STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

VADIM TROSHKIN,

Petitioner,

vs. Case No. 18-6315

ARMOR CORRECTIONAL HEALTH
SERVICES, INC.,

Respondent.
_______________________________/

RECOMMENDED ORDER

A formal hearing was conducted in this case on April 25, 2019, via video teleconference from locations in Tallahassee and Jacksonville, Florida, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Vadim Troshkin, pro se
400 East Bay Street, Apartment 1204
Jacksonville, Florida 32202

For Respondent: Patricia M. Rego Chapman, Esquire
Dean, Ringers, Morgan & Lawton, P.A.
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STATEMENT OF THE ISSUE

The issue is whether Respondent, Armor Correctional Health Service, Inc. ("Armor"), discriminated against Petitioner, Vadim Troshkin ("Petitioner" or "Mr. Troshkin"), based upon his age,

national origin, race, or sex, in violation of section 760.10, Florida Statutes (2015).[1/]

PRELIMINARY STATEMENT

On or about May 22, 2018, Petitioner filed with the Florida Commission on Human Relations ("FCHR") an Employment Charge of Discrimination against Armor. Petitioner alleged that he had been discriminated against pursuant to chapter 760, Title VII of the Federal Civil Rights Act, and/or the Federal Age Discrimination Act, based upon race, sex, and/or age,[2/] as follows:

> I am a Caucasian male over the age of 40. I was discriminated against for these reasons. I applied for an ARNP position with this company on March 22, 2018. Ms. Selena McClain expressed on several occasions that White people are evil, especially the ones from Europe. I had my background security and fingerprints done on March 22, 2018. I found out that the results came back on March 23, 2018. Ms. McClain did not tell me my results [came] back. On April 10, 2018, Ms. McClain sent me an email stating that I would not be hired because I had a history of violations/infractions. I never had any felonies or misdemeanors. Infractions cannot be a reason to deny me employment.

The FCHR investigated Petitioner's Charge. In a letter dated November 16, 2018, the FCHR issued its determination that there was no reasonable cause to believe that an unlawful practice had occurred. The letter stated as follows, in relevant part:

> Complainant applied for a position as a nurse practitioner at Respondent's healthcare service. Complainant stated that he interviewed for this position, but he was not hired. When he asked why he was not hired, Respondent's administrative assistant told Complainant that Respondent could not hire him because he did not pass the background screening. Complainant admitted that he had an infraction on his record. Respondent explained that it provides healthcare services to correctional institutions and correctional institutions require their employees and contractors to pass a background screening. This is because passing a background screening is a prerequisite for obtaining clearance to enter the premises of a correctional institution. Thus, not being able to enter Respondent's clients' correctional facilities rendered Complainant unqualified to work for Respondent. Complainant alleged that Respondent failed to hire him based on his race, sex, and age. Complainant fails to prove a prima facie case because the evidence does not show that Complainant was qualified for the nurse practitioner position.

On November 29, 2018, Petitioner timely filed a Petition for Relief with the FCHR. On November 30, 2018, the FCHR referred the case to DOAH. The case was initially assigned to Administrative Law Judge Suzanne Van Wyk and scheduled for hearing on April 25, 2019. Due to a scheduling conflict, the case was re-assigned to Administrative Law Judge Lawrence P. Stevenson, who conducted the hearing on the scheduled date.

At the hearing, Petitioner testified on his own behalf. He offered no exhibits into evidence. Armor presented the

testimony of its former Regional Manager Vicki Hailey, and its former Administrative Assistant Selena McClain. Respondent's Exhibits 3 through 6 were entered into evidence.

No transcript of the hearing was ordered by either party. Respondent timely submitted a Proposed Recommended Order on May 6, 2019. Petitioner filed no post-hearing written submission.

FINDINGS OF FACT

1. Armor is an employer as that term is defined in section 760.02(7). Armor provides healthcare services in correctional facilities. Armor has a contract with the Jacksonville Sheriff's Office ("JSO") to provide healthcare services in correctional facilities in Duval County.

2. Petitioner is a Caucasian male over the age of 40. His country of origin is Ukraine.

3. Sometime in February 2018, Mr. Troshkin applied for an Advanced Registered Nurse Practitioner ("ARNP") position with Armor at the detention facility adjacent to the JSO headquarters on Bay Street in downtown Jacksonville. There is no dispute that Mr. Troshkin is a licensed ARNP in the State of Florida.

