STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SHARON FORD,

Petitioner,

vs. Case No. 18-5072

LINCARE, INC.,

Respondent.
_____/

RECOMMENDED ORDER

The final hearing in this matter was conducted before Administrative Law Judge Andrew D. Manko of the Division of Administrative Hearings ("DOAH"), pursuant to sections 120.569 and 120.57(1), Florida Statutes (2018),[1/] on February 21 and 28, 2019, in Tampa, Florida.

APPEARANCES

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For Respondent: Luis A. Santos, Esquire
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STATEMENT OF THE ISSUE

Whether Respondent, Lincare, Inc., is liable to Petitioner, Sharon Ford, for subjecting her to a hostile work environment based on sexual harassment.

PRELIMINARY STATEMENT

Ms. Ford filed a Complaint with the Florida Commission on Human Relations ("Commission") on January 19, 2018, alleging that Lincare unlawfully subjected her to a hostile work environment based on sexual harassment committed by Lincare's general counsel, Paul Tripp.

The Commission conducted an investigation and, on July 13, 2018, issued a determination that there was no reasonable cause to conclude that an unlawful employment practice occurred.

On August 16, 2018, Ms. Ford requested a hearing by mailing a Petition for Relief to the Commission. On September 21, 2018, the Commission transmitted the Petition to DOAH to conduct a formal administrative hearing under section 120.57.

Before the hearing, Lincare moved to dismiss the Petition on grounds that it was untimely filed. After reviewing the record and holding a hearing, the undersigned denied the motion.

The final hearing occurred on February 21 and 28, 2019. Ms. Ford testified on her own behalf and Petitioner's Exhibits

1 through 8 were admitted without objection. Lincare presented the testimony of Mr. Tripp and Paula Adams, the head of employee relations and human resources services. Respondent's Exhibits 1 through 11 were admitted without objection.

A two-volume Transcript of the final hearing was filed on March 15, 2019; and, based on an agreed motion for extension, the deadline for post-hearing submittals was April 22, 2019. Each party timely filed its Proposed Recommended Order ("PRO"), which was duly considered in preparing this Recommended Order.

FINDINGS OF FACT

I. The Parties and Complaint Allegations

1. Lincare is a Tampa-based company that focuses on home-healthcare services. It has an annual revenue of over $3 billion and is a wholly-owned subsidiary of a company based in Germany.

2. Ms. Ford, a married woman with children, is an accountant and an attorney. Lincare first hired her as its acquisition counsel in 2001 and promoted her to director of acquisitions in 2002. She held that position for almost 15 years before she left the company on January 27, 2017.

3. Mr. Tripp, a married man with children, served as an Arabic linguist in the Army before obtaining his law degree. Lincare hired Mr. Tripp to replace Ms. Ford as its acquisition

counsel in 2002 and promoted him to general counsel in 2013. He still holds that position.

4. On January 19, 2018, almost a year after leaving Lincare, Ms. Ford filed a Complaint with the Commission alleging a hostile work environment. She alleged that Mr. Tripp, over a 15-month period from December 2015 through March 2017, subjected her to severe and pervasive sexual harassment.

5. On July 13, 2018, the Commission issued its notice of determination of no reasonable cause and mailed it to Ms. Ford. The notice advised her that she "may request an administrative hearing . . . by filing a Petition for Relief within 35 days of the date the determination was signed by the Executive Director." Ms. Ford received the notice in the mail on July 16, 2018.

6. On August 16, 2018, 34 days after the Commission issued its notice, Ms. Ford requested an administrative hearing by mailing her Petition to the Commission via U.S. mail. The Commission received the Petition on August 20, 2018.

7. On the same day, the Commission generated its transmittal letter. But, instead of transmitting the Petition to DOAH, the Commission advised Ms. Ford that the Petition appeared to be untimely because it was received three days beyond the 35-day deadline under section 760.11(7), Florida Statutes. After Ms. Ford responded that she timely requested a

hearing by post-marking her Petition before the 35-day deadline, the Commission transmitted the case to DOAH on September 21, 2018. The transmittal letter, dated August 20, 2018, did not dismiss the Petition as untimely but rather requested assignment of a judge to "conduct all necessary proceedings required under the law."

II. Lincare's Structure and Policies Between 2015 and 2017

8. Lincare had three officers: chief executive officer ("CEO"), chief financial officer ("CFO"), and chief operating officer ("COO"). The corporate chart had the CEO at the top and the CFO and COO, who reported to the CEO, immediately thereunder.

9. The second tier of the chart listed six department heads, none of whom were corporate officers: corporate compliance officer, head of business innovation, head of human resources, head of public relations & communications, general counsel, and director of acquisitions. These managers were equal on the hierarchy chart and all reported directly to the CEO.

10. As director of acquisitions, Ms. Ford brought in the deals, negotiated the business side, and quarterbacked them to closing. She helped move the deals along by ensuring that Lincare personnel communicated and accomplished their required tasks. She provided business advice to the legal department and

worked closely with the acquisition attorney (on smaller deals) and the general counsel (on larger deals). Ms. Ford received a salary and an objective bonus tied to the deals that closed.[2/]

11. As the general counsel, Mr. Tripp oversaw legal affairs and supervised five lawyers in the legal department, but had no control over any other department. As to the deals, Mr. Tripp handled the legal aspects, such as contracts, due diligence, and compliance, provided legal advice, and assessed risks. The CEO, COO, and CFO had sole authority to decide whether a deal closed. Mr. Tripp received a salary and a discretionary bonus tied to the company's financial success in a given year.

12. Although Ms. Ford and Mr. Tripp gave each other advice, they were equals on the corporate chart. Mr. Tripp had no authority over Ms. Ford and lacked the power to hire, discipline, promote, transfer, fire, or control her compensation. They were coworkers who both answered directly to the CEO.

13. The head of human resources ("head of HR") ran the HR department and its roughly 15 to 18 employees. Directly under the Head of HR was the employee relations director, Ms. Adams. Among other things, the HR department oversaw the employee handbook and investigated reports of discrimination and harassment.

