STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ESTELLA MAGRI,

Petitioner,

vs. Case No. 15-3836

AMS AVIATION,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was conducted before Administrative Law Judge Mary Li Creasy by video teleconference at sites in Tallahassee and Miami, Florida, on December 1, 2015.

APPEARANCES

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STATEMENT OF THE ISSUE

Whether the Florida Commission on Human Relations (FCHR) correctly determined that it lacks subject matter jurisdiction over Petitioner's claim of unlawful employment discrimination because the complaint was received more than 365 days after the date of the alleged violation?

PRELIMINARY STATEMENT

On October 16, 2014, Petitioner Estella Magri (Magri or Petitioner) filed a Charge of Discrimination (Charge) with the FCHR alleging that Respondent Aviation Maintenance Staffing, Inc., d/b/a AMS Aviation (AMS or Respondent) discriminated against her based on her sex and in retaliation for reporting sexual harassment.

On April 30, 2015, the FCHR issued a Notice of Determination to Magri indicating that the FCHR lacked jurisdiction to investigate Magri's claims because her Charge was untimely filed, more than 365 days after the alleged adverse employment action. Magri elected to contest the decision and pursue administrative remedies by filing a Petition for Relief with the FCHR. The FCHR transmitted the Petition to the Division of Administrative Hearings (DOAH) on July 6, 2015, and the undersigned was assigned to hear the case. The final hearing was held as scheduled on December 1, 2015.

At the formal hearing, Magri presented the testimony of Vicki Sokolowski, Director, Field Human Resources for AMS, and testified on her own behalf. Respondent presented the testimony of three witnesses: Luis Gonzalez, Shift Manager; Ramses Perez, Vice President of Operations; and Plamen Ilonov, Manager of the Interior Department. Petitioner's Exhibit 4 (pages 161, 162, 166, and 167) was admitted into evidence. Respondent's Exhibits 1 through 3, 4 (pages 1 through 17), 6 through 10, 12, 13, 16, 17 and 22 and were received into evidence.

The parties filed a Joint Pre-hearing Stipulation, and the facts stipulated therein are accepted and made a part of the Findings of Fact below. The two-volume Transcript of the final hearing was filed December 16, 2015, and the Respondent timely filed a proposed order that has been carefully considered by the undersigned in the preparation of this Recommended Order.[1/]

FINDINGS OF FACT

1. AAR Corp. (AAR) is an aviation support company which provides maintenance, repair, and overhaul services to air carriers at various facilities through the United States.

2. AAR uses its own employees in addition to utilizing employees from its temporary staffing company, AMS. When AAR's business increases, it increases its workforce by adding workers from AMS. When AAR experiences a downturn in business, it

similarly reduces its workforce, typically, by reducing workers from AMS through layoffs.

3. Business is usually slow for AAR and AMS during the peak airline travel times, including summer and the winter holidays. Business of AAR and AMS is also affected by AAR's contracts with major airline carriers for scheduled and non-scheduled maintenance to aircraft.

4. Magri was hired by AMS on October 27, 2011, as a Sheet Metal mechanic at the AAR Miami International Airport facility. She began work January 16, 2012, and at all times material hereto, worked as an Interior Mechanic for AMS.

5. Magri's last day physically working for AMS was October 10, 2013.

6. In 2013, Pedro Estrada (Estrada) became Magri's immediate supervisor. According to Magri, Estrada frequently subjected Magri to sexual jokes, graphic comments about her body, and requests for sexual favors.[2/] At the end of September or beginning of October 2013, Estrada came up behind Magri and placed his penis against her buttocks in a sexual manner.

7. Shortly after making a sexual harassment complaint about her supervisor in September 2013, Magri was given a disciplinary memo for poor performance on October 4, 2013. Although there is no prior record of written discipline against Magri, this memo

notified her that this was a "final warning" and any future violations could result in termination.

8. On October 10, 2013, Magri was sent home by her then immediate supervisor, Plamen Ilonov (Ilonov), Manager of Interior, allegedly due to a lack of work. Approximately eight other AMS workers were laid off for the same reason on that date.

