STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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| TERESA URBINA, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| vs. | ) | Case No. 12-2441 |
| | ) | |
| SANMAR, | ) | |
| | ) | |
| Respondent. | ) | |
| | ) | |

RECOMMENDED ORDER

A hearing was held, pursuant to notice, on September 13, 14, and 25, 2012, in Jacksonville, Florida, before the Division of Administrative Hearings by its designated Administrative Law Judge, Barbara J. Staros.

APPEARANCES

For Petitioner: Teresa Urbina, pro se
Apartment 1102
1535 Blanding Boulevard
Middleburg, Florida 32068

For Respondent: Michael G. Prendergast, Esquire
Lindsay Dennis Swiger, Esquire
Holland and Knight, LLP
50 North Laura Street, Suite 3900
Jacksonville, Florida 32202

STATEMENT OF THE ISSUE

Whether Respondent violated the Florida Civil Rights Act of 1992, as alleged in the Charge of Discrimination filed by Petitioner on December 26, 2011.

## PRELIMINARY STATEMENT

On December 26, 2011, Petitioner, Teresa Urbina, filed a Charge of Discrimination with the Florida Commission on Human Relations (FCHR), which alleged that Respondent, Sanmar Corporation, violated section 760.10, Florida Statutes, by discriminating against her on the basis of disability.

The allegations were investigated and on July 2, 2012, FCHR issued its determination of "no cause" and Notice of Determination: No Cause.

A Petition for Relief was filed by Petitioner on July 12, 2012. FCHR transmitted the case to the Division of Administrative Hearings (Division) on or about July 13, 2012. A Notice of Hearing was issued setting the case for formal hearing on September 13 and 14, 2012.[1/] The hearing took place as scheduled, but was not completed in two days. The hearing was reconvened on September 25, 2012, and concluded that day.

At hearing, Petitioner presented the testimony of Maria Rocha, Manuel Sanchez, and William Rocha, and testified on her own behalf. Petitioner's Exhibits numbered 1 through 5, 9 through 13, and 15 through 17 were admitted into evidence. Exhibit 6 was admitted in part, and Exhibit 8 was admitted for a limited purpose. Respondent presented the testimony of Lori Schutter, Alice Torres, Becquer Rosado, Terri Andrews, Tasha Porter, Christy Hammond, Paul Rhodes, and Olivia Thurmond.

Respondent offered Exhibits numbered 1 through 15, 17 through 23, 25 through 32, 34 through 50, 52 through 54, and 56 through 59, which were admitted into evidence.

A Transcript consisting of five volumes was filed on October 10, 2012. On October 22, 2012, Petitioner filed a written post-hearing submission. On November 9, 2012, Respondent filed a Proposed Recommended Order. The parties' respective submissions have been duly considered in the preparation of this Recommended Order.

## FINDINGS OF FACT

1. Petitioner, Teresa Urbana, began employment with Sanmar Corporation (Sanmar) in August 2008 as a seasonal employee and worked there until November 2008. She was rehired in July 2009 in a Re-stocker position. She was promoted to Order Processor and was made a full-time regular employee later that year.

2. Sanmar is a distributor of promotional apparel and accessories to companies that sell promotional apparel. The Jacksonville location is one of seven distribution centers (DC) throughout the country. The Jacksonville DC fulfills customer orders by receiving, picking, checking, packing and shipping them. Respondent is an employer as contemplated by chapter 760, Florida Statutes.

3. An Order Processor is responsible for picking and checking the order, and then packing the order for distribution

to Sanmar's customers. The position description for Order Processor includes the following:

> PHYSICAL DEMANDS:
>
> While performing the duties of this job, the employee is constantly required to walk and stand. The employee is frequently required to reach with hands and arms, handle or feel product, to pull/push cart with product, grasp and perform repetitive hand, wrist and arm motions. The employee is frequently required to climb, kneel/squat, bend and carry. The employee occasionally lifts and/or moves up to 40 pounds, and seldom lifts and/or moves up to 50 pounds. Specific vision abilities required by this job include close vision, color vision, peripheral vision, depth perception and ability to adjust focus.
>
> WORK ENVIRONMENT:
>
> Work environment is moderately noisy. The employee is occasionally required to work near conveyor systems. There is exposure to dust and changes in weather conditions. Employee must be able to handle stress that is involved in meeting strenuous customer deadlines, working in high volume areas, and be flexible and able to interact with employees at all times.

4. Paul Rhodes is the Distribution Manager and Alice Torres is Human Resources Manager for Sanmar's Jacksonville DC. Ms. Torres reports to Olivia Thurmond, Senior Manager of Human Resources. Ms. Thurmond is in the corporate headquarters for Sanmar, which is located in Issaquah, Washington.

