STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RODOLFO GONZALEZ,

Petitioner,

vs. Case No. 20-4261

FLORIDA DEPARTMENT OF HEALTH,
DIVISION OF DISABILITY
DETERMINATIONS,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on December 2, 2020, via Zoom teleconference, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge ("ALJ") of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner: Rodolfo Gonzalez, pro se
2000 Lohman Court
Tallahassee, Florida 32311

For Respondent Louise Wilhite-St. Laurent, General Counsel
Virginia Edwards, Esquire
Department of Health
4052 Bald Cypress Way, Bin A-02
Tallahassee, Florida 32399

STATEMENT OF THE ISSUE

The issue is whether Respondent discriminated against Petitioner based on his race, national origin, age, sex, and/or disability in violation of section 760.10, Florida Statutes.[1]

PRELIMINARY STATEMENT

On February 21, 2020, Petitioner, Rodolfo Gonzalez ("Petitioner" or "Mr. Gonzalez"), filed with the Florida Commission on Human Relations ("FCHR") an Employment Complaint of Discrimination against the Department of Health, Division of Disability Determinations ("Respondent" or "the Division"). Mr. Gonzalez alleged that he had been discriminated against pursuant to chapter 760; Title VII of the Federal Civil Rights Act; the Age Discrimination in Employment Act; and/or the Americans with Disabilities Act, based upon his race, national origin, age, sex, and/or disability/handicap.

The FCHR was unable to conciliate or make a reasonable determination within 180 days of Mr. Gonzalez filing the complaint, and Mr. Gonzalez opted to request a formal administrative hearing pursuant to sections 760.11(4) and (8).

On September 21, 2020, the FCHR referred the case to DOAH for the assignment of an ALJ and the conduct of a formal hearing. The final hearing was scheduled for December 2, 2020, on which date it was convened and completed.

[1] Citations shall be to Florida Statutes (2020) 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.

At the hearing, Mr. Gonzalez testified on his own behalf. Petitioner's Composite Exhibit A was admitted without objection. The Division presented the testimony of Kimberly Jackson, an Operations Service Manager with the Division; Sarah Evans, a Program Administrator with the Division; Brian Garber, Director of the Division; Robin Rega, a Labor Relations Consultant for the Department of Health; Brenshinita McGee, Equal Opportunity Office Manager for the Department of Health; and Scarlett Buchanan, Human Relations Manager for the Department of Health. The Division's Exhibits A through J and L through EE were admitted into evidence without objection.

The two-volume Transcript of the final hearing was filed with DOAH on January 4, 2021. Respondent timely filed its Proposed Recommended Order on January 14, 2021. Petitioner did not file a proposed recommended order.

FINDINGS OF FACT

Based on the evidence adduced at hearing, and the record as a whole, the following Findings of Fact are made:

PARTIES

1. The Division is an employer as that term is defined in section 760.02(7).

2. Mr. Gonzalez is a white Cuban male older than 40 years old. Out of respect for Mr. Gonzalez's privacy, the Division stipulated that Mr. Gonzalez suffers from a disability or handicap without requiring him to disclose its nature at the hearing.

3. Mr. Gonzalez has worked for the Division in Tallahassee since April 3, 2015. Mr. Gonzalez was initially hired in an Other Personal Services ("OPS") capacity as an Operations Analyst I. On June 3, 2016, Mr. Gonzalez received a Career Service appointment to the same position, Operations Analyst I, which remains his position at the Division. Mr. Gonzalez is a switchboard operator.

OCTOBER 24, 2019, AND ITS AFTERMATH

4. While Mr. Gonzalez's complaint broadened over time, the triggering event to his conflict with the Division was a meeting with his immediate supervisor, Operations Service Manager Kimberly Jackson, and several coworkers on the morning of October 24, 2019.

5. Early on the morning of October 24, 2019, Mr. Gonzalez phoned Ms. Jackson to ask if he could take some time off work that morning. Mr. Gonzalez explained that his daughter was having her sick dog put to sleep and that he wanted to be with her because the situation was very emotional. During this conversation, Ms. Jackson told Mr. Gonzalez that she was calling a meeting with all of the switchboard operators later that morning. She left it up to Mr. Gonzalez whether he wanted to miss the meeting.

