STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JOHNNIE CANADY,

Petitioner,

vs. Case No. 16-0984

VOLUSIA COUNTY SCHOOLS,

Respondent.
_____/

RECOMMENDED ORDER

An administrative hearing was conducted in this case on July 1, 2016, in DeLand, Florida, before James H. Peterson III, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Johnnie Lee Canady, pro se
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New Smyrna Beach, Florida 32170

For Respondent: Erin G. Jackson, Esquire
Christopher M. Bentley, Esquire
Thompson, Sizemore, Gonzalez
& Hearing, P.A.
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STATEMENT OF THE ISSUE

Whether Respondent, Volusia County School Board, Florida (Respondent, Volusia County Schools, or the School Board), violated the Florida Civil Rights Act of 1992, sections 760.01

through 760.11, Florida Statutes,[1/] by discriminating against Petitioner, Johnnie Lee Canady (Petitioner), based upon Petitioner's race or disability.

PRELIMINARY STATEMENT

On April 8, 2015, Petitioner, Johnnie Canady, filed a charge of discrimination with the Florida Commission on Human Relations (FCHR or the Commission), which was assigned FCHR No. 201500274 (Complaint of Discrimination). The Complaint of Discrimination alleged that the School Board discriminated against Petitioner based on his race and disability.[2/] Specifically, Petitioner alleged that he was denied a reasonable accommodation after he was removed from his classroom following a psychologist's evaluation finding that Petitioner should not work with students.

After investigating Petitioner's allegations, the Commission's executive director issued a Reasonable Cause Determination on January 13, 2016, finding "there is reasonable cause to believe" Petitioner was discriminated against on the basis of his race when he was denied "positions to which he applied in 2014." An accompanying Notice of Determination notified Petitioner of his right to file a Petition for Relief for an administrative proceeding within 35 days of the Notice. On February 10, 2016, Petitioner timely filed a Petition for Relief, and the Commission forwarded the petition to the

Division of Administrative Hearings for the assignment of an administrative law judge to conduct a hearing. The case was assigned to the undersigned and was scheduled for a hearing to begin on April 29, 2016. Following Respondent's written request for a continuance, the final hearing was rescheduled for July 1, 2016.

During the administrative hearing, Petitioner testified on his own behalf, but called no other witnesses. He introduced 13 exhibits, received into evidence as Exhibits P-1 through P-13. Respondent presented the testimony of three witnesses and introduced 25 exhibits, received into evidence as Exhibits R-1 through R-25.

The proceedings were recorded and a transcript was ordered. The parties were given 30 days from the filing of the transcript within which to file their respective proposed recommended orders. The two-volume Transcript of the hearing was filed on July 19, 2016. Thereafter, the parties timely filed their respective Proposed Recommended Orders, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The School Board is the duly authorized entity responsible for providing public education in Volusia County, Florida.

2. At all material times, Petitioner was employed by the School Board as a seventh-grade social studies teacher at River Springs Middle School (River Springs). The principal of River Springs was Stacy Gotlib.

3. Petitioner served as the River Springs Professional Learning Community Coordinator (PLCC) during the 2012-2013 school year. As a PLCC, Petitioner was responsible for organizing staff meetings to collaboratively discuss issues arising in the classrooms. Petitioner testified that he "signed up" for the PLCC supplemental duty position, which was awarded to him by Ms. Gotlib.

4. During the 2013-2014 school year, Don Sarro, who, at the time, was the department chair for River Springs' social studies department, publicly announced that that he was running for the School Board. Under the circumstances, most employees at River Springs were probably aware that Mr. Sarro would be resigning as department chair, creating a vacancy in the position the following school year. Petitioner claims River Springs discriminated against him on the basis of his race because he "was not told of the vacancy" and "a less qualified white female" was selected for the position. Petitioner did not prove these allegations.

5. At the conclusion of the 2013-2014 school year, Petitioner completed a teaching preference form. Petitioner did

not express an interest in serving as the department chair for the social studies department or any other supplemental duty positions.

6. At the conclusion of the 2013-2014 school year, River Springs teacher, Kelly Moore, notified River Springs that she was interested in serving as the department chair for the social studies department. River Springs did not advertise the supplemental duty position, and no teachers made formal applications for the position. Chester Boles, assistant principal intern at River Springs, selected Ms. Moore for the supplemental duty position. She was the only candidate who expressed any interest in the position. She was looking for a leadership position because she was working toward a degree to become an administrator.

