STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LOU ARMENTROUT,

Petitioner,

vs. Case No. 14-2617

FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.
_____/

RECOMMENDED ORDER

An administrative hearing was conducted in this case on January 16, 2015, in Clermont, Florida, before James H. Peterson, III, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Jamison Jessup
557 Noremac Avenue
Deltona, Florida 32738

For Respondent: Todd Studley, Esquire
Florida Department of Corrections
501 South Calhoun Street
Tallahassee, Florida 32399-2500

STATEMENT OF THE ISSUE

Whether Respondent Department of Corrections (Respondent or the Department) constructively discharged Petitioner Lou Armentrout (Petitioner) in violation of the Florida Civil Rights Act of 1992, sections 760.01–760.11 and 509.092, Florida

Statutes,[1/] by subjecting Petitioner to a hostile work environment because of Petitioner's race, age, or gender.

PRELIMINARY STATEMENT

On November 19, 2013, Petitioner filed a charge of discrimination with the Florida Commission on Human Relations (FCHR or the Commission), which was assigned FCHR No. 201301998 (Charge of Discrimination). The Charge of Discrimination alleges that the Department discriminated against Petitioner in employment by subjecting her to a hostile work environment based upon Petitioner's race, age, and gender, and in retaliation of Petitioner's complaint to management about the hostile work environment, resulting in Petitioner's constructive discharge. After investigating Petitioner's allegations, the Commission's executive director issued a Determination of Cause on May 21, 2014, finding that "reasonable cause exists to believe that an unlawful employment discrimination practice occurred." An accompanying Notice of Determination notified Petitioner of her right to file a Petition for Relief for an administrative proceeding within 35 days of the Notice. On June 2, 2014, Petitioner timely filed a Petition for Relief and, on June 3, 2014, the Commission forwarded the petition to the Division of Administrative Hearings for the assignment of an administrative law judge to conduct an administrative hearing. The case was originally assigned to Administrative Law Judge Suzanne Van Wyk,

who entered Orders dated July 2 and 3, 2014, respectively, scheduling this case for a final hearing to be held September 17, 2014, and accepting Jamison Jessup as Petitioner's Qualified Representative. After Petitioner's Unopposed Motion to Continue Final Hearing was granted, the final hearing was rescheduled for January 16, 2015. The case was subsequently transferred to the undersigned to conduct the administrative hearing.

At the beginning of the administrative hearing held in this case, Petitioner withdrew her claim based upon retaliation.

During the administrative hearing, Petitioner testified, called two witnesses, and introduced five exhibits received into evidence as Exhibits P-1, P-2, P-3, P-5, and P-6. In addition, pages 12-13, 14-30, 57-58, 129, 132-136, 137-138, and 148-149 of Petitioner's pre-marked Exhibit P-4 were received into evidence. Respondent presented the testimony of one witness and introduced four exhibits into evidence as Exhibits R-1 through R-4.

The proceedings were recorded and a transcript was ordered. The parties were given 30 days from the filing of the Transcript within which to submit their respective Proposed Recommended Orders. The one-volume Transcript of the hearing was filed on February 5, 2015. Thereafter, the parties timely filed their Proposed Recommended Orders which were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is an Asian female born February 25, 1970. Petitioner speaks Chinese and English. Petitioner speaks with a Chinese accent. She does not speak or understand Spanish.

2. Respondent is a state agency responsible for "the incarceration and supervision of offenders through the application of work, programs, and services." See § 20.315(1), Fla. Stat.

3. At all material times, Respondent employed more than 15 persons.

4. Petitioner was employed by Respondent at its Lake Correctional Institution (Institution) from September 16, 2011, until October 12, 2012, as a Senior Registered Nursing Supervisor.

5. Petitioner's duties as a Senior Registered Nursing Supervisor included the supervision of approximately 80 nurses at the Institution.

6. While employed at the Institution, Petitioner worked directly under the supervision of the Institution's Chief Health Officer.