6. Mr. Gonzalez testified that Ms. Jackson's manner of giving him the option not to attend the meeting was threatening. He testified that she said, "Well, if you want to play it that way." He took her message to be that he had better not miss the meeting. Mr. Gonzalez came into work and attended the meeting.

7. Ms. Jackson denied that she said "if you want to play it that way" or anything of the sort. She testified that she told Mr. Gonzalez that he could go be with his daughter. Ms. Jackson was aware that another of her subordinates would also be absent that morning. She planned to discuss the meeting topics with that employee later. She testified that it would not have been a problem to include Mr. Gonzalez in that discussion.

8. At 7:41 a.m. on October 24, 2019, Ms. Jackson sent out a memorandum informing her subordinates of the meeting to be held at 9:00 a.m. The memorandum went out after Ms. Jackson and Mr. Gonzalez spoke on the phone. The timing led Mr. Gonzalez to allege that Ms. Jackson had called the meeting in response to his request for leave, apparently from some malicious desire to prevent him from being with his daughter.

9. Ms. Jackson testified that she had planned to call the meeting before she spoke to Mr. Gonzalez on the phone. The purpose of the meeting was to remind staff of certain office procedures, such as the importance of arriving on time so that the switchboard could begin accepting calls promptly at 8:00 a.m., and the prohibition on excessive personal cell phone use. Ms. Jackson stated that she had no reason for wanting to keep Mr. Gonzalez away from his family.

10. Mr. Gonzalez testified that the meeting was short, no more than five minutes. He sat quietly and listened to Ms. Jackson. When she was finished, he raised his hand to ask a question. Ms. Jackson continually interrupted, making it impossible for him to ask his question. Mr. Gonzalez felt embarrassed and demeaned in front of his fellow employees, but denied ever responding aggressively or in an unprofessional manner. Ms. Jackson gave a vague answer to his question. When he attempted to ask a second question, Ms. Jackson shut down the meeting.

11. Ms. Jackson's version of the meeting was that Mr. Gonzalez was very unprofessional. He was rude, aggressive, and interruptive. He did not wait for Ms. Jackson to finish before he began peppering her with questions. Mr. Gonzalez constantly asked her to point to agency rules or written policies to support the directives she was giving. Ms. Jackson tried to explain that these were just office procedures that any supervisor can establish, but Mr. Gonzalez would not be satisfied. At one point, he pointed his finger at Ms. Jackson and said, "Ma'am, I listened to you. Now you're going to listen to me." Ms. Jackson's version of events at the meeting is the more credible.

12. Ms. Jackson testified that two newly hired employees were present and she was concerned they would come away with the impression that this was how she conducted meetings.

13. Ms. Jackson testified that Mr. Gonzalez's behavior at the meeting prompted her to contact her direct superior, Program Administrator Sarah

Evans, to discuss the matter. Ms. Evans decided to informally investigate what happened at the meeting.

14. First, Ms. Evans attempted to phone Mr. Gonzalez to get his version. When she was unable to reach him by phone, Ms. Evans sent an email to Mr. Gonzalez asking him to call her. Ms. Evans then proceeded to contact the other employees who were at the meeting.

15. One employee, Tania Membreno, told Ms. Evans that she preferred not to get involved in the matter. Two other employees, Adam Wiman and Stacey Macon, confirmed Ms. Jackson's version of events. Mr. Wiman told Ms. Evans that the meeting had been "awkward" and that Mr. Gonzalez was rude to Ms. Jackson, continually interrupting her. Mr. Macon told Ms. Evans that he felt uncomfortable during the meeting because Mr. Gonzalez was unprofessional and rude to Ms. Jackson.

16. When Ms. Evans eventually reached Mr. Gonzalez by phone, he refused to give her any information about the meeting without a union representative and Robin Rega, a Department of Health Labor Relations Consultant, present. Mr. Gonzalez hung up on Ms. Evans.