7. Petitioner did not offer evidence that he was treated any differently than any other teacher at River Springs regarding the social studies department chair position. In fact, although he alleges that he was discriminated against because he was not told of the vacancy, he admits that he does not know of anyone who was told. He offered no evidence to show how Ms. Moore was informed. In fact, there was no advertisement. And, Petitioner did not show that race was a factor in the hiring decision.

8. Prior to the start of the 2014-2015 school year, Petitioner applied to the School Board for seven teaching positions at four schools outside of River Springs. He interviewed with the principals of those schools for each of those positions, but was not selected. Petitioner believes that he was discriminated against on the basis of his race because the selected applicants "were less qualified" than Petitioner. Petitioner, however, did not prove his claim. In fact, he testified that he does not have specific knowledge of the individuals who were hired for each position, the race of the selected applicants, or the reasons the applicants were chosen for the positions.

9. Petitioner testified, in relevant part, as follows:

Q: Do you know what position Brian McClary was hired into?
A: No.
Q: Do you know his race?
A: No.
Q: Do you know why he was hired?
A: No.
Q: Okay. How about Jordan Tager, do you know what position he was hired into?
A: No.
Q: Do you know who hired him?
A: No.
Q: Do you know his race?
A: No.
Q: How about Joseph Martin, do you know what job he was entered – hired into?
A: No.
Q: Do you know who hired him?
A: No.
Q: Do you know why he was hired?
A: No.

Q: Do you know his race?
A: No.
Q: Amy Tolley, do you know what job she was hired into?
A: No.
Q: Do you know who hired her?
A: No.
Q: Do you know why she was hired?
A: No.
Q: Do you know her race?
A: No.
Q: How about Elizabeth Stople, do you know what job she was hired into?
A: No.
Q: Do you know who hired her?
A: No.
Q: Do you know why she was hired?
A: No.
Q: Do you know her race?
A: No. [...]
Q: Do you know Chelsea Ambrose?
A: No.
Q: Do you know her race?
A: No.
Q: Do you know what position she was hired into?
A: No.
Q: Do you know why she was hired?
A: No.
Q: How about Amanda Muessing, do you know what job she was hired into?
A: No.
Q: Do you know who hired her?
A: No.
Q: Do you know why she was hired?
A: No.
Q: Do you know her race?
A: No.

10. Petitioner offered no evidence of the race of the individuals selected for the seven positions. Although he offered the résumés of five of the applicants allegedly hired for five of the positions, he failed to substantiate his claims

that he was discriminated against on the basis of his race when he was not selected for one of the seven teaching positions.

11. Petitioner testified that, during the 2013-2014 school year, several teachers were having problems "because the [seventh grade] wing was out of control." He testified that students were being very "disruptive" and there was a general lack of discipline. According to Petitioner, the situation created a "very difficult and stressful" atmosphere for the teachers.

12. On June 8, 2014, Petitioner emailed the School Board's assistant superintendent, Peromnia Grant. His email stated that the stress from the previous school year may "have aggravated some of [his] Persian Gulf War Syndrome [i]ssues." The email stated, in relevant part:

> I have participated in the transfer fair and applied for high schools. If I must return to River Springs or middle school, I might need to take a leave of absence until January, 2015 so the Veterans Administration can conduct a full evaluation of my medical concerns and discuss my retraining for an alternative job.

13. Petitioner sought treatment over the summer with the Veteran Administration Outpatient Clinic (VA). The VA worked "to help stabilize" his condition. He "was in distress" after "a bad [school] year." He was placed on prescription medication for approximately three months.

14. At the beginning of the 2014-2015 school year, Petitioner had a conversation with Eric Ellis, an eighth-grade teacher at River Springs. Petitioner informed Mr. Ellis that he was admitted to the VA hospital over the summer. Petitioner told Mr. Ellis that the VA had asked him if he had any suicidal thoughts and that he advised the VA that he did not. Petitioner further told Mr. Ellis that when the VA asked him if he had any thoughts of harming or killing anyone else, he responded, "Amanda Wiles."[3/] Amanda Wiles was the assistant principal at River Springs.

