

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

MARIA HERNANDEZ, PH.D., )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 11-6179  
 )  
 PALM BEACH ATLANTIC UNIVERSITY, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case by live presentation on October 16 and 17, 2012, in West Palm Beach, Florida, before Errol H. Powell, an Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Stuart Silverman, Esquire  
Stuart Silverman, P.A.  
Post Office Box 812315  
Boca Raton, Florida 33481

For Respondent: Peter L. Sampo, Esquire  
Lisa Ann McGlynn, Esquire  
Allen, Norton and Blue, P.A.  
121 Majorca Avenue, Third Floor  
Coral Gables, Florida 33134

STATEMENT OF THE ISSUE

The issue for determination is whether Respondent committed an unlawful employment act by discriminating against Petitioner

on the basis of marital status in violation of the Florida Civil Rights Act of 1992, as amended.

PRELIMINARY STATEMENT

Maria Hernandez, Ph.D., filed an employment discrimination complaint with the Florida Commission on Human Relations (FCHR) against the Palm Beach Atlantic University (University) on the basis of marital status. The FCHR determined that no reasonable cause existed to believe that an unlawful employment practice had occurred and issued a "Determination: No Cause" and a "Notice of Determination: No Cause" on October 27, 2011. Dr. Hernandez filed timely a Petition for Relief. On December 5, 2011, the FCHR referred this matter to the Division of Administrative Hearings.

At hearing, Dr. Hernandez testified on her own behalf and entered four exhibits (Petitioner's Exhibits numbered 1 through 4) into evidence. The University presented the testimony of six witnesses and entered five exhibits (Respondent's Exhibits numbered 5, 6, 11, 12, and 14) into evidence.

A transcript of the hearing was ordered. At the request of the parties, the time for filing post-hearing submissions was set for more than ten days following the filing of the transcript. The Transcript, consisting of two volumes, was filed on November 5, 2012. The parties requested and were granted additional time to file post-hearing submissions. The University

filed timely its post-hearing submission. Dr. Hernandez's post-hearing submission was filed untimely (one-day late), to which the University did not object having been provided an opportunity to do so. Dr. Hernandez's post-hearing submission is accepted as filed. The parties post-hearing submissions were considered in the preparation of this Recommended Order.

#### FINDINGS OF FACT

1. In June 2008, Dr. Hernandez was hired at the University as a faculty member of the School of Pharmacy in the position as a professor. She had a one-year employment agreement, with no presumption of renewal and a starting salary of \$97,000.00.

2. At all times material hereto, Dr. Hernandez was divorced. Dr. Hernandez had been divorced from her husband since 1995.

3. The University was aware that Dr. Hernandez was divorced when she was hired. She had been recruited by the University's then Dean of the School of Pharmacy, Dan Brown, who, at that time, was also divorced.

4. Marital status is not a factor in hiring an employee by the University. Dr. Hernandez's marital status was not a consideration or a factor in her hiring.

5. By February 15th of each year, faculty members are notified whether their employment contract will be renewed for the following year. If a faculty member is not notified by

February 15th that their contract will not be renewed, the faculty member's contract is automatically renewed for another year.

6. Dr. Hernandez's contract was renewed for the 2009-2010 academic year.

Spring 2010

7. Dean Brown was one of Dr. Hernandez's supervisors.

8. For all the professors in the School of Pharmacy, Dean Brown prepared and distributed a list of all of their current work load ratios. The goal for all Pharmacy professors was a ratio of 0.8.

9. Dr. Hernandez's work load ratio was 0.68, which was below the goal. She failed to meet the goal of the work load ratio for all Pharmacy professors.

10. Dr. Hernandez refused to accept the work load ratio as a reliable tool of performance and considered it as irrelevant to her. She did not express or exhibit an interest in improving her work load ratio.

11. Also, Dean Brown prepared and distributed a comparative analysis of student surveys of all the Pharmacy professors. Students were requested to score the performance of all the Pharmacy professors in 12 different areas.