4. At the time Mr. Troshkin applied for the job, Vicky Hailey was Armor's regional manager overseeing the Jacksonville detention facility. Ms. Hailey's duties included interviewing and hiring applicants to work in the facility.

5. On March 21, 2018, Ms. Hailey conducted an in-person interview with Mr. Troshkin at a job fair in Jacksonville. Ms. Hailey was impressed by Mr. Troshkin and made him a job offer on the spot. Mr. Troshkin was given a "provisional offer" to work for a salary of $87,000 per year. The offer was conditioned on Mr. Troshkin's passing a JSO background screening. JSO mandates this security clearance for any Armor employee working at the Jacksonville detention facility.

6. Mr. Troshkin accepted the provisional offer. Mr. Troshkin testified that he was especially eager to obtain this position because he lived in a condominium directly across the street from the JSO headquarters and the detention facility. He believed that his proximity to the workplace would be an advantage to him and to his employer.

7. When Ms. Hailey made the provisional offer to Mr. Troshkin on March 21, 2018, she instructed him to contact Selena McClain, an administrative assistant at the Jacksonville detention facility, to schedule a time to be fingerprinted for the background screening.

8. Ms. McClain met Mr. Troshkin at the Jacksonville detention facility on March 22, 2018, and escorted him to the JSO headquarters for fingerprinting.

9. Ms. McClain's job duties included coordinating the fingerprinting of applicants and corresponding with the JSO as

to the status of the background screenings. Ms. McClain had no authority to make decisions regarding Armor's hiring process.

10. Background screenings are usually completed within 48 hours of fingerprinting. If issues come up during the screening, the process can take as long as a month. No employee of Armor has any control over the time taken by the JSO to complete its background screening process.

11. On March 26, 2018, Sergeant Shaun Taylor of the JSO sent an email to Ms. McClain stating as follows:

> Vadim Troshkin's background results came back with criminal history that needs to be reviewed by FDLE.[3/] I submitted the paperwork and I will let you know if they request anything further.

12. On the afternoon of April 10, 2018, Ms. McClain received another email from Sgt. Taylor. This email read as follows:

> FDLE just called about Vadim Troshkin and stated that they are having problems getting records from San Diego. They asked me to reach out to see if he has any documentation that shows the disposition and severity for each of his charges. Thanks.

13. Also on April 10, 2018, Ms. McClain had a discussion with Ms. Hailey as to delays in the background checks for Mr. Troshkin and two other candidates for employment. Both of the other candidates were female.

14. Ms. Hailey made the decision to stop the screening process as to these three candidates and to withdraw their provisional job offers. Ms. McClain had no role in the decision, aside from providing information to Ms. Hailey.

15. Ms. Hailey directed Ms. McClain to inform Sgt. Taylor that the JSO could stop the background screening process as to these three candidates. Ms. McClain sent Sgt. Taylor an email to that effect at 3:19 p.m., on April 10, 2018, a little more than 20 minutes after Sgt. Taylor's email to her about the problems FDLE was having in obtaining records for Mr. Troshkin.

16. At the hearing, Ms. Hailey testified that she needed to fill the ARNP vacancy at the Jacksonville detention facility as soon as possible. She had no way of knowing how long Mr. Troshkin's background screening would take or whether it would result in a security clearance. Ms. Hailey had other qualified candidates who had already passed their background screenings, so she made the decision to withdraw the offer to Mr. Troshkin and give the ARNP job to one of the other candidates. Because of the JSO's requirement that Armor employees pass a background screening, Mr. Troshkin was technically not qualified for the ARNP position at the time Ms. Hailey needed to fill it.

17. Mr. Troshkin offered no evidence that any other applicant whose background screening was taking longer than

expected, and whose position Armor deemed critical to fill, was treated differently than he was.

18. Ms. Hailey testified that her reasoning was the same as to the two female candidates whose offers were withdrawn. She stated that withdrawing offers because of problems or delays with the background screening process was not uncommon.

19. On April 10, 2018, at 3:59 p.m., Ms. McClain sent Mr. Troshkin, via email, a letter on behalf of Armor that read as follows:

> Dear Vadim,
>
> We regret to inform you that you failed to pass the Jail's security clearance. Therefore, Armor is unable to extend an offer of employment.
>
> As always we wish you well in your future employment endeavors.

20. Ms. McClain testified that this letter was generated via a template. She chose from a menu the language that most closely applied to Mr. Troshkin's situation. Unfortunately, the language chosen from the menu left Mr. Troshkin with the understandable impression that he had failed the background screening, when in reality the screening had never been completed.