14. The handbook included a detailed anti-harassment policy forbidding sexual harassment by any employee at work or at work-related events outside the office. Harassment was defined to include unwelcome sexual advances, requests for conduct of a sexual nature, and other unwelcome behavior that was personally offensive and interfered with work effectiveness done in person or through electronic means. The policy prohibited any employee from making employment decisions based on the submission to or rejection of sexual advances, and noted in bold that any violation would subject an employee to discipline up to an immediate discharge.

15. The handbook contained a detailed reporting procedure for employees who believed, had concerns, or suspected they or anyone else may have been harassed. The policy required them "to immediately notify" a named individual based on their location, which included the employee relations director or the HR Manager for employees in the corporate office. The handbook required employees to follow the procedure and noted that the failure to do so could adversely affect their rights to pursue a claim.

16. Lincare took harassment allegations seriously. Once an allegation was reported, the employee relations director or HR managers investigated; the legal department was not involved unless a particular legal question arose. They obtained as much

information as possible from the victim, spoke to potential witnesses, reviewed available documents, and interviewed the accused. If the investigation uncovered no corroborating evidence and the accused denied any wrongdoing, a report would be added to the accused's personnel file; upon a second allegation, the accused would be terminated. If a supervisor retaliated against an employee for reporting harassment, that supervisor would be terminated.

17. Lincare disseminated the handbook and updated versions to employees and required them to sign a form acknowledging that they received the handbook and would abide by its policies. Ms. Ford signed such forms each time she received a revised handbook, including in 2015——the version in effect until she left Lincare in January 2017. She knew about the harassment policy, the reporting requirement, and the fact that her failure to so report could adversely affect her rights.

III. Friends and Coworkers for Over 15 Years

18. Ms. Ford and Mr. Tripp worked closely together at Lincare for 15 years and they became good friends in the process.

19. When Lincare hired Mr. Tripp as acquisition counsel in 2002, he worked closely with Ms. Ford on hundreds of deals. They were in constant, daily contact to strategize, handle

diligence and compliance issues, advise each other on the tasks they both had to complete, and ensure the deals closed.

20. They also had a close friendship. They regularly went to lunch alone and with others, as often as three days per week, attended social events with mutual friends, and spoke on the phone and texted about business and personal matters. They had much in common as married parents with kids around the same age and they enjoyed each other's company.

21. When Mr. Tripp became general counsel in 2013, Ms. Ford initially worked closely with the new acquisition counsel. In late 2014, however, she and Mr. Tripp resumed working closely together when Lincare began negotiating larger transactions. Project Maverick was the largest acquisition of Ms. Ford's career and it closed in March 2016. Project Falcon was the largest divestiture of her career and it closed in August 2016.

22. These two deals, and others, required Ms. Ford and Mr. Tripp to work even more closely together from 2015 until she left the company in January 2017. They often met multiple times per day. Ms. Ford sought Mr. Tripp's assistance on the legal side and he sought her assistance on the business side. As before, she remained the quarterback shepherding the deal forward.

23. Their friendship continued during this period. They invited each other to lunch regularly, alone and with coworkers. They attended social events with friends, including holiday dinners in 2015 and 2016. On out-of-town work trips, they rented cars together and sometimes spent time alone, such as for meals. They continued to text and speak on the phone about business and personal matters. They talked about their families, children, and other personal matters much like longtime friends do. They checked in on each other when personal crises occurred. And, when Ms. Ford began tense negotiations with the CEO about her compensation, which ultimately led her to leave Lincare, she relied on Mr. Tripp as a sounding board and for moral support.

24. Even after Ms. Ford left the company in January 2017, she maintained contact with him. They had lunch alone at least once. For months, they continued to text each other, even about personal matters such as when she texted him after he had been in a car accident. However, their communication largely ceased once Ms. Ford filed a lawsuit against Lincare over her compensation.

IV. Ms. Ford's Testimony Accusing Mr. Tripp of Sexual Harassment

25. The first incident occurred on December 11, 2015. In that 10 to 20 minute conversation in her office, Mr. Tripp

professed strong feelings for her and that he desired a confidential, sexual relationship with her. She rejected him and said they were just friends. She immediately called her husband and spoke to him all the way home. She felt humiliated, embarrassed, and angry. She did not attend a football game that weekend with other coworkers to avoid Mr. Tripp and kept her communications with him to e-mail for the next week.

26. The second incident occurred in her office later in December 2015. While discussing another affair that may be happening at work, Mr. Tripp said he could not report the other employee because he wanted to do the same thing with Ms. Ford, notwithstanding the professional and personal risks. She again rejected him.

27. For the next few weeks, Ms. Ford tried to avoid him as much as possible, but she had to face him because the deals began to lag. She said he continued to make comments here and there, but she offered no specific details.

28. The third incident occurred in January 2016, after a conference call in Mr. Tripp's office. He said he knew Ms. Ford was avoiding him, but he could not function. He told her he was willing to leave his wife, but she again rejected him.

29. Over the next few months, the comments and innuendo pretty much ceased so Ms. Ford decided to go back to being friends to ensure that the Maverick and Falcon deals closed.

30. However, a fourth incident occurred in the parking lot after a late conference call in June 2016. Mr. Tripp professed that his feelings were stronger now and that he was waiting for Ms. Ford to change her mind. She said her feelings had not changed and he said he understood.

31. For the remainder of 2016, Ms. Ford testified generally that Mr. Tripp continued to make comments about his inability to function and that he got more obsessive as the year progressed. But she offered little detail about the comments or where and when they occurred, except that she had to be around Mr. Tripp's wife several times and she and Mr. Tripp agreed it was uncomfortable.

32. The fifth incident occurred in October 2016 when Mr. Tripp told her he was learning Hebrew to "connect" with her in her native language. He tried to communicate with her in Hebrew in person and via text, despite her telling him to stop because it made her very uncomfortable. As a result, she again started to avoid him at the office, though he texted her to see if she was alright and admitted to acting like a high school student.

33. In January 2017, Mr. Tripp continued with innuendo, spoke in Hebrew, and told Ms. Ford that he might move closer to her. She believed he was obsessed, which made her nervous about

his stability and her safety. But she offered no specific dates on which these events occurred.