12. Based on the student surveys of faculty performance, Dr. Hernandez was the second lowest ranked Pharmacy professor.

She scored very low in the following areas: "presents material in concise, organized, easy-to-follow manner" and "is an effective teacher." Dr. Hernandez refused to accept the student surveys as a reliable tool of performance and had no interest in the comparative analysis from the student surveys. Additionally, she failed to express or exhibit an interest in improving in those areas in which the students gave her a low ranking.

13. During his supervision of Dr. Hernandez, Dean Brown received several complaints from faculty members regarding emails that they had received from her. The faculty members considered the emails to be "caustic," "obnoxious," and "insulting." As a result, Dean Brown met with her and advised her to stop sending antagonistic emails and insulting her fellow faculty members.

14. One week later, Dr. Hernandez sent such an email to a fellow professor, Mary Ferrill, Ph.D. Dr. Ferrill was married to Dean Brown. Dr. Hernandez's email insinuated that Dr. Ferrill received special treatment because she was married to Dean Brown and asked whether she "sang and danced" for her students. Both Dean Brown and Dr. Ferrill considered the email to be insulting and confronted Dr. Hernandez. Dean Brown raised his voice at Dr. Hernandez when he confronted her because he was very upset in that he had, only a week earlier, advised her to stop sending antagonistic and insulting emails to fellow faculty members. Dean Brown admitted to the University's Human Resources Office

that he was wrong in raising his voice to Dr. Hernandez, and he apologized to Dr. Hernandez.

15. Because of the confrontation with Dean Brown, Dr. Hernandez was fearful that her contract would not be renewed.

16. Many of the classes at the School of Pharmacy are team taught: one course coordinator with several faculty members teaching segments of the course. Essential to team teaching is faculty members exhibiting team work.

17. Dr. Hernandez was one of the team members who taught PHR 2264, Endocrinologic and Musculoskeletal Pharmacotherapy. The course coordinator was Professor Dana Brown, Ph.D.

18. Dr. Hernandez repeatedly failed to meet established deadlines for team members in PHR 2264. Exam questions from team members for PHR 2264 were to be submitted to Dr. Dana Brown two weeks before the scheduled exams. Her responsibility was to carefully review all questions, including how the questions overlapped with questions submitted by other faculty members.

19. Dr. Hernandez failed to submit timely her exam questions, forcing Dr. Dana Brown to follow-up with Dr. Hernandez regarding the questions. Further, Dr. Hernandez would generally not inform Dr. Dana Brown ahead of time that she would be submitting her exam questions late. On one occasion, Dr. Hernandez submitted her exam questions only one day before the exam.

20. Additionally, exam lectures were to be posted 48 hours in advance of a class. Dr. Hernandez failed to post her exam lectures 48 hours before she taught her class and, generally, posted the exam lectures the night before her class.

21. Students complained to Dr. Dana Brown that Dr. Hernandez was difficult to understand. Dr. Dana Brown observed some of Dr. Hernandez's lectures and thought that Dr. Hernandez failed to answer students' questions.

22. Also, on one occasion, Dr. Dana Brown, responding to an email that she received from Dr. Hernandez, hit "reply all." Dr. Hernandez became upset and raised her voice to Dr. Dana Brown because the response went to persons other than Dr. Hernandez.

23. Dr. Dana Brown spoke to Wagdy Wahba, Ph.D., the then Interim Associate Dean, of the School of Pharmacy several times regarding the problems that she was having with Dr. Hernandez.

#### Summer 2010

24. In the summer 2010, Dean Brown stepped down as Dean of the School of Pharmacy to focus on teaching. In August 2010, Dr. Ferrill became the Dean of the School of Pharmacy.

#### Fall 2010

##### Faculty Activities Plan and Report

25. The School of Pharmacy uses a performance instrument for its professors, referred to as a Faculty Activities Plan and Report (FAPR), which is, basically, an evaluation of a

professor's performance in the previous year and expectations for the future. A FAPR that shows significant student or faculty concerns about teaching or collegiality is considered deficient.

26. Dr. Wahba completed the FAPR for all faculty members of the School of Pharmacy.

27. Dr. Wahba was Dr. Hernandez's immediate supervisor. He completed her FAPR. In October 2010, Dr. Hernandez received her FAPR from him and met with him to discuss it.