21. Mr. Troshkin phoned Ms. McClain, who told him that his background screening report had not been received by Armor and

therefore the company had decided to move on to another job candidate.

22. Mr. Troshkin was perplexed. He testified that he had no felony or even misdemeanor convictions on his record. His only problem with law enforcement had been an "unpleasant incident" in California, which he referred to as an "infraction." He stated that he had been unlawfully arrested but that the incident had resulted in no criminal conviction. The case had been closed and sealed. Mr. Troshkin declined to offer any more details about the California incident.

23. Mr. Troshkin began thinking about his dealings with Armor. Ms. Hailey and the other persons he met during the interview process had been friendly and positive.

24. Ms. McClain, however, had been difficult. At the outset of the fingerprinting process on March 22, 2018, the JSO's fingerprint machine was not functioning properly. Mr. Troshkin and Ms. McClain were forced to make small talk for about an hour while the machine was being repaired.

25. Mr. Troshkin testified that things were not going badly until he mentioned that he was a supporter of President Trump. Ms. McClain, who is African American, castigated him, wondering aloud why "you people" come here and support President Trump. In the context of the conversation, Mr. Troshkin took "you people" to mean white immigrants from Eastern Europe.

26. Looking back at how events had transpired, Mr. Troshkin convinced himself that Ms. McClain was behind his rejection by Armor. He testified that he contacted an unidentified person with the FBI who told him that his background screening results had been sent to the JSO on the day after he was fingerprinted. Therefore, Ms. McClain must have done something to prevent the results from reaching Armor, or have lied about the results not reaching the JSO.

27. Mr. Troshkin's vague reference to his contact in the FBI cannot be credited. Also, Ms. McClain was in fact simply acting as a conduit, passing on information that Sgt. Taylor had provided to her, though Mr. Troshkin did not know that at the time.

28. Armor's role in the background screening process is entirely passive. The Armor employees who testified at the hearing did not know how JSO performs the background screenings or which databases the JSO consults during the screenings. JSO notifies Armor of any delays in the process and, ultimately, whether or not the applicant passes. Armor is not notified as to the reasons why an applicant fails a background screening. Armor is not given a report by the JSO reflecting the results of a background screening.

29. Mr. Troshkin began sending emails to Ms. Hailey and other Armor employees.[4/] The first email was sent on April 16,

2018, to Ms. Hailey and Jackie Mattina, an Armor employee who had participated in Mr. Troshkin's interview at the job fair. The email stated that he had contacted "the Florida FBI background check up," and the person he spoke with told him that he had been "cleared" on March 23, 2018. He stated that he could not understand why Ms. McClain "keeps saying that they never received any report and I do not pass that background check up."

30. Later on the same date, Mr. Troshkin sent another email to Ms. Mattina, complaining about the drug dealing that went on near his apartment, "right in front of sheriff office." He stated that the area was "infested with drug dealers" who "give handshakes to cops sitting right there. But it is me with my infraction 'disturbance of peace' is the real threat to the whole justice system and society."

31. On April 18, 2018, Mr. Troshkin sent another email to Ms. Mattina that stated as follows:

> Good afternoon,
>
> I am still in disbelief that Mrs. McClain ruined my career in jail. It is right in front of my building. I would cover any shift you need coverage. And I am a good guy, no drugs, exercise daily 2 hours, spend 3 hours daily studying and reviewing material. Mrs. McClain windows probably facing my condo pool. If she changes her mind I am right there at the pool. She just need to open window and waive her hand.

> I looked through the requirement for the position and it says not to have felonies. I have only infraction. 6 years ago. Next year it will not even show in my background check up.
>
> Still crying, Vadim Troshkin

32. At some point in this time frame, Mr. Troshkin sent a series of messages to Ms. McClain's private Facebook account. The messages read as follows:

> [S]o you decided my fate not to have this job, even if I don't have any felonies or misdemeanors. Pure racism and discrimination. I qualify for any federal job.
>
> I am a good person and good nurse practitioner. I am just tired when some prejudiced people discriminate against hard-working immigrants like me.
>
> [D]o you realize how many times cops fabricate complete lies and destroy lives of many people. Do you realize that according to statistics 20% inmates are in jail by fabricated charges. Maybe it is time to stop being a hypocrite and playing righteous as cops can fabricate anything on anybody including you or your family, friends etc.
>
> You do not have any idea how much I needed that job and I was going to give 200% of myself into this job. No, you just threw my opportunity away. And completely unfair and even illegally.
>
> As an immigrant from ex-Soviet union I experience discrimination mostly on daily basis. And that incident happened only because red-neck cop fabricated all. She, it was she tortured me for 6 hours. I will never forget her happy eyes when she was

> watching being in horrible pain. She fabricated all of it.
>
> [B]ut I forgot you are so righteous, almost saint.