5. Sanmar's Employee Handbook includes an Equal Employment Opportunity Policy, an Anti-Harassment and Non-Discrimination

Policy, and a Reasonable Accommodation Policy. Petitioner received a copy of the Employee Handbook.

Allegations Related to Disability

6. On April 21, 2011, Petitioner approached Ms. Torres to inform her of pain Petitioner was having in her wrists and hands. Petitioner informed Ms. Torres that she believed that this condition was work-related. With the help of Ms. Torres' assistant, Yadira Batlle, Petitioner completed an Accident/Incident Report. Ms. Batlle actually completed the form based on information provided by Petitioner, because Petitioner is not fluent in English, as her primary language is Spanish. The Accident/Incident Report was signed by Petitioner and references carpel-tunnel in both hands as the description of the injury.

7. On that same day, Sanmar provided Petitioner with contact information for Solantic Baptist Occupational Health (Solantic) so she could receive evaluation and treatment for her injury which Petitioner claimed was work related. While there was some dispute as to whether Petitioner's condition was work related and covered by workers' compensation, it is undisputed that Sanmar reported the injury to its workers' compensation carrier and Petitioner did receive benefits and medical treatment through workers' compensation.

8. On April 22, 2011, Petitioner was evaluated at Solantic. As a result of her evaluation, Petitioner was released to return to work with a work restriction of wearing wrist braces. Petitioner continued to perform her Order Processor job duties wearing wrist braces.

9. Petitioner also was evaluated by her personal physician, Dr. Esquivia-Munoz, who provided a note dated June 1, 2011, which stated as follows:

> This patient has bilateral moderate carpal tunnell [sic] syndrome worse at right wrist, which is interfering with her regular duties and regular activities for which she will need surgical decompression in the future.

10. When Ms. Torres received this doctor's note, she explained to Petitioner that the note did not include any specifics as to any work restrictions. As a result, Ms. Torres advised Petitioner she could not allow her to return to work until the company received work restrictions from her doctor. Therefore, Sanmar placed Petitioner on a leave of absence under the Family and Medical Leave Act (FMLA).

11. On June 2, 2012, Ms. Torres sent a fax to Dr. Esquivia-Munoz with a request that he complete an attached certification of Petitioner's health condition. He completed the form, but the information he provided essentially repeated what he wrote on the June 2, 2011, note, and did not provide specific working restrictions which Sanmar requested and needed

to be able to provide appropriate and safe working restrictions for Petitioner. Ms. Torres forwarded these documents to Christy Hammond, Sanmar's Leave Supervisor, who is located in the Washington office.

12. On June 3, 2012, Lori Shutter, Sanmar's Benefits Manager, faxed a request to Dr. Esquivia-Munoz, requesting that he complete an enclosed "release to return to work" form identifying work restrictions. She also attached a position description for the Order Processor position. Sanmar did not receive a completed form or further specific work restrictions from Dr. Esquivia-Munoz despite this request.

13. Petitioner went back to Concentra, the workers' compensation medical provider, for further evaluation. Concentra identified her activity status as "modified activity" and identified her work restrictions as no pushing, pulling or lifting over zero pounds, and referred her to a hand surgeon. The facsimile shows that this information was faxed to Sanmar on June 13, 2011.

14. Ms. Torres forwarded this information to Ms. Hammond in the corporate office, and discussed it with Mr. Rhodes. The Order Processor position involved frequent reaching, pushing, grasping, and performing repetitive hand motions. Pushing, pulling, and lifting are essential functions of the Order Processor job. Accordingly, the work restrictions received from

Concentra prevented Petitioner from performing essential functions of the job of Order Processor, with or without reasonable accommodations.

15. Sanmar found light-duty work that Petitioner could do within the work restrictions as set forth by Concentra. She was assigned to do "go-backs," which is part of the order processing job, but not the entire job. Go-backs are items, such as hats or t-shirts, found in the wrong bins. The go-back work required Petitioner to use a computer to find the product's correct location, write down that location, and carry the product to the correct location. There is no regular go-back position at Sanmar. This was a temporary assignment created to accommodate Petitioner by eliminating many of the regular functions of the Order Processor position, including pushing, pulling, picking, and packing items to fill customer orders.

16. On June 13, 2011, Ms. Torres called Petitioner to advise her that Sanmar had light-duty work within Petitioner's work restrictions. Petitioner returned to work on June 15, 2011, performing go-backs at her regular rate of pay, i.e., as when she could perform all functions of the Order Processor position.

