

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

MICHELLE C. PHILLIPS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 00-1794
	)	
ORANGE LAKE COUNTRY CLUB	)	
REALTY, INC.,	)	
	)	
Respondent.	)	
_____	)	

RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in Orlando, Florida, on August 1, 2001.

APPEARANCES

For Petitioner:	Edward R. Gay Law Firm of Edward R. Gay, P.A. 1516 East Concord Street Orlando, Florida 32803
For Respondent:	Richard A. DuRose Foley & Lardner 111 North Orange Avenue, Suite 1800 Post Office Box 2193 Orlando, Florida 32801-2386

STATEMENT OF THE ISSUE

The issue is whether Respondent has unlawfully discriminated against Petitioner in employment and, if so, the remedy.

### PRELIMINARY STATEMENT

By Petition for Relief filed March 15, 2000, Petitioner alleged that Respondent violated the Florida Civil Rights Act of 1992, as amended, by terminating her employment as a real estate salesperson. Petitioner alleged that Respondent declined to accommodate her illness of chronic hepatitis C by denying her request to work a schedule of three consecutive days at work followed by two consecutive days off from work followed by three consecutive days at work.

Respondent has denied the material allegations and requested a formal hearing. Additionally, Respondent filed a motion to dismiss the petition as untimely filed.

By Recommended Order of Dismissal entered on July 10, 2000, the Administrative Law Judge recommended that the Florida Commission on Human Relations enter a final order dismissing the petition as untimely filed. The Administrative Law Judge noted that the petition was not filed within 35 days of the issuance, on January 31, 2000, of a Notice of Determination: No Cause. However, by Order dated April 19, 2001, and filed May 23, 2001, the Florida Commission on Human Relations entered an Order Remanding Petition for Relief from an Unlawful Employment Practice, which the Administrative Law Judge accepted by Order entered on June 1, 2001.

At the hearing, Petitioner called three witnesses and offered into evidence 12 exhibits: Petitioner Exhibits 1-12. Respondent called one witness and offered into evidence 11 exhibits: Respondent Exhibits 1-11. All exhibits were admitted.

The court reporter filed the transcript on August 29, 2001. The parties filed their proposed recommended orders by September 17, 2001.

#### FINDINGS OF FACT

1. Petitioner was born on November 1, 1953. She is a licensed real estate salesperson. Respondent first hired her in July 1993 to sell timeshare units at its large resort development in Orange County.

2. Not long prior to her initial employment with Respondent, Petitioner was diagnosed with hepatitis C, which Petitioner disclosed to Respondent prior to being hired. Hepatitis C is a chronic disease that is relatively inactive and active at times. During periods that her disease is active, Petitioner suffers extreme fatigue, nausea, and lack of appetite.

3. In 1996, Petitioner was diagnosed with rheumatoid arthritis. She also suffers from several other conditions, but, with the possible exception of recurrent back problems, they do not appear to have played any role in the facts of this case.

4. The sale of timeshare units is an intensive, high-volume form of real estate marketing. Respondent is a large timeshare marketer, employing at any time 200-300 sales consultants, such as Petitioner. At the time of the hearing, which appears to be typical during the period in question, Respondent was marketing weekly units for 325 dwelling units that were online, generating a total of over 15,000 units for sale. As complexes are sold, the developer constructs new complexes for the sale of additional timeshare units. Weekly units cost \$11,000-\$12,000.

5. An integral part of timeshare sales is the production of prospective buyers. Respondent enters into agreements with various brokers to produce prospective buyers. In return for a premium to the customer, such as free tickets to a nearby theme park, prospective buyers visit the timeshare development and take a tour of the facility with a sales consultant. Respondent pays \$250-\$300 for each of the 40,000 tours that take place annually at the timeshare development.

6. Respondent plans carefully to ensure that the number of prospective buyers is matched to the number of sales consultants scheduled for a particular day. Respondent schedules the daily arrival of prospective buyers at three or four specified times, ranging from early morning to early afternoon. Respondent conducts tours everyday of the year except Christmas.

7. In the vast majority of cases, one sales consultant conducts the tour for one family or, in the case of individual buyers, one person. When the number of prospective buyers exceeds the number of sales consultants, consultants may conduct group tours or buyers may have to wait; however, in either case, the likelihood of a sale is greatly reduced.

8. The normal schedule for a sales consultant is four days on, followed by two days off, although some sales consultants work five days, followed by two days off. Reporting to work by 6:50 a.m., sales consultants meet briefly for a morning sales meeting. The first wave of prospective buyers reaches the site at 7:30 a.m.