28. In the "Dean's Comments" section for the FAPR, Dr. Wahba included the following issues that he determined that Dr. Hernandez needed to address:

[a.] Not showing up for scheduled class in February 2010, and not sending the recorded lecture to the students until 21 days later.

[b.] How to improve relationship, communication & cooperation with other faculty & coordinators within the team-taught courses.

[c.] How to avoid reactive responses to concerns expressed by colleagues & administration, verbally and via e-mail[.]

[d.] Currently not posting lectures on e-college in a timely fashion according to school policy[.]

[e.] Currently not submitting exam questions to coordinators in a timely fashion[.]

[f.] Showing up late or not at all to scheduled review sessions and committee meetings[.]

Dr. Wahba and Dr. Hernandez discussed his comments.



29. Additionally, Dr. Wahba noted in the Dean's Comments section that, of great concern, was how Dr. Hernandez was going to address the negative comments from students in her student surveys. The students' comments mainly revolved around Dr. Hernandez's disorganized lecture presentations and her difficulty in explaining material clearly.

30. During the meeting in October 2010 with Dr. Wahba on the FAPR, Dr. Hernandez showed no willingness to improve in the areas that he had determined deficient. Further, she took the position that she had no deficiencies in her performance and demanded proof from him of her deficiencies.

31. After the October 2010 meeting, Dr. Wahba met with Dr. Hernandez a second time to discuss her FAPR. She continued to resist his efforts to address the areas determined by him to be deficient.

32. After the meetings, the next step in the FAPR process was for Dr. Hernandez to respond to Dr. Wahba's comments with a written plan of action and to sign the FAPR. She failed to do so. She was the only faculty member of the School of Pharmacy who did not complete the FAPR process. Dr. Hernandez blames Dr. Wahba for her not completing the FAPR process, taking the position that his responsibility was to "pursue" her to complete the FAPR process.

December 13, 2010 Meeting

33. As Dean of the School of Pharmacy, one of Dr. Ferrill's responsibilities was to review the FAPRs of the School of Pharmacy's faculty.

34. In the fall of 2010, three faculty members had deficient FAPRs: Dr. Hernandez; Luna Bennett, Ph.D.; and Devon Sherwood, Ph.D. Dr. Ferrill met with each of them to discuss their deficient FAPR.

35. Before meeting with Dr. Hernandez, Dr. Ferrill met with Dr. Wahba and discussed Dr. Hernandez's FAPR. Dr. Wahba advised Dr. Ferrill that he had reached an impasse with her in that she had never responded to his comments in the FAPR.

36. On December 13, 2010, Dr. Ferrill met with Dr. Hernandez to discuss her FAPR and her plans to improve on the deficiencies. Others who attended this meeting included Dr. Wahba and Keysha Bryant, Ph.D., a professor in the School of Pharmacy.

37. During the meeting, Drs. Ferrill and Wahba discussed areas in which Dr. Hernandez's performance was good. Further, they discussed the areas of deficiency and informed her that she needed a plan of action to improve in those areas. Additionally, Dr. Ferrill advised Dr. Hernandez that she was at risk of non-renewal of her contract unless she made strides to improve on her areas of deficiency.

38. During the meeting, Dr. Hernandez was not receptive to the discussion regarding her deficiencies. She indicated, among other things, that nothing was wrong with her teaching skills and that she saw no reason to change what she was doing. Additionally, when queried about her plan of action to address the negative comments in the FAPR, she became emotional and raised her voice.

39. Sometime near the end of the meeting, Dr. Hernandez expressed that she was emotionally upset, explaining that her ex-husband was ill and that she was taking care of him. Without questioning from anyone, she stated voluntarily that her ex-husband was living with her, indicating that she recognized that she was sinning in the University's eyes, but not in the eyes of God.

40. The University has a policy against members of the University, including faculty and students, having extramarital sexual relationships. The policy prohibits a member of the University from having extramarital sexual relationships regardless of whether the subject person was divorced, single, or married to someone other than the person with whom the subject person was having a sexual relationship.