34. Mr. Tripp came to Ms. Ford's office twice that month after she had heated meetings with the CEO, including on her last day at the company, January 27, 2017. He cried because he could not imagine how he would go on if she left, as she was the only reason he came to work every day. That evening, he told her on the phone that he now knows what a divorce feels like.

35. Mr. Tripp continued to harass her following her departure, including taking his family to the same ski resort in March 2017. She testified that she stayed in her room to avoid him and never initiated contact with him while there, though text messages admitted into evidence confirm she texted him several times, about a security breach and generally about his vacation.

36. In January 2018, a year after she left the company during a mediation of her lawsuit against Lincare, Ms. Ford for the first time accused Mr. Tripp of sexual harassment. She had not reported the allegations pursuant to Lincare's policy, though she knew it required her to do so. She never informed other coworkers either. In fact, the only person she said she told was her husband, though he did not testify at the hearing.

37. Ms. Ford testified that she did not report the allegations because she had a contentious relationship with the

CEO during this period and she believed the CEO would terminate her. She also was concerned that Mr. Tripp was unstable and could decide to kill the deals to ensure she missed out on her bonuses. Lastly, she thought reporting would be futile due to Lincare's culture of harassment, including by one of the two individuals to whom she was directed to report, the head of HR.

V. Mr. Tripp's Testimony Denying the Alleged Sexual Harassment

38. Mr. Tripp said that he never harassed Ms. Ford. Indeed, no one has ever accused him of harassment. He said he never expressed romantic feelings for her, suggested having a sexual relationship with her, or did anything to scare her.

39. Ms. Ford's allegations against him came as a shock. He believed they had been good friends for over 15 years and she never indicated otherwise. They enjoyed each other's company, had children around the same age, and spoke often about business and personal things, like friends often do.

40. Even during the period of alleged harassment, he noticed no changes in her behavior. They continued to invite each other to lunch regularly, often eating together alone, and continued to discuss deeply personal matters about their families. They texted each other often and attended holiday dinners with friends. She chose to sit next to him at a work event at a hotel in the fall of 2016.

41. The same could be said for business trips during this period. On a March 2016 trip to New York, Ms. Ford left a group dinner early with him because he was sick, they worked out the next day, and had breakfast. On an August 2016 trip to Nashville to celebrate the closing of the Maverick deal, they rented a car together and went to dinner alone after Ms. Ford invited him. On a trip to New York in August/September 2016, Ms. Ford stayed with Mr. Tripp to retrieve his briefcase from the office and went to the airport together after the rest of the team left.

42. Mr. Tripp admitted to learning some Hebrew, but because he liked languages (he was an Arabic linguist in the Army), not to become romantically connected to Ms. Ford. He practiced with her because she was the only person he knew who spoke Hebrew, just as he did with other coworkers who spoke another language. She never said it made her uncomfortable.

43. Mr. Tripp also admitted that his wife suggested moving closer to Plant High School because it had a beneficial program for their son. The idea had nothing to do with Ms. Ford, who did not live nearby, and they decided not to move in any event.

44. Even on her final days at Lincare, they had usual interactions. Mr. Tripp admitted calling Ms. Ford the evening of her last day (but said he had not come down to her office earlier) to express concern for his friend and sadness that they

would no longer be working together. He did not recall commenting about a divorce, but if he had, it only related to her being a friend.

45. For a few months after she left Lincare, Mr. Tripp believed their relationship had not changed. They continued to text each other and had lunch alone at least once. Though he took a ski trip to the same resort in March 2017, his wife chose the resort and Ms. Ford reached out to him several times during that trip to see how he was doing. Ms. Ford also texted him after he had a car accident in March/April 2017.

46. It was not until several months after Ms. Ford left Lincare and filed her lawsuit against the company that he noticed a change in her attitude. At one point, he invited her to lunch with a mutual friend, but she did not respond and he later learned they had lunch without him. Ms. Ford also told him on the phone that he was going to hate her someday, though he had no idea then what that meant. After a hurricane in August/September 2017, he reached out to make sure she was safe; she thanked him and wished his family well too. That was their last communication before the sexual harassment allegations were made.

VI. Credibility Findings as to the Conflicting Testimony

47. After hearing the conflicting testimony from Ms. Ford and Mr. Tripp and observing their demeanor, the undersigned

found it exceedingly difficult initially to determine who is telling the truth and who is quite an effective storyteller. Ms. Ford's conviction in her accusations against Mr. Tripp was equal to his conviction in his denials. But, when considering all of the record evidence and testimony, the scales of credibility tip in Mr. Tripp's favor for several reasons.

48. For one, Ms. Ford cultivated a professional and personal relationship with Mr. Tripp throughout the alleged harassment period and continued to do so even after she left Lincare. Although she said she maintained contact because they had to work together and she wanted him as an ally, she also accused him of stalker-like, obsessive, humiliating, and unstable behavior. Her efforts to maintain a friendship with him, even after leaving Lincare, are at odds with someone who feels humiliated and fears for their safety.

49. Ms. Ford's testimony also veered from the affidavit she filed with the Commission. She testified that he generally made comments between November 2016 and January 2017, yet her affidavit offered more specifics as to the comments allegedly made. Her testimony about him moving to her neighborhood was entirely omitted from her affidavit. Her testimony about his efforts to sometimes communicate with her in Hebrew was at odds with the affidavit's claim that he did so "continuously." And,

her testimony about the comments he made on her last day at Lincare differed as to substance and degree from her affidavit.

50. Further, Ms. Ford's testimony was directly refuted by other evidence. She testified that she did not affirmatively communicate with him about anything personal in March 2017, but text messages confirm that she checked in with him several times during the trip about his vacation and engaged in more friendly conversation than initially admitted.

51. Ms. Ford's reasons for waiting until a year after she left Lincare to report the accusations also call her credibility into doubt. Though she testified that she feared Mr. Tripp would kill two large deals and her bonuses therefrom, those deals closed in March and August 2016, and yet she never reported the allegedly ongoing harassment before she left Lincare at the end of January 2017. It also cannot be ignored that she waited until January 2018 to report the accusations and did so during the mediation of her compensation lawsuit against the company.

