STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MATTHEW P. MATHEWS,

Petitioner,

vs. Case No. 20-4767

LENNOX NATIONAL ACCOUNT SERVICES,

Respondent.
_____/

RECOMMENDED ORDER

An administrative hearing was conducted in this case on March 15 and 16, 2021, via Zoom, before James H. Peterson III, Administrative Law Judge with the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Matthew P. Mathews, pro se
Apartment 305
7940 Front Beach Road
Panama City Beach, Florida 32407

For Respondent: Sherril M. Colombo, Esquire
Littler Mendelson, P.C.
Wells Fargo Center, Suite 2700
333 Southeast Second Avenue
Miami, Florida 33131

STATEMENT OF THE ISSUE

Whether Respondent, Lennox National Account Services (Lennox or Respondent), violated the Florida Civil Rights Act of 1992,[1] by discriminating

[1] Unless otherwise indicated, all references to the Florida Statutes, Florida Administrative Code, and federal laws are to the current versions, which have not substantively changed since the time of the alleged discrimination.

against the employment of Matthew P. Mathews (Petitioner) because of his disability, or in retaliation for his engagement in protected activities.

PRELIMINARY STATEMENT

Petitioner filed an Employment Complaint of Discrimination (Discrimination Complaint) with the Florida Commission on Human Relations (the Commission or FCHR) on April 8, 2020, which was assigned FCHR Case No. 202024568.

After investigating Petitioner's allegations, the Commission's executive director issued a document entitled "Determination: No Reasonable Cause," dated October 5, 2020, accepting the Commission's Office of General Counsel's recommendation "that it is unlikely that unlawful discrimination occurred in this matter." An accompanying Notice of Determination notified Petitioner of his right to file a Petition for Relief for an administrative proceeding within 35 days of the Notice. On October 25, 2020, Petitioner timely filed a Petition for Relief, and the Commission forwarded the petition to DOAH for the assignment of an administrative law judge to conduct a hearing.

The undersigned was assigned the case and scheduled the administrative hearing to be held January 11, 2021, but that hearing date was continued until March 15, 2021, when the final hearing was held via Zoom conference. During the hearing, Petitioner testified on his own behalf, called Respondent's Human Resources Director Karen Cerrato, Respondent's Safety Director Steve Coe, and Respondent's Panama City Branch Manager Keith Green as witnesses, and offered 21 exhibits received into evidence as Exhibits P-1 through P-7, P-10 through P-19, P-21, P-22, P-24, and P-25, as described in Petitioner's Exhibit List attached as Exhibit A to the Prehearing Stipulation filed in this case on March 11, 2021. Although the exhibit

numbers may differ, all of Petitioner's exhibits identified in the Pre-hearing Stipulation were electronically filed on the docket of this case. Also, at the final hearing, a video file was played. That video file is contained on a flash drive and was received into evidence as Exhibit P-26. Respondent presented its case through expanded cross-examination of Petitioner and his witnesses and offered 32 exhibits received into evidence as Exhibits R-1 through R-11, R-13, R-14, R-17, R-18, R-20, and R-22 through R-37, as described in Respondent's Exhibit List attached as Exhibit B to the Prehearing Stipulation. In addition, by agreement of the parties, the first five docket entries in this case were received into evidence as Joint Exhibits 1 through 5.

The proceedings were recorded and a transcript was ordered. The parties were given 30 days from the filing of the transcript to submit their proposed recommended orders. The four-volume Transcript of the hearing was filed April 28, 2021. On May 26, 2021, the parties filed a Joint Request for Extension of Time to Submit the Post-Hearing Proposed Findings of Fact and Conclusions of Law, which was granted by an Order Granting Extension of Time entered May 26, 2021, giving the parties until June 3, 2021, within which to file their respective Proposed Recommended Orders. Thereafter, the parties filed their Proposed Recommended Orders on June 3, 2021, both of which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Lennox sells, installs, recycles, and maintains commercial heating, ventilation, and air-conditioning equipment for large, national companies. Lennox's services are performed by service technicians assigned to branch offices throughout the United States.