17. On June 17, 2011, Petitioner submitted a Leave of Absence Request Form, requesting to commence leave on June 20, 2011. Ms. Torres then provided a Notice of Eligibility and

Rights and Responsibilities for leave under FMLA to her. This document notified Petitioner that she was eligible to receive FMLA leave, and further notified her that she needed to provide sufficient certification to support her request for FMLA leave by July 1, 2011.

18. On June 20, 2011, Petitioner clocked in at work at approximately 12:24 p.m., after an appointment with Petitioner's hand specialist, Dr. Greider. Petitioner immediately went to the Human Resources office and provided a note from Dr. Greider which confirmed that she had an appointment with him that morning, and left his office at 11:30.

19. Petitioner also provided a doctor's note from Dr. Greider detailing Petitioner's work restrictions. She gave the note to Ms. Batlle, because Ms. Torres was out of the office at that time. The note reads as follows:

> LIGHT DUTY WORK RESTRICTIONS
>
> No repetitive gripping and pinching.
> No repetitive pulling and pushing.
> No lifting greater than 5 pounds.
> No production keying (until further notice)
> Frequent rest breaks- 5 minutes per hour.
>
> Effective until pending surgery.

20. Ms. Batlle left copies of these doctor's notes for Ms. Torres, along with a handwritten note stating that Petitioner was going home for the day.

21. Ms. Thurmond happened to be visiting the Jacksonville DC on June 20, 2011. Ms. Torres, Ms. Thurmond, and Mr. Rhodes, along with Ms. Hammond by telephone, discussed Petitioner's new work restrictions and concluded that, because processing go-backs required keyboarding, gripping and pinching, Petitioner could no longer perform that light-duty work.[2/] Accordingly, Sanmar approved Petitioner's request for FMLA leave.

22. Beginning June 21, 2011, Petitioner began taking the FMLA leave she had requested. During this leave, Petitioner had surgery on her right hand on July 21, 2011. Petitioner remained on FMLA leave until September 13, 2011, at which point she had exhausted her FMLA leave entitlement and had still not been released to work. Rather than terminating Petitioner's employment at that time, Sanmar provided additional leave until the company was able to determine whether Petitioner would be able to return to work. Sanmar provided Petitioner an FMLA Designation Notice which informed her that her absence from September 14 through September 25 would be provided to her "as a reasonable accommodation under the Americans with Disability Act (ADA)."

23. On September 16, 2011, Ms. Hammond prepared a letter to Dr. Greider outlining the modified work description in doing go-backs, and asking him to advise whether or not she would be able to perform those duties. Dr. Greider faxed a reply to

Ms. Hammond on September 20, 2011, advising that the activities described in Ms. Hammond's letter would be acceptable.

24. Ms. Torres and Ms. Hammond prepared a letter to Petitioner dated September 22, 2011, advising her that Sanmar had received a written confirmation from Dr. Greider that she had been approved to return to work with the modified duties (performing go-backs). The letter further notified Petitioner that she was expected to return to work on September 26, 2011, which she did. Ms. Torres did not receive any complaints from Petitioner during the September to November timeframe regarding her ability to perform the go-backs duty.

25. On November 2, 2011, Petitioner provided Ms. Torres with a note from Dr. Grieder confirming Petitioner would be out of work for surgery on her left hand from November 7 through 10, 2011. The note states the following:

> Patient is scheduled for hand surgery on 11/7/11 and may remain out of work from date of surgery until 11/10/11 at which point patient may return to work with no use of the left hand until follow up appointment on 11/21/11.

26. Ms. Torres and Petitioner had a discussion regarding Dr. Greider's note during which Petitioner expressed doubt that she would be able to return to work November 10 as she still had restrictions on the use of her right hand and did not know what

kind of work she would be able to perform after surgery on her left hand.

27. Ms. Torres than contacted Ms. Hammond via e-mail requesting her assistance in confirming the work restrictions, if any, on Petitioner's use of her right hand. On November 8, 2011, Ms. Hammond, through the company's workers' compensation carrier, received confirmation from Dr. Greider's office that she was released from work restrictions with regard to her right hand as of October 17, 2011.[3/]

28. On November 9 and 10, Petitioner left voice mail messages for Ms. Torres and her assistant regarding her inability to work.

29. On November 11, 2011, Petitioner did not report to work. Because this was the date that had been indicated by Dr. Greider as the date she was released to return to work (regarding her right hand), and after receiving guidance from Ms. Hammond and input from the workers' compensation carrier, Ms. Torres called Petitioner and informed her that Sanmar had not received any additional information from Dr. Grieder and advised Petitioner that it was Petitioner's responsibility to obtain a new note from her doctor if she could not work. Ms. Torres reminded Petitioner that she needed to come in to discuss her restrictions and possible light-duty work.

