STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DARLENE FITZGERALD,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 00-4798
	)	
SOLUTIA, INC.,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to notice this cause came on for formal proceeding before P. Michael Ruff, Administrative Law Judge of the Division of Administrative Hearings, in Pensacola, Florida. The hearing was conducted on September 13, 2001, and the appearances were as follows:

APPEARANCES

For Petitioner: Danny L. Kepner, Esquire
Shell, Fleming, Davis & Menge, P.A.
226 South Palafox Street, Ninth Floor
Pensacola, Florida 32501

For Respondent: Erick M. Drlicka, Esquire
Emmanuel, Sheppard & Condon
30 South Spring Street
Pensacola, Florida 32501

STATEMENT OF THE ISSUES

The issues to be resolved in this proceeding concern whether the Respondent Solutia, Inc., discriminated against the Petitioner Darlene Fitzgerald, by allegedly denying her

employment because of her hearing impairment. Embodied within that general issue is the question of whether, under Chapter 760, Florida Statutes, and other relevant law, the Respondent is an "employer"; whether the Petitioner is handicapped or disabled; whether the Petitioner is qualified for the position for which she applied; whether the Petitioner requested a reasonable accommodation from the alleged employer; whether the Petitioner suffered an adverse employment decision because of a disability; and whether the Petitioner has damages, their extent, and whether the Petitioner properly mitigated any damages.

PRELIMINARY STATEMENT

In March 1998 the Petitioner allegedly was denied employment by the Respondent because of a hearing impairment. On April 23, 1998, and on June 23, 1998, the Petitioner filed charges of discrimination with the Florida Commission on Human Relations (Commission) against the Respondent. The Commission investigated the matter and ultimately entered a determination of "no cause" by letter of the Commission dated October 26, 2000. The Commission found that the Petitioner had not stated a prima facie case of employment discrimination because she had not established that she had actually applied for a position with the subject Respondent company. On November 2, 2000, a Petition for Relief was filed by the Petitioner

requesting a formal proceeding concerning her alleged employment discrimination.

The matter was transmitted to the Division of Administrative Hearings and ultimately assigned to the undersigned Administrative Law Judge. The cause came on for formal hearing as noticed on September 13, 2001, at which time the Petitioner submitted her own testimony as well as that of Robin Steed. Petitioner's Exhibit one consisting of the April 23, 1998, charge of discrimination, was admitted into evidence. The Respondent presented the testimony of Francis Webb, Martha Wyse and Denise McLeod. Respondent's Exhibits one through seven were admitted into evidence as well.

Upon conclusion of the hearing the parties elected to transcribe the proceedings and to avail themselves of the opportunity to file Proposed Recommended Orders. Those Proposed Recommended Orders have been timely filed and have been considered in the rendition of this Recommended Order.

FINDINGS OF FACT

1. The Petitioner, Darlene Fitzgerald, is a 34-year-old woman who alleges that she applied for a "carpet walker" position with either the Respondent or "AmStaff" in March 1998. The Respondent, Solutia, Inc. (Solutia), is a company which owned and operates a manufacturing plant that manufactures fibers and carpet in Escambia County, Florida. A

number of independent contractors operate at the Solutia plant, performing certain phases of the manufacture and related services and operations there, including "AmStaff" and "Landrum."

2. AmStaff is a contractor which operates a tire yarn plant and a Kraft plant at the Solutia facility. AmStaff hires its own employees to work in its operations at the Solutia plant. It is solely responsible for all hiring, counseling, disciplinary and termination decisions concerning its employees. AmStaff has its own payroll, does the Social Security withholdings for its employees, pays workers' compensation premiums on its employees and provides retirement benefits to its employees.

3. Landrum is a staff leasing company which is responsible for certain jobs at the Solutia plant, including carpet walkers. Landrum is solely responsible for all of its hiring, counseling, disciplinary and termination decisions concerning its employees. Landrum has its own payroll, does its own Social Security withholdings for its employees and pays workers' compensation premiums on its employees.

