

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CARLOS F. VILLAVERDE,

Petitioner,

vs.

Case No. 17-5208

CITY OF ORLANDO,

Respondent.

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RECOMMENDED ORDER

Administrative Law Judge D. R. Alexander conducted a hearing in this matter on April 3, 2018, in Orlando, Florida, and a continued hearing by telephone on April 6, 2018.

APPEARANCES

For Petitioner: Keith L. Hammond, Esquire
Law Office of Keith L. Hammond, P.A.
Suite 1200
250 North Orange Avenue
Orlando, Florida 32801

For Respondent: Wayne L. Helsby, Esquire
Allen, Norton & Blue, P.A.
Suite 100
1477 West Fairbanks Avenue
Winter Park, Florida 32789

STATEMENT OF THE ISSUE

The issue is whether Petitioner was terminated unlawfully from employment by the City of Orlando (City) on the basis of his national origin and disability, and in retaliation for engaging in a protected activity.

PRELIMINARY STATEMENT

On January 23, 2017, Petitioner filed his charge of discrimination in the form of a Technical Assistance Questionnaire for Employment Complaints (TAQ) with the Florida Commission on Human Relations (FCHR). The TAQ alleged that he had been terminated from employment as a reserve police officer by the City because of his national origin (Hispanic), disability (injuries suffered in an on-the-job motor vehicle accident), and in retaliation for engaging in a protected activity (filing a workers' compensation claim). On July 20, 2017, the FCHR issued its Determination: No Reasonable Cause (Determination), in which it determined that no reasonable cause existed to believe that an unlawful employment practice had occurred. Petitioner then filed a Petition for Relief on September 18, 2017,^{1/} and the matter was referred by the FCHR to the Division of Administrative Hearings on September 21, 2017, to resolve the dispute.

At the hearing, Petitioner testified on his own behalf and presented the testimony of seven witnesses. Petitioner's Exhibits 1 through 9 were accepted in evidence. Respondent presented the testimony of one witness. Respondent's Exhibits 1 through 9 were accepted in evidence. Finally, Joint Exhibits 1 and 2 were accepted in evidence.

A two-volume Transcript of the hearing has been prepared. Both parties filed proposed recommended orders (PROs) on June 25,

2018, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is a 55-year-old male of Hispanic (Cuban) heritage. He worked full-time as a police officer with the City until 2011, when he resigned his full-time status and was granted permission to begin working as a reserve officer.

2. Reserve officers are appointed by and serve at the discretion of the Chief of Police. Only retiring or resigning sworn officers with at least ten or more years of consecutive service and in good standing can be members of the reserve unit. Currently, around two dozen reserve officers work for the City. A reserve officer must be a sworn law enforcement officer and able to exercise law enforcement authority and make arrests. If a reserve officer is unable to perform law enforcement functions, the Chief of Police will exercise his authority to withdraw his or her reserve status.

3. Reserve officers have no employment or promotion rights. In addition to their contract assignment, they must satisfy a volunteer commitment by working at least 12 hours per month in either a patrol first-responder assignment or pre-approved special assignment. However, the volunteer commitment does not apply to reserve officers working at the Orlando International Airport (Airport). If a reserve officer is unable to fulfill

this 12-hour requirement, the Chief of Police will exercise his authority to withdraw his or her reserve status.

4. Beginning in January 2012, Petitioner worked exclusively as an Airport Specialist at the Airport on successive one-year contracts. Reserve officers working at the Airport are called Temporary Employee Police Reserve Officers (TEPROs). The TEPRO program was initiated by the City in 2012 and is designed to augment the number of police officers working at the Airport. This is because the Airport law enforcement contingent has been understaffed for many years.^{2/}

5. TEPROs have arrest powers, wear uniforms, carry a gun and taser, and are required to take police action just like full-time law enforcement officers.

6. The Greater Orlando Airport Authority (GOAA) contracts with the City to provide law enforcement services at the Airport and reimburses the City for salaries and equipment of full-time officers and TEPROs. Therefore, TEPROs cannot be assigned to any other division in the Police Department. Approximately 70 to 80 officers, including command staff, full-time officers, and TEPROs on one-year contracts, work in the Airport Division (Division). When the events herein occurred, the number of TEPROs working at the Airport was capped at nine.