15. On or about August 19, 2014, Petitioner attended a pre-planning meeting at River Springs. During the meeting, Petitioner got into a loud verbal exchange with Mr. Sarro. River Springs assistant principal intern, Chester Boles, attended the meeting. Petitioner was upset because he believed Mr. Sarro was using the meeting as a platform to give "a political speech" and to talk about "how wonderful everything" was at the school. Petitioner believed Mr. Sarro was breaking school policy and that he "had to stop him." Petitioner proceeded to engage in a heated discussion with Mr. Sarro. At some point during the conversation, Petitioner stated something to the effect that, "I better shut my mouth, I'm getting racist," and shoved a crumpled up piece of paper into his mouth.

After the meeting, Mr. Boles informed Ms. Gotlib of the situation.

16. Shortly after the meeting, Mr. Sarro approached Mr. Ellis about Petitioner. Mr. Ellis explained to Mr. Sarro that he too was concerned about Petitioner. Mr. Sarro asked Mr. Ellis if he would like to go with him to the principal's office to share their concerns about Petitioner with Ms. Gotlib. Mr. Ellis agreed and they both went to the principal's office and spoke to Ms. Gotlib.

17. After speaking with Mr. Sarro and Mr. Ellis, Ms. Gotlib contacted the School Board's director of Professional Standards, Sandy Hovis. Ms. Gotlib informed Mr. Hovis about Petitioner's reportedly threatening comments and unusual behavior. Mr. Hovis then met with Mr. Ellis and Mr. Sarro to discuss their concerns. Mr. Ellis told Mr. Hovis that Petitioner made a comment to the VA that he would like to hurt or kill the assistant principal at River Springs.

18. On August 19, 2014, Mr. Hovis met with Petitioner and informed Petitioner of the information that was reported to him by administration and his fellow teachers. He advised Petitioner that Petitioner was being administratively assigned to home with pay pending a safety evaluation to be conducted under the School Board's Employee Assistance Program (EAP). Safety evaluations are requested by the School Board when there

are concerns that an employee may be an "imminent risk of danger to [himself] or to others."

19. Following the meeting, Petitioner sent Mr. Hovis an email, entitled "[a]ccusations from staff at River Springs Middle." In his email, Petitioner stated that the "first accusation about [him] biting down on folder paper is correct." Petitioner claimed that it was a heated discussion, which led him to tell Mr. Sarro "a thing or two, or three about himself (about 3 minutes' worth)."

20. When referring an employee to EAP, the School Board works with Horizon Health, a third-party administrator that contracts with the School Board. Mike Nash with Horizon Health was the liaison between the School Board and independent health care providers. Mr. Nash, who was located in Colorado, was responsible for ensuring that Petitioner met with appropriate healthcare providers to conduct evaluations.

21. In accordance with arrangements made by Mr. Nash, Petitioner met with a licensed mental health counselor, Brianard Hines, PhD, in August and September 2014, for a safety evaluation.

22. Sandy Hovis did not have any conversations with Dr. Hines.

23. Although no contemporaneous written report from Dr. Hines was submitted into evidence, Petitioner introduced a

"To whom it may concern" letter from Dr. Hines, dated May 15, 2016, stating:

> Dr. Johnny Canady was referred to me through the Volusia County Schools Employee Assistance Program as a mandatory referral for three sessions to evaluate current risk to self and others. Mr. Canady had allegedly made statements which other employees believed contained some degree of implicit threat to staff at his school, was suspended from his teaching duties and directed to participate in the assessment sessions with me.
>
> Dr. Canady attended sessions at my office in Port Orange Florida on August 24, September 4 and September 11, 2014. On those occasions he participated actively and denied any current or past homicidal or suicidal ideation. He also adamantly denied making any statements which were intended to be or could of been considered to be threatening in any way. He reported some symptoms of Posttraumatic Stress Disorder, which he attributed to his earlier service in the military.
>
> After completing his three sessions, the Volusia County School Board apparently decided that he should participate in a fitness for duty evaluation before returning to his job. Fitness for duty evaluations are not performed by Employee Assistance Programs, and it is my understanding that Mr. Canady obtained his evaluation from another provider.
>
> Please let me know if I can provide any further information, although complete records are available through the Employee Assistance Program at any time, which were provided through Horizon Health.