4. A carpet walker is a person who tests carpet for wear and tear. A carpet walker is required to work 40 hours per week and to walk approximately 18 miles a day testing carpet. Neither Solutia nor AmStaff employs carpet walkers. The

Petitioner has never been to Solutia's facility or offices and has never gone out to the Solutia plant to apply for a job. She has had no contact with anyone representing or employed by Solutia concerning a job.

5. All of the Petitioner's contacts concerning employment in March 1998, were with either AmStaff or Landrum. The Petitioner testified that she saw a newspaper ad that AmStaff was taking job applications, but never produced a copy of that ad.

6. The Petitioner went to AmStaff to fill out an employment application. AmStaff's office is not at the Respondent Solutia's plant. The Petitioner gave conflicting testimony as to the date she allegedly applied with AmStaff for a carpet walker position. First, she testified that she applied for the position on March 15, 1998, which was a Sunday. After that was established by the Respondent, as well as the fact that AmStaff was closed on Sundays, the Petitioner then maintained that she applied for the carpet walker position on March 19, 1998. This date is incorrect, however, as evidenced by Respondent's Exhibit two in evidence, which is AmStaff's "notification of testing."

7. According to the Petitioner the company name printed on the employment application she filled out was AmStaff. The Petitioner was then scheduled for testing by AmStaff on

March 12, 1998, at Job Service of Florida (Job Service). The notification of testing clearly indicates that the Petitioner applied for a job with AmStaff.

8. While at the Job Service, the Petitioner spoke with an individual named Martha Wyse. The Petitioner and Robin Steed (an interpreter who accompanied the Petitioner to the job service site), met Martha Wyse, who never identified her employer. Subsequent testimony established that Martha Wyse was AmStaff's recruiting coordinator. Martha Wyse has never been employed at Solutia nor did she ever identify herself as being employed by Solutia.

9. All applicants with AmStaff must be able to meet certain physical requirements, including, but not limited to pushing and pulling buggies weighing 240 to 1,080 pounds; lifting 50 to 75 pound fiber bags, lifting 60 pound boxes, stacking and pouring 55 pound bags and working indoors in temperatures of up to 100 degrees Fahrenheit.

10. The Petitioner admitted that she could not push or pull buggies weighing 240 pounds; could not lift 50 to 75 pound fiber bags, could not lift 60 pound boxes nor stack and pour 55 pound bags or work indoors in temperatures in the range of 100 degrees. Additionally, the Petitioner admitted that her obstetrician and gynecologist had restricted her, in March 1998, to no lifting or pushing.

11. On September 24, 1998, the Petitioner was involved in an automobile accident. Her doctors restricted her to lifting no more than 25 to 30 pounds as a result of the injuries sustained in the automobile accident. Because of the injuries sustained in the automobile accident, the Petitioner was unable to work and applied for Social Security disability. Apparently she was granted Social Security disability with attendant benefits.

12. AmStaff employees must work around very loud machinery. There is noise from the machines themselves, combined with that of the air conditioning equipment. Horns blow signaling that forklift trucks are moving through the employment area. The machinery also emits a series of beeps that are codes to let employees know to do different things at different times regarding the machinery. Although the Petitioner stated that she had no restrictions concerning her hearing and could hear everything with the help of her hearing aid, she also stated that she could not stand loud noises generated by machines.

13. In addition to the physical requirements, AmStaff employees were required to work rotating shifts. The employees had to rotate between a 7:00 a.m. to 7:00 p.m., shift and a 7:00 p.m. to 7:00 a.m., shift. The Petitioner did not want to work from 7:00 p.m. to 7:00 a.m. Additionally,

AmStaff's employees were required to work 36-hour weeks followed by 42-hour weeks on alternating week schedules. The Petitioner did not want to work more than 20-hours per week in 1998, and in particular the months of April through September 1998. She did not want to work more than 20-hours per week, as she did not want to endanger her Social Security income benefits or have them reduced.