41. Dr. Ferrill believed that Dr. Hernandez was admitting to violating the University's policy on extramarital sexual relationships. Dr. Ferrill questioned her further as to whether

she was having an extramarital sexual relationship with her ex-husband, but Dr. Hernandez refused to answer.

42. Prior to the meeting on December 13, 2010, Dr. Hernandez had never spoken of her living arrangement or sexual relations with her ex-husband to Dr. Ferrill.

43. Further, prior to the meeting on December 13, 2010, Dr. Ferrill was not aware of Dr. Hernandez's living arrangements.

44. Dr. Ferrell believed that she was required to report any University policy violation or potential violation of which she was or became aware. As a result, Dr. Ferrill advised Dr. Hernandez that she (Dr. Ferrell) was required to report the potential policy violation to her (Dr. Ferrill's) supervisor.

45. After the meeting on December 13, 2010, Dr. Ferrill reported to Provost Joseph Kloba that Dr. Hernandez had admitted to violating the University's policy against extramarital relations. Once Dr. Ferrill made the report to Provost Kloba, she considered that her duty to report was fulfilled. Dr. Ferrell spoke to no one else regarding Dr. Hernandez's living arrangements.

46. Provost Kloba determined that no violation of the University's policy existed and that no further action was warranted. Once Provost Kloba made his decision, Dr. Ferrill considered Dr. Hernandez's living arrangements to be a non-issue.

### Dr. Hernandez's Living Arrangements

47. In October 2010, Dr. Hernandez's ex-husband had a health crisis while visiting family in Georgia. Due to his health crisis, he suffered, among other things, cognitive deficits and became totally disabled.

48. In November 2010, Dr. Hernandez moved her ex-husband to E. J. Healey Rehabilitation Facility in West Palm Beach, Florida. He remained at the facility until March 2011.

49. The evidence demonstrates that no one at the University was aware of Dr. Hernandez's living arrangements until the meeting on December 13, 2010.

### Post December 13, 2010 Meeting and Non-Renewal of Contract

50. After the meeting on December 13, 2010, Drs. Ferrill and Wahba gave Dr. Hernandez an extension to respond to her FAPR. Three days later, on December 16, 2010, Dr. Hernandez submitted her response.

51. In her response, Dr. Hernandez indicated that there was no need to make any significant improvements. Further, she indicated that she did not understand the issues presented and would discuss the comments with the University's Human Resources Office. As to students' critical comments, she indicated that she did not know what to do with the comments, but would conduct a research project about it.

52. In January 2011, Dr. Hernandez participated in a group interview conducted by the School of Pharmacy for the position of Dean of Faculty. The interviewee was Seena Haines, Ph.D. Dr. Hernandez asked Dr. Haines questions which appeared to relate to the spring 2010 incident that Dr. Hernandez had with then Dean Brown when he confronted Dr. Hernandez about the email she (Dr. Hernandez) had sent to Dr. Ferrill. Dr. Hernandez's questions to Dr. Haines were considered by Dr. Ferrill to be inappropriate for a group interview; by Dr. Dana Brown to be unprofessional; and by Dr. Wahba to be out of place.

53. Dr. Ferrill recommended to Provost Kloba that Dr. Hernandez's contract not be renewed for another year. Dr. Ferrill's recommendation was based upon the deficiency issues identified in the FAPR regarding Dr. Hernandez's teaching and collegiality and upon Dr. Hernandez's lack of interest in improving her deficiencies.

54. Provost Kloba, who was also the Chief Academic Officer, was responsible for making the decision as to whether to renew Dr. Hernandez's contract. He reviewed, among other things, her FAPRs, including the student comments and her responses, and received feedback from Drs. Ferrill, Wahba and Brown (Dean Brown in spring 2010). Provost Kloba decided to not renew Dr. Hernandez's contract for another year.

55. Dr. Hernandez's living arrangements were not considered and were not a factor in Provost Kloba's decision of non-renewal.