33. On April 22, 2018, Mr. Troshkin came to JSO headquarters and asked to speak with Ms. McClain. He testified that the person at the desk phoned Ms. McClain and that he could hear Ms. McClain screaming over the phone. Mr. Troshkin testified that he could hear Ms. McClain calling him a "criminal" and directing the JSO personnel to either evict or arrest him.

34. Ms. McClain credibly testified that she felt threatened when Mr. Troshkin contacted her via her private Facebook account and she reported the contact to Ms. Hailey, who in turn contacted Armor's legal counsel. In a letter dated April 18, 2018, Armor's attorneys conveyed the company's request that Mr. Troshkin cease and desist his communications to Armor's employees. Mr. Troshkin complied with the attorneys' request.

35. Mr. Troshkin testified that he had no complaints about Ms. Hailey or the manner in which he was interviewed and given a job offer. He testified that he never felt that Ms. Hailey harbored any discriminatory intent towards him or ever discriminated against him. Mr. Troshkin testified that the only individual at Armor who discriminated against him was Selena McClain.

36. Ms. McClain credibly testified she had no discriminatory animus towards Mr. Troshkin. She credibly denied that her initial conversation with Mr. Troshkin included any disparaging remarks about his race or national origin. She credibly denied screaming at a JSO employee over the phone that Mr. Troshkin should be arrested. She testified that she did not know his country of origin.

37. As found above, Ms. McClain's only role in this matter was to pass information from Sgt. Taylor to Ms. Hailey. The decision not to proceed with hiring Mr. Troshkin was made by Ms. Hailey alone and was based on Sgt. Taylor's information, not on any misinformation allegedly provided by Ms. McClain.

38. In summary, Petitioner offered no credible evidence that he was discriminated against on the basis of his age, national origin, race, or sex.

39. Petitioner offered no credible evidence that he was qualified for the position, given that a mandatory condition for hiring Petitioner was that he receive a security clearance to work in the JSO's Jacksonville detention facility.

40. Petitioner offered no credible evidence disputing the legitimate, non-discriminatory reasons given by Armor for his termination.

41. Petitioner offered no credible evidence that Armor's stated reasons for not hiring Petitioner were a pretext for

discrimination based on Petitioner's age, national origin, race, or sex.

CONCLUSIONS OF LAW

42. The Division of Administrative Hearings has jurisdiction of the subject matter and of the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

43. The Florida Civil Rights Act of 1992 (the "Florida Civil Rights Act" or the "Act"), chapter 760, prohibits discrimination in the workplace.

44. Section 760.10 states the following, in relevant part:

> (1) It is an unlawful employment practice for an employer:
>
> (a) 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, national origin, age, handicap, or marital status.

45. Armor is an "employer" as defined in section 760.02(7), which provides the following:

> (7) "Employer" means any person employing 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such a person.

46. Florida courts have determined that federal case law applies to claims arising under the Florida Civil Rights Act, and as such, the United States Supreme Court's model for

employment discrimination cases set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), applies to claims arising under section 760.10, absent direct evidence of discrimination.[5/] See Harper v. Blockbuster Entm't Corp., 139 F.3d 1385, 1387 (11th Cir. 1998); Paraohao v. Bankers Club, Inc., 225 F. Supp. 2d 1353, 1361 (S.D. Fla. 2002); Fla. State Univ. v. Sondel, 685 So. 2d 923, 925 n.1 (Fla. 1st DCA 1996); Fla. Dep't of Cmty. Aff. v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991).

47. Under the McDonnell analysis, in employment discrimination cases, Petitioner has the burden of establishing by a preponderance of evidence a prima facie case of unlawful discrimination. If the prima facie case is established, the burden shifts to the employer to rebut this preliminary showing by producing evidence that the adverse action was taken for some legitimate, non-discriminatory reason. If the employer rebuts the prima facie case, the burden shifts back to Petitioner to show by a preponderance of evidence that the employer's offered reasons for its adverse employment decision were pretextual. See Texas Dep't of Cmty. Aff. v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981).