14. Landrum did not have an opening for a carpet walker position at the time the Petitioner allegedly applied for that position. The Petitioner did not ask AmStaff or Landrum for any disability accommodations.

15. If an employee is not entirely aware of the sounds and signals emanating from a plant and the machinery within the plant, that employee cannot respond immediately or accurately to situations that may cause problems with the machinery and ultimately could cause injury to the employee or to other employees. If a bobbin is not seated properly on a machine, for example, the machine will begin to produce a clanking noise. If the noise is not heard by the operating employee and the bobbin is not re-seated properly it can become detached from the machine and be thrown by the force of the machine potentially striking either the operator or anyone who happens to be moving through the machine aisle nearby at the time. Further, there are over 300 alarm boxes throughout

the plant. These alarms are used in emergency situations. The alarms indicate the type of emergency, the location of the emergency and its severity. There are different types of warnings for vapor clouds and evacuations. All warnings come through that alarm system. An employee must listen for the type of sound or blast, the number of sounds or blasts and the sequence of the sounds or blasts in order to determine the type of emergency and to know how to react to it.

16. The Petitioner was unemployed from September 24, 1998 until April 2000, when she became employed at Walmart. She left her employment at Walmart in July of 2000. After leaving Walmart the Petitioner has not been employed and has not looked for work. She apparently worked at Popeye's Fried Chicken for an undetermined period of time after March 1998. From April to September of 1998, she voluntarily restricted her work to no more than 20-hours per week in order to keep from reducing her Social Security disability benefits.

CONCLUSIONS OF LAW

17. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. Sections 120.569 and 120.57(1), Florida Statutes.

18. In a proceeding such as this, the Petitioner has the burden of establishing by preponderant evidence a prima facie case of unlawful discrimination. If that prima facie case is

demonstrated, a presumption of discrimination arises and the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for its action. The burden of going forward with evidence is next placed on the Petitioner to demonstrate that the proffered reason is pretextual. The ultimate burden of persuasion remains, at all times, with the Petitioner, however. See Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L.Ed.2d 207 (1981); St. Mary's Honor Center v. Hicks, 509 U.S. _____, 113 S. Ct. 2742, 2747, 125 L.Ed.2d 407, 416 (1993).

19. Chapter 760, Florida Statutes, known as the "Florida Civil Rights Act" (FCRA) provides that it is unlawful for an employer to fail or refuse to hire any individual because of that person's handicap. See Section 760.10(1)(a). The initial inquiry must be, therefore, whether the Respondent is an employer within the meaning of the statute. The Petitioner has the burden of demonstrating that the Respondent in this case meets the definition of an employer for purposes of Chapter 760, Florida Statutes, concerning the position for which she made application and which is the subject matter of this controversy. Preponderant evidence demonstrates that the Respondent Solutia, Inc., was not the hiring company which made any employment decision with regard to the Petitioner and was not the entity to which the Petitioner applied for

employment in the position in question. The Petitioner submitted her application to AmStaff, Inc. All contacts she had with the employer personnel were with AmStaff or Landrum, Inc. The Petitioner has never been to the offices of Solutia, never filled out an application for employment with Solutia and had no contact with anyone employed by or representing Solutia concerning a carpet-walker position or any other position. AmStaff was solely responsible for all decisions related to the Petitioner's job application of March 1998.

20. The Petitioner also did not apply for a job at Landrum during the pertinent time in March 1998. The Petitioner herself testified that, although she applied at AmStaff in March 1998, she did not apply at Landrum.

21. The evidence shows that AmStaff was not the Respondent's agent. AmStaff controls the manners and means of how work is to be performed, and makes all of the hiring, disciplinary and termination decisions concerning applicants and its employees. AmStaff's supervises its employees and not Solutia, the Respondent. AmStaff also maintains a separate payroll from that of Solutia and is responsible itself for all payroll withholdings. The Petitioner did not establish liability on the part of the Respondent through principles of agency based on any action taken by AmStaff. See Greason v. Southeastern Railroad Associated Bureaus, 650 F.Supp 1 (N.D.