7. When Petitioner was hired, the Chief Health Officer was Dr. Moreno. Dr. Moreno's annual performance evaluation of Petitioner for the period ending February 29, 2012, gave Petitioner an overall 3.51 performance rating score, indicating

that Petitioner "consistently meets and may occasionally exceed the performance expectation of the position." Petitioner never received an evaluation score below a 3, indicating that the employee at least "meets expectation," on any written evaluation of her performance while she was employed by the Institution.

8. After Dr. Moreno resigned in April or May 2012, Dr. Virginia Mesa was hired as Chief Health Officer of the Institution in May of 2012. Dr. Mesa is Hispanic.

9. Dr. Mesa's supervision was often harsh. Dr. Mesa had a bad temper and would raise her voice and reprimand employees in the presence of others, including inmates.

10. Dr. Mesa described her supervisory style as the "team approach." She advised that, instead of meeting with employees individually, she would meet them as a "team."

11. She would meet every morning with the nurses in the medical unit and once a week in the psych unit. Petitioner attended these meetings. During the meetings, Dr. Mesa would often address the group, many of whom were Hispanic, in Spanish instead of English. Many of the discussions were regarding Dr. Mesa's medical direction and discussion about patients' cases.

12. Dr. Mesa knew that Petitioner did not speak Spanish. On more than one occasion, Petitioner asked Dr. Mesa what was being said, and Dr. Mesa would reply, "Ask one of the nurses."

13. Although Dr. Mesa never specifically mentioned Petitioner's race, age, or gender, she treated Petitioner harshly and made fun of Petitioner's Asian accent behind her back. On one occasion, while Petitioner was not present, Dr. Mesa made a joke of Petitioner's pronunciation of a word by substituting Petitioner's mispronunciation with a vulgar term, repeating the word a number of times in the presence of other employees and laughing with those employees while poking fun at Petitioner. While not mentioning Petitioner's race, it is evident that the joke was designed to ridicule Petitioner on account of Petitioner's race.[2/]

14. Petitioner was made aware by others that Dr. Mesa belittled her behind her back. Dr. Mesa's contempt for Petitioner was overt. Dr. Mesa would raise her voice and glare at her, and challenge Petitioner's competence as a supervisor and medical professional in front of others in a bullying way. Dr. Mesa would humiliate Petitioner by testing Petitioner's bedside nursing skills in front of other nurses and inmates, knowing that Petitioner had not been working as a nurse for a number of years, primarily because Petitioner had been working in an administrative position.

15. Feeling as though her authority was being undermined by Dr. Mesa, and wanting to improve her business relationship and obtain some direction from Dr. Mesa, Petitioner asked for

private meetings with Dr. Mesa on numerous occasions. Dr. Mesa refused. In addition, despite Petitioner's continued requests that she use English, Dr. Mesa continued to address Hispanic staff in Spanish during morning staff meetings.

16. Dr. Mesa did, however, meet privately with Gary Assante, a white male, who, although not licensed in a medical profession, was an administrator with the Institution with lateral authority to that of Petitioner. Instead of giving directions directly to Petitioner, Dr. Mesa would give directions through Mr. Assante to Petitioner. Some of the directions were of a medical nature. Dr. Mesa would also use nurses supervised by Petitioner to deliver directions to Petitioner.

17. Dr. Mesa's tactics undermined Petitioner's supervisory authority. Petitioner became frustrated because Dr. Mesa's tactics were interfering with Petitioner's ability to do her job.

18. Petitioner complained to the assistant warden of the Institution, Assistant Warden Young, of Dr. Mesa's intimidation and behavior. In particular, Petitioner complained that, in addition to her intimidation of Petitioner, Dr. Mesa threatened nursing staff members with termination on several occasions. Assistant Warden Young set up a meeting between Petitioner, Mr. Assante, and Dr. Mesa to discuss the issues in July 2012.

