued equipment. By 9:00 p.m. on

March 23, 2010, Boland submitted her letter of resignation to Ms. Keenan. Although March 23, 2010, was her last day in the office, her final day was set as April 2, 2010. By allowing that to be her last day, Boland was able to use some accumulated leave that she would not have been paid for due to her probationary status, and would receive an additional full month of health insurance coverage. That severance date was, under the circumstances, a reasonable and generous accommodation on the part of the DEM.

46. Also during the morning of March 23, 2010, and after Boland's meeting, Younger met with Ms. Keenan and Mr. Helms. He advised them that he did not intend to resign. He reiterated that he had not intended to deceive anyone, but explained that he was a perfectionist and had not yet found the perfect time to reveal the relationship. At the March 23, 2010, meeting, Younger disclosed, for the first time, Ms. Smith's "freaky sex life" comment allegedly made on January 22, 2010. Given the lack of materiality of the statement to any issue in this proceeding, and the hearsay nature of the testimony, no finding is made as to whether Ms. Smith actually made that comment or not.

47. On March 25, 2010, Younger again advised Ms. Keenan that he was not going to resign, but would let the decision-making process run its course. Younger reiterated that he had not meant to deceive Ms. Keenan about the relationship.

48. Ms. Keenan determined that the totality of the circumstances -- especially the fact that Younger had discussed the issue of a superior/subordinate relationship with Mr. Helms in January, 2010, but ignored Mr. Helms' advice and instruction -- created significant doubt as to Younger's judgment and managerial integrity. The REP Program is one of the most sensitive in the agency. Having lost all confidence in Younger's ability to effectively serve in the program, Ms. Keenan decided to dismiss Younger from his position. She asked Mr. Helms to relate her decision to Younger. Mr. Helms told Younger of Ms. Keenan's decision, and advised him that he still had the option to resign by noon on March 26, 2010.

49. On the morning of March 26, 2010, Younger submitted his letter of resignation to Ms. Keenan. His final day was set as April 16, 2010, so that he could use some accumulated leave for which he would not otherwise have been paid. That severance date was, under the circumstances, a reasonable and generous accommodation on the part of the DEM.

50. Ms. Keenan, as the decision-maker for the DEM in this matter, testified that her decision to accept the resignations of Petitioners or, had they not done so, to dismiss Petitioners, was based solely on what she considered to be an improper personal relationship between a supervisor and a subordinate. She testified that she did not initiate or take any action based on

the marital status of either Petitioner. She further testified that she did not initiate or take any action based on Boland's female gender or Younger's male gender. Her decision would have been unaffected regardless of whether Petitioners were single, married, or divorced, and regardless of whether the gender roles had been reversed. Ms. Keenan's testimony was credible, clear, and convincing, and is accepted by the undersigned.

Comparators

51. The only evidence of other DEM personnel who were in "comparable" circumstances, but who were treated differently than Petitioners, involved Denise Imbler, a DEM Community Program Manager, and Donald Kunish, a DEM Planning Manager and Ms. Imbler's direct subordinate. They were in their supervisor/subordinate organizational positions from September 2001 until September 30, 2003.

52. At some point in their professional relationship, Ms. Imbler and Mr. Kunish developed an attraction for one another. Before acting on their mutual attraction, Ms. Imbler and Mr. Kunish went to their Bureau Chief, Eve Rainey, to try and work out an arrangement that would allow them to date one another without running afoul of supervisor/subordinate ethical considerations. At the time of the request, Craig Fugate was the Director.

53. Since Ms. Imbler and Mr. Kunish disclosed their intent before acting on it, the DEM was willing to try and accommodate their request. A number of options were considered to sever the supervisor/subordinate relationship, including transfers to different positions, and up to the resignation of one of them. After some consideration, the decision was made that an organizational change could be made that called for Mr. Kunish to report directly to Ms. Rainey. Thus, Ms. Imbler would no longer be Mr. Kunish's supervisor, eliminating the DEM's concerns of ethics and managerial integrity. The organizational change was implemented on October 1, 2003.

54. After the organizational change was made, Ms. Imbler and Mr. Kunish began to see one another on a personal level. Since their personal issues had been revealed and resolved well beforehand, there were no adverse employment actions resulting from their relationship.