Ga, 1986) (no agency was found by the court in this decision where there was no evidence that the Defendant controlled, managed, supervised or otherwise affected the labor practices and policies of the Plaintiff's employer in that case).

22. The evidence likewise demonstrates that Landrum was not the Respondent's agent. Landrum and Solutia are not sister companies or related corporations. There is no common management or ownership and there is no common financial control between the companies. Like AmStaff, Landrum is responsible for its own hiring, disciplining and firing of employees. It pays its own employee salaries, their Social Security taxes and workers' compensation premiums. Landrum controls the manner and means of how the work is done by its employees and therefore, no liability through an agency relationship on the part of the Respondent has been established, based on any action regarding employment taken by Landrum.

23. Even if the Petitioner had established that the Respondent was an employer for purposes of Chapter 760, Florida Statutes, the Petitioner has not shown that the Respondent discriminated against her because of a disability. In order for the Petitioner to demonstrate a prima facie case of discrimination, based on a disability, she must show: (1) That she is handicapped; (2) That she is otherwise

qualified for the position for which she applied; and (3) That she suffered an adverse employment action under circumstances which give rise to an inference that the employment action was based sole upon her handicap.

24. Section 760.22(7), Florida Statutes, defines "handicap" as follows:

> (a) A person has a physical or mental impairment which substantially limits one or more of major life activities, or he has a record of having, or is regarded as having, such physical or mental impairment . . .

This definition is essentially the same as that provided in the Americans With Disabilities Act of 1990 (ADA), 42 U.S.C. Section 706(7)(b), which states that a disability is:

> (a) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (b) a record of such an impairment;
>
> (c) being regarded as having such an impairment.

Thus the Florida definition of "handicap" is substantially the same as the federal definition of "disability." Further, Florida case law holds that the Florida Civil Rights Act is to be construed in accordance with the ADA. Greene v. Seminole Electric Cooperative, Inc., 701 So. 2d 646 (5th DCA 1997).

25. Examples of major life activities include caring for oneself, performing manual tasks, walking, seeing, hearing,

speaking, breathing, learning and working. 29 C.F.R. Section 1630.2(i). Case law indicates that corrective and mitigating measures for a physical impairment should be considered in determining whether a person is substantially limited in his or her major life activities. See Sutton v. United Airlines, Inc., 527 U.S. 471, 119 S. Ct. 2139, 144 L.Ed. 450 (1999).

26. The Petitioner admittedly has a hearing impairment. By her own testimony, however, she hears from 60 percent to 80 percent in her least impaired ear with the assistance of her hearing aid. She testified that she did not have any restrictions with regard to her hearing and could "hear everything" with the use of her hearing aid. She also testified that she has worked at a variety of jobs, including in a textile plant, in the past, notwithstanding her hearing impairment. She also testified that she has difficulty understanding spoken words or voices unless she is facing the speaker and watching their lips move in some circumstances. This testimony, therefore, does not clearly establish that the Petitioner has a legal handicap or disability, although she clearly suffers from the physical impairment of hearing loss. It is not clear that that impairment substantially limits a major life activity based upon the totality of her testimony. Assuming that her impairment does substantially limit a major life activity and, therefore, qualifies as a disability for

purposes of the ADA, the Petitioner in any event, failed to establish the remainder of her prima facie case for disability discrimination.