During the meeting, Dr. Mesa stated that she is paid too much to listen to the allegations.

19. Despite Petitioner's complaints, Dr. Mesa's intimidating behavior continued.

20. On August 22, 2012, without any prior warning of disciplinary action, Dr. Mesa brought Michelle Hanson to Petitioner's office. Michelle Hanson was the Regional Nursing Director of the Department's Region 3 Office, which included the Institution.

21. During the meeting, Dr. Mesa questioned Petitioner's competency as a nurse and told Petitioner that she wanted to demote her. Petitioner told Dr. Mesa that she did not want a demotion and asked Dr. Mesa to specify the problems with Petitioner's performance. Dr. Mesa never did. In fact, there is no evidence of verbal counseling or reprimands from Dr. Mesa in Petitioner's personnel file. Dr. Mesa never provided a written evaluation of Petitioner's performance while Petitioner was employed by the Institution.

22. Near the end of August or early September, Petitioner verbally complained to the Institution's warden, Warden Jennifer Folsom, about Dr. Mesa's behavior. Dr. Mesa's intimidation continued.

23. On September 16, 2012, Petitioner provided Warden Folsom with a letter explaining how Dr. Mesa's "workplace

bullying" was adversely affecting Petitioner and the workplace environment, asking "higher level management for assistance and to make a reasonable working environment," and advising that Dr. Mesa had asked Petitioner to take a demotion. Petitioner's letter explained, in part:

> I strongly feel workplace bullying is linked to a host of physical, psychological, organizational and social costs. Stress is the most predominant health effect associated with bullying in the workplace. My experience with workplace bullying is developed poor mental health and poor physical health, inability to be productive and loss of memory and fear of making key decisions. Recently, I also turn to other organizations for job opportunities and I have been asked by Dr. Mesa and Mr. Assante where do I go for interview and how long will this last by asking for days and hours for interviewing. My fearful of retaliation even made me so scared to ask for job interviewing.

24. Petitioner met with Warden Folsom the next day, September 17, 2012. During the meeting, Warden Folsom assured Petitioner that Dr. Mesa did not have the authority to demote her, and gave Petitioner someone to contact in Employee Relations regarding her concerns. Warden Folsom followed up the meeting with a letter dated September 17, 2012, stating:

> It has come to my attention that you have alleged harassment by your supervisor. You are being provided the name and contact number for the Intake Officer at the Regional Service Center.

Norma Johnson
(407)521-2526 ext. 150

Please be aware the Department does not tolerate inappropriate behavior in the workplace. Your allegations will be looked into and any appropriate action taken.

25. The letter was signed by Warden Folsom and a witness, as well as by Petitioner, acknowledging receipt. It was copied to Norma Johnson, Employee Relations.

26. After that, Petitioner spoke a couple of times by telephone with Norma Johnson. She told her that Dr. Mesa was continuing to harass and bully her in the workplace, and that Dr. Mesa was causing a hostile work environment. Despite Petitioner's complaints, nothing changed. It is apparent that Petitioner's complaints were ignored. In fact, Dr. Mesa claimed that she never heard about complaints that she treated individuals that are Hispanic differently than she treated Petitioner, and could not recall if the Warden ever approached her regarding Petitioner's complaints. Incredibly, Dr. Mesa testified that she was not made aware of Petitioner's complaint that she was speaking Spanish and Petitioner could not understand until after Petitioner left her employment with the Institution.

27. After Petitioner's meeting with the Warden and conversations with Norma Johnson, Dr. Mesa continued to speak Spanish at meetings with staff and Petitioner could not

understand. Dr. Mesa continued to direct Petitioner through other employees. And Dr. Mesa continued to raise her voice and challenge Petitioner's competence in front of other employees.

28. The evidence supports Petitioner's claim that the way she was treated was discrimination, based upon Petitioner's race. The evidence does not, however, support Petitioner's claims that she was discriminated against based upon Petitioner's age or gender.