55. Both Ms. Imbler and Mr. Kunish were single, as opposed to being married but separated, thus leading Petitioners surmise that they were treated differently than persons outside of their protected class due to their marital status. In addition, Ms. Imbler, the supervisor, was female while Mr. Kunish, the subordinate, was male, as opposed to the other way around, thus suggesting to Petitioners that they were treated differently due to their sex.

56. Ms. Imbler and Mr. Kunish did not report to the same supervisors as did Petitioners. Ms. Imbler and Mr. Kunish did not engage in conduct similar to the Petitioners. Ms. Imbler and Mr. Kunish were open, direct, and forthcoming with the DEM, and took action before commencing their relationship to prevent adverse inferences as to their ethics and integrity. In short, the situation involving Ms. Imbler and Mr. Kunish was materially dissimilar from that of Boland and Younger. Their conduct, and the DEM's reaction to it, is distinguishable and therefore inapplicable as a comparator.

Ultimate Findings of Fact

57. In this case, Ms. Keenan's decision to take disciplinary action against Petitioners was based entirely on the realistic and good faith belief that Younger, a supervisor, and Boland, a subordinate employee, were carrying on a personal relationship without advising the DEM. Whether the suspicion was accurate or not is not the issue. Ms. Keenan thought it was accurate. Even if mistaken in her belief, a personal relationship between a supervisor and a subordinate raises issues of judgment and managerial integrity, as well as ethical issues of preferential treatment, assignments, and performance evaluations that reflect on both Younger and Boland. Those issues were sufficient to warrant Ms. Keenan's, and thereby the DEM's, decision to seek and accept Petitioners' resignations.

58. There was no competent, substantial evidence adduced at the hearing that any persons who were not members of the Petitioners' protected classes, i.e., having the marital status of being separated, and having their respective genders, were treated differently from Petitioners, or under similar circumstances were not subject to similar adverse employment actions.

59. There was not a scintilla of evidence introduced at the hearing that Petitioners' marital status or sex had anything to do with their being discharged by the DEM, and it is expressly found that those factors formed no basis for the discharge of either Petitioner.

CONCLUSIONS OF LAW

60. Sections 120.569 and 120.57(1), Florida Statutes (2011), grant DOAH jurisdiction over the subject matter of this proceeding and of the parties.

61. Section 760.10 provides, in pertinent part:

> (1) It is an unlawful employment practice for an employer:
>
> (a) To discharge or to fail or refuse to hire any 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.

62. Petitioners advance two claims. First, they maintain that DEM discriminated against them on account of their marital status as "separated." Second, Petitioners each claim that the DEM discriminated against them on account of their sex, being female for Boland and male for Younger.

63. Section 760.11(1) provides that "[a]ny person aggrieved by a violation of ss. 760.01-760.10 may file a complaint with the [FCHR] within 365 days of the alleged violation . . . ." Petitioners timely filed their complaints.

64. Section 760.11(7) provides that upon a determination by the FCHR that there is no probable cause to believe that a violation of the Florida Civil Rights Act of 1992 has occurred, "[t]he aggrieved person may request an administrative hearing under ss. 120.569 and 120.57, but any such request must be made within 35 days of the date of determination of reasonable cause. . . ." Following the FCHR determination of no cause, Petitioners timely filed their Petitions for Relief requesting this hearing.

65. Chapter 760, Part I, is patterned after Title VII of the Civil Rights Act of 1964, as amended. When "a Florida statute is modeled after a federal law on the same subject, the Florida statute will take on the same constructions as placed on its federal prototype." Brand v. Florida Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994); see also Valenzuela v. GlobeGround

North America, LLC., 18 So. 3d 17 (Fla. 3rd DCA 2009); Fla. State Univ. v. Sondel, 685 So. 2d 923 (Fla. 1st DCA 1996); Fla. Dep't of Cmty. Aff. v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991).

66. Petitioners have the burden of proving by a preponderance of the evidence that the DEM committed an unlawful employment practice. See St. Louis v. Fla. Int'l Univ., 60 So. 3d 455 (Fla. 3rd DCA 2011); Fla. Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

67. Employees may prove discrimination by direct, statistical, or circumstantial evidence. Valenzuela v. GlobeGround North America, LLC., 18 So. 3d at 22. Direct evidence is evidence that, if believed, would prove the existence of discriminatory intent without resort to inference or presumption. Denney v. City of Albany, 247 F.3d 1172, 1182 (11th Cir. 2001); Holifield v. Reno, 115 F.3d 1555, 1561 (11th Cir. 1997). Courts have held that "'only the most blatant remarks, whose intent could be nothing other than to discriminate. . .' will constitute direct evidence of discrimination." Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d 1354, 1358-59 (11th Cir. 1999)(citations omitted).