27. There is no evidence to indicate, for instance, that the Respondent discriminated against her based upon a "record" of disability. A record of impairment is defined as a situation where a person "has a history of, or has been classified as having, a mental or physical impairment that substantially limits one or more live activities." 29 C.F.R. Section 1630.2(k). The Petitioner must show that "a record relied on by an employer indicates that the individual has or has had a substantially limiting impairment" to satisfy this theory of disability discrimination. See Hilburn v. Murata Electronics North America, 181 F.3d 1220 (11th Cir. 1999). The Respondent, however, has never met nor had any contact with the Petitioner. The Respondent never had, or had access to, any of the Petitioner's education, medical or employment records. There is no record on which the Respondent could have relied in order to support this theory of discrimination. There is no evidence that the Respondent Solutia, Inc., was on actual notice of any impairment, much less a legal disability.

28. There is no record evidence that the Respondent regarded the Petitioner as having a disability. To prevail on this theory a Petitioner must first introduce substantial

evidence that the employer regarded her as having a permanent or long time impairment. Sutton v. Lader, 185 F.3d 1203, 1209 (11th Cir. 1999). The Respondent never had contact with the Petitioner; therefore, the Respondent could not have regarded her as impaired. Further, as with an actual disability, a perceived impairment must be believed to substantially limit a major life activity of the individual. Hilburn at 1230. The Petitioner has not established that her hearing impairment rose to a level of a disability within the meaning of the ADA. Also, Denise McLeod of Landrum, explained to the Petitioner the safety regulations and issues at the Solutia plant, but told her that Landrum would be glad to contact her if something she was qualified for came available.

29. The Petitioner also failed to demonstrate that she was qualified to perform the job she was seeking, with either AmStaff or Landrum. An essential requirement of the carpet walker job with Landrum, was that a person worked 35 to 40 hours per week and walked approximately 18 miles per day. AmStaff employees were required to meet the physical requirement set forth in Respondent's Exhibit five in evidence. In addition to the physical requirements, AmStaff employees were required to work rotating day and night shifts and 36 to 42 hours per week. The Petitioner admitted that she chose not to work more than 20 hours per week in 1997 and 1998

so as not to cause a reduction of her Social Security benefits. In addition, she was unwilling to work nights (i.e., between 7:00 p.m. and 7:00 a.m.) at the time she applied for work with AmStaff. The Petitioner could not do any significant lifting or pushing at this time. Independent from the physical limitations associated with her difficult pregnancy, the Petitioner admitted that at the time she applied for work with AmStaff, she could not push or pull buggies weighing over 240 pounds, could not work in 100 degree temperatures, and could not stack bags and boxes weighing from 55 to 72 pounds. She also conceded that she was unable to tolerate loud noises such as those made by machines in the plant. The operational area of the plant has a very high noise level. Based upon her own testimony, the Petitioner was not shown to be qualified for the carpet walker job or other jobs with AmStaff.

30. The Petitioner has the burden of requesting a reasonable accommodation from an employer and showing that a reasonable accommodation for a disability exists that would allow her to perform the essential functions of the job she has applied for. See Fussell v. Georgia Ports Authority, 906 F. Supp. 1561, 1569 (S.D. Ga. 1995). The Petitioner conceded that she had never asked AmStaff or Landrum for any accommodations. Furthermore, she presented no evidence as to

whether a reasonable accommodation existed which would allow her to work for AmStaff or Landrum at the Solutia plant. Even the installation of lights to accompany the alarms would not fully accommodate the Petitioner in emergency situations. A light does not give the kind of warning that is needed in order for the employee to respond appropriately to different emergency situations. Moreover, installation of the lights would require a re-wiring of the entire plant of over 200 acres in area which is not a reasonable accommodation to require of the employer.

31. Moreover, an employer is not required to substantially change the job description or the duties and requirements of the job as an accommodation for a disabled employee or potential employee. Such is not deemed by the courts to be a reasonable accommodation. Brand v. Florida Power Corporation, 633 So. 2d 504 (Fla. 1st DCA 1994); Howell v. Michelin Tire Corporation, 860 F.Supp 488 (M.D. Alabama 1994). Thus, desiring to work only 20 hours per week, declining to work on the night shift, 7:00 p.m. to 7:00 a.m., and being unable to tolerate loud noises or to perform the requirements of the job in terms of physical lifting, pushing or pulling, the Petitioner did not present the alleged employer with a set of employee-specific circumstances concerning the Petitioner which the employer can reasonably

accommodate without totally changing the description, requirements and duties of the job in question which an employer is not required to do.