29. The harsh treatment Petitioner received, based upon her race, undermined Petitioner's supervisory authority and interfered with Petitioner's ability to do her job. The discrimination was overt, continuous, and created a hostile work environment that was intolerable. Petitioner, in essence, was forced to leave the employ of the Institution.

30. Approximately two weeks later, on September 28th or 29th, 2012, after deciding that she could no longer endure the situation, Petitioner sent the following letter to Dr. Mesa and Warden Folsom:

> Dear DOC:
>
> Please accept this letter as my formal notice of resignation from Senior Registered Nurse Supervisor effective 10/12/12.
>
> This is the most difficult decision I have ever made throughout my career; however, my time here at Lake Correctional Institution has been some of the most rewarding and memorable years of my professional life. I

> sincerely appreciate the opportunities that I have been given to contribute to the organization's success, while growing professionally and personally.
>
> Sincerely,
> Lou Armentrout
>
> Cc Human Resource:
> Please leave all my leave times (annual and sick leaves) in people first until receiving notification from me.
> Thank you for your assistance.

31. In the year following Petitioner's resignation, the health care services were privatized and provided by Corizon Health, Inc. Most employees kept their jobs that they held prior to privatization. Had Petitioner remained with the Institution, it is likely that she would have transitioned over to an equivalent position with Corizon Health, Inc.

32. After leaving the Institution on October 12, 2012, Petitioner obtained a job with the Department of Health on October 26, 2012. Petitioner suffered a loss of pay in the amount of $2,222.40 during the period of her unemployment between October 12, 2012, and October 26, 2012.

33. Petitioner's pay at her new job with the Department of Health is $299.32 less per two-week pay period than her job at the Institution. $299.32 per two-week pay period equals $648.53 less each month ($299.32 X 26 weeks = $7,782.32/year ÷ 12 months = $648.53/month ÷ 30 = approximately $21.62/day). The time period between the date Petitioner began her new job with the

Department of Health on October 26, 2012, and the final hearing held January 16, 2015, equals 26 months and 21 days. The loss in pay that Petitioner experienced in that time period totals $17,315.80 ((26 month x $648.53/month) + ($21.62/day x 21 days) = $17,315.80). The total loss in pay ($2,222.40 + $17,315.80) that Petitioner experienced from her resignation until the final hearing is $19,538.20.

34. Petitioner also drives 92 miles further each work day to her new position with the Department of Health. The extra cost that Petitioner incurs to get to her new job, calculated at the State rate of $0.445 per mile, equals $40.94 per day. Taking into account 260 work days per year (5 work days per week), from beginning of Petitioner's new job through the date of the hearing equals a total of $23,663.32 (578 days x $40.94/day), without subtracting State holidays or vacation days. Subtracting nine State holidays and two weeks for vacation each year results in a total of $21,943.84 to reimburse Petitioner for the extra miles driven each work day through the day of the final hearing (536 days x $40.94/day).

CONCLUSIONS OF LAW

35. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes, and Florida Administrative Code Rule 60Y-4.016(1).

36. The State of Florida, under the legislative scheme contained in sections 760.01–760.11 and 509.092, Florida Statutes, known as the Florida Civil Rights Act of 1992 (the Act), incorporates and adopts the legal principles and precedents established in the federal anti-discrimination laws specifically set forth under Title VII of the Civil Rights Act of 1964, as amended. 42 U.S.C. § 2000e, et seq.

37. The Florida law prohibiting unlawful employment practices is found in section 760.10. This section prohibits discrimination "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." § 760.10(1)(a), Fla. Stat.

38. Florida courts have held that because the Act is patterned after Title VII of the Civil Rights Act of 1964, as amended, federal case law dealing with Title VII is applicable. See e.g., Fla. Dep't of Cmty. Aff. v. Bryant, 586 So. 2d 1205, 1209 (Fla. 1st DCA 1991).