68. Petitioners presented no direct or statistical evidence of discrimination by the DEM in its decision to dismiss Petitioners.

69. In the absence of any direct evidence of discriminatory intent, Petitioners must rely on circumstantial evidence of such intent. In McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and as refined in Texas Dep't of Cmty. Aff. v. Burdine, 450 U.S. 248 (1981) and St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993), the United States Supreme Court established the procedure for determining whether employment discrimination has occurred when employees rely upon circumstantial evidence of discriminatory intent.

70. Under McDonnell Douglas, Petitioners have the initial burden of establishing a prima facie case of unlawful discrimination. To establish their prima facie case under section 760.10(1)(a), Petitioners must prove that: (1) they were members of a protected class; (2) that they were qualified for their jobs; (3) that they were subject to an adverse employment decision; and (4) similarly-situated employee's outside the Petitioners' protected class were treated more favorably. McDonnell Douglas Corp. v. Green, at 802; Texas Dep't of Cmty. Aff. v. Burdine, at 252-253; Burke-Fowler v. Orange Cnty., Fla., 447 F.3d 1319, 1323 (11th Cir. 2006); Valenzuela v GlobeGround North America, LLC., 18 So. 3d at 22.

71. If the Petitioners are able to prove their prima facie case by a preponderance of the evidence, the burden shifts to the employer to articulate a legitimate, non-discriminatory

reason for its employment decision. Texas Dep't of Cmty. Aff. v. Burdine, 450 U.S. at 255; Dep't of Corr. v. Chandler, 582 So. 2d 1183 (Fla. 1st DCA 1991). The employer has the burden of production, not persuasion, to demonstrate to the finder of fact that the decision was non-discriminatory. Dep't of Corr. v. Chandler, supra. This burden of production is "exceedingly light." Holifield v. Reno, 115 F.3d 1555, 1564 (11th Cir. 1997); Turnes v. Amsouth Bank, N.A., 36 F.3d 1057, 1061 (11th Cir. 1994).

72. If the employer produces evidence that the decision was non-discriminatory, then the complainant must establish that the proffered reason was not the true reason but merely a pretext for discrimination. St. Mary's Honor Center v. Hicks, 509 U.S. at 516-518. In order to satisfy this final step of the process, Petitioners must "show[] directly that a discriminatory reason more likely than not motivated the decision, or indirectly by showing that the proffered reason for the employment decision is not worthy of belief." Dep't of Corr. v. Chandler, 582 So. 2d at 1186, citing Tex. Dep't of Cmty. Aff. v. Burdine, 450 U.S. at 252-256. The demonstration of pretext "merges with the plaintiff's ultimate burden of showing that the defendant intentionally discriminated against the plaintiff." (citations omitted) Holifield v. Reno, 115 F.3d at 1565.

73. The law is not concerned with whether an employment decision is fair or reasonable, but only with whether it was motivated by unlawful discriminatory intent. As set forth by the Eleventh Circuit Court of Appeals, "[t]he employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason." Nix v. WLCY Radio/Rahall Commc'ns, 738 F.2d 1181, 1187 (11th Cir. 1984). In a proceeding under the Civil Rights Act, "[w]e are not in the business of adjudging whether employment decisions are prudent or fair. Instead, our sole concern is whether unlawful discriminatory animus motivates a challenged employment decision." Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d at 1361. Moreover, "[t]he employer's stated legitimate reason . . . does not have to be a reason that the judge or jurors would act on or approve." Dep't of Corr. v. Chandler, 582 So. 2d at 1187.

Prima Facie Case

74. The Petitioners failed to prove a prima facie case that their dismissal by the DEM was motivated by discriminatory intent based either on their marital status or their gender.

75. The undersigned is willing to accept that both Petitioners are members of protected classes by virtue of their genders. Although Younger is male, he can be considered as a member of a protected class, since the term "sex" in section

760.10 is a general term that in everyday usage can mean either male or female. See Gen. Dynamics Land Sys. v. Cline, 540 U.S. 581, 597-598 (2004); Oncale v. Sundowner Offshore Servs., 523 U.S. 75 (1988).