24. On or about September 18, 2014, Mr. Nash informed Mr. Hovis that Horizon Health recommended that Petitioner submit to a fitness-for-duty evaluation. Mr. Hovis was not provided with written documentation of Horizon Health's recommendation. Later that day, Mr. Hovis met with Petitioner and directed him to undergo a fitness-for-duty evaluation.

25. Unlike a safety evaluation, a fitness-for-duty evaluation determines whether the employee is capable and able to perform the duties and responsibilities of his or her position.

26. As indicated in the letter from Dr. Hines, Dr. Hines did not perform Petitioner's fitness-for-duty evaluation. Rather, it was performed by licensed psychologist Dr. William Friedenberg. Petitioner was on placed on paid administrative leave pending the outcome of the evaluation.

27. Dr. Friedenberg's fitness-for-duty evaluation of Petitioner determined that Petitioner suffered from "Adjustment Disorder with mixed anxiety and depressed mood." Specifically, Dr. Friedenberg determined:

> Although it does not appear that Dr. Canady poses a risk of danger to himself or others, he realizes that it is not advisable for him to return to a classroom teaching setting at this time due to the stress associated with this job and his previous reaction to such stressors. It is thus the opinion of this examiner that, within a reasonable degree of psychological certainty, Dr. Canady is not

> currently fit for return to duty in his previous capacity as a classroom teacher. He will likely, however, be able to return successfully to employment with the Volusia County School system in an administrative capacity.

28. Upon receiving Petitioner's fitness-for-duty-evaluation, the School Board requested further clarification from Dr. Friedenberg. Dr. Friedenberg explained that "administrative capacity" was a non-student contact position. Dr. Friedenberg was unable to provide a timeline as to when Petitioner would be able to return to his previous position as a classroom teacher. Based on Dr. Friedenberg's assessment, the School Board reviewed its vacancies and determined that there were no vacant positions for which Petitioner was qualified because the positions all involved student interaction.

29. On October 21, 2014, Mr. Hovis met with Petitioner and reviewed Dr. Friedenberg's evaluation with Petitioner. Because there were no vacant positions available, the School Board, through Mr. Hovis, offered Petitioner the option of resigning, being terminated, or taking a leave of absence in lieu of termination. Petitioner elected to take a leave of absence. During his leave of absence, on May 11, 2015, Petitioner voluntarily resigned from his position.

30. In his Complaint of Discrimination filed with FCHR on April 8, 2015, Petitioner claims that he was discriminated on

the basis of his alleged disability. Particularly, Petitioner claims that he was "denied [a] reasonable accommodation" when he was not placed in another position within the school district.

31. Petitioner did not offer any evidence that there were any vacant positions available at the time that he was granted a leave of absence. Since that time, Petitioner has not applied for a single administrative position. At the final hearing, during cross examination, Petitioner testified:

> Q: [After you received] Dr. Friedenberg's report, [d]id you apply for any administrative position within the School Board?
>
> A: No, because Mr. Hovis said we have nothing for you.
> [...]
>
> Q: Did you ever go on to the Volusia County School Board web site to look to see whether there was any position that you were interested in?
>
> A: No. [Mr. Hovis] said they had nothing for me, so there was no reason for me to – in my mind to waste my time doing that. He said they have nothing for me.
>
> Q: And to this day you haven't applied for any other position within the school district, correct.
>
> A: No, because they say I'm not fit for duty. I can't be around – I can't be in the classroom setting . . .

32. The evidence submitted by Petitioner was insufficient to establish that he was denied a reasonable accommodation or

that the School Board otherwise discriminated against him because of his disability.

CONCLUSIONS OF LAW

33. The Division of Administrative Hearings has jurisdiction over the parties and the 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).

34. The state of Florida, under the legislative scheme contained in sections 760.01 through 760.11, Florida Statutes, known as the Florida Civil Rights Act of 1992 (the Act), incorporates and adopts the legal principals 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.

35. The Florida law prohibiting unlawful employment practices is found in section 760.10. The Act makes it an unlawful employment practice, among other things, for an employer:

> To discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status.

§ 760.10(b)(2), Fla. Stat.

36. 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).

37. 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. Usually, however, as in this case, 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).

38. 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, non-discriminatory reason" for its action. Third, if [Respondent] satisfies this burden, [Petitioner] has the opportunity to prove by a preponderance of the evidence

> that the legitimate reasons asserted by [Respondent] are in fact mere pretext.