52. Lastly, though not fatal to her claim, Ms. Ford's failure to present any corroborating evidence cannot be ignored. She testified that she lost weight, suffered hair loss, and could not sleep, and said that it was the worst year of her life. Yet, the record is devoid of evidence that any other friends or coworkers noticed such changes, that she missed work

or social events, or that she suffered at work in any way. She said he sent her inappropriate text messages, but provided no proof of them. She apparently kept a journal about work issues, but did not document the harassing incidents. And, though she said she immediately told her husband in December 2015, she chose not to present his testimony even though he was the only person who could corroborate her accusations.

CONCLUSIONS OF LAW

53. DOAH has jurisdiction over the parties and the subject matter of this cause. §§ 120.569, 120.57(1), & 760.11(7), Fla. Stat.; Fla. Admin. Code R. 60Y-4.016.

54. The Florida Civil Rights Act of 1992 ("FCRA") protects employees from sex-based discrimination at work, including sexual harassment. See §§ 760.10(1)(a) & 760.11, Fla. Stat. "Florida has opted for a strong policy against sexual harassment in the work place." Speedway SuperAmerica, LLC v. Dupont, 933 So. 2d 75, 86 (Fla. 5th DCA 2006). The FCRA "is remedial and requires a liberal construction to preserve and promote access to the remedy intended by the Legislature." Woodham v. Blue Cross & Blue Shield of Fla., 829 So. 2d 891, 894 (Fla. 2002) (quoting Joshua v. City of Gainesville, 768 So. 2d 432, 435 (Fla. 2000)).

55. A hostile work environment claim is established "upon proof that the workplace is permeated with discriminatory

intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1275 (11th Cir. 2002) (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993)).

56. Because the FCRA is patterned after Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-17, "the Florida statute will take on the same constructions as placed on its federal prototype." Brand v. Fla. Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994); Harper v. Blockbuster Entm't Corp., 139 F.3d 1385, 1387 (11th Cir. 1998).

57. The burden of proof in this proceeding is on Ms. Ford as the complainant. § 120.57(1)(j), Fla. Stat.; Dep't of Banking & Fin., Div. of Sec. & Investor Prot. v. Osborne Stern & Co., 670 So. 2d 932, 935 (Fla. 1996). To prove a violation of the FCRA, Ms. Ford must establish a prima facie case of discrimination by a preponderance of the evidence. See Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17, 22 (Fla. 3d DCA 2009). A preponderance of the evidence is defined as "the greater weight of the evidence," or evidence that "more likely than not" tends to prove a certain proposition. S. Fla. Water Mgmt. Dist. v. RLI Live Oak, LLC, 139 So. 3d 869, 872 (Fla. 2014).

VII. Preliminary Timeliness Issues Raised by Lincare

58. Lincare raises two preliminary issues: (1) the Petition for Relief was untimely because it was not received by the Commission within 35 days of the date of determination; and (2) the claim is time-barred because the Complaint was not filed within 365 days of any actionable conduct.

A. Ms. Ford's Petition for Relief

59. Lincare moved to dismiss the Petition as untimely because the Commission did not receive it within 35 days of the date of determination. The undersigned denied that motion on November 28, 2018, but Lincare renewed the issue in its PRO.[3/]

60. If, like here, the Commission determines there is no reasonable cause to believe that a discriminatory practice has occurred, the aggrieved person may seek further review by either "filing a civil action or requesting an administrative hearing." § 760.11(4), Fla. Stat. The deadline for requesting an administrative hearing is as follows:

> The aggrieved person may request an administrative hearing under ss. 120.569 and 120.57, but any such request must be made within 35 days of the date of determination of reasonable cause . . . . If the aggrieved person does not request an administrative hearing within the 35 days, the claim will be barred.

§ 760.11(7), Fla. Stat. The statute expressly requires that a "request" for hearing be "made" within 35 days of the "date of determination."

61. The "date of determination" starts the 35-day clock but is not defined in the statute. Applying the plain meaning of the language as is required, Joshua, 768 So. 2d at 435-36, the "date of determination" is the date on which the Commission issues its decision. See Fla. Admin. Code R. 60Y-3.003(28) (defining "Date of determination" as "the date the Determination was signed by the Executive Director or his or her designee").[4/]

62. As to when a "request" for hearing is timely "made," the statute also does not define those terms but they too should be given their plain meaning. Joshua, 768 So. 2d at 435-36. "Request" is defined as "the act or an instance of asking for something." Merriam-Webster Dictionary, available at https://www.merriam-webster.com/dictionary/request (last visited Apr. 30, 2019). "Make" is defined as follows: "to begin or seem to begin (an action)" or "to set in order." Id., available at https://www.merriam-webster.com/dictionary/make (last visited Apr. 30, 2019). To make a request in this context, thus, is to begin the act of asking for a hearing, which is accomplished by placing the request in the mail——the same means by which the Commission notified Ms. Ford of its no cause determination.

63. Conversely, the term "file" is defined as follows: "To deliver a legal document to the court clerk or record custodian for placement in the official record." Black's Law Dictionary at 642 (7th ed. 1999). By definition, filing accomplishes the delivery of the document to the recipient, whereas making a request merely initiates the act of asking for something. Given those definitions, it makes perfect sense why a filing deadline would be based on receipt and a requesting deadline would be based on the postmark date it is mailed.

64. The Legislature's use of "request" and "file" in distinct contexts in this section cannot be ignored. Compare § 760.11(1), Fla. Stat. (using "file" to refer to a complaint) and id. at § 760.11(4) (using "filing" to refer to a "civil action" and "requesting" to refer to an "administrative hearing"), with id. at § 760.11(7) (noting that an "aggrieved person may request an administrative hearing"). Doing so "is strong evidence that different meanings were intended." State v. Bradford, 787 So. 2d 811, 819 (Fla. 2001) (quoting State v. Mark Marks, P.A., 698 So. 2d 533, 540 (Fla. 1997)); see also Cason v. Fla. Dep't of Mgmt. Servs., 944 So. 2d 306, 315 (Fla. 2006) (noting that the Legislature knows how to express itself and accomplish its intent through the statutory language).