9. AMS employees were aware of a likely work slowdown at that time because US Airways cancelled its contract with AAR in the fall of 2013 due to US Airways impending merger with American Airlines. However, neither Magri, nor her co-workers, were told by Human Resources or their supervisors, the anticipated duration of the layoff.

10. In fact, it was common practice for AMS employees to be laid off and then returned to work within a week to a month due to the workflow fluctuations. This happened to Magri for a month in 2012. Laid off employees, including Magri, were directed to regularly call or text their supervisor to see when work was available. AMS had no system of notifying employees whether a layoff would be long or short term.

11. When a layoff was anticipated to be long term, the AMS worker was removed from the Human Resources payroll system and internal paperwork was generated indicating termination, however, the employee was not notified of their status other than "lay off."

12. At the time of an anticipated long-term layoff, the AMS Human Resources Department also deactivated the worker's security badge that would provide access to the facility. However, the employee was not asked to return the badge, nor was the employee advised that the badge was inactive.

13. When she was sent home on October 10, Magri was instructed by Ilonov to check with him regarding when she might be returned to the work schedule. At this time she was not aware a decision was made that she would likely be laid off more than a month. For the next two weeks, Magri called and sent text messages to Ilonov looking for clarification as to when she might be returned to work.

14. Magri sent a text message to Ilonov on October 11 asking "Why me." Ilonov responded that 10 people were affected, not just Magri. Magri asked, "Plamen do you think its [sic] layoff will take long time?"

15. On October 12, after receiving no response, Magri texted Ilonov, "Good morning, Plamen, do you think I have to take out my tool box?" Ilonov replied, "Good morning, it is possible. I don't see much next 2-3 months."

16. In a telephone conversation this same week, Ilonov indicated to Magri that work might be available October 21 if United Airlines planes arrived for service. Based on this, Magri

had a legitimate expectation that she would be returned to the schedule.

17. On October 20, Magri sent a text to Ilonov stating, "Do you don't [sic] know how long? I'm very scared without work." Ilonov did not reply.

18. During this week, several employees were called to return to work. Ilonov did not return Magri to work because he only called back those he considered his "best" workers.

19. On October 24, Magri sent several text messages to Ilonov seeking an explanation of when she might return to work or why she wasn't called back. Ilonov responded that he was calling whoever he thought he needed, and "We are really slowing down, and soon more changes."

20. On October 25, Magri went to the facility to speak directly with Ilonov. During this meeting he made it clear to Magri for the first time that it was not his decision whether to put her back on the schedule, and that he did not think the "higher ups" wanted her to return. He told her he could not tell her anything further and that she would need to contact the Maintenance Manager, Luiz Gonzalez (Gonzalez). This was the first time Magri realized that this would not be a short-term layoff.

21. At some point shortly thereafter, Magri spoke to Gonzalez by telephone, who told her she needed to look for alternative employment.

22. Respondent maintains two conflicting factual assertions. Respondent contends the decision to terminate Magri's employment was made on October 10, 2013, as evidenced by its internal removal of Magri from the payroll system and the deactivation of her employee security badge (neither of which Magri was aware). Alternatively, Respondent claims there was no decision to terminate Magri and that she remains eligible for rehire.

23. Regardless of whether Magri's separation from employment was a termination or long-term layoff, the earliest Magri knew or should have known that she suffered adverse action was October 24, 2013, when she became aware that although some of her co-workers were being immediately called back to work, she was not.

24. Accordingly, Magri's charge, filed on October 16, 2014, which is 357 days from the alleged violation, was timely with regard to her claim of sex discrimination and retaliation arising from her termination.

CONCLUSIONS OF LAW

25. DOAH has jurisdiction over the parties to, and subject matter of, this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes.