56. Regardless with whom Dr. Hernandez was living, Provost Kloba would not have renewed her contract.

57. By letter dated February 1, 2011, Provost Kloba informed Dr. Hernandez that her contract would not be renewed for another year.

58. By letter dated February 4, 2011, Provost Kloba informed Dr. Hernandez that, effective February 1, 2011, through June 30, 2011, she was placed on paid administrative leave. She received all pay and benefits through the expiration of her annual contract, i.e., June 30, 2011.

#### Divorced Faculty Members

59. The evidence demonstrates that the University employs several faculty members who are divorced.

60. The evidence demonstrates that Dr. Brown (Dean Brown) is divorced.

#### Comparative Employees

61. The evidence fails to demonstrate any similarly situated employee who was not divorced and was treated more favorably than Dr. Hernandez.

62. The evidence fails to demonstrate any employee who was accused of the same or similar conduct and was treated more favorably than Dr. Hernandez.

Current Employment

63. Currently, and since January 2012, Dr. Hernandez is a Professor of Medical Sciences at California North State University, College of Pharmacy. She is subject to a yearly appointment. Her yearly salary is \$110,000.00.

CONCLUSIONS OF LAW

64. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the parties thereto, pursuant to sections 760.11 and 120.569, Florida Statutes (2012), and subsection 120.57(1), Florida Statutes (2012).

65. The standard of proof is preponderance of the evidence. § 120.57(1)(j), Fla. Stat. (2012).

66. These proceedings are de novo. § 120.57(1)(k), Fla. Stat. (2012).

67. Section 760.10, Florida Statutes (2009) and (2010), 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.



(b) To limit, segregate, or classify employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities, or adversely affect any individual's status as an employee, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.

68. In the instant case, Dr. Hernandez must rely upon circumstantial evidence to prove discriminatory intent by the University. For such cases, a three-step burden and order of presentation of proof have been established for unlawful employment practices. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Aramburu v. The Boeing Co., 112 F.3d 1398, 1403 (10th Cir. 1997); Combs v. Plantation Patterns, 106 F.3d 1519, 1527-1528 (11th Cir. 1997).

69. The initial burden is upon Dr. Hernandez to establish a prima facie case of discrimination. McDonnell Douglas, 411 U.S. at 802; Aramburu, 112 F.3d at 1403; Combs, 106 F.3d at 1527-1528. Dr. Hernandez establishes a prima facie case of discrimination by showing four factors: (1) that she belongs to a protected group; (2) that she was subjected to an adverse employment action; (3) that her employer treated similarly situated employees outside the protected group differently or more favorably; and (4) that she was qualified to do the job. McDonnell Douglas, supra; Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997); Aramburu, supra; Combs, supra. See Kendrick v. Penske Transp.

Servs., 220 F.3d 1220 (10th Cir. 2000) (similarly situated employees need not be outside the protected group).

70. Further, as to similarly situated employees, Dr. Hernandez must show that she and the other employees (the comparator employees) are "similarly situated in all relevant respects." Holifield, supra. In making such a determination, consideration must be given to "whether the employees are involved in or accused of the same or similar conduct and are disciplined in different ways." Id.

71. The comparator employees "must be similarly situated in all material respects, not in all respects." McGuinness v. Lincoln Hall, 263 F.3d 49, 53 (2d Cir. 2001); Shumway v. United Parcel Serv., Inc., 118 F.3d 60, 64 (2d Cir. 1997). "In other words, . . . those employees must have a situation sufficiently similar to plaintiff's to support at least a minimal inference that the difference of treatment may be attributable to discrimination." McGuinness, 263 F.3d at 54. Similarly situated "only requires similar misconduct from the similarly situated comparator." Anderson v. WBMG-42, 253 F.3d 561, 565 (11th Cir. 2001). The employees need not have the disciplines administered by the same supervisor to be similarly situated. Id. An employee who is discharged subsequent to the complaining employee can be examined as to whether they are similarly situated. McGuinness, 263 F.3d at 53.