65. Notwithstanding, Lincare argues that the Legislature intended to impose a filing deadline on requests for hearing. Lincare's arguments miss the mark.

66. First, although section 760.11(7) notes that a request for hearing is made under section 120.569, that section indicates that a petition for hearing "shall be filed with the agency." This language seems to direct where the request should be made, as opposed to legislative intent to turn a deadline to request a hearing into a filing deadline based on receipt.

67. Second, although Florida Administrative Code Rule 60Y-5.008(1) notes that the complainant "may file a Petition for Relief . . . within 35 days of the Date of Determination," that language is directly contrary to the terms "made" and "request" used in section 760.11(7). Although the Commission is authorized in section 760.06 to promulgate rules to implement the FCRA, a rule must yield when it contravenes the clear and unambiguous language of a statute. Willette v. Air Prods., 700 So. 2d 397, 399 (Fla. 1st DCA 1997). Indeed, "an administrative law judge may not base agency action that determine the substantial interests of a party on . . . a rule that is an invalid exercise of delegated legislative authority." § 120.57(1)(e)1., Fla. Stat.

68. Third, for the same reasons, the fact that Florida Administrative Code Rules 28-106.104 and 28-106.111 provide that

a Petition for Relief is filed and that filing is complete upon receipt by the agency does not change the result. Indeed, the FCRA provision imposes distinct requirements for requesting a hearing that are contrary to the uniform rules: (1) enlarging the amount of time (from 21 days to 35 days); (2) altering the date from which the clock runs (from date of receipt of agency action to the date of determination by the Commission); and (3) changing the method for electing a hearing (from filing a petition that is complete on receipt to making a request that, as plainly defined above, is complete upon mailing). Compare Fla. Admin. Code R. 28-106.104 & 28-106.111 with § 760.11(7), Fla. Stat. That is why Lincare's reliance on Cann is misguided, as it was based on the filing requirement in rule 28-106.111. Cann, 813 So. 2d at 239-40.[5/] Section 760.11(7) controls. Willette, 700 So. 2d at 399.

69. Applying this analysis here, Ms. Ford's 35-day deadline started to run on July 13, 2018, the date of determination, and expired 35 days later on August 17, 2018. Because she postmarked her request for hearing on August 16, 2018, her Petition was timely. Not only does this construction comport with the plain statutory language, it is also the most appropriate result given the FCRA's remedial purposes and the liberal construction due to be given to ensure access to a

tribunal for formal proceedings to consider the relief Ms. Ford seeks.

B. Ms. Ford's Complaint

70. Lincare also asserts that Ms. Ford's claim is time-barred because she filed her Complaint with the Commission beyond the statutory deadline.

71. A person aggrieved by a violation of the FCRA "may file a complaint with the [C]ommission within 365 days of the alleged violation." § 760.11(1), Fla. Stat. A hostile work environment claim is timely if "all acts which constitute the claim are part of the same unlawful employment practice and at least one act falls within the time period." AMTRAK v. Morgan, 536 U.S. 101, 115, 117, 122 (2002) (noting that harassment "occurs over a series of days or perhaps years" and "[s]uch claims are based on the cumulative affect of individual acts").

72. However, an employee who fails to prove that the acts occurring within the limitations period are sexual in nature, gender-related, and sufficiently severe and pervasive, cannot recover. See Menefee v. Montgomery Cnty. Bd. of Educ., 137 Fed. App'x 232, 233-34 (11th Cir. 2005) (finding claim time-barred where plaintiff failed to prove that timely acts were of a "sexual or gender-related nature"); see also Jones v. Allstate Ins. Co., 707 Fed. App'x 641, 647 (11th Cir. 2017) (holding that untimely acts cannot be considered where accused was transferred

and timely acts were insufficiently severe and pervasive); Mahgoub v. Miami Dade Cmty. College, Case No. 05-11520, 2006 U.S. App. LEXIS 9291, at *2-3 (11th Cir. Apr. 13, 2006) (finding claim time-barred where plaintiff alleged only conclusory allegations that acts occurred within limitations period); Gupta v. Fla. Bd. of Regents, 212 F.3d 571, 583 (11th Cir. 2000) (noting that acts "that do not relate to the sex of the actor or of the offended party (the plaintiff), are not counted").

73. Ms. Ford's claim is essentially based on eight specified incidents from December 2015 through March 2017, along with conclusory allegations as to other unspecified comments and innuendo during this period. There is little doubt that the specific incidents from December 2015 through June 2016, if they occurred as alleged, were sexual in nature and gender-related. In each of these incidents, Mr. Tripp allegedly professed his feelings for Ms. Ford and sought a sexual relationship with her.[6/]

74. However, the alleged incidents from October 2016 until January 2017 (e.g., Mr. Tripp's efforts to learn and practice Hebrew with Ms. Ford, contemplating a move to a new neighborhood, and expressing sadness about Ms. Ford leaving Lincare) bear a tenuous relationship to both the prior incidents and sexually harassing behavior in general. Consistent with the findings above and based on the credible weight of the evidence,

Ms. Ford failed to establish that this alleged conduct was sexual in nature and gender-related; thus, it cannot be considered as part of the same harassment claim. Mahgoub, 2006 U.S. App. LEXIS 9291, at *2-3; Menefee, 137 Fed. Appx. at 233-234; Gupta, 212 F.3d at 583. The same is true for Mr. Tripp's March 2017 vacation to the same resort as Ms. Ford, which occurred two months after Ms. Ford left Lincare. Cf. Hipp v. Liberty Nat'l Life Ins. Co., 252 F.3d 1208, 1222 n.12 (11th Cir. 2001) (holding that termination of employment starts clock running on statute of limitations).

75. Because the last incident that arguably could be sexual harassment occurred in June 2016 and Ms. Ford did not file her Complaint until January 2018, her claim is time-barred.