2. Petitioner accepted employment with Lennox as a Level II Service Technician on June 10, 2019.

3. Petitioner's Discrimination Complaint alleges:

> Complainant (CP), began his employment with Respondent in 06/2019 and holds the position of Level II Tech. CP was subjected to retaliation, different terms and conditions of employment and was held to a different standard because of his disability and Respondent failed to accommodate him. CP sustained a job-related injury on 02/11/2020, CP reported the injury to his Manager Keith Green on 02/12/2020. CP told Keith he needed to see a doctor; Keith pressed CP to do more work. CP told Keith in a loud, clear voice that he needed to see the doctor. CP saw Dr. Bernier and sent Keith a copy of his doctor slip. On 02/24/2020, CP went to Lennox NAS corporate for a week of classroom training and went on tour with all other students. CP met all corporate leadership and they all saw he was injured. Steve Coe (Safety Director) pulled CP from class to a closed-door meeting with Chris and began to yell at him and berate CP about his injury. CP was asked why he didn't report the injury, but CP told them he did. CP asked Steve Coe to consider his credentials and allow him the opportunity to do other work, CP was dismissed. On 03/04/2020, Respondent retaliated against CP by retrieving the equipment provided to him such as, his work van, company cell phone and he no longer had access to his work email. CP contacted Joanna Amy to inquiry why they had taken away his work equipment and why he no longer had access to his work email. Joanna informed CP it was because he had filed for Workman's Comp. CP status is currently unknown, he is not considered terminated and he has not resigned but, is not currently working.

4. During his employment with Lennox, Petitioner was assigned to the Panama City Beach Branch, where he reported to Branch Manager Keith Green. Steve Coe was the assigned safety director at the time.

5. As part of his orientation process for employment with Lennox, Petitioner acknowledged receipt of the company handbook (Handbook). The

Handbook states that Lennox offers reasonable accommodations to qualified, disabled candidates and employees. The Handbook further states that the accommodation process (including work restrictions) is administered by Lennox's office of human resources and must be properly documented. Specifically, section 5.9 of the Handbook entitled "Accommodations," provides:

> The accommodation process (including 'light duty,' work restrictions, etc.), is administered – exclusively – by Human Resources and must be properly documented. If the need for accommodation is not obvious, you will be required to submit medical documentation about your disability and the limitation(s) that you are experiencing. You may also be asked to provide an explanation the workplace barrier(s) that need to be accommodated and a description of the desired accommodation. The forms in question – the 'Healthcare Provider Information Request Form' and the 'Accommodation Request Form,' respectively – are available from Human Resources and will serve as the basis for your interactive discussions with them.

6. During his active employment, Lennox provided Petitioner with access to a company cell phone, email, and fleet work van solely for work-related purposes.

7. In addition to the Handbook, Petitioner acknowledged receiving the NAS Policy & Procedures Booklet, which included the Company Vehicle Use Requirements and the Fleet Safety Policy. That vehicle policy stated, in relevant part:

> **B. <u>Vehicle Use</u>**
> Understand that you will be assigned a Company vehicle to be used to perform your job responsibilities. You will also be allowed to use the vehicle to travel between home and work (i.e. for commuting) …. *You will not … use the vehicle for personal use beyond that which is incidental to your commute to or from work.* (emphasis added).

8. In addition to the use of a company vehicle, Petitioner acknowledged the cell phone agreement wherein he agreed that Lennox was providing him with a cell phone for "business use."

9. Petitioner also acknowledged receipt of the Lennox's code of business conduct (Code of Conduct). The Code of Conduct includes Lennox's policy prohibiting discrimination and/or harassment due to a disability or any other status protected by federal, state, and/or local law. The Code of Conduct includes reporting procedures encouraging reporting of alleged discrimination, harassment, or retaliation.

10. Access to information about Lennox's policies, including the Code of Conduct and reporting procedures, is available to employees online (among other places), and explained through training sessions, new-hire orientation, and company publications and postings.

11. According to Petitioner, on October 24, 2019, while working for Lennox in the Panama City area, he was ordered by Keith Green to pick up a crane pad above his head, and when he did, "he felt something in his knee." Petitioner allegedly spoke to Mr. Green on the phone when Mr. Green sent him to another job and said to Mr. Green, "Will you please be mindful of your tradesman because my knee is hurting."

12. Petitioner testified that the phone call became "hostile" and that he ended up talking to Safety Director Steve Coe, who sent Petitioner to Tallahassee for a four-hour ladder training course. There is no documentation indicating that Petitioner reported the alleged knee injury as an on-the-job injury that day.

13. After that, Petitioner allegedly either aggravated his knee injury, or injured his knee again, while using an "unapproved" ladder on February 11, 2020, at the direction of Mr. Green.

14. On February 13, 2020, Petitioner spoke with Lennox's safety director, Steve Coe, about discomfort with his right knee. When asked by Mr. Coe if he injured his knee at work, Petitioner replied he was going for an MRI and if he

needs surgery, he will report the injury as "work-related"; otherwise, he would handle it with his own insurance. Mr. Coe explained to Petitioner that is not an appropriate way of handling the matter and then outlined the process for reporting work-related injuries. Petitioner did not report the injury as work-related to Mr. Coe or his supervisor, Mr. Green, and he subsequently returned to work to attend a training class.