17. Ms. Evans and Ms. Jackson prepared a "supervisor counseling memorandum" to be presented to Mr. Gonzalez because of his behavior at the October 24, 2019, meeting. On October 31, 2019, Ms. Evans and Ms. Jackson met with Mr. Gonzalez and explained that they were providing him with the memorandum as a reminder to remain professional and courteous in the office. Mr. Gonzalez reacted by stating that he was never unprofessional. He attempted to veer the conversation off onto a discussion of another employee whom he believed was unprofessional. Mr. Gonzalez refused to sign the memorandum, though Ms. Evans explained that his signature would only indicate that he had received the document, not that he agreed with its contents. Mr. Gonzalez did agree to take a copy of the memorandum before he left the meeting.

18. The supervisor counseling memorandum was not made part of Mr. Gonzalez's employment record and did not constitute adverse employment action or disciplinary action against Mr. Gonzalez. It was merely a reminder to Mr. Gonzalez of the behavior and deportment expected of Division employees.

19. The Department of Health's personnel policy defines "counseling" as "[a] discussion between a supervisor and an employee that identifies a problem, clarifies expectations and consequences, and provides direction for the resolution of the problem." The Department of Health's personnel policy does not treat counseling as disciplinary action. Meetings held by supervisors to counsel employees are not considered investigatory interviews, and employees covered by a collective bargaining agreement do not have the right to union representation during counseling meetings.

THE GRIEVANCE AND EMPLOYMENT COMPLAINT OF DISCRIMINATION

20. The supervisor counseling memorandum gave Mr. Gonzalez 60 days to respond in writing, if he wished. Mr. Gonzalez decided to file a formal Career Service employee grievance pursuant to section 110.227(4), Florida Statutes. On November 4, 2019, Mr. Gonzalez obtained a grievance form and a copy of the Department of Health's employee grievance policy from Ms. Rega. On November 12, 2019, Mr. Gonzalez forwarded his completed Career Service employee grievance form, with attached exhibits, to Ms. Jackson via email, with copies to Ms. Evans, Ms. Rega, Mr. Gonzalez's union representative, and a representative of the FCHR.

21. On its face, Mr. Gonzalez's grievance complained of "discrimination of age, gender, ethnic [sic]." The six-page narrative attached to the grievance gave Mr. Gonzalez's version of the events of October 24, 2019, and the subsequent supervisor counseling memorandum.

22. The narrative also alleged that Ms. Jackson had arranged the furniture in Mr. Gonzalez's office in a way that aggravated his

claustrophobia, then refused to allow him to move the furniture. He alleged that Ms. Jackson would not approve his request to take annual leave over the Christmas holidays. He alleged that Ms. Jackson had wrongly asserted that she possessed the authority to deny Mr. Gonzalez's Family Medical Leave Act ("FMLA") leave requests. He alleged that the Division had unfairly cut his pay when he moved from OPS to Career Service. Finally, Mr. Gonzalez alleged that persons unknown were sabotaging his efforts to obtain other jobs within the Department of Health. Specifically, he believed he was being denied a veteran's preference in his applications for other positions in the agency.[2]

23. Mr. Gonzalez's narrative did not explain how any of the actions of which he complained constituted age, gender, or ethnic discrimination, aside from the fact that Kimberly Jackson is a black female. The only solution requested by Mr. Gonzalez in his grievance was for individuals in the Division to "Quit harassment, stalking, and scrutiny; Treatment like other employees; Get my original starting pay, and 10% for violating veterans preference."

24. The Department of Health's grievance policy and section 110.227(4) specifically exclude discrimination claims from the Career Service grievance process. Discrimination claims are routed to the agency's Equal Opportunity Office. On that jurisdictional basis, Ms. Jackson denied the grievance on November 18, 2019.

25. Brenshinita McGee, Manager of the Department of Health's Equal Opportunity Office, testified that her office investigated the allegations contained in Mr. Gonzalez's grievance. However, before an investigative memorandum could be completed, Mr. Gonzalez filed an Employment Complaint of Discrimination with the FCHR. This action changed the Equal

[2] Mr. Gonzalez's narrative also included allegations that a Division employee was stalking him and that he was under intense surveillance by his superiors following the issuance of the supervisor guidance memorandum. Mr. Gonzalez presented no testimony or other evidence regarding these allegations, which are therefore found to have been abandoned.

Opportunity Office's role from investigating an internal complaint to responding on behalf of the Department of Health to an external complaint.