26. "As a jurisdictional prerequisite to filing an FCRA action, a plaintiff must exhaust her administrative remedies by filing a timely charge with the appropriate agency." Jones v. Bank of America, 2013 U.S. Dist. LEXIS 164730, *7-8 (M.D. Fla. 2013) (citations omitted). "To exhaust administrative remedies under the FCRA, a plaintiff must satisfy the requirements of Fla. Stat. § 760.11." Id., at *8 citing Maggio v. Fla. Dep't of Labor & Emp. Sec., 899 So. 2d 1074, 1079 (Fla. 2005); Woodham v. Blue Cross & Blue Shield of Florida, Inc., 829 So. 2d 891, 894 (2002).

27. Section 760.11(1), Florida Statutes, provides, in pertinent part, as follows:

> (1) Any person aggrieved by a violation of ss. 760.01-760.10 may file a complaint with the commission within 365 days of the alleged violation, naming the employer, employment agency, labor organization, or joint labor-management committee, or, in the case of an alleged violation of s. 760.10(5), the person responsible for the violation and describing the violation . . . .

28. Respondent alleges that Magri's Charge was untimely because it was filed on October 16, 2014, which is more than 365 days after October 10, 2013, the last date on which Magri physically worked for Respondent and the date Respondent contends Petitioner knew or should have known of her layoff.

Magri's Charge, as to Discrimination and Retaliation Arising from Her Termination, Was Timely.

29. Determining the timeliness of Magri's charge requires precisely identifying the "alleged violation" of which she complains. Magri alleges not only that she was subjected to unwelcome sexual harassment, but that sex discrimination also motivated her separation from employment.

30. In Delaware State College v. Ricks, 449 U.S. 250, 259 (1980), the court held that the limitations period for filing a charge began to run when the adverse employment decision was made and the charging party was notified. Ricks, a college professor, alleged that he received a notice of denial of tenure and a one-year terminal employment contract. Ricks asserted that his limitations period did not begin to run until the actual end of his employment. The Court disagreed and reasoned that the termination of employment a delayed, but inevitable, consequence of denial of tenure.

31. Due to the nature of Magri's employment, her situation is very different from that of Ricks. Termination is not an inevitable consequence of a layoff from Respondent. As discussed above, short-term layoffs and call backs are a routine part of the job for those who work for Respondent. In fact, Respondent's business model is based on the premise that a flexible workforce is the most conducive to its highly unpredictable work flow.

32. Respondent's witnesses consistently testified that a decision to terminate Magri's employment was not made and that

laid-off employees are not told when to anticipate rehire because the company itself does not know what its workflow needs will be.[3/] October 24 was the first date Ilonov communicated to Magri that this might be something other than a short-term layoff.

33. Respondent cites to Pearson v. Macon-Bibb County Hospital Authority, 952 F. 2d 1274 (11th Cir. 1992), for the proposition that even when an employer's adverse employment decision is "equivocal," the operative date on which the statute of limitations begins to run is the date on which the adverse action is communicated to the plaintiff. Pearson was given the option of resigning, transferring to an alternative position internally, or being fired. Ultimately, Pearson was administratively terminated when she failed to return from a medical leave and had not secured another position with the hospital. The court held that the equivocal character of the adverse employment decision did not deprive that decision of its status as the operative act for the running of the statute of limitations. Id. at 1297.

Equitable Tolling Applies to Magri's Charge.

34. Importantly, the court reversed summary judgment against the plaintiff and remanded on the issue of equitable tolling finding:

> While the employer is actively trying to find a position within the company for the employee, the . . . filing period . . . is

> equitably tolled until such time as it is or should be apparent to an employee with a reasonably prudent regard for his rights that the employer has ceased to actively pursue such a positon.
>
> * * *
>
> It is too much for the law to expect an employee to sue his employer for age discrimination at the same time he is led to believe the employer is trying to place him in another job.

Id. at 1280, citing Cocke v. Merrill Lynch & Co., 817 F.2d 1559, 1561-1562 (11th Cir.1987).