VIII. Sexual Harassment Claim on the Merits

76. Even if Ms. Ford's claim was timely, she fails to establish a prima facie case of sexual harassment. To do so, she must prove by a preponderance of the evidence that: (1) she belongs to a protected group; (2) she was subjected to unwelcome harassment; (3) the harassment was based on her status in a protected group; (4) the harassment was sufficiently severe or pervasive to alter the terms and conditions of her employment and create a discriminatorily abusive working environment; and (5) Lincare is directly or vicariously liable for such

environment. Miller, 277 F.3d at 1275; accord Maldonado v. Publix Supermarkets, 939 So. 2d 290, 293-94 (Fla. 4th DCA 2006).

77. Elements (1), (2), and (3) require little explanation. If the preponderance of the evidence establishes that Ms. Ford belongs to a protected group and is subjected to unwelcome sexual harassment at work because she is a woman (i.e., "that but for the fact of her sex, she would not have been the object of harassment"), the first three elements are met. Mendoza v. Borden, Inc., 195 F.3d 1238, 1248 (11th Cir. 1999) (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)); see also Gupta, 212 F.3d at 583 (noting that "conduct must be of a sexual or gender-related nature" to be considered, whereas acts "that do not relate to the sex . . . of the offended party (the plaintiff), are not counted").

78. The parties agree that Ms. Ford is a woman and, accordingly, belongs to a protected group.

79. However, consistent with the findings of fact and credibility determinations above, Ms. Ford failed to prove by the greater weight of the evidence that she was sexually harassed. Even if all things credibility-wise were equal (they are not), the undersigned would be constrained to find that Ms. Ford failed to prove elements (2) and (3) by a preponderance of the evidence.

80. Ms. Ford also failed to establish that the harassment was severe or pervasive. "[A] sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so." Faragher v. Boca Raton, 524 U.S. 775, 787 (1998); accord Mendoza, 195 F.3d at 1246. In evaluating objective severity, courts consider all of the circumstances, such as the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Faragher, 524 U.S. at 787-88 (quoting Harris, 510 U.S. at 23). The "conduct must be extreme to amount to a change in the terms and conditions of employment." Faragher, 524 U.S. at 788; see also Gupta, 212 F.3d at 586 (noting that cases with sufficiently pervasive and severe harassment "have involved patterns or allegations of extensive, long lasting, unredressed, and uninhibited sexual threats or conduct").

81. Although Ms. Ford testified that Mr. Tripp's conduct was severe, pervasive, and altered the terms and conditions of her employment, the weight of the credible evidence fails to establish that her belief was objectively and subjectively reasonable. As already discussed, she both cultivated and maintained a close personal friendship with Mr. Tripp throughout

this period. The incidents testified to with any specificity occurred sporadically over 15 months, several were not sexual in nature or gender-related, and, importantly, none involved physical threats, physical contact, or threats of retaliation. More egregious conduct has been found insufficiently severe and pervasive. See, e.g., Weiss v. Coca-Cola Bottling Co., 990 F. 2d 333, 337 (7th Cir. 1993) (holding that asking employee out, calling her "dumb blond," putting his hand on her shoulder several times, placing "I love you" signs in her work area, and trying to kiss her at work and elsewhere were not severe and pervasive).[7/]

82. Moreover, Ms. Ford fails to prove that the conduct objectively and subjectively altered the terms of her employment. Although Ms. Ford testified that she attempted to avoid Mr. Tripp and that the work environment was the worst of her career, she acted for much of the time as if nothing was wrong. The record is devoid of evidence that anyone at work noticed changes in her behavior or mood. And, importantly, her performance by all accounts was unaffected given that she quarterbacked several deals to closing during this period, including the largest acquisition and divestiture of her career.

83. Lastly, even if Ms. Ford had sufficiently proven the first four elements of her claim, the weight of the credible evidence does not support a basis to hold Lincare liable. The

analysis of this element hinges on whether the harassment is perpetrated by a coworker or a supervisor.[8/]

84. Based on the weight of the credible evidence, Mr. Tripp was Ms. Ford's coworker not her supervisor.[9/] A supervisor is one "empowered . . . to take tangible employment actions against the victim, i.e., to effect a 'significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.'" Vance v. Ball State Univ., 570 U.S. 421, 429 (2013) (quoting Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998)).

85. The evidence here is undisputed that Lincare did not empower Mr. Tripp to take any tangible employment action against Ms. Ford. He did not hire her and had no authority to fire her, discipline her, promote her, transfer her, or otherwise control her compensation. In fact, they were equal on the corporate chart and both answered directly to the CEO.[10/]

86. Because Mr. Tripp was Ms. Ford's coworker, Lincare can only be liable if Ms. Ford proves "actual knowledge on the part of the employer or conduct sufficiently severe and pervasive as to constitute constructive knowledge to the employer." Miller, 277 F.3d at 1275; accord Maldonado, 939 So. 2d at 293-94. It is

undisputed that Lincare had no actual knowledge of the alleged harassment because Ms. Ford never reported it.

87. As to constructive knowledge, that requires an analysis of: "(1) the remoteness of the location of the harassment as compared to the location of management; (2) whether the harassment occurs intermittently over a long period of time; (3) whether the victims were employed on a part-time or full-time basis; and (4) whether there were only a few, discrete instances of harassment." Miller, 277 F.3d at 1278-79 (quoting Allen v. Tyson Foods, Inc., 121 F.3d 642, 647 (11th Cir. 1997)). Where an "employer has 'promulgated an effective and comprehensive' anti-harassment policy that is 'aggressively and thoroughly disseminated' to its employees, an employee's failure to utilize the policy's grievance process will prevent constructive knowledge of such harassment from adhering to the employer." Miller, 277 F.3d at 1279 (quoting Farley v. Am. Cast Iron Pipe Co., 115 F.3d 1548, 1554 (11th Cir. 1997)).

88. Ms. Ford's failure to report precludes a finding that Lincare had constructive knowledge given its widely-disseminated, comprehensive anti-harassment policy, of which Ms. Ford acknowledged receipt and strategically chose not to avail herself. And, given that the alleged harassing behavior occurred in private, happened sporadically over a 15-month

period, amounted to eight isolated incidents (testified to with specificity), and was insufficiently pervasive and severe, Ms. Ford failed to establish constructive knowledge.