32. An employer is likewise not required to employ someone who imposes a direct threat to his or her health or safety or that of others. See Moses v. American Nonwovens, Inc., 97 F.3d 446 (11th Cir. 1996) (wherein the court stated that an employer can terminate a disabled employee if the disability renders a "direct threat" to his own health or safety); Donahum v. Consolidated Rail Corp., 224 F.3d 226 (3rd Cir. 2000).

33. The Petitioner's hearing impairment posed a direct threat to her safety as well as that of co-workers, if she went to work for AmStaff or Landrum at the Solutia plant. An employee who is not aware of or is unable to hear the sounds and signals emanating from the plant and the machinery within the plant consistently and effectively, cannot respond immediately to situations that may cause problems with the machinery and ultimately could cause injury to an employee. Moreover, there are over 300 alarm boxes throughout the Solutia plant. These alarms are use in emergency situations. They indicate the type of emergency, where the emergency is located, and the severity of the emergency. There are different types of warnings for vapor clouds and evacuations.

All warnings come through that alarm system. An employee must listen for the type of sound or blast, the number of sounds or blasts and the sequence of the sounds or blasts in order to determine the type of emergency.

34. The Petitioner failed to show that the Respondent caused her to suffer an adverse employment action under circumstances which give rise to an inference that the employment action was based upon her handicap. The evidence and testimony show that the Respondent was not hiring or employing carpet walkers. The Petitioner never filled out an application with Solutia, had never been to the Solutia facilities nor had any contact with anyone from Solutia. As such, the Respondent did not cause the Petitioner to suffer any adverse employment action which would support her charge of discrimination.

35. It is undisputed that Landrum was the company which employed carpet walkers. The Petitioner testified that she did not apply for a carpet walking position with Landrum. Even if she had applied for a position with Landrum, the undisputed testimony was that no carpet walker position was available in early March when she purportedly applied for the position. In addition, the Petitioner's own testimony showed that she was not qualified for the position. Accordingly, Landrum could not have caused the Petitioner to suffer any

adverse employment action which would support her charge of discrimination.

36. The evidence and testimony show that AmStaff was not hiring or employing carpet walkers. As such, AmStaff could not have cause the Petitioner to suffer an adverse employment action with respect to the carpet walker position which forms the basis of the Petitioner's charge. Even though the Petitioner did apply for a job with AmStaff, AmStaff did not cause the Petitioner to suffer an adverse employment action under circumstances which give rise to an inference that the employment action was based solely upon her handicap, because the Petitioner's own testimony shows that she was not qualified for any position with AmStaff.

37. The Petitioner has an affirmative obligation to mitigate her damages. Walters v. City of Atlanta, 903 F.2d 1135 (11th Cir. 1986). The Petitioner is foreclosed from recovering any damages if she failed to properly mitigate her damages. The Petitioner stopped working on September 24, 1998, when she was in an automobile accident and sustained injury. She did not return to work until April 2000. She only worked for Walmart for a couple of months. Further, she limited her hours of work to 20 hours a week so her SSI benefits would not be reduced. She has not worked since July 2000 and has not looked for work.

RECOMMENDATION

Having considered the foregoing Findings of Fact, Conclusions of Law, the evidence of record and the candor and demeanor of the witnesses, as well as the pleadings and arguments of the parties, it is

RECOMMENDED:

That a Final Order be entered dismissing the Petition for Relief in its entirety.

DONE AND ENTERED this 6th day of December, 2001, in Tallahassee, Leon County, Florida.

P. MICHAEL RUFF
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 6th day of December, 2001.

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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.