15. Petitioner requested, and was allowed time off work on February 28, 2020, to attend an MRI appointment for his right knee.

16. On March 2, 2020, Petitioner notified Lennox that he was unable to return to work due to his knee injury. On the same day, Petitioner applied for both short-term disability and workers' compensation. Petitioner's short-term disability claim was handled by Lennox's third-party disability administrator, Sedgwick.

17. The short-term disability notification to Lennox from Sedgwick, which also included Petitioner as a recipient, referenced Petitioner's last day worked as February 27, 2020, and first day of absence as March 2, 2020. The notification further stated that Petitioner would also be evaluated under the Family Medical Leave Act (FMLA) for available coverage.

18. Sedgewick's March 2, 2020, short-term disability notification also informed Petitioner that he may want to apply for a "reasonable accommodation" in addition to other potential benefits, such as unpaid personal leave of absence. The notification further stated that during its review process, Petitioner's absences should be treated as pending, with neither approval nor disapproval under Lennox's attendance policy.

19. Because Petitioner indicated in his short-term disability filing that his knee injury occurred at work, a workers' compensation claim was initiated with Lennox's third-party workers' compensation administrator, ESIS.

20. Because Petitioner was no longer actively working, on March 4, 2020, consistent with company practice and policy, Lennox collected its fleet van that had been issued to Petitioner.

21. Also, since Petitioner had not returned to work or provided a return to work date, Lennox disabled Petitioner's access to the company email since he was no longer at work.

22. Petitioner claims that he was treated differently than another Lennox service technician, Julian Wiles, who allegedly was permitted to retain access to the company portal while on leave. Petitioner's evidence of this was the fact that Mr. Wiles was included in company training emails while on leave.

23. Further evidence indicated, however, that simply because Mr. Wiles was included as a recipient on company emails sent to numerous other employees about training requirements, it did not indicate that Mr. Wiles had access to the portal while on approved leave. Rather, the training email evidence submitted by Petitioner was simply reflective of training emails that were sent out in clusters for those who had not completed training.

24. Further, it was shown that, unlike Petitioner, Mr. Wiles was on approved medical leave during the period he was absent because he had provided necessary medical documentation, and then he eventually returned to work.

25. Although Petitioner was removed from Lennox's portal, at Petitioner's request, Lennox agreed to allow Petitioner to retain his company-issued cell phone.

26. Petitioner's short-term disability was denied by Sedgwick on March 9, 2020. Sedgwick's short-term disability denial letter stated, in part, that Petitioner's leaves of absence, unless excused by another form of leave or a reasonable accommodation, were unapproved under Lennox's attendance policy, which is set forth in the Handbook. Specifically, the March 9, 2020, short-term disability denial letter from Sedgwick advised Petitioner:

> • Attendance: The denial of your claim means that the absences in question – unless excused by another form of leave or a reasonable accommodation – are unapproved under your Company Attendance Policy (Appendix C to the Employee Handbook). Excessive

> Unapproved absences or ***3*** *consecutive work days of No-Call, No-Show* will result in discipline, up to and including the termination of your employment. Please talk to your Human Resources Business Partner if you have questions.
>
> • Reasonable Accommodations: In addition to paid and unpaid leave, your company also offers reasonable accommodations (including additional unpaid time-off) to qualified disabled employees. Reasonable accommodations are *managed by Human Resources* – not by the LII Disability Leave Service Center. For more information, please refer to the Employee Handbook. To apply for an accommodation, please contact your Human Resources Business Partner at the number listed in Appendix A to the Employee Handbook.

(emphasis added).

27. Subsequently, on March 10, 2020, Sedgwick notified Mr. Green and Lennox that Petitioner's short-term disability benefit claim was denied as of March 2, 2020, due to the worker's compensation exclusion, and that Petitioner was not eligible for leave under FMLA due to length of service.

28. Because Petitioner did not qualify for leave under FMLA, he was deemed on unapproved absence from Lennox as of March 2, 2020.

29. On May 14, 2020, Lennox's human resources director, Karen Cerrato, sent Petitioner a letter (the May 14th letter) advising Petitioner that he needed to contact Lennox's office of human resources by May 19, 2020, to arrange a convenient time to discuss leave options or return to work with or without reasonable accommodations.

30. The May 14th letter made it clear that, if Petitioner wanted to obtain approved leave or reasonable accommodations, he was responsible for making the requests and filling out necessary paperwork. Accommodation paperwork was attached to the May 14th letter, including an "Accommodation Request

Form" and a "Health Care Provider Information Form." The attached accommodation paperwork stated:

> You are responsible for making sure that HR receives the completed forms and any other information needed to support your accommodation request. In most cases, this will require you to return documentation and/or follow-up with your health care provider to ensure that they are doing their part.