39. As developed in federal cases, a prima facie case of discrimination under Title VII may be established by statistical proof of a pattern of discrimination, or on the basis of direct evidence which, if believed, would prove the existence of discrimination without inference or presumption.[3/] Usually,

however, direct evidence is lacking and one seeking to prove discrimination must rely on circumstantial evidence of discriminatory intent, using the shifting burden of proof pattern established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). See Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997).

40. Under the shifting burden pattern developed in McDonnell Douglas:

> First, [Petitioner] has the burden of proving a prima facie case of discrimination by a preponderance of the evidence. Second, if [Petitioner] sufficiently establishes a prima facie case, the burden shifts to [Respondent] to "articulate some legitimate, nondiscriminatory reason" for its action. Third, if [Respondent] satisfies this burden, [Petitioner] has the opportunity to prove by a preponderance that the legitimate reasons asserted by [Respondent] are in fact mere pretext. U.S. Dep't of Hous. and Urban Dev. v. Blackwell, 908 F.2d 864, 870 (11th Cir. 1990)(housing discrimination claim); accord Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17, 22 (Fla. 3d DCA 2009)(gender discrimination claim)("Under the McDonnell Douglas framework, a plaintiff must first establish, by a preponderance of the evidence, a prima facie case of discrimination.").

41. Therefore, in order to prevail in her claim against the Department, Petitioner must first establish a prima facie case by a preponderance of the evidence. Id.; § 120.57(1)(j), Fla. Stat. ("Findings of fact shall be based upon a preponderance of the evidence, except in penal or licensure

proceedings or except as otherwise provided by statute and shall be based exclusively on the evidence of record and on matters officially recognized.").

42. "Demonstrating a prima facie case is not onerous; it requires only that the plaintiff establish facts adequate to permit an inference of discrimination." Holifield, 115 F.3d at 1562; cf., Gross v. Lyons, 763 So. 2d 276, 280 n.1 (Fla. 2000)("A preponderance of the evidence is 'the greater weight of the evidence,' [citation omitted] or evidence that 'more likely than not' tends to prove a certain proposition.").

43. Petitioner's Charge of Discrimination against the Department alleges that Petitioner was subjected to a hostile work environment because of her race, age and gender. Petitioner failed to show a prima facie case of age or gender discrimination. Petitioner did, however, establish a prima facie case that she was subjected to a hostile work environment based upon her race.

44. A hostile work environment claim is established upon proof that "the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1275 (11th Cir. 2002)(quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1998)).

45. In order to establish a prima facie case under the hostile work environment theory, Petitioner must show: (1) that she belongs to a protected group; (2) that she has been subject to unwelcome harassment; (3) that the harassment must have been based on a protected characteristic of the employee, such as race; (4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and (5) that the employer is responsible for such environment under a theory of vicarious or of direct liability. Id.

46. Petitioner established all of the elements required to establish a prima facie case. Petitioner is Asian, she was subject to unwelcomed intimidation, intentional embarrassment, ridicule and exclusion based upon her race, and the transgressions against Petitioner, as described in the Findings of Fact above, were sufficiently severe and pervasive to alter the terms and conditions of her employment and create a hostile work environment.

47. Factors relevant in determining whether conduct is sufficiently severe and pervasive to show a hostile work environment include, among others: (a) the frequency of the conduct, (b) the severity of the conduct, (c) whether the conduct is physically threatening or humiliating, or a mere offensive utterance, and (d) whether the conduct unreasonably

interferes with the employee's job performance. Miller, 277 F.3d at 1276.

48. Dr. Mesa's disrespect, intimidation, and exclusion of Petitioner from meaningful participation in team meetings by addressing Petitioner's subordinates in another language occurred on a daily basis. The conduct was severe in that it undermined Petitioner's supervisory authority, interfered with Petitioner's ability to do her job, and intentionally humiliated Petitioner. Despite Petitioner's efforts and complaints, the offensive and discriminatory conduct continued and unreasonably interfered with Petitioner's job performance.