89. Because Ms. Ford has not proven by a preponderance of the evidence that Lincare had actual or constructive knowledge of the alleged harassment, this element also fails.

90. In sum, based on the weight of the credible evidence, the undersigned concludes that Ms. Ford's sexual harassment claim is untimely and, regardless, fails on the merits.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations issue a final order finding that Petitioner, Sharon Ford, failed to timely file her Complaint and, regardless, that Ms. Ford failed to establish that Respondent, Lincare, Inc., committed an unlawful employment practice against her, both of which warrant dismissal of her Petition for Relief.

DONE AND ENTERED this 17th day of May, 2019, in Tallahassee, Leon County, Florida.

ANDREW D. MANKO
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of May, 2019.

ENDNOTES

[1/] All statutory references are to Florida Statutes (2018), unless otherwise noted.

[2/] The undersigned acknowledges that the parties dispute the exact measure for how the director of acquisition's bonuses should be calculated, which is the subject of a separate lawsuit between Ms. Ford and Lincare.

[3/] The Commission also apparently rejected Lincare's argument. Had it deemed the Petition untimely, it was required to dismiss it as time-barred, which it did not do. § 760.11(7), Fla. Stat.

[4/] Contrary to Ms. Ford's argument, the date of determination does not include any additional days for mailing. See Fla. Admin. Code R. 28-106.106 ("[n]o additional time shall be added when the period of time begins pursuant to a type of notice described in Rule 28-106.111, F.A.C."); see also Watson v. Broward Cty., 937 So. 2d 1264, 1266 (Fla. 5th DCA 2006) (rejecting argument that party requesting administrative hearing had additional five days to mail their request under rule 28-106.103); Cann v. Dep't of Child. & Fams., 813 So. 2d 237, 238-39 (Fla. 2d DCA 2002) (same).

[5/] Lincare's other cases also do not support its argument. In one case, FCHR ultimately rejected the ALJ's findings because it concluded that a petition postmarked by the 35-day deadline was timely. See Clardy v. Dep't of Corr., Case No. 06-2815, 2007 Fla. Div. Adm. Hear. LEXIS 148 (Fla. DOAH Mar. 7, 2007) (acknowledging that FCHR rescinded its prior dismissal order based on fact that petition was postmarked "within the 35-day time period for filing the Petition For Relief"). In several others, the Commission ultimately either rejected an ALJ's findings as to untimeliness or found it unnecessary to consider them because it agreed with the ALJ's decision on the merits. See Itule v. Muffler Corp., Case No. 99-4035, 2000 Fla. Div. Adm. Hear. LEXIS 5576 (Fla. DOAH Mar. 10, 2000), rejected in part, Case No. 01-54 (Fla. FCHR Feb. 13, 2002) (dismissing petition on merits consistent with ALJ's findings, but rejecting ALJ's conclusion that petition was untimely); Hernandez v. Transp. Electronics, Inc., Case No. 99-3576, 2000 Fla. Div. Adm. Hear. LEXIS 5573 (Fla. DOAH June 6, 2000), rejected, Case No. 01-55 (Fla. FCHR Dec. 5, 2001) (rejecting ALJ's findings as to untimeliness and remanding to DOAH for hearing on the merits); see also Tabak v. Office Depot, Case No. 04-1451, 2004 Fla. Div. Adm. Hear. LEXIS 1982 (Fla. DOAH Oct. 1, 2004), adopted on merits, Case No. 04-159 (Fla. FCHR Dec. 27, 2004) (dismissing petition on merits consistent with ALJ's findings and noting that, as such, it was "unnecessary to either accept or reject the [ALJ's] conclusion that the Petition for Relief was not timely filed" because it was not received until 38 days after the date of determination"). And, in another case, the ALJ acknowledged that "this is not a case where the Petition was mailed prior to the deadline, but was not timely received by the FCHR due to a delay in the delivery of the mail," which is exactly the scenario here. See Carr v. S. Wine & Spirits, Case No. 16-2919 (Fla. DOAH June 20, 2016) (recommending dismissal of petition where it was dated and faxed on the 36th day).

[6/] An analysis of whether these incidents are sufficiently severe and pervasive so as to be actionable is included below, but will be assumed for purposes of addressing whether the claim is time-barred.

[7/] See also Maldonado, 939 So. 2d at 292-97 (finding five incidents over almost two years, involving touching the coworker's buttocks twice, saying she "was going to be his," and twice biting his lip in a way the coworker thought was sexual, was insufficiently severe or pervasive); Mendoza, 195 F.3d at 1248 (finding four instances involving sexually-charged comments, physical contact of rubbing hips and touching the

employee's shoulder, and constant following and staring by the accused were insufficiently severe); Sprague v. Thorn Ams., Inc., 129 F.3d 1355, 1366 (10th Cir. 1997) (noting that five incidents over a 16-month period, involving sexual and disparaging comments, including looking down the employee's dress, were too sporadic to constitute severe and pervasive harassment); Baskerville v. Culligan Int'l Co., 50 F.3d 428, 430 (7th Cir. 1995) (holding that nine instances of repeated references to the plaintiff as "tilly" and "pretty girl" and one instance of simulated masturbation over a seven-month period were insufficiently severe or pervasive).

[8/] The undersigned rejects Ms. Ford's contention that Mr. Tripp was Lincare's proxy, subjecting it to automatic liability for his conduct. Evaluating whether an individual is a proxy is a factual question. Ackel v. Nat'l Commc'ns., Inc., 339 F.3d 376, 384 (5th Cir. 2003).