U.S. Dep't of Hous. & Urban Dev. v. Blackwell, 908 F.2d 864, 870 11th Cir. 1990)(housing discrimination claim); accord, Valenzuela v. Globe Ground 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.").

39. Therefore, in order to prevail in his claim against Respondent, Petitioner must first establish a prima facie case by a preponderance of the evidence. Id.; § 120.57(1)(j); 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 than not' tends to prove a certain proposition.").

40. Petitioner failed to establish a prima facie case of discrimination on his claim that he was denied seven teaching positions at four different schools by four different principals on the basis of his race.

41. In order to establish a prima facie case of failure-to-hire or failure-to-promote based upon discrimination, Petitioner must establish: (1) he is a member of a protected class; (2) he was qualified for and applied for the position;

(3) he was rejected despite his qualifications; and (4) other employees who are equally or less qualified, but were not members of the protected class, were selected for the position. Underwood v. Perry Cnty. Comm'n, 431 F. 3d 788, 794 (11th Cir. 2005)(failure to hire); Marable v. Marion Military Inst., 595 Fed. App'x. 921, 926 (11th Cir. 2014) (failure to promote).

42. Petitioner did not present any evidence that the individuals selected for the teaching positions were outside of his protected class. Petitioner could not identify the teachers who were selected for the positions; the race of those selected; who made the decisions to hire; or the reasons why they were selected. Instead, Petitioner relies on nothing more than conclusory allegations that are not supported by facts or law.

43. Even if Petitioner was able to establish a prima facie case of race discrimination, Petitioner cannot prove pretext by arguing or even showing that he was better qualified than another employee. Petitioner "must show not merely that [Respondent's] employment decision [was] mistaken but that [it was] in fact motivated by race. [As the Eleventh Circuit has] explained, a plaintiff may not establish that an employer's proffered reason is pretext merely by questioning the wisdom of the employer's reasons, at least not where . . . the reason is one that might motivate a reasonable employer." Thomas v. Hall, 2011 U.S. Dist. LEXIS 101873, *12 (N.D. Fla. 2011). Petitioner

must show that the disparities in qualifications must be of "such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff." Brooks v. Cnty. Comm'n of Jefferson Cnty., 446 F. 3d 1160, 1163 (11th Cir. 2006). "An employee's own testimony about his qualifications is 'weak and insubstantial' evidence of comparative qualifications." Brooks v. CSX Transportation, Inc., 555 Fed. Appx. 878, 882 (11th Cir. 2014).

44. Petitioner did not offer any evidence that his qualifications were such that no reasonable person could have chosen the other applicants over him for a particular position. He offered no evidence for the reasons why he believed the other applicants were less qualified than he for those positions. Petitioner offered no evidence that his race played any role in the four principals' decisions to not select him for one of the seven teaching positions.

45. Petitioner also did not offer any evidence that he was discriminated against when River Springs gave Ms. Moore the supplemental duty position. Petitioner acknowledged that he never applied for or expressed any interest in the supplemental duty position. In fact, on June 8, 2014, Petitioner informed River Springs that he might not return for the 2014-2015 school year. Furthermore, the evidence demonstrated that Ms. Moore was

the only teacher who expressed any interest in the supplemental duty position, and, therefore, she was selected.

46. Petitioner also failed to establish a claim for disability discrimination. The American Disabilities Act (ADA) and the FCRA prohibit discrimination against a qualified individual on the basis of disability. 42 U.S.C § 12112(a)(uses the term "disability"); § 760.10(a), Fla. Stat. (uses the term "handicap"). To prevail on his disability discrimination claim, Petitioner must show that: (1) he is disabled; (2) he was a "qualified individual" when he was terminated; and (3) he was discriminated against on the account of his disability. Wood v. Green, 323 F. 3d 1309, 1312 (11th Cir. 2003).

47. The Eleventh Circuit has held that an employer "can lawfully require a psychiatric/psychological fitness-for-duty evaluation under [the ADA] if it has information suggesting that an employee is unstable and may pose a danger to others." Owusu-Ansah v. Coca-Cola Co., 715 F. 3d 1306, 1312 (11th Cir. 2013). "[T]he ADA does not, indeed cannot, require [an employer] to forgo a fitness for duty examination to wait until a perceived threat becomes real or questionable behavior results in injuries." Id. at 1311 (quoting Watson v. City of Miami Beach, 177 F. 3d 932, 935 (11th Cir. 1999)); See also Krocka v. City of Chicago, 203 F. 3d 507, 515 (7th Cir. 2000) ("We have stated that where inquiries into the psychiatric health of an

employee are job related and reflect a 'concern[] with the safety of . . . employees,' the employer may . . . require that the employee undergo a physical examination designated to determine his ability to work.").