7. In January 2012, Petitioner entered into his first Temporary/Seasonal Employment Contract with the City, whereby the

City agreed to employ Petitioner in the Police Department as a TEPRO for one year from January 2012 through January 2013. At that time, Petitioner was capable of performing the full duties of a law enforcement officer without accommodation. Petitioner was not hired for any particular assignment and could be assigned to any number of posts throughout the Division.

8. In March 2013, March 2014, January 2015, and January 2016, Petitioner entered into new employment contracts with the City, whereby the City agreed to hire Petitioner as a TEPRO for one year. The last contract was executed on January 13, 2016, and ran through January 13, 2017.^{3/} When he signed each contract, Petitioner was capable of performing the full duties of a law enforcement officer without accommodation.

9. On September 8, 2016, Petitioner was injured in an on-the-job accident at the Airport. He had pulled over a taxicab for a traffic stop when another vehicle struck his police car from behind, driving Petitioner underneath the dashboard and pinning him there while pushing his car into the taxicab he had stopped.

10. The accident required Petitioner to undergo cervical fusion of his C-6 and C-7 vertebrae in February 2017 and damaged his ulnar nerve causing numbness in his right hand. He still experiences severe pain in his back and neck on a daily basis.

11. Petitioner's injuries limit his ability to perform manual tasks for extended periods. His musculoskeletal functions are substantially limited, and he cannot sit or stand for prolonged periods. The range of movement in his neck is also substantially limited. He is restricted from pushing or pulling any amount of weight, and from lifting more than ten pounds.

12. As of April 2018, or 15 months after his last contract expired, these medical conditions still existed and prevented Petitioner from performing the job duties of a full-time police officer, such as carrying a weapon, making arrests, responding to calls, assisting other officers, and taking other police enforcement action. Unfortunately, there is still no definitive timetable for a full recovery.

13. Although the City had the discretion to immediately terminate Petitioner's contract when the accident occurred, it permitted him to assess the injury and address the medical issues. A few weeks after the accident, Petitioner requested an accommodation that would permit him to go on light duty. His request was approved. The City's policy is to allow full-time officers to remain on light duty for no more than twelve months; they then are required to be medically retired or terminated from employment unless the Chief of Police, at his discretion, authorizes another six-month extension. While he was not sure,

the Deputy Chief of Police believed this policy did not apply to reserve officers.

14. Petitioner returned to work on October 13, 2016, in a light-duty capacity because of restrictions imposed by his physician. As noted above, these restrictions prevent Petitioner from responding to a situation that could escalate and require him to take police action.

15. From October 13, 2016, through January 16, 2017 (or three days after his contract expired), Petitioner worked in a light-duty capacity in "district 285." District 285 is the nomenclature for a police officer position in the Division's office at the Airport that takes walk-up calls for matters such as stolen vehicles or answering calls from outside or within the Airport for general questions. The office is manned by an officer 24 hours per day, seven days per week. If the officer is on light duty, he works in plain clothes, does not carry a firearm, and, pursuant to Police Department policy, cannot take police enforcement action. District 285 refers to the position during the day shift, while district 185 refers to the position during the night shift. The position cannot be filled by a civilian.

16. At least one officer must fill each shift (day and night) at the front desk of the office. The position is filled by a mix of full-time officers and TEPROs, a few of whom from

time to time may be on light duty. If an officer on light duty works the front desk, this would enable an officer with no restrictions to be assigned to a patrol position. If a full-time or reserve officer without restrictions works the front desk, he or she is required to respond to calls for service and take police action for any incidents that may arise.

17. From October 13, 2016, to January 16, 2017, Petitioner worked one to three shifts per week (ten hours per shift) in the front desk position.

18. Officers on light duty are required to submit an Alternative Duty Update (Update) every 30 days in order to remain on light duty and to continue to work. On December 14, 2016, Petitioner provided the City with an Update in order to remain on light duty. The Update indicated that he still had work restrictions (no pushing, pulling, or lifting anything over ten pounds, limited bending, no overhead work, and changing his seated or standing position every 30 to 60 minutes); his physician recommended surgery (which was approved by Risk Management on January 18, 2017, and performed the following month); and there was no estimated date for his return to full duty. After the surgery, Petitioner would be in no-duty and light-duty status until the recovery was complete. The Chief of Police approved his alternative duty request on January 3, 2017. This allowed Petitioner to finish out his one-year contract,

which expired ten days later. Contrary to Petitioner's suggestion, the Update did not constitute a request for an accommodation under a new contract.