72. Once Dr. Hernandez establishes a prima facie case, a presumption of unlawful discrimination is created. McDonnell Douglas, supra; Aramburu, supra; Combs, 106 F.3d at 1528. The burden shifts then to the University to show a legitimate, nondiscriminatory reason for its action. McDonnell Douglas, supra; Aramburu, supra; Combs, supra.

73. If the University carries its burden, Dr. Hernandez must then prove, by a preponderance of the evidence, that the reason offered by the University is not its true reason, but only a pretext for discrimination. McDonnell Douglas, 411 U.S. at 804; Aramburu, supra; Combs, supra.

74. However, at all times, the ultimate burden of persuasion that the University intentionally discriminated against her remains with Dr. Hernandez. Texas Dep't of Comty. Affairs v. Burdine, 450 U.S. 248 (1981).

75. The first prong of the prima facie standards requires Dr. Hernandez to demonstrate that she belongs to a protected class, here, marital status. The "term 'marital status' as used in section 760.10 . . . means the state of being married, single, divorced, widowed or separated . . . ." Donato v. Am. Tel. & Tel. Co., 767 So. 2d 1146, 1155 (Fla. 2000). The evidence demonstrates that Dr. Hernandez was divorced and, therefore, demonstrates that she satisfied the first prong of the test.

76. The second prong of the prima facie standards requires Dr. Hernandez to demonstrate that she was subjected to an adverse employment action. The evidence demonstrates that Dr. Hernandez's annual contract was not renewed and, therefore, demonstrates that she satisfied the second prong of the test.

77. However, the evidence fails to demonstrate that Dr. Hernandez satisfied the third prong of the test. She failed to demonstrate that any other employee was similarly situated. Consequently, she failed to demonstrate that other employees, whether inside or outside the protected group, were similarly situated; or that the University treated similarly situated employees, whether inside or outside the protected group, differently or more favorably. Anderson, 253 F.3d at 565; McGuinness, 263 F.3d at 54; Kendrick, supra; Holifield, 115 F.3d at 1562; Shumway, 118 F.3d at 64.

78. Assuming Dr. Hernandez had established a prima facie case, the University has demonstrated a legitimate, nondiscriminatory reason for its employment action of not renewing her annual contract. The University demonstrated that deficiencies existed in Dr. Hernandez's performance; that the deficiencies were brought to her attention and discussed with her; that she was notified that an effort to remedy the deficiencies was required to be made; that, if she made no effort to remedy the deficiencies, her annual contract was in jeopardy

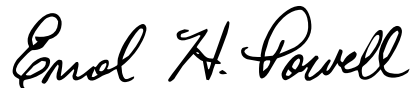
of not being renewed; that she made no effort to remedy the deficiencies; and that the deficiencies were not remedied.

79. Moreover, the evidence demonstrates that the University had faculty at the School of Pharmacy who were divorced; that the University was aware that she was divorced when the University hired her as a faculty member; that her ex-husband living with her was not a factor in the University's decision not to renew her annual contract; and that her ex-husband began living with her only after her annual contract was not renewed.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations enter a final order dismissing the discrimination complaint of Maria Hernandez, Ph.D.

DONE AND ENTERED this 4th day of February, 2013, in Tallahassee, Leon County, Florida.



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ERROL H. POWELL  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(850) 488-9675  
Fax Filing (850) 921-6847  
[www.doah.state.fl.us](http://www.doah.state.fl.us)

Filed with the Clerk of the  
Division of Administrative Hearings  
this 4th day of February, 2013.

COPIES FURNISHED:

Stuart Silverman, Esquire  
Stuart Silverman, P.A.  
Post Office Box 812315  
Boca Raton, Florida 33481

Peter L. Sampo, Esquire  
Lisa Ann McGlynn, Esquire  
Allen, Norton and Blue, P.A.  
121 Majorca Avenue, Third Floor  
Coral Gables, Florida 33134

Denise Crawford, Agency Clerk  
Florida Commission on Human Relations  
Suite 100  
2009 Apalachee Parkway  
Tallahassee, Florida 32301

Cheyenne Costilla, Interim General Counsel  
Florida Commission on Human Relations  
Suite 100  
2009 Apalachee Parkway  
Tallahassee, Florida 32301

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.