31. On March 18, 2020, Petitioner's worker's compensation claim was denied by the Florida Department of Financial Services, Division of Workers' Compensation, on the basis that "there was no accident as defined by 440.02(1) that resulted in said injury."

32. On May 19, 2020, Petitioner responded to Ms. Cerrato's May 14th letter by providing a document from Sedgwick indicating that he was able to return to work on May 3, 2020, without restrictions.

33. The next day, May 20, 2020, Ms. Cerrato sent an email to Petitioner advising that he had not adequately responded to the May 14th letter's request for his leave options or return to work. The email stated that, not only was the Sedgwick document that Petitioner provided her insufficient to comprise an accommodation request, it rather "provides an unrestricted return to work date of 5/3 (more than 2 weeks ago)." The final paragraph of the email stated:

> Please call me before 4:00 pm today so we can discuss the option you plan to pursue. If I do not receive your call by 4:00 pm today, I will understand (based on the paperwork you provided) that you have been able to work without restrictions since 5/3 and have elected to resign.

34. In response, that same day, May 20, 2020, Petitioner's workers' compensation counsel, Chris Cumberland, sent an email to Ms. Cerrato, but failed to provide a return to work date or clarify whether reasonable

accommodations were needed. Rather, Petitioner's counsel's email stated in pertinent part:

> Mr. Mathews is willing to return to work, but as the carrier has not provided an authorized workers compensation physician, he is unaware at this time as to what his work restrictions truly are. He knows personally that he is in a great deal of pain and that he likely has a torn meniscus in his knee which needs to be repaired before he can perform tasks at a full duty level. I would ask that you please discuss this with your counsel and I will advise my client accordingly.

35. Jodie Michalski, counsel for Lennox, responded to Mr. Cumberland via email that same day, May 20, 2020, noting Petitioner's unapproved absence status since early March because of his previously denied short-term disability, workers' compensation, and FMLA claims, and suggesting the option of applying for a reasonable accommodation under the Americans with Disabilities Act (ADA). Ms. Michalski's email also advised Petitioner's counsel that Lennox was willing to grant a reasonable period for additional unpaid leave so that Petitioner could complete the necessary paperwork. Ms. Michalski's email posed the following questions:

> 1. Is your client interested in pursuing an accommodation (including additional, unpaid time off)?
> 2. If so, can he commit to providing the completed paperwork to Human Resources within 15 calendar days, which we consider a reasonable amount of time?

36. The last sentence of Ms. Michalski's email stated: "I look forward to your response by 4:00 p.m. Alternatively, your client can reach out to Karen Cerrato directly with his response."

37. When neither Mr. Cumberland nor Petitioner timely responded to Ms. Michalski's May 20th email to Petitioner's counsel, on May 26, 2020, Ms. Cerrato emailed Petitioner and advised him that, in the absence of an

appropriate response, Lennox would conclude there was no interest in a reasonable accommodation and would process Petitioner's separation of employment after 4:00 p.m. on May 27, 2020. At the time, Petitioner had received approximately 84 days of unapproved absence and was advised that if he would like to pursue a reasonable accommodation, including additional unpaid leave, that he must contact Ms. Cerrato immediately.

38. On May 27, 2020, after the 4:00 p.m. deadline, instead of responding directly to Ms. Cerrato's requests for clarification, Petitioner sent three separate emails to Ms. Cerrato indicating that he was willing to work within the restrictions from his doctor (which were not provided), referring to the disability statement previously provided (the one stating that he could return to work May 3rd), and advising that he had an upcoming doctor visit. Petitioner's correspondence failed to provide the requested accommodation paperwork and, instead, alleged, "To this point, your demands have been impossible because Lennox has prevented me from various resources."

39. Ms. Cerrato responded to Petitioner by email that same day, again requesting that he engage in good faith with Lennox, address the questions previously directed to him, provide any restrictions from his doctor, and complete the accommodation paperwork, including the Employee Accommodation Request Form and Health Care Provider Information Form. Ms. Cerrato's email gave Petitioner more time, until May 28, 2020, to provide the previously requested information and necessary paperwork. She also advised Petitioner that if he failed to provide the information and paperwork by June 12, 2020, it would be assumed that Petitioner was cleared to return to work without restrictions but that he had chosen not to return to employment with Lennox.