49. The evidence also demonstrated that the Department was responsible for a hostile work environment under the theory of direct and vicarious liability. Dr. Mesa, who was responsible for the hostile work environment was the Medical Director of the Institution. Despite numerous efforts and attempts by Petitioner to persuade Dr. Mesa to stop, the hostile work environment continued. Petitioner's complaints, both written and oral, to the Assistant Warden, Warden, and Human Resources, were to no avail.

50. The Department failed to offer a non-discriminatory reason for Dr. Mesa's conduct toward Petitioner. There was no excuse for the hostile work environment or discrimination against Petitioner.

51. The hostile work environment caused the constructive discharge of Petitioner. Considering the daily exclusion, intimidation, and refusal to address Petitioner's numerous requests to alleviate the situation, under an objective standard, a reasonable person would feel compelled to resign. See Steel v. Offshore Shipbuilding Inc., 867 F.2d 1311, 1317 (11th Cir. 1989); McCaw Cellular Commc'n of Fla., Inc. v. Kwiatek, 763 So. 2d 1063, 1063 (Fla. 4th DCA 1999).

52. In sum, Petitioner carried her burden of persuasion necessary to state a prima facie case for her claim of a hostile work environment based on Petitioner's race and that she was thereby constructively discharged. The Department failed to offer or prove a legitimate, nondiscriminatory reason for its actions. And, Petitioner proved that the Department violated the Act and is liable to Petitioner for discrimination in employment.

53. As Petitioner brought this action as an administrative proceeding pursuant to section 760.11(4)(b), Florida Statutes, as opposed to a civil action in court pursuant to section 760.11(4)(a), the relief under the Act to which she is entitled is authorized in section 760.11(6), which provides in pertinent part:

> If the administrative law judge, after the hearing, finds that a violation of the Florida Civil Rights Act of 1992 has

> occurred, the administrative law judge shall issue an appropriate recommended order in accordance with chapter 120 prohibiting the practice and providing affirmative relief from the effects of the practice, including back pay . . . .

54. In accordance with section 760.11(6) and federal case law, Petitioner is "presumptively entitled to back pay." Weaver v. Casa Gallardo, Inc., 922 F.2d 1515, 1526 (11th Cir. 1991)(superseded by statute on other grounds).

55. As noted in the Findings of Fact above, Petitioner experienced a loss in pay totaling $19,538.20, from the date of her resignation until the final hearing.[4/] In addition, $21.62 per diem should be added to this amount from the date of the hearing, January 16, 2015, through the date that the Commission enters a final order in this case. See Nord v. U.S. Steel Corp., 758 F.2d 1462, 1473 (11th Cir. 1985)("make whole" purpose of Title VII requires back pay period to be extended through date of judgment).

56. Petitioner is also entitled to recover $23,663.32 for additional travel costs that she would not have incurred if she had stayed at her original employment, calculated at the State rate of 44.5 cents per mile as set forth in section 112.61(7)(d)1.a., Florida Statutes, through the date of the final hearing, plus an additional $40.94 for each work day Petitioner drives to her job at the Department of Health between

this Recommended Order and the Commission's final order in this case.

57. In addition, as the evidence showed that Petitioner was, in effect, forced to leave the employ of the Department, she should be entitled to reinstatement. See § 760.11(6), Fla. Stat.; cf. O'Loughlin v. Pinchback, 579 So. 2d 788, 795 (Fla. 1st DCA 1991)("prevailing plaintiff in a wrongful discharge case is entitled to reinstatement absent unusual circumstances") (citations omitted). In this regard, although, because of privatization, the Department no longer has the position that Petitioner occupied, the evidence indicated that she would have transitioned over to an equivalent position with Corizon Health, Inc. Therefore, the Department should make arrangements with Corizon Health, Inc., to employ Petitioner in an equivalent position.