19. On or about January 6, 2017, Petitioner was informed by his direct supervisor, Lieutenant Boos, that the City would not be offering him a new employment contract after his current contract expired a week later. When told that his contract would not be renewed, Petitioner did not request an extension of his light duty, a transfer to a light-duty position downtown, a leave of absence, or any other accommodation. Also, he did not ask the City to reconsider offering him a new contract. When he asked Lieutenant Boos if there was a reason why it was not renewed, his supervisor responded "no," and Petitioner was told that the City just wanted to exercise its right not to renew the contract.

20. Neither Lieutenant Boos, nor the commander of the Division, Captain DeSchryver, knew the exact reason for this action; they knew only that the Deputy Chief had told Captain DeSchryver not to renew the contract. According to Captain DeSchryver, he recommended that the City renew the contract, but after reviewing the matter, the City decided it needed a full-time officer at the Airport. Petitioner filed his TAQ with the FCHR a few weeks later. Even then, he did not suggest a specific accommodation.

21. At the time his contract was not renewed, Petitioner was unable to exercise law enforcement authority or make arrests. The City could not assign Petitioner to the district 285 position for another 12 months because there was no timetable for his return to full duty. Also, the City needed all positions at the Airport staffed by as many full-duty officers as possible who were capable of performing the essential functions of the job. As explained by the Deputy Chief, the City needed to have "a number of full-body officers out there to work the calls and to assist each other and to keep everybody at the airport safe," and not to just have a certain number of officers assigned to the Airport, even if they could not perform the essential functions of the job.

22. The Deputy Chief went on to explain that "it was decided that we would take another course of action and terminate the contract and get a full-body person at the airport." He also testified that the City "needed a full-fledged officer out there [at the Airport]"; "we needed an officer who could do the full job of a police officer"; "we just need to have as many full-time officers or full-service officers as we can"; and by hiring a full-time reserve officer, that would give him "a full-time officer out there who can respond to any kind of call out there and also assist the other officers out there to handle anything that comes up." The Chief of Police added that "it's really a

waste of taxpayers' money to keep someone on contract in light-duty status when they cannot perform the function of a reserve officer or TEPRO."

23. Petitioner contends the statements of the Chief of Police and Deputy Chief fall within the category of "the most blatant remarks," whose intent could be nothing other than direct evidence of discrimination. However, this testimony is not evidence of discrimination, given the fact that Petitioner's latest Update in mid-December 2016 indicated that he faced impending major surgery, he had numerous doctor-imposed physical limitations, and there was no timetable on when, if ever, he would return to full-duty status.

24. For the first time, in his PRO, Petitioner contends that, as an accommodation, the City should have: (a) executed a new contract and assigned him to the district 285 position for another year, or (b) executed a new contract with a different reserve unit and transferred him to a light-duty position in another division. In essence, Petitioner argues that the City should have given him another one-year contract, even though he was awaiting major surgery (which was performed the following month) and would be on light-duty or no-duty status for an indefinite period of time. Indefinite light duty or no duty is not a reasonable accommodation.

25. If the TEPRO contract was renewed, transfer to another light-duty position in another division was not possible. As a contract employee with GOAA, Petitioner could not be transferred to another division. If Petitioner signed a new contract with another reserve unit, it would be a burden on the City, and an unreasonable accommodation, to assign him to a light-duty position for an indefinite period of time. As it turns out, Petitioner would have been on light-duty or no-duty status for the duration of the renewed contract. Assuming another contract was executed in January 2018, Petitioner would still be on light duty as of April 2018, with no timetable for returning to full service, if ever. In sum, assuming that Petitioner's injury constitutes a disability, there was no reasonable accommodation that the City could have offered.

26. Petitioner was replaced by another reserve officer, Don Luezzi, a white male, who formerly worked in the Airport Division before he retired and expressed interest in an Airport Specialist position. In 2017, the City also hired Izzy Hernandez, a Cuban, as a TREPRO. His contract was renewed in 2018.