To be a proxy or alter ego, the "official must be high enough in the management hierarchy that his actions 'speak' for the employer." Helm v. Kansas, 656 F.3d 1277, 1286 (10th Cir. 2011) (citing Faragher, 524 U.S. at 789). "Only individuals with exceptional authority and control within an organization can meet that standard," Helm, 656 F.3d at 1286, such as corporate officers and directors, owners, and other high-level managers with authority over corporate affairs and who can bind the company. See Townsend v. Benjamin Enters., 679 F.3d 41, 53-55 (2d Cir. 2012) (holding that jury could reasonably conclude that accused was the corporation's alter ego where he was the only vice president of the company, exercised significant control over corporate affairs, was second-in-command only to his wife, who was the president, and was a corporate shareholder); Ackel, 339 F.3d at 384 (reversing summary judgment in company's favor based, in part, on trial court's erroneous conclusion that president, general manager, and director who was in charge of all business was not company's proxy); Mallinson-Montague v. Pocrnick, 224 F.3d 1224, 1233 (10th Cir. 2000) (holding that alter ego instruction was proper where accused was the senior vice president of consumer lending for the company, only answered to the president who in turn only answered to the board of directors, "had the authority to hire and fire employees in the consumer lending department, was the ultimate supervisor of all employees in the department, and had the ultimate authority to disapprove all consumer loans").

Conversely, middle-level managers who do not control corporate affairs, are not authorized to bind or speak for the

company, and are subordinate to higher-level superiors cannot be deemed proxies. See Johnson v. West, 218 F.3d 725, 730 (7th Cir. 2000) (holding that the chief of police at a VA hospital was not the VA's proxy because he had at least two supervisors in the hospital and others within the VA and "was not a high-level manager whose actions 'spoke' for the VA"); Torres v. Pisano, 116 F.3d 625, 634-635 & n.11 (2d Cir. 1997) (holding that middle-level manager of company was not alter ego because he was not in a sufficiently high position "in the management hierarchy of the company for his actions to be imputed automatically to the employer"); see also Helm, 656 F.3d at 1286 (holding that a judge was not the proxy of the state because judges "do not exercise a sufficient degree of control over the myriad operations of the state," they "operate in a limited sphere (the judicial branch) and perform a limited role (interpreting and applying the law that is enacted by other state officials)," "their decisions are subject to review and reversal by 'higher ranking' state judges," and do not "speak for and represent the state").

Based on the weight of the credible evidence, Ms. Ford failed to establish that Mr. Tripp is Lincare's proxy. Mr. Tripp was neither a corporate officer nor a director. He had no authority to make business decisions on behalf of Lincare or otherwise control the policies and procedures of any department beyond legal. He had no ownership or stock interest in Lincare. He also reported directly to the CEO and received instructions from both the COO and CFO (similar to Ms. Ford); he did not supervise or control any other manager, including Ms. Ford and the employee relations director. The fact that Mr. Tripp's office was in the "C-Suite" along with the CEO, COO, and CFO, does not render him a proxy, as the offices of several other managers who were not corporate officers were in the C-Suite and the only reason Ms. Ford's office was not there was due to a lack of space.

[9/] Ms. Ford's claims to the contrary are insufficient. Although Ms. Ford testified that Mr. Tripp assigned her tasks to do, she assigned him tasks to do, as well. She admittedly quarterbacked the deals and ensured that everyone, including Mr. Tripp, stayed on task to ensure the deals closed, which included him performing legal tasks requested by her. Further, Mr. Tripp's status as a supervisor or coworker is not dependent on how Ms. Ford viewed him or where his office was located, but rather whether Lincare empowered him to take tangible employment action against her, which it did not do.

[10/] Even if Mr. Tripp was deemed a supervisor, Ms. Ford still failed to establish Lincare's liability. Where the perpetrator is "a supervisor with immediate (or successively higher) authority" over the victim, the "employer is subject to vicarious liability." Faragher, 524 U.S. at 807. "The employer will be strictly liable for the hostile environment if the supervisor takes tangible employment action against the victim," Miller, 277 F.3d at 1278; accord Vance, 570 U.S. at 424. But where no such tangible employment action is taken, like here, vicarious liability is subject to an affirmative defense:

> The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense.

Faragher, 524 U.S. at 807-08; accord Miller, 277 F.3d at 1278. This defense must be established by the defendant by a preponderance of the evidence. Faragher, 524 U.S. at 807-08.

Based on the weight of the credible evidence, Lincare sufficiently establishes the Faragher defense. As previously discussed, Lincare disseminated a detailed anti-harassment policy to all of its employees and required them to acknowledge receipt. The policy explicitly prohibited all forms of sexual harassment at work and detailed the reporting procedure,

requiring anyone who had even a concern about harassment to report to a particular HR director/manager. The policy also detailed how reports were investigated and prohibited retaliation of any kind, rendering it a "serious violation of this policy" that could subject the retaliator to immediate discharge. And Ms. Adams, the head of employee relations and human resources services, testified at length how seriously Lincare took the policy and its investigations, including details as to prior reports and how they were handled.

Despite being aware of the policy and signing the forms in 2004, 2006, 2007, 2008, 2010, 2014, and June 2015, Ms. Ford unreasonably failed to report the claim as required. She said she did not report the harassment because Mr. Tripp could have killed one of the two deals on which they were working, thereby reducing her compensation. This claim is both (1) speculative, in that Ms. Ford presented no evidence that Mr. Tripp had ever done this in the past; and (2) unpersuasive, in that Mr. Tripp credibly testified that the CEO did not seek his advice in this manner and he neither would nor could make that happen. It also bears emphasizing that, by killing a deal that financially benefitted Lincare to fulfill a personal vendetta against Ms. Ford, Mr. Tripp would be shooting himself in the foot (as his discretionary bonuses were tied to Lincare's success), risking his reputation with the CEO, and likely breaching his ethical and fiduciary duties to the company. Second, Ms. Ford claimed that she was concerned the CEO would fire her for reporting the harassment because she liked Mr. Tripp. However, the weight of the credible evidence established that Lincare took such allegations seriously and, of course, it could have been liable for retaliating against Ms. Ford in this manner. And, the credibility of her testimony in this regard is further undermined given that the deals closed over five months before she left Lincare, she never reported the allegations during that period, and, in fact, waited to inform Lincare until a mediation of a wage-dispute lawsuit against Lincare a year after she left the company.

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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.