9. Each sales consultant devotes considerable effort to developing personal rapport with the prospective customer. Although the walking tour of the facility may only take 30 minutes, the total time that the consultant spends with the customer is considerably longer; Petitioner typically spent three hours with each prospective customer. A sales consultant had to be available at the complex until 3:00 p.m., unless his or her supervisor released the consultant earlier. However, if the consultant sold a unit, he or she was free to leave at that time under Respondent's "write and ride" policy.

10. Although Respondent trained new consultants, sales consultants were free to develop their own sales techniques.

Supervisors sometimes accompanied underproducing consultants on their tours, but never successful consultants. Respondent developed her own presentation in terms of content and style.

11. Respondent enforced attendance policies among the sales consultants. Consultants wishing to take a vacation had to obtain permission from their supervisors. Consultants unexpectedly unable to report to work had to call their supervisors prior to 6:45 a.m. on the day of their unscheduled absence. In recognition of the fact that consultants had to be onsite in order to sell timeshare units, these policies allowed Respondent to schedule a sufficient number of consultants to serve the expected number of prospective buyers for which Respondent had paid on a particular day.

12. Respondent entered into a Sales and Marketing Agreement with each sales consultant. The agreement provides that each consultant is an independent contractor, not an employee, and that Respondent shall pay sales consultants exclusively on a commission basis.

13. Petitioner was employed by Respondent over five different periods of time: July 16, 1993, through November 5, 1993; April 13, 1994, through May 17, 1994; December 1, 1994, through May 23, 1995; June 3, 1996, through October 31, 1996; and November 25, 1996, through January 7, 1997.

14. The 1993 termination was due to "statistics" and "attendance." Presumably, "statistics" means low productivity.

15. A handwritten note in Petitioner's file suggests that the 1994 termination was due to attendance.

16. No documentary evidence explains the reason for the 1995 termination. This was the first termination done by Jacki Tutas, who was Petitioner's immediate supervisor from early 1995 through January 1997. The 1995 termination was probably due to attendance. Petitioner missed 52 days of work from December 14, 1994, through May 17, 1995. Fourteen of these absences were "no call, no show." Petitioner also admitted to missing several days of work in May 1995, contesting only that she had received permission not to call in each day, so that the missed work was not "no call, no show."

17. The 1996 termination was due to "hepatitis C." The person completing the form, who was not Ms. Tutas, indicated that she would rehire Petitioner. Ms. Tutas completed another form one week later for the same termination. Ms. Tutas indicated that the termination was for attendance and that she would not rehire Petitioner "unless she gets her health back."

18. In May 1996, Ms. Tutas contacted Petitioner about returning to work. Petitioner agreed to do so and started working the next month. However, during the first three months of this period, Petitioner missed 20 days of work.

19. In August or September 1996, Petitioner asked Ms. Tutas for a reduced schedule. In response to Ms. Tutas's request for supporting documentation, Petitioner produced medical information, but Ms. Tutas evidently found it too general, so, about three weeks later, Ms. Tutas asked for a doctor's letter.

20. By a form dated November 13, 1996, Petitioner's physician stated that Petitioner had been totally disabled from September 1996 due to chronic hepatitis and rheumatoid arthritis and was cleared to return to work on November 19, 1996. Interestingly, the period covered by this note excludes the first three months of this term of employment, during which Petitioner was absent 20 days. The physician advised Petitioner to "limit work to 4 hours per day, no more than 3 days working in a row," and requested a follow-up visit in two to three months.

21. However, Respondent had already terminated Petitioner by the time that Petitioner's physician had completed the one-page form. Seeking her job back, on November 18, 1996, Petitioner mailed a letter to Respondent's director of sales stating that she was "ready and able to work, full-time." She notes that she had taken a flu vaccination as a precautionary measure and would resign if she missed one day due to "this illness," which presumably refers to the hepatitis C.



22. Respondent rehired Petitioner about one week later, and Petitioner testified that she did not miss another day of work due to hepatitis or rheumatoid arthritis. However, Petitioner missed a considerable amount of work.

23. Petitioner was "no call, no show" on November 27, November 29, December 15, and December 22. She missed December 26 through December 29 and then January 3 through January 7, although only one of those days was "no call, no show." However, Petitioner left early on December 30, January 1, and January 2. Petitioner testified that she began to suffer flu symptoms on December 24 and missed work due to the flu and a upper respiratory infection. The first two absences are unexplained, and the third may be due to an arrest of Petitioner on December 14, in which the arresting officer found Petitioner intoxicated.