48. In order to prove a prima facie case of unlawful employment discrimination under chapter 760, Petitioner must establish that: (1) he is a member of the protected group;

(2) he was subject to adverse employment action; (3) Armor treated similarly situated employees outside of his protected classifications more favorably; and (4) Petitioner was qualified to do the job and/or was performing his job at a level that met the employer's legitimate expectations. See, e.g., Jiles v. United Parcel Serv., Inc., 360 Fed. Appx. 61, 64 (11th Cir. 2010); Burke-Fowler v. Orange Cnty., 447 F.3d 1319, 1323 (11th Cir. 2006); Knight v. Baptist Hosp. of Miami, Inc., 330 F.3d 1313, 1316 (11th Cir. 2003); Williams v. Vitro Serv. Corp., 144 F.3d 1438, 1441 (11th Cir. 1998); McKenzie v. EAP Mgmt. Corp., 40 F. Supp. 2d 1369, 1374-75 (S.D. Fla. 1999).

49. Petitioner has failed to prove a prima facie case of unlawful employment discrimination.

50. Petitioner established that he is a member of a protected group, in that he is a Caucasian male over the age of 40 and is of Ukrainian national origin.

51. Petitioner established that he was subject to an adverse employment action, in that he was given a provisional job offer by Armor that was later withdrawn.

52. Petitioner offered no credible evidence to support an inference that he was discriminated against because of his age, national origin, race, or sex.

53. Petitioner failed to demonstrate that he possessed all of the necessary qualifications to work as an ARNP for Armor at

the Jacksonville detention facility. An essential requirement of the job was that Petitioner obtain a security clearance from the JSO. Petitioner was unable to obtain that clearance in a timely fashion.

54. Petitioner offered no evidence to establish that any similarly situated employee was treated differently by Armor.[6/] The evidence shows that Ms. Hailey made the same decision with respect to two female applicants on the same date she decided to withdraw the offer to Petitioner. Ms. Hailey testified that she routinely made the same decision with respect to applicants whose background check did not clear in a reasonable amount of time.

55. Armor presented adequate evidence of legitimate, non-discriminatory reasons for withdrawing its offer to Petitioner. Ms. Hailey, on behalf of Armor, initially made Petitioner a provisional offer conditioned upon his passing a background screening. Only those Armor employees who have obtained a security clearance are allowed by the JSO to work in the Jacksonville detention facility. More than two weeks after Ms. Hailey made the provisional offer, Petitioner's background screening was still in process. Ms. Hailey determined that she could not hold the ARNP position open any longer and decided to fill the position with another qualified applicant who had cleared the background screening process. As of the date the

successful candidate was hired, Petitioner was not qualified for the position.

56. Because Armor articulated a legitimate, nondiscriminatory reason for not hiring Petitioner, the burden shifts back to Petitioner to produce evidence that Armor's stated reason is a pretext for discrimination. To establish pretext, Petitioner must "cast sufficient doubt" on Armor's proffered nondiscriminatory reasons "to permit a reasonable factfinder to conclude that the [employer's] proffered legitimate reasons were not what actually motivated its conduct." Murphree v. Comm'r, 644 Fed. Appx. 962, 968 (11th Cir. 2016)(quoting Combs v. Plantation Patterns, 106 F.3d 1519, 1538 (11th Cir. 1997)).

57. If the proffered reason is one that might motivate a reasonable employer, "an employee must meet that reason head on and rebut it, and the employee cannot succeed by simply quarreling with the wisdom of that reason." Chapman v. AI Transp., 229 F.3d 1012, 1030 (11th Cir. 2000) (en banc). Pretext must be established with "concrete evidence in the form of specific facts" showing that the proffered reason was pretext; "mere conclusory allegations and assertions" are insufficient. Bryant v. Jones, 575 F.3d 1281, 1308 (11th Cir. 2009)(quoting Earley v. Champion Int'l Corp., 907 F.2d 1077, 1081 (11th Cir. 1990)). A reason cannot be a pretext for

discrimination “unless it is shown both that the reason was false, and that discrimination was the real reason.” FSU v. Sondel, 685 So. 2d 923, 927 (Fla. 1st DCA 1996) (quoting St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 515 (1993)).

58. Petitioner failed to produce any evidence tending to prove that Armor’s stated reasons for withdrawing its offer were pretextual. Petitioner’s suspicions, without more, are insufficient to establish that Ms. Hailey and Ms. McClain’s testimony regarding the hiring process was false, and that Ms. Hailey’s reason for withdrawing the job offer was due to Petitioner’s age, national origin, race, or sex.