26. On February 21, 2020, Mr. Gonzalez filed his Employment Complaint of Discrimination with the FCHR, attaching a copy of his grievance and all supporting information that had previously been sent to Ms. Jackson.

27. On February 28, 2020, Ms. McGee sent an email to Kendricka Howard, an Investigation Manager with the FCHR, requesting clarification as to the issues associated with Mr. Gonzalez's case. Ms. Howard responded: "The issues associated with this case are: Discipline, Failure to Accommodate, Failure to Hire, Failure to Promote, Terms/Conditions and Wages."

DISCIPLINE

28. The only record evidence of anything resembling a disciplinary action against Mr. Gonzalez was the supervisor counseling memorandum. As found above, a supervisor counseling memorandum is not disciplinary action. There is no evidence that Mr. Gonzalez has ever been disciplined by the Division. Mr. Gonzalez suffered no adverse employment action as a result of the supervisor counseling memorandum or the meeting with his supervisors on October 31, 2019.

FAILURE TO ACCOMMODATE

29. The Division stipulated that Mr. Gonzalez suffers from a disability or handicap. However, no evidence was presented to show that Mr. Gonzalez ever requested an accommodation from the Department of Health's Equal Opportunity Office or that the Department of Health failed to accommodate him. The closest thing to an accommodation claim was Mr. Gonzalez's allegation that Ms. Jackson would not allow him to move the furniture in his office to alleviate his claustrophobia. At the hearing, Ms. Jackson reasonably explained that all Division office employees are prohibited from moving their

own furniture for reasons of personal safety. If employees wish to move their furniture, they must submit a request to the maintenance department. Ms. Jackson had no objection to Mr. Gonzalez reordering the furniture in his office.

FAILURE TO HIRE OR PROMOTE

30. Mr. Gonzalez alleges that he was denied the veteran's preference mandated by section 295.07, Florida Statutes, and Florida Administrative Code Chapter 55A-7, when applying for other positions within the Department of Health. In support of this claim, Mr. Gonzalez referenced applying for three positions between February and March 2018.[3]

31. In February 2018, Mr. Gonzalez applied for a Regulatory Specialist II position in the Department of Health's Office of Medical Marijuana Use. At the hearing, it was established that the Office of Medical Marijuana Use is separate and distinct from the Division. No one in the Division had any decision making authority or advisory role as to who was chosen for the Office of Medical Marijuana Use position. There was no evidence that the Division committed any adverse employment action or discriminated against Mr. Gonzalez with respect to his application for the Office of Medical Marijuana Use position.

32. In March 2018, Mr. Gonzalez applied for a Medical Disability Examiner position with the Division. In accordance with statutory and rule requirements, Mr. Gonzalez received an additional five points as a veteran's preference, but failed to score well enough on the work sample portion of the interview to warrant an in-person interview. There was no evidence that the Division committed any adverse employment action or discriminated against

[3] In all of these applications, Mr. Gonzalez declined to provide information as to his gender, race, ethnicity, or age. As to these job applications, Mr. Gonzalez did not claim unfair treatment on any basis other than the veteran's preference.

Mr. Gonzalez with respect to his application for the Medical Disability Examiner position.

33. In March 2018, Mr. Gonzalez applied for a Management Review Specialist position with the Division. The notice for the position specifically stated: "Current employment with the Division of Disability Determinations processing federal Social Security claims is required." At all times during his employment with the Department of Health, Mr. Gonzalez has been a switchboard operator for the Division. He did not meet the minimum qualifications for the Management Review Specialist position. There was no evidence that the Division committed any adverse employment action or discriminated against Mr. Gonzalez with respect to his application for the Management Review Specialist Position.

TERMS, CONDITIONS, AND WAGES

34. Mr. Gonzalez's reduction in salary after his voluntary transition from OPS to Career Service was neither adverse employment action nor discriminatory. This reduction in salary was consistent with the Division's practice for all employees. The Director of the Division, Brian Garber, testified that OPS switchboard operators are paid slightly more than Career Service operators to compensate for the facts that OPS employees do not get paid time off for holidays, do not accrue sick leave or annual leave, and do not participate in the State of Florida's retirement system. When an OPS operator transitions into Career Service, his or her salary is reduced, but other benefits are obtained that offset the salary reduction.