27. Even though his contract was not renewed, Petitioner remained a reserve officer, serving at the pleasure of the Chief of Police. To retain reserve status, however, Petitioner was required to file Updates on his medical status. On April 2,

2017, Petitioner submitted an Update, advising that he remained in no-work status (due to his recent surgery) and that his next follow-up appointment was scheduled on June 1, 2017.

28. On June 26, 2017, Petitioner was issued a Return to Duty Notice (Notice), advising him that his reserve status would be revoked effective September 8, 2017, if he was not able to return to full duty by that date. A Notice is an administrative form letter that is generated and issued automatically to all employees who are on alternative-duty status or medical leave for the preceding six months.

29. From January 2017 through July 2017, Petitioner was unable to work any off-duty jobs as a reserve officer because of his medical condition and work restrictions. During this same time period, he was unable to work as a patrol first-responder or in a pre-approved special assignment as a law enforcement officer. He did not identify any reasonable accommodation which would have allowed him to do so.

30. On July 26, 2017, Petitioner's reserve status was withdrawn, effective immediately, by the Chief of Police on the advice of counsel and because Petitioner was unable to fulfill the requirements of the reserve unit. Actually, the reserve status could have been revoked earlier because Petitioner was unable to fulfill the requirements of the reserve unit,

specifically the requirement that he volunteer 12 hours per month as a law enforcement officer.

31. The withdrawal of Petitioner's reserve status occurred six months after the TAQ was filed, was not considered by the FCHR, and is not a relevant issue. Assuming arguendo that it is a relevant consideration in the case, there is no evidence that this action was taken for discriminatory reasons.

32. Petitioner is not precluded from re-applying for reserve status or as a TEPRO once he is able to perform the functions of a law enforcement officer and fulfill the requirements of the reserve unit.

33. Petitioner contends the City treated another TEPRO, Kathy Tomas, a white female, more favorably than him by offering her a new one-year contract while she was on light duty. Ms. Tomas suffered an on-the-job injury on March 18, 2017, while attempting to arrest an unruly JetBlue passenger who was refused boarding because of too many carry-on bags. At the time, she was working under a one-year contract that expired in January 2018. Because of a fractured elbow and torn rotator cuff suffered during the arrest, Ms. Tomas went on light duty after the incident. After the elbow injury was resolved, she had surgery performed on her rotator cuff, and, as of April 2018, still remained on light duty.

34. In September 2017, the City entered into new contracts with all of its TEPROs, including Ms. Tomas, in order to effectuate a pay raise. New contracts were necessary because the existing contracts provided for a set pay rate, and without a new contract, the new pay rate could not be implemented.

35. If Ms. Tomas is unable to return to full duty at the expiration of her current contract in September 2018, the City will not enter into a new employment contract with her. Although her accommodation was longer, Ms. Tomas received the exact same accommodation as Petitioner.

36. Petitioner was not treated less favorably than other employees who were similarly situated, based on his national origin or perceived disability.

37. In his PRO, Petitioner asserts the December 14 Update is the protected activity that forms the basis for the retaliation charge. On the other hand, the City's PRO asserts the only protective activity identified by Petitioner is his TAQ filed in March 2017. (The TAQ was actually filed on January 23, 2017, not in March 2017.) However, both assertions miss the mark, as the TAQ alleges the protected activity is Petitioner's filing of a workers' compensation claim. The exact date on which he filed his claim is not of record, but an email indicates that Petitioner spoke with the "workers' comp case manager" on September 14, 2016, or eight days after he was injured. Resp.

Ex. 1. In any event, the TAQ trumps the other assertions and is the only protected activity that has been considered. There is no evidence that the filing of the workers' compensation claim was in any way related to the non-renewal of the TEPRO contract.

38. The City's decision to not renew the contract was not based on Petitioner's heritage (Cuban), disability, or in retaliation for him filing a workers' compensation claim.