35. Again, Magri's situation is distinguishable from that of the Plaintiff in Pearson. Magri was told on October 10 that she was being laid off, to call back for work, and that additional work was possible. Magri had no reason to believe this was an "adverse employment action" because short-term layoffs for her job were the norm, she was being told there might be work on October 21, and others being laid off were being returned to work. Contrary to Respondent's assertions, the evidence does not support a conclusion that Magri knew or should have known on October 10, 2013, that she was facing a long-term layoff or termination.

36. Magri demonstrated a "reasonably prudent regard" for her rights. She continued to push Ilonov for any information regarding an imminent return to work. On October 24, she was given the first indication by Ilonov that while some were being

called back, she was not. It was not until their conversation on October 25 that for the first time Magri was told the "higher ups" did not want her back.

37. There is conflicting authority regarding whether the jurisdictional prerequisite of section 760.11 can be equitably tolled or estopped. The grounds for tolling limitations periods are set forth in section 95.051, Florida Statutes. Notably the grounds for tolling do not include either misleading conduct by the respondent or claimant's objectively reasonable ignorance of the charge-filing deadline. See, Cunningham v. Pinellas Cnty. Sherriff's Dep't, 2000 U.S. Dist. LEXIS 3825 (M.D. Fla., Feb. 29, 2000); Greene v. Seminole Electric Cooperative, 701 So. 2d 646 (Fla 5th DCA 1997)(the only acts or circumstances that will toll the statute of limitations period are those enumerated in Fla. Stat. Ann. § 95.051).

38. However, in Machules v. Dept. of Admin., 523 So. 2d 1132 (Fla. 1988), a limitations period was tolled in an administrative proceeding on grounds not listed in § 95.051.

> The tolling doctrine is used in the interests of justice to accommodate both a defendant's right not to be called upon to defend a stale claim and a plaintiff's right to assert a meritorious claim when equitable circumstances have prevented a timely filing. Equitable tolling is a type of equitable modification which 'focuses on the plaintiff's excusable ignorance of the limitations period and on [the] lack of prejudice to the defendant.' Cocke v. Merrill

> Lynch & Co., 817 F.2d 1559, 1561 (11th Cir. 1987) (quoting Naton v. Bank of California, 649 F.2d 691, 696 (9th Cir. 1981)). Contrary to the analysis of the majority below, equitable tolling, unlike estoppel, does not require active deception or employer misconduct, but focuses rather on the employee with a reasonably prudent regard for his rights.

Id. at 1134 (citations omitted).

39. In this case, Magri reasonably believed, due to the misrepresentations of her supervisor, that work would be forthcoming. Given the remedial nature of the FCRA, and the need to construe the administrative preconditions on an individual's right of access to courts to seek redress for unlawful discrimination narrowly,[4/] even if Magri knew as of October 10 that she was suffering an adverse personnel action, the statute of limitations period should be tolled until October 24, when she had reason to believe that this was something other than a routine short-term job occurrence, and that she was being treated differently than her co-workers.

40. Here, the prejudice to the Respondent is minimal. The parties stipulated that "the FCHR lacks jurisdiction over any sex discrimination or harassment claim which occurred more than one year prior to the filing of the Charge." Magri admitted at deposition and at hearing that the last possible date of any sexual harassment was October 10, 2013, the last date that she physically worked for the Respondent, and more than 365 days

prior to the filing of her charge on October 16, 2014. As such, Magri's claim for sexual harassment is time barred.

41. Magri's claims for sex discrimination and retaliation, arising from her separation from employment, remain. The restricted time frame within which to file a charge of discrimination is to protect employers from "stale" claims. However, extending the charge filing deadline for a mere two weeks to encompass the time when Magri reasonably believed she would be returned to work, due to her employer's actions, does not prejudice Respondent.

The Doctrine of Spoliation of Evidence Does Not Bar Magri's Claims.

42. Respondent argues in its proposed recommended order[5/] that Magri's claims should be dismissed in their entirety because she failed to maintain records that would support her claims or Respondent's defenses. Specifically, Respondent points to the fact that Magri did not maintain a computer calendar that might show when she had conversations with Ilonov or others regarding The alleged reporting of sexual discrimination and harassment. Magri also did not maintain a copy of the telephone records or text messages between Ilonov and herself regarding her potential return to work after October 10, 2013.