48. An employer does not need to investigate the allegations before requiring an employee to undergo a fitness-for-duty evaluation. In Owusu-Ansah, the Eleventh Circuit stated, in relevant part:

> When he was deposed, [the plaintiff] denied having behaved that way during his meeting with [his supervisor], and he now points out that there were no prior incidents showing that he had a propensity for workplace violence. That, however, is not dispositive. Although [the employer] apparently never asked [the Plaintiff] for his version of what happened at the meeting, it did not rely solely on [the supervisor's] account in ordering the evaluation. [The employer] knew that [the plaintiff] had refused to speak to [the human resources manager] and [one of the psychiatrists] about his workplace problems.

715 F. 3d at 1312.

49. The Eleventh Circuit determined that the employer had "a reasonable, objective concern about the employee's mental state, which affected job performance and potentially threatened the safety of its other employees." Id.; see also Rodriguez v. Sch. Bd. of Hillsborough Cnty., 60 F. Supp. 3d 1273 (M.D. Fla. 2014) (holding that if the employer has a reasonable, objective

concern about the plaintiff's mental state, a fitness-for-duty evaluation is permitted).

50. The evidence establishes that the School Board had a reasonable, objective concern regarding Petitioner's mental state. Two teachers reported to the principal their concerns regarding Petitioner, including a comment that he allegedly made to the VA about killing or harming assistant principal Wiles. Petitioner also was involved in a heated exchange with another teacher during a faculty meeting, which led him to crumple up a piece of paper and shove it into his mouth. Based on these reports, the School Board had legitimate concerns about Petitioner and the safety of its employees and students. See Rodriguez, 60 F. Supp. 3d at 1277 ("Courts have acknowledged that in the context of school employees, 'a school board's psychological examination of an employee is both job-related and consistent with a business necessity if that employee exhibits even mild signs of paranoid or agitated behavior that causes the school administration to question the employee's ability to perform essential job duties.'")(emphasis added); see also Miller v. Champaign Cmty. Unit Sch. Dist., 983 F. Supp. 1201, 1206 (C.D. Ill. 1997) ("As a matter of law a psychiatric examination is 'job-related and consistent with business necessity' when an elementary school employee shows even mild signs of 'schizophreniform' behavior. Because elementary school

personnel deal directly with very young children, it is appropriate for principals and other school employees to require medical/psychiatric follow-up to any and all allegations of paranoia or other mental disorder.").

51. Although Petitioner denies making any comments about assistant principal Wiles, the School Board had an objective, reasonable belief to require him to submit to a fitness-for-duty evaluation. The School Board was not required to conduct an investigation before referring him to EAP and then submitting him for a fitness-for-duty evaluation. The School Board did not discipline Petitioner for alleged misconduct, but rather was acting out of concern for the well-being of Petitioner and others. Petitioner did not offer any evidence to the contrary.

52. The ADA requires an employer to make "reasonable accommodations" to an otherwise qualified employee with a disability, "unless doing so would impose [an] undue hardship." Lucas v. W.W. Grainger, Inc., 257 F. 3d 1249, 1255 (11th Cir. 2001). As the Eleventh Circuit stated in Frazier-White v. Gee, 818 F. 3d 1249 (11th Cir. 2016):

> The employee has the burden of identifying an accommodation and demonstrating that it is reasonable. Lucas, 257 F. 3d at 1255-56. Assuming she cannot do so, the employer has no affirmative duty to show undue hardship. Earl v. Mervyns, Inc., 207 F. 3d 1361, 1367 (11th Cir. 2000). Moreover, an employer's "duty to provide a reasonable accommodation is not triggered unless a

> specific demand for an accommodation has been made." Gaston v. Bellingrath Gardens & Home, Inc., 167 F.3d 1361, 1363-64 (11th Cir. 1999)("[T]he initial burden of requesting an accommodation is on the employee. Only after the employee has satisfied this burden and the employer fails to provide that accommodation can the employee prevail on a claim that her employer has discriminated against her.").