CONCLUSIONS OF LAW

39. Petitioner has the burden of proving by a preponderance of the evidence that the City committed an unlawful employment practice. See § 120.57(1)(j), Fla. Stat. Here, Petitioner alleges he was discharged from employment on account of his Hispanic origin and disability, and in retaliation for filing a workers' compensation claim. He also alleges that the City "never engaged in any interactive process to discuss whether a reasonable accommodation would enable [him] to perform the essential functions of [his] position beyond [his] termination date."

40. Section 760.10(1)(a), Florida Statutes, makes it an unlawful employment practice for an employer to discharge any individual because of his national origin or handicap, while section 760.10(7) prohibits retaliation for engaging in a protected activity.

41. The Florida Civil Rights Act (Act) is patterned after federal law. Therefore, reliance on federal decisions in interpreting the Act's provisions is appropriate.

42. Petitioner has the burden of proving a prima facie case of discrimination by direct or circumstantial evidence. Where direct evidence is lacking, one seeking to prove discrimination must rely on circumstantial evidence of discriminatory intent, using the three-part shifting burden of proof pattern established in McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973).

43. Where, as here, no direct evidence of discrimination exists, to establish a prima facie case of national origin discrimination, Petitioner must prove that: 1) he is a member of a protected class; 2) he was subjected to an adverse employment action; and 3) his employer treated similarly-situated employees, who were not members of the same protected class, more favorably. Wilson v. B/E Aero., Inc., 376 F.3d 1079, 1087 (11th Cir. 2004).

44. Petitioner is a member of a protected class (Hispanic) and was subjected to an adverse employment action. As previously found, however, he failed to prove that the City treated similarly-situated employees who were not members of the protected class more favorably. Therefore, his claim of national origin discrimination must fail.

45. Petitioner also contends he was discriminated against on the basis of his disability in two ways: by the City's non-

renewal of his contract; and by the City's failure to provide a reasonable accommodation. In his PRO, he also contends his reserve status was withdrawn because of his disability. As previously found, however, the withdrawal of his reserve status occurred seven months after the TAQ was filed, was not raised in the Petition for Relief filed on September 18, 2017, and is beyond the scope of this proceeding.

46. To establish a prima facie case of discrimination based on a failure to accommodate, Petitioner must prove by a preponderance of the evidence: 1) that he is a disabled person; 2) that he is a qualified individual; and 3) that he was discriminated against by way of the City's failure to provide a reasonable accommodation. McKane v. USB Fin. Servs., 363 Fed. Appx. 679, 680 (11th Cir. 2009).

47. Petitioner bears the burden of identifying an accommodation and demonstrating that it allows him to perform the job's essential functions. Lucas v. W.W. Grainger, Inc., 257 F.3d 1249, 1255 (11th Cir. 2001). The employer's duty to provide a reasonable accommodation is not triggered until the claimant makes a specific demand for an accommodation. Gaston v. Bellingrath Gardens & Home, Inc., 167 F.3d 1361, 1363 (11th Cir. 1999). Petitioner did not request any accommodation when his contract expired. At hearing, he argued that he should have been offered a new TEPRO contract, or alternatively, a new contract as

a reserve officer in another division. Under either scenario, he would remain on light duty or no duty for an indefinite period of time, with no timetable for returning to full duty, if ever. An indefinite extension of light duty is not a reasonable accommodation and would place an undue hardship on the City. Frazier-White v. Gee, 818 F.3d 1249, 1256 (11th Cir. 2016); Rio v. Runyon, 972 F. Supp. 1446, 1458 (S.D. Fla. 1997). A qualified person with a disability must be able to perform the essential functions of the job with or without reasonable accommodation. Dickey v. Dollar Gen. Corp., 351 Fed. Appx. 389, 391 (11th Cir. 2009). Therefore, even if Petitioner can demonstrate that he is disabled and qualified for the position, he cannot satisfy the requirement that the City failed to offer him a reasonable accommodation.

48. In his TAQ, Petitioner argues that the City did not engage him in an "interactive process" concerning a reasonable accommodation. Where a claimant does not or cannot demonstrate a reasonable accommodation, the employer's lack of investigation into reasonable accommodation is unimportant. Willis v. Conopco, Inc., 108 F.3d 282, 285 (11th Cir. 1997).