35. Mr. Gonzalez did not dispute that he received benefits when he transferred from OPS to Career Service, including paid leave, paid holidays, discounted insurance options, and retirement benefits. Mr. Garber testified that he specifically requested that Mr. Gonzalez be paid more than other starting switchboard operators because he speaks Spanish. There was no evidence that the Division committed any adverse employment action or

discriminated against Mr. Gonzalez with respect to his wages as a Career Service employee.

36. Mr. Gonzalez claimed that a vacation request was not approved "until [he] had to take measures to HR." On October 16, 2019, Mr. Gonzalez submitted a request for annual leave the week of Christmas 2019. Ms. Jackson approved his request on November 18, 2019, six days after Mr. Gonzalez filed his complaint with the FCHR.

37. At the hearing, Ms. Jackson explained the delay in approving Mr. Gonzalez's leave. As the Christmas and New Year's holidays approach, Ms. Jackson asks all of her subordinates to submit their leave requests by a date certain so that she can arrange for all positions to be covered during that period. She did not approve Mr. Gonzalez's request until all of her other subordinates had submitted their requests.

38. Ms. Jackson also noted that approval of Mr. Gonzalez's particular request was contingent upon his accumulating sufficient leave hours before the requested vacation time arrived. In any event, there was no evidence that Mr. Gonzalez was treated disparately or discriminatorily as to his leave requests. The record established that Ms. Jackson has approved every request Mr. Gonzalez has made to use annual leave.

39. Mr. Gonzalez claimed disparate and discriminatory treatment in how his workload is determined, alleging that he was given much more work than the other switchboard operators. The credible evidence reflected that Mr. Gonzalez's workload is distributed evenly with other switchboard operators.

40. Mr. Gonzalez's claim about Ms. Jackson's interfering with his right to take FMLA leave was premised on nothing more than a misunderstanding. On August 21, 2019, at 2:53 p.m., Mr. Gonzalez sent an email to Ms. Jackson stating that he would be absent from work on September 6, 2019, due to a medical procedure. The text of the email did not mention FMLA, though the subject line did read, "Medical Procedure/FMLA." Ms. Jackson overlooked the

subject line and responded to the text, inquiring whether Mr. Gonzalez had submitted a leave request for the date in question. When Mr. Gonzalez responded in the negative, Ms. Jackson nonetheless approved the leave, still not realizing it was FMLA leave and her approval was not required. The approval was given at 3:08 p.m., on August 21, 2019, 15 minutes after Mr. Gonzalez sent his initial email. At the hearing, Ms. Jackson acknowledged her error. Mr. Gonzalez made no showing that he suffered any actual harm from Ms. Jackson's mistake.

41. Mr. Gonzalez alleged that he has been "given a difficult time when [he tries] to make up [his] time from doctor's appointments." This allegation was not supported by record evidence. Ms. Jackson employs a request and approval process for all employees who wish to "adjust their time," i.e., make modifications from the normal 8:00 a.m. to 5:00 p.m. schedule. The record evidence shows instances in which Mr. Gonzalez properly requested to adjust his time and other instances in which he made time adjustments without prior approval from Ms. Jackson. In neither situation was Mr. Gonzalez "given a difficult time" by Ms. Jackson. To the contrary, the evidence indicates great forbearance by Ms. Jackson in allowing Mr. Gonzalez to adjust his time for doctor's appointments.

42. Ms. Jackson has no control over the availability of overtime hours. When she is notified by her superiors that overtime is available in her section, Ms. Jackson makes it available equally to all of her subordinate employees. The record indicates that Mr. Gonzalez has both accepted and declined the offers of overtime. There was no evidence that Mr. Gonzalez has ever been denied an opportunity to utilize overtime when it was available.

COMPARATOR EMPLOYEES

43. Mr. Gonzalez has not shown that any other employee outside of the protected classes claimed in his FCHR complaint have been treated differently than he has. Mr. Gonzalez actually highlighted the fact that he

and several of his OPS counterparts were treated equally when they moved over to Career Service as a group in 2016. The evidence supports a finding that the policies and procedures implemented and reinforced by Ms. Jackson and her supervisors in the Division apply equally to all employees.