76. The undersigned is also willing to accept that Petitioner's status as being separated from their respective spouses puts them as members of a protected class. See Donato v. American Telephone and Telegraph Co., 767 So.2d 1146, 1155 (Fla. 2000)("we hold that the term 'marital status' as used in section 760.10 of the Florida Statutes means the state of being married, single, divorced, widowed or separated. . . .").

77. Both Petitioners established that they were qualified to hold their positions by virtue of their being hired to, and holding those positions. See Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d at 1360 (". . . plaintiffs, who have been discharged from a previously held position, do not need to satisfy the McDonnell Douglas prong requiring proof of qualification. . . . [I]n cases where a plaintiff has held a position for a significant period of time, qualification for that position sufficient to satisfy the test of a prima facie case can be inferred.")(citations and internal quotation marks omitted).

78. Both Petitioners suffered an adverse employment action, in that they were each compelled to resign in the face of pending dismissal.[3/]

79. Where Petitioners have failed in the establishment of their prima facie case is their complete and abject failure to demonstrate that persons not in their protected classes were treated differently in comparable situations. As established by the Fifth District Court of Appeal:

> "In determining whether employees are similarly situated for purposes of establishing a prima facie case, it is necessary to consider whether the employees are involved in or accused of the same or similar conduct and are disciplined in different ways." The employee must show that she and the employees outside her protected class are similarly situated "in all relevant respects." Thus, "the quantity and quality of the comparator's misconduct [must] be nearly identical to prevent courts from second-guessing employers' reasonable decisions and confusing apples with oranges."
>
> Similarly situated employees "must have reported to the same supervisor as the plaintiff, must have been subject to the same standards governing performance evaluation and discipline, and must have engaged in conduct similar to the plaintiff's, without such differentiating conduct that would distinguish their conduct or the appropriate discipline for it." If a plaintiff fails to present sufficient evidence that a non-protected, similarly situated employee was treated more favorably by the employer, the defendant is entitled to summary judgment. (Citations omitted)

Valenzuela v GlobeGround North America, LLC., 18 So. 3d at 22-23.

80. Ms. Imbler and Mr. Kunish, whom Petitioners identified as the only comparators, shared few similarities with Petitioners. Therefore, Petitioners have failed to prove a prima facie case of discrimination, and their petitions for relief should be dismissed.

Legitimate, Non-discriminatory Reason

81. Assuming, for the sake of argument, that Petitioners made a prima facie showing (which they did not), the burden would shift to the DEM to proffer a legitimate non-discriminatory reason for its action, which at this stage is a burden of production, not a burden of persuasion. Holland v. Washington Homes, Inc., 487 F.3d 208, 214 (4th Cir. 2007).

82. The DEM met its burden by producing credible, clear, and convincing testimony and documentary evidence of its reasonable and good faith belief that Petitioners were engaged in an undisclosed personal relationship, and that the relationship adversely affected management's belief in Petitioners' judgment, truthfulness, and integrity. The DEM furthermore proved that the disciplinary action of dismissing Petitioners was due solely to those reasons, and not to reasons of sex or marital status. Although the DEM's burden was light, the evidence showing its reason to be legitimate and non-discriminatory was overwhelming.

Therefore, even if Petitioners had met their burden of establishing a prima facie case of discrimination, the DEM has refuted such prima facie case by proffering a legitimate non-discriminatory reason for Petitioners' constructive dismissal.

Pretext

83. Assuming again, for the sake of argument, that Petitioners made a prima facie showing, then upon DEM's production of evidence of a legitimate non-discriminatory reason for its action, the burden shifted back to Petitioners to prove by a preponderance of the evidence that DEM's stated reasons were not its true reasons, but were a pretext for discrimination. To do this, Petitioners would have to "prove '*both* that the reason was false, *and* that discrimination was the real reason' for the challenged conduct." Jiminez v. Mary Washington Coll., 57 F.3d 369, 378 (4th Cir. 1995), citing St. Mary's Honor Center v. Hicks, 509 U.S. at 515. (emphasis in original). To show pretext, Petitioners "must be afforded the 'opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.'" Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000) (citations omitted). Petitioners could accomplish this goal "by showing that the employer's proffered explanation is unworthy of

credence." Texas Dep't of Cmty. Aff. v. Burdine, 450 U.S. at 256.