59. It is not the place of the court or tribunal to determine who is better qualified for a job, or to sit in judgment of an employer’s selection. “[D]isparities 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 for the job in question.” Cooper v. S. Co., 390 F.3d 695, 732 (11th. Cir. 2004)(quoting Lee v. GTE Fla., Inc., 226 F.3d 1249, 1254 (11th Cir. 2000)).

60. A court’s role is not to sit as a “super-personnel department” to re-examine a company’s business decisions. The court does not ask whether the employer selected the most qualified candidate, but whether the selection was based on an

unlawful motive. Denney v. City of Albany, 247 F.3d 1172, 1188 (11th Cir. 2001).

61. Petitioner presented no evidence beyond his own speculations to prove Ms. McClain's sub rosa machinations were the real reason he did not get the ARNP job at the Jacksonville detention facility. In the absence of evidence that Armor's action was discriminatory, the undersigned is constrained to defer to the company's business decision.

62. In summary, Petitioner failed to establish that Armor's reason for withdrawing its provisional job offer was for any other reason than the business reasons proffered by Armor.

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 Armor Correctional Health Services, Inc., did not commit any unlawful employment practices, and dismissing the Petition for Relief filed in this case.

DONE AND ENTERED this 31st day of May, 2019, in Tallahassee, Leon County, Florida.

LAWRENCE P. STEVENSON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of May, 2019.

ENDNOTES

[1/] Citations shall be to Florida Statutes (2018) unless otherwise specified. Section 760.10 has been unchanged since 1992, save for a 2015 amendment adding pregnancy to the list of classifications protected from discriminatory employment practices. Ch. 2015-68, § 6, Laws of Fla.

[2/] It is unclear when "national origin" became part of Petitioner's allegations.

[3/] "FDLE" is an acronym for the Florida Department of Law Enforcement.

[4/] Mr. Troshkin's emails and Facebook messages are reproduced verbatim, without correction.

[5/] "Direct evidence is 'evidence, which if believed, proves existence of fact in issue without inference or presumption.'" Rollins v. TechSouth, Inc., 833 F.2d 1525, 1528 n.6 (11th Cir. 1987) (quoting Black's Law Dictionary 413 (5th ed. 1979)). "Only the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of a protected classification, constitute direct evidence." Kilpatrick v. Tyson Foods, Inc., 268 Fed. Appx. 860, 862 (11th Cir.

2008)(citation omitted). Direct testimony that a defendant acted with a discriminatory or retaliatory motive, if credited by the finder of fact, would change the legal standard "dramatically" from the McDonnell test. Bell v. Birmingham Linen Serv., 715 F.2d 1552, 1557 (11th Cir. 1983). Petitioner offered no credible evidence that would satisfy the stringent standard of direct evidence of discrimination.

6/ As to the question of disparate treatment, the applicable standard was set forth in Maniccia v. Brown, 171 F.3d 1364, 1368-1369 (11th Cir. 1999):

> "In determining whether employees are similarly situated for purposes of establishing a prima facie case, it is necessary to consider whether the employees are involved in or accused of the same or similar conduct and are disciplined in different ways." Jones v. Bessemer Carraway Med. Ctr., 137 F.3d 1306, 1311 (11th Cir.), opinion modified by 151 F.3d 1321 (1998) (quoting Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997)). "The most important factors in the disciplinary context are the nature of the offenses committed and the nature of the punishments imposed." Id. (internal quotations and citations omitted). We require that the quantity and quality of the comparator's misconduct be nearly identical to prevent courts from second-guessing employers' reasonable decisions and confusing apples with oranges. See Dartmouth Review v. Dartmouth College, 889 F.2d 13, 19 (1st Cir.1989) ("Exact correlation is neither likely nor necessary, but the cases must be fair congeners. In other words, apples should be compared to apples."). (Emphasis added).

The Eleventh Circuit has questioned the "nearly identical" standard enunciated in Maniccia, but has in recent years reaffirmed its adherence to it. See, e.g., Brown v. Jacobs Eng'g, Inc., 572 Fed. Appx. 750, 751 (11th Cir. 2014); Escarra v. Regions Bank, 353 Fed. Appx. 401, 404 (11th Cir. 2009); Burke-Fowler, 447 F.3d at 1323 n.2.

In any event, Petitioner in the instant case failed to provide any persuasive evidence to establish disparate treatment.

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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.