40. Petitioner responded with another email later that same day, May 27th, promising to submit the accommodation paperwork following his doctor's appointment scheduled for May 28, 2020. In his email, Petitioner

also made complaints directed against Mr. Green and Mr. Coe regarding Petitioner's alleged injury and alleging discrimination.

41. Ms. Cerrato contacted Petitioner via email the next morning, May 28, 2020, stating, in part, that she looked forward to receiving the completed paperwork and engaging in the interactive process. In her email, Ms. Cerrato also advised Petitioner that his complaint against Ms. Cerrato, Mr. Green, and others for discrimination, harassment, and bullying, had been investigated and that the allegations were not substantiated.

42. Petitioner responded to Ms. Cerrato via email later that day, May 28th, advising that his doctor's appointment had been rescheduled for May 29th, suggesting that Ms. Cerrato was unwilling to fairly address issues he had reported to her, suggesting that she had made an "offer" and requesting arbitration.

43. Ms. Cerrato responded by email the next day stating:

> I am happy to grant you an additional day to submit your accommodation paperwork.
>
> In the meantime, please clarify the following two points:
>
> 1. You reference my "offer'. What offer did I make?
> 2. You reference "arbitration" several times. Please explain what you mean.
>
> I look forward to receiving your paperwork today.

44. Petitioner did not provide the paperwork or respond.

45. On June 5, 2020, Ms. Cerrato sent an email to Petitioner stating:

> I understood from your May 28, 2020 email that you would be sending me your accommodation request and supporting medical documentation on May 29 after your doctor's appointment.
>
> Another week has passed, but we have not received anything further from you (e.g. your request form,

> medical support, a request for more time, or a response to the questions I asked on May 28). We must concluded [sic], therefore, that you will not be pursuing an accommodation or returning to work. As such, we have processed your separation, effective today.
>
> If you feel there has been an error (e.g. if I missed an email from you), please let me know.
>
> If I do not hear from you, we wish you well in your future endeavors.

46. Petitioner failed to respond. Petitioner was never considered by Lennox to be disabled, never properly requested accommodations, and failed to prove that he had a work-related injury. Petitioner never provided required paperwork, did not clarify any workplace restrictions, never requested more time before returning to work, and never advised whether he even intended to return to work.

47. Petitioner's workers' compensation claim was denied, and the evidence submitted in this case was insufficient to prove Petitioner's claims of discrimination or retaliation.

CONCLUSIONS OF LAW

48. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding. *See* §§ 120.569, 120.57(1), and 760.11(4)(b), Fla. Stat.; *see also* Fla. Admin. Code R. 60Y-4.016.

49. The Florida Civil Rights Act of 1992, as amended (FCRA), is codified in sections 760.01 through 760.11, Florida Statutes.

50. The FCRA is modeled after Title VII of the Civil Rights Acts of 1964 and 1991, 42 U.S.C. § 2000, *et seq*. (Title VII), so that federal case law regarding Title VII is applicable to construe the FCRA. *See Castleberry v. Edward M. Chadbourne, Inc.*, 810 So. 2d 1028, 1030 (Fla. 1st DCA 2002).

51. Section 760.10(1) provides, in pertinent 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, national origin, age, handicap, or marital status.

52. The language in section 760.10(1) parallels language in Title I of the ADA, 42 U.S.C. § 12112(a), which prohibits discrimination in employment based on disabilities,[2] as follows:

> General rule. No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

53. Noting differences in the federal analysis of discrimination claims based on handicap from analyses applied to other discrimination claims, in an opinion rendered not long after enactment of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (ADA), the Florida First District Court of Appeal in *Brand v. Florida Power Corporation*, 633 So. 2d 504, 510, n.8 (Fla. 1st DCA 1994), observed:

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[2] "The ADA has three separate titles: Title I covers employment discrimination, 42 U.S.C. §§ 12111-12117; Title II covers discrimination by government entities, Id. §§ 12131-12165; and Title III covers discrimination by places of public accommodation, Id. §§ 12181-12189." *Colorado Cross Disab. Coal. v. Hermanson Fam. Ltd. P'ship I*, 264 F.3d 999, 1006 (10th Cir. 2001)

> Due to its recent enactment, we do not comment on what effect the Americans with Disabilities Act of 1990 (ADA) (42 U.S.C. §§ 12101-12213) may have on handicap discrimination claims prosecuted pursuant to Florida's Human Rights Act, but it appears from our examination of certain key provisions in the ADA paralleling section 504 that Congress intended to extend protections against handicap discrimination equal to or greater than that provided by section 504 to qualified individuals with handicaps. Hence, we are of the view that case law interpreting section 504 is highly persuasive authority in actions brought under the ADA to the extent that the provisions in the two acts coincide.