30. Ms. Torres received another call from Petitioner on November 14, 2011. Ms. Torres reiterated to Petitioner that she needed to report to work with her restrictions so Sanmar could attempt to accommodate her appropriately.

31. Petitioner reported to work later that same day. She met with Mr. Rhodes and Ms. Torres to discuss her ability to work and what accommodations would be necessary. Mr. Rhodes first advised Petitioner that she would be doing go-backs which could be performed without the use of her left hand. When Petitioner expressed concern about her ability to perform that task, Mr. Rhodes agreed to assign her a temporary light-duty position auditing the restock until they could review the matter further. Petitioner agreed to perform the restock work. Also on November 14, 2011, Ms. Torres received a fax from Dr. Grieder's office which attached the same November 2, 2011, note regarding Petitioner's restrictions. Nothing in the November 14, 2011, fax from Dr. Grieder's office changed Petitioner's work restrictions.

32. Auditing the restock is not a regular position at Sanmar, but is one part of the many duties of the inventory department. In offering this temporary work to Petitioner, Sanmar eliminated many of the essential functions of the Order Processor job.

33. Petitioner left the November 14 meeting with Ms. Torres and Mr. Rhodes and worked for about two hours. After about two hours, Petitioner apparently fainted and left work in an ambulance which transported her to the hospital. That was the last day Petitioner worked for Sanmar.

34. Petitioner received notes from Dr. Greider dated November 21, 2011, and December 9, 2011, listing the same light duty restrictions (i.e., no repetitive gripping and pinching, no repetitive pulling and pushing, no lifting greater than five pounds, no production keying, and frequent rest breaks), valid for the left hand only. Petitioner also received a note from Dr. Greider dated January 23, 2012, indicating that she may continue previous restrictions until February 6, 2012, at which time the patient may return to work full duty. However, Ms. Hammond, Ms. Thurmond, and Ms. Torres, all testified that they did not receive this note. Petitioner was seen by an orthopedic doctor in August 2012. The doctor's note indicates that she has a permanent work restriction which precludes her from lifting more than 10 to 15 pounds.

Facts regarding disciplinary action

35. Through an employee loan program, Sanmar approves loans to employees under certain circumstances. In late December 2010, an incident arose involving Petitioner and her request for an employee loan.

36. On December 28, 2010, Ms. Torres heard Petitioner speaking in a loud voice outside of Ms. Torres' office. She heard Petitioner accusing her assistant at that time, Sandra Colindres, of refusing to help her with papers required for such a loan. Petitioner spoke in a tone of voice that Ms. Torres felt was not appropriate for the office. She then asked Petitioner to meet with her in her office. While in Ms. Torres' office, Petitioner complained that Ms. Colindres was unwilling to help her with the loan paperwork. Petitioner had not been scheduled to work that day.

37. Ms. Torres informed Petitioner that the loan process had very recently been changed, and that the loan would need to be approved by Human Resources if it were determined that there was a critical need. Ms. Torres considered Petitioner's tone of voice during this conversation in her office to be disrespectful, demanding and rude.

38. At the end of this meeting, Ms. Torres told Ms. Colindres to give Petitioner the employee loan form. When Petitioner left Ms. Torres' office, Petitioner approached a co-worker who was also in the office and began talking in a loud voice about what had just happened. Ms. Torres overheard Petitioner talking about their meeting to another employee and asked Petitioner to discuss the issue in her office. Ms. Torres told Petitioner that her conduct was disruptive, unprofessional,

and unacceptable. She told Petitioner that she had caused a disturbance in the workplace, that Ms. Torres would be informing the DC manager about this incident, and that Petitioner would likely be receiving corrective action.[4/]

39. Shortly thereafter, Ms. Torres accompanied a pest control representative to the break room. When they arrived in the break room, Ms. Torres observed Petitioner telling a group of employees her version of the events in her office. The employees dispersed when they saw Ms. Torres enter the break room. When Ms. Torres turned to leave the break room, she saw Petitioner complaining to yet another group of employees about the incident. Ms. Torres considered this behavior to be extremely disruptive. Ms. Torres then asked a supervisor, Tasha Porter, to instruct Petitioner to leave the premises.

40. Ms. Torres was relatively new to the company, and she consulted with Paul Rhodes and Olivia Thurmond to determine appropriate disciplinary action that would be consistent with the company's response to similar instances of conduct.