58. Section 760.11(6) further provides:

> In any action or proceeding under this subsection, the commission in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs. It is the intent of the Legislature that this provision for attorney's fees be interpreted in a manner consistent with federal case law involving a Title VII action.

59. As Petitioner was represented by a Qualified Representative, and not an attorney, she is not entitled to an award of attorney's fees.[5/] It is, however, recommended that the

Commission award Petitioner her costs, and, to the extent necessary, remand the case for issuance of a recommended order regarding the amount of costs owed to Petitioner. See e.g., Caiminti v. The Furniture Enterprises, LLC, DOAH No. 09-3961 (Fla. DOAH Dec. 16, 2009; FCHR Feb. 26, 2010).

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:

1. Finding that the Department constructively discharged Petitioner Lou Armentrout by subjecting her to a hostile work environment on account of Petitioner's race in violation of the Act;

2. Ordering the Department to pay Petitioner $19,538.20 in back pay through the date of the final hearing, January 16, 2015, plus $21.62 per diem thereafter through the date of the Commission's final order, with interest accruing on the total amount at the applicable statutory rate from the date of the Commission's final order;

3. Ordering the Department to pay Petitioner $23,663.32, as an additional aspect of back pay, for extra daily travel expenses incurred to get to and from her new job through the date of the final hearing, plus $40.94 for each work day

thereafter that Petitioner drives to her new job through the date of the Commission's final order, with interest accruing on the total amount at the applicable statutory rate from the date of the Commission's final order;

4. Ordering the Department to make arrangements to reinstate Petitioner to an equivalent position with Corizon Health, Inc., for service at the Institution;

5. Prohibiting any future acts of discrimination by the Department; and

6. Awarding Petitioner her costs incurred in this case.

DONE AND ENTERED this 29th day of April, 2015, in Tallahassee, Leon County, Florida.

JAMES H. PETERSON, III
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of April, 2015.

ENDNOTES

[1/] Unless otherwise indicated, all references to the Florida Statutes, Florida Administrative Code, and federal laws are to the current versions which have not substantively changed since the time of the alleged discrimination.

[2/] While Dr. Mesa's ridicule of Petitioner's accent may implicate a claim based on national origin, see e.g., Raad v. Fairbanks North Star Borough School District, 323 1185, 1194-95 (9th Cir. 2003)("Accent and national origin are obviously inextricably intertwined in many cases."), Petitioner did not make that claim.

[3/] For instance, an example of direct evidence in an age discrimination case would be the employer's memorandum stating, "Fire [petitioner] – he is too old," clearly and directly evincing that the plaintiff was terminated based on his age. See Early v. Champion Int'l Corp., 907 F.2d 1077, 1081 (11th Cir. 1990).

[4/] This figure takes into account the fact that Petitioner appropriately minimized the amount owed for back pay by securing other employment. Champion Intern. Corp. v. Wideman, 733 So. 2d 559, 562 (Fla. 1st DCA 1999)(plaintiff in employment discrimination suit required to minimize damages by attempting to find suitable employment).

[5/] Here, as in the Commission's Interlocutory Order in Lugo v. Haynes, DOAH Case No. 11-1116 (Fla. DOAH Jan. 28, 2013, ¶ 61; FCHR Apr. 4, 2013), adopting Judge Watkins' Conclusions of Law, it is concluded that nothing in section 760.35(3) authorizes the award of attorneys' fees to non-attorneys. The Florida Supreme Court tells us that: "When the words of a statute are plain and unambiguous and convey a definite meaning, courts . . . must read the statute as written, for to do otherwise would constitute an abrogation of legislative power." Nicoll v. Baker, 668 So. 2d 989, 990-91 (Fla. 1996). See also Dep't of Ins. v. Fla. Bankers Ass'n, 764 So. 2d 660 (Fla. 1st DCA 2000).

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.