SUMMARY OF FINDINGS

44. In sum, Mr. Gonzalez's complaints bespeak a general dissatisfaction with the decisions of his supervisors, in particular his immediate superior, Ms. Jackson. However, disagreements with those in authority do not support claims of discrimination, particularly where the employee cannot establish that he or she has suffered any adverse effects from the disputed decisions. Mr. Gonzalez failed to establish that he was subjected to any adverse employment action by the Division.

45. Mr. Gonzalez offered no evidence that he was treated differently than any other similarly situated employee.

CONCLUSIONS OF LAW

46. DOAH has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

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

48. 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.

> (b) To limit, segregate, or classify employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities, or adversely affect any individual's status as an employee, because of such individual's race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status.

49. The Division 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.

50. Florida courts have determined that federal case law applies to claims arising under the FCRA, and as such, the United States Supreme Court's model for employment discrimination cases set forth in *McDonnell Douglas Corporation 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. *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).

51. "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)). In *Carter v. City of Miami*, 870 F.2d 578, 582 (11th Cir. 1989), the court stated:

> This Court has held that not every comment concerning a person's age presents direct evidence of discrimination. [*Young v. Gen. Foods Corp.*, 840 F.2d 825, 829 (11th Cir. 1988)]. The *Young* Court made clear that remarks merely referring to characteristics associated with increasing age, or

> facially neutral comments from which a plaintiff has inferred discriminatory intent, are not directly probative of discrimination. *Id*. Rather, courts have found only the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of age, to constitute direct evidence of discrimination.

Petitioner offered no evidence that would satisfy the stringent standard of direct evidence of discrimination. It is not uncommon for a petitioner to have no direct evidence because "direct evidence of intent is often unavailable." *Shealy v. City of Albany*, 89 F.3d 804, 806 (11th Cir. 1996). Accordingly, those who claim to be victims of discrimination "are permitted to establish their case through inferential and circumstantial proof." *Kline v. Tenn. Valley Auth.*, 128 F.3d 337, 348 (6th Cir. 1997).

52. Circumstantial evidence is evidence that is susceptible to more than one reasonable interpretation or inference. *E.E.O.C. v. W. Customer Mgmt. Grp., LLC*, 899 F. Supp. 2d 1241 (N.D. Fla. 2012). In the employment discrimination context, evidence that suggests, but does not dispositively prove, a discriminatory motive is, by definition, circumstantial evidence. *Hawthorne v. Baptist Hosp., Inc.*, 448 Fed.Appx. 965, 967-68 (11th Cir. 2011); *Burrell v. Bd. of Trs. of Ga. Military Coll.*, 125 F.3d 1390, 1393-94 (11th Cir. 1997).

53. 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). "The inquiry into pretext centers on the employer's beliefs, not the employee's beliefs…." *Alvarez v. Royal Atl. Developers, Inc.*, 610 F.3d 1253, 1266 (11th Cir. 2010)(the issue is whether the employer was dissatisfied with the employee for a non-discriminatory reason, not whether that reason was unfair or mistaken).

54. 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 and adverse employment action; (3) the Division 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 Cty.*, 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 Servs. 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).

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

56. Petitioner is a white Cuban male older than 40 years old and suffers from a disability or handicap.

57. Petitioner continues to hold the job of switchboard operator at the Division and is therefore presumed to be performing his job at a level that meets his employer's legitimate expectations.

58. However, Petitioner has failed to establish that he was subject to an adverse employment action or that the Division treated similarly situated employees outside of his protected classifications more favorably.

59. "An employment action is considered 'adverse' only if it results in some tangible, negative effect on the plaintiff's employment." *Lucas v. W.W. Grainger, Inc.*, 257 F.3d 1249, 1261 (11th Cir. 2001). Petitioner is required to

show a serious and material change in terms, conditions, or privileges of employment. *Matias v. Sears Home Improvement Prods.*, 391 Fed. Appx. 782, 785-86 (11th Cir. 2010). A transfer of employment without evidence of loss in salary or tangible benefits is insufficient to support a tangible, negative effect on employment. *Collins v. Miami-Dade Cty.*, 361 F. Supp. 2d 1362 (S.D. Fla. 2005).