54. Subsequently, Florida courts have construed the FCRA in conformity with the federal Rehabilitation Act, 29 U.S.C. § 701 et seq., as well as the ADA and related regulations. *See e.g., McCaw Cellular Commc'ns of Fla., Inc. v. AT&T Wireless Serv.*, 763 So. 2d 1063, 1065 (Fla. 4th DCA 1999); *Green v. Seminole Elec. Coop.*, 701 So. 2d 646, 647 (Fla. 5th DCA 1997); *cf., Chanda v. Engelhart/ICC*, 234 F.3d 1219, 1221 (11th Cir. 2000)("[A]ctions under the Florida Civil Rights Act are analyzed under the same framework as the ADA.").

55. As developed in federal cases, a prima facie case of discrimination under Title VII may be established by direct evidence, which, if believed, would prove the existence of discrimination without inference or presumption. Direct evidence, consisting of blatant remarks whose intent could be nothing other than discriminatory, does not exist in this case. *See Damon v. Fleming Supermarkets of Fla., Inc.*, 196 F.3d 1354, 1358-59 (11th Cir 1999). Where direct evidence is lacking, one seeking to prove discrimination must rely on circumstantial evidence of discriminatory intent, using the three-part shifting "burden of proof" pattern established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Holifield v. Reno*, 115 F.3d 1555, 1562 (11th Cir. 1997).

56. Under *McDonnell Douglas*, first, Petitioner has the burden of proving a prima facie case of discrimination by a preponderance of the evidence. Second, if Petitioner sufficiently establishes a prima facie case, the burden shifts to Respondent to "articulate some legitimate, nondiscriminatory reason" for its action. Third, if Respondent satisfies this burden, Petitioner has the opportunity to prove by a preponderance of the evidence that the legitimate reasons asserted by Respondent are, in fact, mere pretext. *McDonnell Douglas Corp*., 411 U.S. at 802-04.

57. Considering applicable federal case law analyses under both Title VII and the ADA, in order to establish a prima facie case of discrimination based on handicap under the FCRA, Petitioner must prove: (1) that he is a handicapped person within the meaning of section 760.10(1)(a); (2) that he is a qualified individual; and (3) that Respondent discriminated against him based on his disability. *See e.g., Byrd v. BT Foods, Inc*., 948 So. 2d 921, 925-26 (Fla. 4th DCA 2007), citing *Earl v. Mervyns*, 207 F.3d 1361, 1365 (11th Cir. 2000); *Pritchard v. S. Co. Servs*., 92 F.3d 1130 (11th Cir. 1996).

58. As explained by the Forth District Court of Appeal in *Byrd*:

> Regarding the first element of a prima facie case, the FCRA does not define the term "handicap." We therefore look to the ADA's definition of a "disability." *See Ross v. Jim Adams Ford, Inc.*, 871 So. 2d 312 (Fla. 2d DCA 2004). The ADA defines a "disability" as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual, a record of such impairment; or being regarded as having such an impairment." 42 U.S.C. § 12102(2). "Major life activities" include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." *Bragdon v. Abbott*, 524 U.S. 624, 118 S.Ct. 2196, 141 L.Ed.2d 540 (1998); see 45 C.F.R. § 84.3(j)(2)(ii); 28 C.F.R. § 41.31(b)(2)(1997).

948 So. 2d at 926

59. As to the first element, Petitioner failed to establish that he had a handicap or disability. His application for short-term disability was denied by the third-party disability administrator, Sedgwick. He never provided information or evidence that he had an impairment that substantially limited one or more of his major life activities. In fact, the information he provided to Lennox indicated that he was able to return to work as of May 3, 2020.

60. Regarding the second element, Petitioner failed to show he was a qualified individual.

> The ADA provides that a "qualified individual" is an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the job. 42 U.S.C.A. § 12111(8). If a qualified individual with a disability can perform the essential functions of the job with reasonable accommodation, then the employer is required to provide the accommodation unless doing so would constitute an undue hardship for the employer. 42 U.S.C.A. § 12112(b)(5)(A). Reasonable accommodations to the employee may include, but are not limited to, additional unpaid leave, job restructuring, a modified work schedule, or reassignment. 42 U.S.C.A. § 12112(9)(B).

Byrd, 948 So. 2d at 925, quoting *McCaw Cellular Commc'ns of Fla. v. Kwiatek*, 763 So. 2d at 1065.

61. Despite repeated requests from Lennox asking Petitioner to provide information regarding what reasonable accommodations he was seeking, Petitioner failed to provide that information. Petitioner presented no evidence that he could perform the essential functions of his job with Lennox with reasonable accommodations.