41. Mr. Rhodes was out of the office from December 27, 2010, through January 2, 2011. On January 3, 2011, Mr. Rhodes and Petitioner met to discuss the December 28, 2010, incident. Tasha Porter also attended the meeting and supervisor Daniel Serrano attended the meeting as an interpreter. Mr. Rhodes also

spoke to and received written statements from Alice Torres, Sandra Colindres and Tasha Porter regarding the incident.

42. After reviewing the matter, a decision was made to give Petitioner a final Written Warning for unprofessional conduct and disruptive behavior which had taken place on December 28, 2010. Petitioner refused to sign the final Written Warning, did not acknowledge that she committed the actions described, but acknowledged that the conduct described would be unacceptable and that a person engaging in such conduct could be terminated. The final Written Warning was given to Petitioner on January 10, 2011, by Mr. Serrano, who also speaks Spanish.

43. Prior to receiving this final Written Warning, Petitioner had not reported a disability to anyone at Sanmar. There is nothing in the record to establish or suggest that any one at Sanmar knew, perceived or regarded Petitioner as having a disability at that time.

44. On the evening of April 18, 2011, Group Lead Terri Andrews was supervising the employees on the lo-bay floor. Employees were working overtime to get all customer orders shipped by the end of the day. Ms. Andrews was at the print station, as Petitioner approached her. Ms. Andrews directed Petitioner to report to the pack line. Petitioner told Ms. Andrews that she wanted to go home. Ms. Andrews told Petitioner again to report to the pack line and Petitioner left

the floor. Ms. Andrews described Petitioner as appearing agitated.

45. Petitioner arrived at the pack line where Becquer Rosado, another Group Lead, was directing employees where they were needed the most. Mr. Becquer saw Petitioner approaching and before he could direct her to a position, she put her hand up in the air, walked past him, and told him that she would only take instructions from Patricia Alonso and not from him. This was done in front of other employees.

46. Patricia Alonso was a Department Lead for the pack line. A Group Lead is superior to a Department Lead because Group Leads oversee several functions, while Department Leads only supervise a single function. Employees are expected to follow the directions of both Group and Department Leads.

47. Mr. Rosado reported this incident to his supervisor, Lori Pritchard, and completed an Employee Concern form the following day. Ms. Andrews also reported Petitioner's behavior to Ms. Pritchard, and completed an Employee Concern form on April 21, 2011. It was that day that Petitioner approached Ms. Torres to talk about pain that Petitioner was having in her wrists and hands as more fully discussed in paragraph 6 above.

48. Petitioner was not at work from April 21 until April 26, 2011. After reviewing the Employee Concern forms, Ms. Torres met with Petitioner regarding the April 18, 2011,

incident. During this meeting, Petitioner denied being disrespectful to Ms. Andrews and Mr. Rosado. After speaking to Petitioner on April 26, 2011, Ms. Torres recommended that Petitioner be terminated for her actions of April 18, 2011, because Petitioner had just received a final Written Warning for her behavior on January 10, 2011.

49. However, Mr. Rhodes decided to give Petitioner another chance and, instead of terminating Petitioner, decided that Sanmar would issue a Final Warning Follow Up Discussion Memo to Petitioner, which was done on May 5, 2011. This Discussion Memo reiterated that any future violation of company policy by Petitioner would result in further corrective action up to and including termination of employment.

50. During May and June 2011, and pursuant to Sanmar's Voluntary Time Out (VTO) procedure, Petitioner volunteered on several occasions to go home when production was slow and Sanmar asked for volunteers. Employees interested in VTO simply had to write their names on the "Go Home Early Sheet." Sanmar then selected employees for VTO in the order in which the employees volunteered to go home early. Petitioner's name appears on the VTO sheets in evidence, and her name is near the top of the list on most days. She was not sent home early on days that she had not signed up for VTO on the Go Home Early sheet.

51. On June 20, 2011, after leaving the doctor's notes referenced in paragraph 18 through 20 with Ms. Battle, Petitioner proceeded to the break room where Tasha Porter, a supervisor, found her engaged in a conversation with co-workers while on the clock and not on a break. When Ms. Porter asked Petitioner why she was in the break room while clocked in, Petitioner replied that she taking her break. Ms. Porter reported this to Ms. Torres. Afterwards, Petitioner returned to work processing go-backs, although another employee was doing the keyboarding, as further explained above.

52. As discussed in paragraph 21 above, Ms. Thurmond was visiting the Jacksonville DC on June 20, 2011. Ms. Torres, Ms. Thurmond, and Mr. Rhodes discussed the incident in the break room and decided to issue a final Written Warning to Petitioner for falsification of time records for this incident of being "on the clock" while in the break room. This was the same meeting in which they discussed Petitioner's June 20, 2011, work restrictions.