43. Sanctions for spoliation of evidence may be imposed when a party fails to preserve evidence in its custody. Fleury

v. Biomet, 865 So. 2d 537 (Fla. 2nd DCA 2003). Regarding the appropriate level of sanction, the Fleury court explained:

> Even when it is clear that evidence has been lost while in the custody of a party, the appropriate sanction varies according to the willfulness or bad faith, if any, of the party who lost the evidence, the extent of the prejudice suffered by the other party, and what is required to cure the prejudice. Harrell v. Mayberry, 754 So. 2d 742, 745 (Fla. 2d DCA 2000); Sponco Mfg., Inc. v. Alcover, 656 So. 2d 629, 630 (Fla. 3d DCA 1995). Dismissal or default, the harshest of all sanctions, are reserved for cases in which one party's loss of evidence renders the opposing party completely unable to proceed with its case or defense. Harrell, 754 So. 2d at 745.

Id. at 539.

44. Magri's failure to maintain the records at issue do more to impair her credibility than to harm Respondent's defenses. While it would be ideal to have Magri's computer and cell phone records to corroborate or disprove her alleged communications with Respondent regarding alleged sexual harassment, that part of her claims is untimely and not going forward. Accordingly, there is no prejudice to Respondent regarding its defense of the sexual harassment allegations.

45. The computer and cell phone records could have corroborated Magri's recollection of her conversations with Ilonov and Gonzalez or been used to impeach her testimony in this regard. However, Magri's purported conversation with Gonzalez is

not at issue due to the finding that the adverse action was first communicated to Magri by Ilonov on October 24 (rather than sometime after October 25, the date Magri claims to have discussed it with Gonzalez). Magri's text communications were saved by Ilonov and presented as Exhibit 22 by Respondent at the final hearing. Accordingly, any prejudice to Respondent is negligible.

46. Further, there was no showing of willfulness or bad faith on the part of Magri. The records which were lost went primarily to the issue of timeliness of Magri's charge. Magri, not Respondent, appears to be the party harmed by the loss of the records. Accordingly, the undersigned recommends no sanction for the alleged spoliation of evidence.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations decline jurisdiction of Petitioner's charge of sexual harassment, which allegedly occurred prior to October 10, 2013, and take jurisdiction of Petitioner's charge of sex discrimination and retaliation arising from her separation from employment on October 24, 2013.

DONE AND ENTERED this 29th day of February, 2016, in Tallahassee, Leon County, Florida.

MARY LI CREASY
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of February, 2016.

ENDNOTES

[1/] On January 19, 2016, four days after the due date for filing proposed recommended orders, Petitioner untimely requested an extension of time to file a proposed recommended order. This request was denied by Order dated January 20, 2016. Despite this ruling, on January 22, 2016, Petitioner filed a proposed recommended order. Due to its untimeliness, it was stricken on February 10, 2016, and not considered by the undersigned in preparation of this Recommended Order.

[2/] The parties stipulated prior to the hearing that the only issue presented was that of the timeliness of the filing of Magri's charge of discrimination with the FCHR. The undersigned is making no finding regarding whether the conduct of Estrada, as alleged by Magri, constituted unlawful sexual harassment.

[3/] Respondent's Human Resources representative, Vicki Sokolowski, testified that Magri was never terminated and is still eligible for rehire.

[4/] For a recent discussion on the remedial nature of the FCRA and its construction, see, Sheridan v. State of Florida, Dep't of Health, 2016 Fla.App. LEXIS 54 (Fla. 1st DCA Jan. 6, 2016).

[5/] Respondent did not identify spoliation of evidence or its ramifications as a factual or legal issue for determination in the Joint Pre-Hearing Stipulation submitted on November 20, 2015. Nor did Respondent file a motion to compel to recover Magri's cellular telephone records. However, this issue is being addressed because it was extensively discussed in Respondent's proposed recommended order.

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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.