24. On January 7, 1997, Respondent terminated Petitioner for attendance. Ms. Tutas indicated that she would not rehire Petitioner, stating: "She's not physically able to meet the attendance standards. Been in and out, at least, 4 times. Told her that if she can bring a letter from another resort in 6 mos. that her attendance is acceptable we'll consider hiring her back. After 6 mos."

25. Ignoring Petitioner's absences, she was an outstanding producer in December 1996. She had a high percentage of sales

and a high percentage of sales that resulted in closings. However, she had a very low number of tours. Coupled with the disruption caused by her unexpected absences, Petitioner's production was not satisfactory.

26. Petitioner claims that Respondent has unfairly treated her. Respondent modified a work schedule of a another sales consultant; however, she had recently suffered the death of a son in college and wanted to devote time to a victims' advocacy program. Another consultant missed a lot of work, but not nearly as much work as Petitioner missed.

#### CONCLUSIONS OF LAW

27. The Division of Administrative Hearings has jurisdiction over the subject matter. Section 120.57(1), Florida Statutes. (All references to Sections are to Florida Statutes.)

28. Section 760.10(1)(a) provides that it is an unlawful employment practice for an employer to discharge an employee due to a handicap.

29. To make a prima facie showing, Petitioner must prove that she has a disability, she was qualified to do the job, and Respondent discriminated against her due to her disability. See, e.g., Goldsmith v. Jackson Memorial Hospital Public Health Trust, 33 F. Supp. 2d 1336 (S.D. Fla. 1998), aff'd. 198 F.3d 263 (11th Cir. 1999).

30. Petitioner has failed to make a prima facie showing. She clearly suffers from the disabilities of hepatitis C and rheumatoid arthritis, which both qualify as handicaps. She is qualified to sell timeshare, as evidenced by her success in doing so. However, she has presented no evidence that Respondent has discriminated against her due to her disability.

31. Respondent terminated her due to poor attendance. Petitioner's job required her presence at the complex as scheduled, given Respondent's substantial investment in producing prospective buyers. Petitioner repeatedly failed to come to work when scheduled. By her own admission, the poor attendance in the last two weeks of her employment was not even due to her disabilities, further undermining her ability to make a prima facie case.

32. Repeatedly, Petitioner failed to call in when she was unable to report to work. Nothing in the record links this failure to any disability. Petitioner was well aware of the importance of consultants appearing for work when scheduled, yet she did not bother to call in many times.

33. It is difficult to reconcile Petitioner's claim of discrimination with the repeated decisions by Ms. Tutas to rehire Respondent after firing her. Ms. Tutas and Respondent's other managerial employees were obviously aware of Petitioner's serious illnesses and obviously, in rehiring her, were not

discriminating against her on the grounds of these disabilities. The facts clearly establish that Respondent justifiably required attendance on the part of the sales consultants, and Respondent justifiably terminated Petitioner for poor attendance--not due to discrimination against Petitioner on the ground of her disabilities. On the last termination, the absences were not even due to Petitioner's disabling illnesses.

34. Under the circumstances, it is unnecessary to address Respondent's alternative claims that Petitioner was an independent contractor and Section 760.10 does not prohibit discrimination against independent contractors, as distinguished from employees.

#### RECOMMENDATION

It is

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

DONE AND ENTERED this 28th day of September, 2001, in Tallahassee, Leon County, Florida.

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ROBERT E. MEALE  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(850) 488-9675 SUNCOM 278-9675  
Fax Filing (850) 921-6847  
www.doah.state.fl.us

Filed with the Clerk of the  
Division of Administrative Hearings  
this 28th day of September, 2001.

COPIES FURNISHED:

Dana A. Baird, General Counsel  
Florida Commission on Human Relations  
325 John Knox Road  
Building F, Suite 240  
Tallahassee, FL 32303-4149

Azizi Coleman, Agency Clerk  
Florida Commission on Human Relations  
325 John Knox Road  
Building F, Suite 240  
Tallahassee, FL 32303-4149

Edward R. Gay  
Law Firm of Edward R. Gay, P.A.  
1516 East Concord Street  
Orlando, Florida 32803

Richard A. DuRose  
Foley & Lardner  
111 North Orange Avenue, Suite 1800  
Post Office Box 2193  
Orlando, Florida 32801-2386

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 must be filed with the agency that will issue the final order in this case.