53. Ms. Torres and Ms. Thurmond issued a final Written Warning to Petitioner at the same meeting in which they notified her that Sanmar had approved Petitioner's request for FMLA leave. The weight of the evidence shows that this took place on June 21, 2011.

54. On or around November 3, 2011, prior to Petitioner going on leave for her second hand surgery, Ms. Torres learned of an incident involving Petitioner and her son, Manuel Sanchez, who also worked for Sanmar. Specifically, Ms. Torres learned that Mr. Sanchez may have forged Petitioner's signature on a time-off request which asked for permission to be off work on October 28, 2011. After discussing this with Mr. Sanchez, Ms. Torres concluded that he had forged his mother's name on the time-off request at her request. Sanmar considered this to be falsification of company records. This is an offense for which Sanmar has disciplined employees in the past.[5/]

55. On Friday November 4, 2011, which was Petitioner's last day at work before taking leave for her second hand surgery, Ms. Torres discussed the forged time off request with Petitioner. Petitioner admitted that she had asked her son to fill out the request and sign her name. At the end of their conversation, Ms. Torres told Petitioner not to discuss their meeting or the situation with anyone, not even Petitioner's son, because the company was continuing to investigate the matter.

56. Despite this instruction, Lori Pritchard, a supervisor, reported to Ms. Torres that Petitioner went directly to her son and had a heated discussion with him at the print station. Although Ms. Pritchard was unable to fully understand their conversation because it was in Spanish, Ms. Pritchard

advised Ms. Torres that she believed they were discussing Ms. Torres' meeting with Petitioner.

57. Following this incident, Ms. Torres met again with Mr. Sanchez and Mr. Sanchez admitted he and Petitioner were discussing the forged time off request at the print station on November 4. Ms. Torres, however, was unable to speak to Petitioner about this incident until November 14, 2011, when Petitioner returned to work after her November 7 (second) surgery.

58. During the meeting with Petitioner upon her return to work on November 14, 2011, (see paragraph 30), Mr. Torres and Mr. Rhodes told Petitioner the company was still reviewing the incident regarding the forged time-off request. They advised Petitioner that they had confirmation she and Mr. Sanchez discussed the forged time off request at the print station. While Petitioner denied this, she admitted she talked about the incident with her son at home, where Mr. Sanchez also resided.

59. Ms. Torres and Mr. Rhodes believed Petitioner should be terminated for the November 4 incident, because it involved an incident of insubordination, following the previous warnings of unprofessional conduct issued In January and May 2011. However, they wanted to discuss their recommendation with Ms. Thurmond and Marty Rask, Operations Manager, in keeping with the company's normal practice. Although they planned to talk to

Ms. Thurmond and Mr. Rask and, with their concurrence, terminate Petitioner later during the day on November 14, they were not able to do so because of Petitioner unexpectedly became ill on that day. This began a lengthy leave of absence from which she never returned.

60. Mr. Rhodes and Ms. Torres recommended that Sanmar terminate Petitioner for her insubordination on November 4, when she discussed the document falsification issue with her son in violation of Ms. Torres' instructions, as well as her dishonest and evasive response on November 14, when Mr. Rhodes and Ms. Torres spoke to her about the incident.

61. The final decision to terminate Petitioner was made on November 30, 2011. However, Sanmar did not communicate the termination decision to Petitioner until January 24, 2012. This delay resulted from circumstances related to Petitioner's medical leave and on-going workers' compensation proceedings.[6/] Sanmar decided to move forward with its November 30, 2011, termination decision.

62. Sanmar's usual practice of communicating employee termination is to inform the employee in person. However, Christy Hammond had been communicating with Petitioner and respected Petitioner's request that she not be required to come to the workplace only to be fired. Therefore, Sanmar decided to issue the termination letter via mail.

63. Accordingly, on January 24, 2012, Sanmar sent Petitioner a termination letter signed by Olivia Thurmond. Enclosed with the letter was a documentation form explaining the reasons for Petitioner's termination, i.e., Petitioner's insubordination on November 4 and her dishonest and evasive behavior on November 14, combined with her prior discipline.

CONCLUSIONS OF LAW

64. The Division of Administrative Hearings has jurisdiction over the parties and subject matter in this case. §§ 120.569 and 120.57, Fla. Stat. (2012).

65. The Florida Civil Rights Act (FCRA) states that it is an unlawful employment practice for an employer to discharge or otherwise discriminate against an individual on the basis of handicap. § 760.10(1), Fla. Stat.