84. The only evidence of pretext produced by Petitioners consisted of complaints of a "gossipy" supervisor who (allegedly) once made an inappropriate comment about Boland, concerns by the "gossipy" supervisor about Younger's job performance, inconsequential assumptions as to the Petitioners' marital status expressed during the March 22, 2010, meeting, and minor discrepancies in the sequence of events surrounding Petitioners' dismissal. None of the evidence supports a finding or a conclusion that the DEM's proffered explanation was false, nor does it support an inference that the explanation was pretextual.

Conclusion

85. The DEM put forth uncontested evidence that Petitioners were discharged because they were engaged in an unethical personal relationship that called their judgment and integrity into question. Whether Petitioners were actually engaged in such a relationship, as opposed to just "car-pooling", is irrelevant, because the DEM believed they were so engaged. Section 760.10 is designed to eliminate workplace discrimination, but it is "not designed to strip employers of discretion when making legitimate, necessary personnel decisions," such as the decision to discharge an employee for

unethical conduct. See Holland v. Washington Homes, Inc., 487 F.3d at 220. Because Boland and Younger failed to put forth any credible evidence that the DEM had some discriminatory reason for discharging them, their petitions must be dismissed.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED:

a) that the Florida Commission on Human Relations issue a final order finding that Respondent, Division of Emergency Management, did not commit any unlawful employment practice as to Petitioner, Anne Boland, and dismissing the Petition for Administrative Hearing filed in FCHR No. 2011-1065, DOAH Case No. 11-5198; and

b) that the Florida Commission on Human Relations issue a final order finding that Respondent, Division of Emergency Management, did not commit any unlawful employment practice as to Petitioner, Michael Younger, and dismissing the Petition for Administrative Hearing filed in FCHR No. 2011-1066, DOAH Case No. 11-5199.

DONE AND ENTERED this 26th day of January, 2012, in Tallahassee, Leon County, Florida.

E. GARY EARLY
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of January, 2012.

[1/] Due to a reorganization of the DEM, the Bureau of Compliance and Planning was renamed as the Bureau of Preparedness, effective July 1, 2010. However, when the organizational bill passed the legislature earlier in 2010, the DEM immediately began to internally refer to the bureau as the Bureau of Preparedness. Thus, exhibits and testimony that refer to the Bureau of Preparedness are deemed to apply equally to the Bureau of Compliance and Planning.

[2/] During their testimony, Petitioners disputed that they admitted to a "personal" relationship at the March 22, 2010, meeting, and testified that Ms. Keenan actually asked if they were involved in an "inappropriate" relationship. Petitioners testified that they admitted to an "inappropriate" relationship, but believed it related only to their car-pooling. Given the events that had transpired since November 30, 2009, culminating with the fact that Petitioners had been living under the same roof for more than 6 weeks, even if Ms. Keenan used the word "inappropriate" instead of "personal," Petitioners' testimony that they did not understand Ms. Keenan's questions to be related to whether they were engaged in a relationship of a more intimate nature than a car-pool is not credible, and is not accepted. The most persuasive evidence is that Ms. Keenan asked Petitioners

directly whether they were engaged in a personal relationship, to which Boland, and eventually Younger, admitted they were. [3/] At the conclusion of the March 22, 2010, meeting, Boland and Younger were faced with an order to resign or be fired. Having little or no choice in the matter, Petitioners chose to salvage what dignity they could, and submitted letters of resignation that did not burn bridges on the way out. The undersigned accepts the argument that, given the circumstances, the decisions were not voluntary, but were constructive discharges. As stated by the First District Court of Appeal:

> Under federal case law appellant's resignation would be considered a constructive discharge, meaning that a person may be deemed discharged if the words and actions of the employer would logically lead a prudent person to believe his tenure had been terminated. NLRB v. Trumbull Asphalt Company, 327 F.2d 841 (8th Cir. 1964); Jack Thompson Oldsmobile v. NLRB, 684 F.2d 458 (7th Cir. 1982); Young v. Southwestern S&L Association, 509 F.2d 140 (5th Cir. 1975).

LeDew v. Unemplmt. App. Comm'n, 456 So. 2d 1219, 1223-1224 (Fla. 1st DCA 1984). Accepting the resignations as constructive discharges supports a conclusion that Petitioners were subject to adverse employment decisions as a result of their relationship. Such a finding does not mean, however, that the adverse employment decisions were the result of unlawful discrimination.

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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.