49. Petitioner also contends the contract was not renewed because of his disability. Contrary to his assertion, there is no direct evidence of discrimination. As previously found, the testimony of the Chief of Police and Deputy Chief do not

constitute "only the most blatant remarks" that can only be construed as evidence of discrimination. Where direct evidence of discrimination by the City because of a disability is lacking, as here, Petitioner must prove, by circumstantial evidence, that: 1) he has a disability; 2) he was qualified for the job with or without an accommodation; and 3) he was discriminated against on the basis of his disability. D'Angelo v. ConAgra Foods, Inc., 422 F.3d 1220, 1226 (11th Cir. 2005).

50. Even assuming that he has a disability, Petitioner failed to demonstrate that he could perform the essential functions of the job, with or without an accommodation. The record shows that when his contract was not renewed, Petitioner was facing major surgery the following month; the estimated recovery time was at least six months to a year; he had no timetable for returning to full-time duty, if ever; and existing medical restrictions prevented him from performing the regular duties of a law enforcement officer. As late as April 2018, Petitioner faced more surgery, and the same medical restrictions remained in place.

51. Even if Petitioner established a prima facie case, his claim also must fail for another reason: he did not rebut the City's legitimate, non-discriminatory reason for his discharge, namely, he could not fulfill the requirements of a full-time police officer and he had no timetable for returning to full-time

status, if ever. The burden is on Petitioner to prove Respondent's stated reason was mere pretext for unlawful discrimination. Here, there was no evidence that the City's action was taken for a discriminatory reason. The disability claim must fail.

52. Finally, there is no evidence, direct or circumstantial, that the City did not renew the contract because Petitioner filed a workers' compensation claim.

53. In summary, the allegations in the TAQ must fail.

RECOMMENDATION

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

RECOMMENDED that the Florida Commission on Human Relations enter a final order dismissing the Petition for Relief, with prejudice.

DONE AND ENTERED this 18th day of July, 2018, in Tallahassee, Leon County, Florida.



D. R. ALEXANDER
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 18th day of July, 2018.

ENDNOTES

^{1/} In its PRO, the City contends for the first time the Petition for Relief was not timely filed. The FCHR's Determination was issued on July 20, 2017. It stated, among other things, that the Determination "will become final if Complainant does not file a Petition for Relief within 35 days, and the Commission will dismiss the complaint." The Petition for Relief was filed on September 18, 2017, or more than 35 days after the Determination was issued. See § 760.11(6), Fla. Stat. ("An administrative hearing pursuant to paragraph (4)(b) must be requested no later than 35 days after the date of determination of reasonable cause by the commission."). However, in his PRO, Petitioner's counsel points out that the Determination mailed to his office was returned to the FCHR as "Undeliverable." The PRO represents that counsel eventually contacted the FCHR on September 15, 2017, and a second Determination was emailed to counsel on September 18, 2018. The Petition for Relief was filed the same day. The FCHR has not raised timeliness as an issue in this case, and it played no role in its preliminary investigation and determination.

^{2/} In January 2017, there were approximately 20 police officer slots budgeted by the Greater Orlando Airport Authority that were not filled.

^{3/} Although the contract reflects an expiration date of January 13, 2017, Mr. Villaverde testified his last day of work was January 16, 2017.

COPIES FURNISHED:

Tammy S. Barton, Agency Clerk
Florida Commission on Human Relations
Room 110
4075 Esplanade Way
Tallahassee, Florida 32399-7020
(eServed)

Dionna Little, Esquire
City of Orlando
400 South Orange Avenue
Orlando, Florida 32801
(eServed)

Keith L. Hammond, Esquire
Law Office of Keith L. Hammond, P.A.
Suite 1200
250 North Orange Avenue
Orlando, Florida 32801
(eServed)

Wayne L. Helsby, Esquire
Allen, Norton & Blue, P.A.
Suite 100
1477 West Fairbanks Avenue
Winter Park, Florida 32789
(eServed)

Marc A. Sugarman, Esquire
Allen Norton & Blue, P.A.
Suite 100
1477 West Fairbanks Avenue
Winter Park, Florida 32789-7108
(eServed)

Cheyenne Costilla, General Counsel
Florida Commission on Human Relations
Room 110
4074 Esplanade Way
Tallahassee, Florida 32399-7020
(eServed)

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.