66. The FCRA is to be construed in conformity with federal law. Specifically, courts have looked to the Rehabilitation Act, 29 U.S.C., et seq., and the Americans With Disabilities Act (ADA), 42 U.S.C. section 12101, et seq., as well as related regulations and judicial decisions, in construing claims relating to handicap or disability. Knowles v. Sheriff, 460 F. App'x 833, 835 (11th Cir. 2012); Chanda v. Engelhard/ICC, 234 F.3d 1219 (11th Cir. 2000); Brand v. Florida Power Corp., 633 So. 2d 504 (Fla. 1st DCA 1994).

67. In construing the FCRA in accordance with federal law, the method of proving discrimination is normally analyzed by a tribunal based upon an approach set forth in the United States Supreme Court cases of McDonnell Douglas v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); and Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). In this method of analysis, the employee has the burden of establishing by a preponderance of the evidence a prima facie case of unlawful discrimination. If the employee succeeds, a presumption of discrimination arises and the burden shifts to the employer to produce evidence articulating a legitimate, nondiscriminatory reason for its action. If the employer produces such evidence, the employee must prove that the employer's proffered reason was not the true reason for the employment decision, but was, in fact, a pretext for discrimination. The burden shifting analysis of employment discrimination cases applies to the ADA and, therefore, FCRA claims. Holly v. Clairson Indus., L.L.C., 492 F.3d 1247, 1255 (11th Cir. 2007): and see Dep't of Corr. v. Chandler, 582 So. 2d 1183 (Fla. 1st DCA 1991) (court discusses shifting burdens of proof in discrimination cases).

68. In this case, Petitioner's burden is to establish a prima facie case of employment discrimination by proving by a preponderance of the evidence (1) that she is a handicapped or

disabled individual under the ADA; (2) that she was a qualified individual at the relevant time, i.e., that she could perform the essential functions of the job in question with or without reasonable accommodations; and (3) that she was discriminated against because of her handicap or disability. Holly v. Clairson Indus., L.L.C., supra; Lucas v. Grainger, 257 F.3d 1249, 1255 (11th Cir. 2001), (citing Reed v. Heil, 206 F.3d 1055, 1061 (11th Cir. 2000)). If Petitioner is unable to establish a prima facie case, the burden of producing rebuttal evidence does not shift to the employer, and judgment should be entered for the employer. Brand, supra, 633 So. 2d at 510-511.

69. In the event that Petitioner does meet her burden of proof, the employer then has the burden of showing that the Petitioner's handicap is such that it cannot be accommodated or that the proposed accommodation is unreasonable because it results in an undue hardship on defendant's activities. Brand, supra, at 511-512. The plaintiff bears the burden of identifying an accommodation and demonstrating that the accommodation allows her to perform the essential functions of the job. Lucas v. Grainger, supra, at 1255-1256.

70. Once the employer places in evidence valid reasons for the challenged action, Petitioner cannot remain silent, but must rebut the employer's position, if she can. Cleveland v. Home Shopping Network, Inc., 369 F.3d 1189, 1193 (11th Cir. 2004);

Brand, supra, at 512. In this connection, the ultimate burden of persuading the trier of fact that the employer intentionally discriminated against Petitioner remains at all times with the employee (Petitioner). Id.

71. The ADA defines a disability as a physical or mental impairment that substantially limits one or more of the major life activities of an individual, a record of such impairment or being regarded as having such an impairment. 42 U.S.C. § 12102(2); Rossbach v. City of Miami, 371 F.3d 1354, 1357 (11th Cir. 2004).

72. Major life activities are defined as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." Hilburn v. Murata Elec. N. Am., Inc., 181 F.3d 1220, 1227 (11th Cir. 1999). The inability to perform one particular type of job does not constitute a substantial limitation on one's ability to work. Rossbach v. City of Miami, supra, at 1359; Aucutt v. Six Flags over Mid-America, 85 F.3d 1311 (8th Cir. 1996).

73. Applying the above case analysis to the instant facts, it is not entirely clear whether Petitioner's medical condition of carpal tunnel syndrome qualifies as a handicap or disability under the law. Petitioner's treating physician(s) did not testify. However, Sanmar did provide what it described as a reasonable accommodation, at least on a temporary basis, under

the ADA when it approved FMLA leave. It appears that Sanmar did regard her as having a disability at least for that period of time.

74. Assuming that Petitioner meets the first prong of establishing a prima facie case, the second prong requires Petitioner to establish that she is a qualified individual, who could perform the essential functions of the job with or without an accommodation.