60. The evidence failed to establish that Petitioner suffered any tangible negative effect in his employment. No adverse employment action was ever taken against Petitioner. He was promoted into Career Service from OPS, with a higher starting salary due to his ability to speak Spanish. His FMLA rights have been respected by his employer. His leave requests and requests to work, or not work, overtime have been honored. Petitioner's subjective view of his treatment by Ms. Jackson is unsupported by objective facts.

61. A person suffers "disparate treatment" in his or her employment, in violation of Title VII—and, by extension, the FCRA—when he or she is singled out and treated less favorably, on the basis of his or her status as a member of a protected class than other employees who are otherwise similarly situated in all relevant respects. *Johnson v. Great Expressions Dental Ctrs. of Fla., P.A.,* 132 So. 3d 1174, 1176 (Fla. 3d DCA 2014); *Valenzuela v. Globeground N. Am., LLC*, 18 So. 3d 17, 23 (Fla. 3d DCA 2009).

62. It should be noted, however, that in a proceeding under the FCRA, the court is "not in the business of adjudging whether employment decisions are prudent or fair. Instead, [the court's] sole concern is whether unlawful discriminatory animus motivates a challenged employment decision." *Damon v. Fleming Supermarkets of Fla., Inc.*, 196 F.3d 1354, 1361 (11th Cir. 1999). Not everything that makes an employee unhappy is an actionable adverse action for purposes of the FCRA. *Davis v. Town of Lake Park*, 245 F.3d 1232, 1238 (11th Cir. 2001).

63. The evidence failed to establish that any similarly situated employees outside of Petitioner's protected classifications were treated more favorably.

Petitioner offered no named comparators aside from a few of his fellow employees who moved from OPS to Career Service at the same time he did. Petitioner's point was not that these employees had been treated differently from him but that they had all been treated the same in having their salaries reduced.

64. To prevail on a failure to accommodate claim, Petitioner must demonstrate that: (1) he was a qualified individual with a disability; (2) he made a specific request for a reasonable accommodation; and (3) the employer failed to provide the reasonable accommodation, or engage in the requisite interactive process in order to identify a reasonable accommodation. *D'Onofrio v. Costco Wholesale Corp.*, 964 F.3d 1014, 1021 (11th Cir. 2020); *see also* 42 U.S.C. § 12112(b); and *Lucas*, 257 F.3d at 1255 ("An employer unlawfully discriminates against a qualified individual with a disability when the employer fails to provide 'reasonable accommodations' for the disability--unless doing so would impose undue hardship on the employer."). The third prong examines whether, but for Petitioner's disability, he would have been subjected to the alleged discrimination. *Alboniga v. Sch. Bd. of Broward Cty.*, 87 F. Supp. 3d 1319, 1338 (S.D. Fla. 2015); *and Holly v. Clairson Indus., L.L.C.*, 492 F.3d 1247, 1263, n.17 (11th Cir. 2007)(The petitioner "bears the burden of showing not only that [the employer] failed to reasonably accommodate his disability, but that, but for [the employer's] failure to accommodate his disability, he would not have been terminated.").

65. "The duty to provide a reasonable accommodation is not triggered unless a specific demand for an accommodation has been made." *Gaston v. Bellingrath Gardens & Home, Inc.*, 167 F.3d 1361, 1363 (11th Cir. 1999).

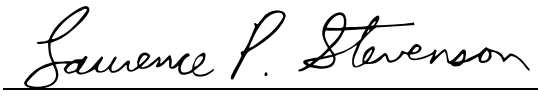
66. The closest thing to an accommodation claim was Petitioner's assertion that he was not allowed to move his furniture despite his claustrophobia. The evidence plainly indicated that the Division had a general and sensible safety prohibition on employees moving their own furniture. Ms. Jackson never said that Petitioner could not request

maintenance to come in and move his furniture for him. There was no credible evidence to support a failure to accommodate claim.

RECOMMENDATION

Based upon 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 the Department of Health, Division of Disability Determinations did not commit any unlawful employment practices and dismissing the Petition for Relief filed in this case.

DONE AND ENTERED this 4th day of February, 2021, in Tallahassee, Leon County, Florida.



LAWRENCE P. STEVENSON
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Filed with the Clerk of the
Division of Administrative Hearings
this 4th day of February, 2021.

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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.