62. Further, in view of unrefuted evidence indicating Petitioner's lack of response to repeated requests from Lennox asking Petitioner to provide necessary information and paperwork for an accommodation, it is found that

it was Petitioner's lack of response, and not Lennox's refusal, that resulted in the failure of Petitioner to secure a reasonable accommodation.

63. Petitioner also failed to prove that he was discriminated against because of his disability.

64. Other than his own speculative belief, Petitioner submitted no evidence to support his contention that he was discriminated against because of his disability. Mere speculation or self-serving belief on the part of a complainant concerning motives of a respondent is insufficient, standing alone, to establish a prima facie case of intentional discrimination. *See Lizardo v. Denny's, Inc.*, 270 F.3d 94, 104 (2d Cir. 2001)("Plaintiffs have done little more than cite to their mistreatment and ask the court to conclude that it must have been related to their race. This is not sufficient.").

65. In sum, Petitioner failed to present a prima facie case. "Failure to establish a prima facie case of . . . discrimination ends the inquiry." *Ratliff v. State,* 666 So. 2d, 1008, 1013 n.6 (Fla. 1st DCA 1996)(citations omitted).

66. Despite numerous communications between Petitioner and Lennox, including communications in which his attorney was involved, Petitioner did not engage in the accommodation process in good faith and failed to return to work. Instead, under the facts, it is found that Petitioner abandoned his job. As such, his separation from employment with Lennox does not constitute an adverse action. *See, e.g., Nero v. Hosp. Auth. of Wilkes Cty.*, 86 F.Supp.2d 1214, 1228 (S.D. Ga. 1998), *aff'd* 202 F.3d 288 (11th Cir. 1999), where the United States District Court explained:

> "Adverse employment action' is broadly defined and as a matter of law includes not only discharges, but also demotions, refusals to hire, refusals to promote, and reprimands." *McCabe v. Sharrett*, 12 F.3d 1558, 1563 (11th Cir. 1994). An adverse employment action can also take the form of a constructive discharge where an employee resigns. To show a constructive discharge, however, a plaintiff must provide evidence that his or her working conditions were so intolerable that a

> reasonable person in that position would be compelled to resign. *Morgan* v. Ford, 750 F.3d 750, 754, (11th Cir. 1993). Thus, "when an employee voluntarily quits under circumstances insufficient to amount to a constructive discharge, there has been no adverse employment action." *Hartsell v. Duplex Prod., Inc.*, 123 F.3d 766, 775 (4th Cir. 1997) (internal quotes omitted). "[R]esignations can be voluntary even where the only alternative to resignation is facing possible termination." *Hargray v. City of Hallandale*, 57 F.3d 1560, 1568 (11th Cir. 1995).

67. In sum, there was no adverse employment action. Petitioner lost his position with Lennox due to job abandonment and not because of discrimination.

68. Moreover, even if Petitioner had established the elements to show a prima facie case, the fact that he abandoned his job was a legitimate, non-discriminatory reason supporting Lennox's decision to terminate Petitioner. There was no evidence indicating Lennox's reason for terminating Petitioner because of his job abandonment was mere pretext for discrimination. As explained by the Eleventh Circuit in *Chapman v. AI Transport*, 229 F.3d 1012, 1030 (11th Cir. 2000):

> A plaintiff is not allowed to recast an employer's proffered nondiscriminatory reasons or substitute his business judgment for that of the employer. Provided that 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. *See Alexander v. Fulton County, Ga.,* 207 F.3d 1303, 1341 (11th Cir. 2000) (Title VII case) ("[I]t is not the court's role to second-guess the wisdom of an employer's decisions as long as the decisions are not racially motivated."); *Combs v. Plantation Patterns, 106 F.3d 1519, 1541-1543 (11th Cir. 1997)*]. We have recognized previously and we reiterate today that:

> [f]ederal courts "do not sit as a super-personnel department that reexamines an entity's business decisions. No matter how medieval a firm's practices, no matter how high-handed its decisional process, no matter how mistaken the firm's managers, the ADEA does not interfere. Rather our inquiry is limited to whether the employer gave an honest explanation of its behavior." *Elrod v. Sears, Roebuck & Co.,* 939 F.2d 1466, 1470 (11th Cir. 1991) (quoting *Mechnig v. Sears, Roebuck & Co.,* 864 F.2d 1359, 1365 (7th Cir. 1988) (citations omitted)); *see also Nix v. WLCY Radio/Rahall Communications,* 738 F.2d 1181, 1187 (11th Cir. 1984) (An "employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason."); *Abel v. Dubberly,* 210 F.3d 1334, 1339 n. 5 (11th Cir. 2000). We "do not ... second-guess the business judgment of employers." *Combs,* 106 F.3d at 1543; *accord Alexander,* 207 F.3d at 1339, 1341; *Damon v. Fleming Supermarkets of Florida, Inc.,* 196 F.3d 1354, 1361 (11th Cir. 1999) ("We have repeatedly and emphatically held that a defendant may terminate an employee for a good or bad reason without violating federal law. We are not in the business of adjudging whether employment decisions are prudent or fair." (internal citation omitted)).