75. The Eleventh Circuit addressed the issue of determining what functions of a particular job are deemed to be essential:

> The ADA provides that in determining what functions of a given job are deemed to be essential, 'consideration shall be given to the employer's judgment . . . and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.' 42 U.S.C. § 12111(8).

Holbrook v. City of Alpharetta, Ga., 112 F.3d 1522, 1526 (11th Cir. 1997).

76. The Order Processor job requires many activities that Petitioner could not perform. When it offered Petitioner temporary light-duty work, it eliminated essential elements of the position, i.e., repetitive gripping and pinching, pulling

and pushing, and lifting as found in the job description for the Order Processor job.

77. Sanmar placed Petitioner on temporary work duty after she reported her injury. An employer is not required to make fundamental alterations in its program or create a new job for the plaintiff/petitioner. Brand, supra (citing Alexander v. Choate, 469 U.S. 287, 300 (1985)); Sch. Bd. of Nassau County v. Arline, 480 U.S. 273 (1987).

78. Accordingly, as to the second prong of a prima facie case, Petitioner has failed to establish that she could perform the essential functions of the job of Order Processor with or without reasonable accommodations.

79. As to the third prong of the prima facie test, Petitioner did not prove that she was discriminated against because of her handicap or disability.

80. Even if Petitioner established a prima facie case, Respondent has offered legitimate, non-discriminatory reasons for its actions. The days that Petitioner left work early were a result her request to do so as part of the VTO process. The final written warnings were issued because of distinct actions of Petitioner which were found to be unacceptable to the company's management. That is, the January 10, 2011, written warning was issued because of behavior directed to the company's Human Resources Manager; the final written warning dated May 5,

2011, was issued as a result of this type of behavior to two Group Leads; and the final written warning dated June 21, 2011, was for falsification of records.

81. Finally, Petitioner's termination was for discussing an ongoing investigation with her son in violation of directions given to her, and the accumulation of past behavior that resulted in disciplinary action, including termination. Whether the company's request that she not discuss this matter with her son was realistic or not is irrelevant. "The employer may fire an employee for 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." Dep't of Corr. v. Chandler, supra at 1187 (quoting Nix v. WLCY Radio/Rahall Communic'n, 738 F. 2d 1181, 1187 (11th Cir. 1984)).

82. Finally, Petitioner did not meet her burden of proving that Sanmar's proffered reasons for its actions were not the true reasons but were, in fact, a pretext for unlawful discrimination. While the timeframes of her injuries were intertwined to some degree with the timeframes of the events leading up to her termination, the undersigned is not persuaded that Sanmar disciplined and terminated Petitioner's employment because of her disability. In summary, Petitioner has failed to carry her burden of proof that Respondent engaged in disability discrimination.

## RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law set forth herein, it is

RECOMMENDED:

That the Florida Commission on Human Relations enter a final order dismissing the Petition for Relief filed by Petitioner, Teresa Urbina.

DONE AND ENTERED this 30th day of November, 2012, in Tallahassee, Leon County, Florida.

BARBARA J. STAROS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of November, 2012.

## ENDNOTES

[1/] On August 1, 2012, Petitioner filed a request for an interpreter, as Petitioner's primary language is Spanish and she does not speak much English. This request was relayed to FCHR, requesting that an interpreter be provided. By e-mail dated August 13, 2012, FCHR responded that "the Commission does not provide interpreters for hearings outside the Commission. Ms. Urbina will have to get an interpreter for the hearing." Petitioner is pro se. The Division made arrangements to provide

a Spanish interpreter at the hearing to afford Petitioner due process.

[2/] Ms. Torres, Ms. Thurmond, and Mr. Rhodes also discussed a pending disciplinary matter regarding Petitioner, which will be addressed later in this Order.

[3/] Dr. Greider's patient's notes reveals that as of her office visit with him on October 17, 2011, he "was not going to place any work restrictions on her at this point."

[4/] Ms. Torres speaks Spanish and was able to converse with Petitioner without an interpreter.

[5/] Following Sanmar's investigation of this incident, Mr. Sanchez received a final Written Warning for falsification of records on November 9, 2011.

[6/] Sanmar and Petitioner, through their respective workers' compensation counsel, were in the process of negotiating a settlement of Petitioner's workers' compensation claim. This would have included Petitioner's agreement to sign a release of all claims and resign her employment, which would have obviated the need to terminate Petitioner. These settlement negotiations, which were ultimately unsuccessful, are only relevant as explanation of the delay in informing Petitioner of her termination.

COPIES FURNISHED:

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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.