Id. at 1255-1256.

53. At the hearing, Petitioner expressly acknowledged that he did not make a specific demand for an accommodation. Instead, Petitioner takes the position that the initial burden for providing accommodation lies with the school system. He believes that Dr. Friedenberg, who was not an employee of the School Board, was required to identify "in his medical summary any classroom accommodations that [he] could have had to return to the classroom."

54. Petitioner's argument is contrary to established case law. Petitioner, and not the School Board, has the initial burden of identifying an accommodation that would allow him to perform the essential functions of his position. Lucas, 257 F. 3d at 1255-56. Based on Dr. Friedenberg's psychological evaluation, Dr. Friedenberg determined that Petitioner could not "return to a classroom teaching setting," but only to "a non-student contact position." The School Board reviewed Dr. Friedenberg's recommendations with Petitioner. Petitioner

understood that he was not medically cleared to return to the classroom. He did not identify any accommodations (nor could he) that would allow him to work in a classroom setting. Petitioner did not seek a second medical opinion, or try to refute Dr. Friedenberg's evaluation. He did not file a grievance as set forth in the collective bargaining agreement. In fact, Petitioner testified that the union representative, who attended the meeting on his behalf, "did not suggest [that he] pursue a second opinion or anything."

55. Petitioner did not request any accommodation. The School Board offered one in the form of a leave absence. Petitioner now claims that there may have been some other accommodation that would have allowed him to remain in the classroom despite the determination that he should not be around students. He never offered any suggestions on what that accommodation might look like, nor is it likely that an accommodation could be offered in that regard. Regardless, the ADA does not provide a "cause of action for failure to investigate possible accommodations." McKane v. UBS Fin. Servs., Inc., 363 Fed. Appx. 679, 681 (11th Cir. 2010).

56. Reassignment to a vacant position may be a reasonable accommodation under the law. "When a transfer to another position is the proffered 'reasonable accommodation,' a plaintiff must identify a specific and vacant position."

Booth v. Henderson, 31 F. Supp. 2d 988, 995 (S.D. Ga. 1998). "[W]hether a reasonable accommodation can be made for that employee is determined by a reference to a specific position." Duckett v. Dunlop Tire Corp., 120 F.3d 1222, 1224-25 (11th Cir. 1997).

57. Based on Dr. Friedenberg's assessment, Respondent reviewed its vacancies. There were no vacant positions for which Petitioner was qualified because the positions all involved student interaction. The School Board gave Petitioner the option to take a leave of absence or resign from his position. Petitioner chose to take the leave of absence. He never applied for or expressed interest in any vacant position.

58. To the extent Petitioner claims that he was discriminated against based on his race when he was allowed a leave of absence, Petitioner did not offer any evidence to support his allegations. To prove that the School Board was motivated by unlawful discriminatory intent, Petitioner must identify an employee who was similarly-situated, but was treated more favorably. See Mannicia v. Brown, 171 F.3d 1364, 1368 (11th Cir. 1999). In order to be similarly-situated, the courts require that the "quantity and quality of the comparator's misconduct be nearly identical to prevent courts from second-guessing employer's reasonable decisions and confusing apples and oranges." Id. Petitioner did not identify

a single employee who was similarly-situated and was treated differently after a licensed psychologist determined that he or she was not currently fit to return to duty.

59. Considering the evidence adduced at the final hearing, it is concluded that Respondent did not deny Petitioner any reasonable accommodations, and is not liable to Petitioner for discrimination in employment.

RECOMMENDATION

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

RECOMMENDED that the Florida Commission on Human Relations enter a final order dismissing Petitioner's Complaint of Discrimination and Petition for Relief consistent with the terms of this Recommended Order.

DONE AND ENTERED this 27th day of September, 2016, 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
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of September, 2016.

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/] Although Petitioner's Complaint of Discrimination also alleged unlawful workplace retaliation, at the final hearing, Petitioner advised that he was not pursuing his claim of workplace retaliation.

[3/] At the final hearing, Mr. Ellis could not remember the specific word that as used by Petitioner regarding what he would like to do to Ms. Wiles. He was certain, however, that Petitioner told him he wanted to "kill," "hurt," or "harm" Ms. Wiles.

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.