69. Petitioner also failed to demonstrate a prima facie case of unlawful retaliation in violation of the ADA or Title VII. Title VII makes it unlawful for employers to retaliate against employees for opposing unlawful employment practices. *See* 42 U.S.C. § 2000e-3(a); *see also* § 760.10(7), Fla. Stat. (It is an unlawful employment practice for an employer to discriminate against a person because that person has "opposed any practice which is an unlawful employment practice" or because that person "has made a charge . . . under this subsection.)."

70. Just as in discrimination claims based on status, a plaintiff or petitioner may establish a claim of illegal retaliation using either direct or

circumstantial evidence. Direct evidence of retaliation does not exist in this case. In relying on circumstantial evidence, tribunals use the *McDonnell Douglas* analytical framework. *See Bryant v. Jones*, 575 F.3d 1281, 1308 (11th Cir. 2009). "Under [that] framework, a plaintiff alleging retaliation must first establish a prima facie case by showing that: (1) he engaged in a statutorily protected activity; (2) he suffered an adverse employment action; and (3) he established a causal link between the protected activity and the adverse action." *Id.* at 1307-08.

71. In this case, Petitioner failed to establish a prima facie case of retaliation. At the outset, the evidence did not demonstrate that Petitioner engaged in statutorily protected expression regarding his alleged disability. While Petitioner complained of harassment, bullying, and discrimination, he did not provide any evidence to support his complaint nor did he indicate that the alleged conduct was related to his alleged disability or any protected expression.

72. In addition, the alleged retaliatory act of retrieving his work van and ending his access to the company portal, including his email access, were not adverse actions, but rather consistent with company policy. Because Petitioner was not entitled to use the fleet van for non-business use, or to receive company information on the internal portal while he was not working, he could not have suffered an adverse action with respect to these items. In other words, removing these items could not have negatively impacted a term or condition of Petitioner's employment as he was not entitled to retain the van or continue as an authorized recipient on the portal system.

73. Moreover, even if Petitioner had engaged in protected activity and the alleged retaliatory acts were adverse actions (which they were not), there is no causal link between those actions and his separation. Furthermore, he was not terminated until June 5, 2020, months after the van was retrieved and access to Lennox's portal and email was denied.

74. As explained in *Thomas v. Cooper Lighting, Inc.*, 506 F.3d 1361, 1364 (11th Cir. 2001):

> The burden of causation can be met by showing close temporal proximity between the statutorily protected activity and the adverse employment action. *See Brungart v. BellSouth Telecomms., Inc.*, 231 F.3d 791, 798-99 (11th Cir. 2000). But mere temporal proximity, without more, must be "very close." *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 273, 121 S. Ct. 1508, 1511, 149 L. Ed. 2d 509 (2001) (internal citations omitted). A three to four month disparity between the statutorily protected expression and the adverse employment action is not enough. *See id.* (citing *Richmond v. ONEOK*, 120 F.3d 205, 209 (10th Cir. 1997) (3 month period insufficient) and *Hughes v. Derwinski*, 967 F.2d 1168, 1174-75 (7th Cir. 1992) (4 month period insufficient)). Thus, in the absence of other evidence tending to show causation, if there is a substantial delay between the protected expression and the adverse action, the complaint of retaliation fails as a matter of law. *See Higdon v. Jackson*, 393 F.3d 1211, 1220 (11th Cir. 2004) (citing [**6] *Wascura v. City of South Miami*, 257 F.3d 1238, 1248 (11th Cir. 2001)).

75. Overall, because of lack of evidence, failure to show causation, and failing to demonstrate that Lennox's articulated reason for Petitioner's separation from employment was pretextual, Petitioner failed to demonstrate, by a preponderance of the evidence, that Lennox engaged in unlawful discrimination or retaliation when Petitioner's employment was terminated for abandonment of his position.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations enter a final order dismissing Petitioner's Discrimination Complaint and Petition for Relief consistent with the terms of this Recommended Order.

DONE AND ENTERED this 22nd day of June 2021, in Tallahassee, Leon County, Florida.

JAMES H. PETERSON, III
Administrative Law Judge
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Filed with the Clerk of the
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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.