**STATE OF FLORIDA**
**ADMINISTRATION COMMISSION**

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| Audrey Randolph, | * | |
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| Petitioner, | * | |
| | * | |
| v. | * | AC CASE NO.: ALJ-02-01 |
| | * | FCHR Case No.: 98-3306 |
| Florida Division of Administrative Hearings, | * | DOAH Case No.: 02-0287 |
| | * | |
| Respondent. | * | |
| | * | |
| | * | |

## RECOMMENDED ORDER

Pursuant to notice, the Administration Commission, by its duly designated and specially appointed Administrative Law Judge, William W. Large, held a formal hearing in the above-styled case commencing on Monday, September 22, 2003, and ending on Tuesday, September 23, 2003, in Tallahassee, Florida.

### APPEARANCES

Petitioner: Ms. Audrey Randolph, Pro Se
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For Respondent: Mr. Linzie F. Bogan, Esquire
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## PRELIMINARY STATEMENT

On or about November 18, 1998, Petitioner, Audrey Randolph, filed a Charge of Discrimination with the Florida Commission on Human Relations (FCHR) alleging that Respondent, Florida Department of Management Services, Division of Administrative Hearings (DOAH), had unlawfully discriminated against her in her employment. Specifically, Petitioner alleged that DOAH unlawfully terminated her based on her race (African American), religion (Protestant/Charismatic), disability (perceived immune system disorder), marital status (divorced), and in retaliation for associating with a DOAH employee who had previously filed a grievance against DOAH.

On October 1, 2001, the Florida Commission on Human Relations investigated the charge and issued a "Notice of Determination: No Cause" in this case. The Notice held that there was no reasonable cause to believe that an unlawful employment practice had occurred in Petitioner's case. Petitioner disagreed with the Commission's determination and requested a formal administrative hearing on November 27, 2001. Petitioner's request for hearing was forwarded to the Division of Administrative Hearings on December 10, 2001. Because DOAH was a party to the proceeding, it was necessary to have the Florida Administration Commission

assign a special administrative law judge to preside over this matter. On May 15, 2002, the Florida Administration Commission appointed William W. Large, Esquire, to act as the administrative law judge.

At the final hearing, Petitioner testified on her own behalf and called four witnesses: Ann Cole, Carol Ripandelli, Deborah Ash, and Myon Boyd. Petitioner offered the following exhibits which were received into evidence: P1; P2; P3A-E; P4; P5A-C; P7A-E; P8; P9; P10; P11; and P12A-E. Respondent presented the testimony of two witnesses: Ann Cole and Elma Moore. Respondent's exhibits 2, 5, 6-11, and 13-18 were received into evidence. The transcript of the hearing was filed with the Division of Administrative Hearings on October 8, 2003. The parties submitted Proposed Recommended Orders that have been read and considered in preparation of this Recommended Order.

## FINDINGS OF FACT

EMPLOYMENT STATUS

1. Petitioner (Randolph) is an African-American female.

2. Petitioner was hired by Respondent on June 2, 1997, and was terminated by Respondent from her employment on September 30, 1997.

3. When initially hired, Petitioner's official employment class title was Other Personnel Services (OPS) Paralegal Specialist.

4. On July 1, 1997, approximately one month after her date of employment, Petitioner's official employment class title was changed to Administrative Secretary and Petitioner's pay plan status was changed from OPS to Career Service.

5. On September 1, 1997, Petitioner's class title was reclassified to Paralegal Specialist.

6. From July 1, 1997, until the date of her termination, Petitioner was employed in a probationary status by DOAH with her primary job responsibilities being that of a proofreader.

7. Probationary employees are not entitled to progressive discipline and can be terminated at will pursuant to Florida Administrative Code Rule 60L-36.005.

8. Ann Cole, the clerk of DOAH, interviewed all candidates for the newly created proofreader position.

9. There were several applicants for the proofreader position and after a series of tests and interviews Ann Cole determined that Petitioner was the best applicant for the proofreader position and Petitioner was hired for the job.

10. Approximately one month after Petitioner was hired, a second proofreader (Dr. Rappendelli) was hired. Dr. Rappendeli is a white female.

11. Both Petitioner and Dr. Carol Ripandelli were supervised at DOAH by Ann Cole.

ATTENDANCE HISTORY

12. During the first month of her employment Petitioner shared a work area in DOAH's mailroom with current DOAH employee Elma Moore, an African-American female.

13. Elma Moore typically arrived at work between 7:00 and 7:15 a.m. even though the required start time for employees of the clerk's office was 8:00 a.m.

14. Elma Moore was able to directly observe the times during which Petitioner arrived at work. Ms. Moore noted that Petitioner reported to work forty-five minutes late on her first day. Ms. Moore further noted that Petitioner would often be late.

15. Elma Moore was relocated to another part of the clerk's office when Dr. Rappendelli was hired.

16. Elma Moore, even from her new workstation, continued to be situated such that she was able to observe the times at which Petitioner customarily arrived at work.

17. Elma Moore testified that during the four month period that Petitioner worked for DOAH, at least two to three times each week, Petitioner would arrive at work approximately ten to thirty minutes beyond the mandatory 8:00 a.m. start time for employees.

18. The testimony of Elma Moore is further corroborated by the affidavit of Deanna Hartford.

19. Ms. Hartford, who was the Deputy Clerk Supervisor for DOAH during Petitioner's period of employment, stated that she observed Petitioner arrive to work late, without notice, on several occasions during her OPS employment and during her career service probationary employment.

20. Ms. Hartford stated in her affidavit that around the first week of September 1997 she was asked by Ann Cole to observe Petitioner's attendance. Ms. Hartford noted that during this period of observation Petitioner arrived to work at the following times on the dates as indicated: September 8, 1997, 8:20 a.m.; September 9, 1997, 8:25 a.m.; September 10, 1997, 8:10 a.m.; and September 17, 1997, 8:20 a.m.

21. Ms. Hartford reported to Ann Cole, Petitioner's supervisor, that Petitioner was frequently late for work.

22. This is consistent with Elma Moore's testimony that Petitioner, at least two to three days per week, was customarily late for work in excess of ten minutes.

23. Petitioner attempted to contradict the testimony of Elma Moore and the affidavit of Deanna Hartford by testifying that she was told by her supervisor, Ann Cole, to make up her tardy time thereby excusing the fact that she was habitually late for work.

24. Ms. Cole stated the importance of proofreaders being punctual to work, and testified that she and Petitioner had at least two meetings where they discussed Petitioner's tardiness issue prior to her termination.

25. Ms. Cole stated that she spoke with Petitioner about her timesheet and attendance, and the need for Petitioner to tell her when she is late and how she plans to make up her time.

26. Ms. Cole stated that Petitioner's communication regarding her promptness and plans to make up time never improved.

27. Ms. Hartford stated that she never observed Petitioner disclose her late arrivals to her supervisor, Ms. Cole. On more than one occasion, Ms. Hartford stated, she reported Petitioner's tardiness to Ms. Cole, who indicated she was unaware of the late arrival.

PHONE USE

28. Unlike some of the other jobs in the clerk's office, the proofreader's duties and responsibilities did not require the utilization of the telephone.

29. Elma Moore stated that during the time that she shared an office with Petitioner, her desk was in close proximity to Petitioner's desk and that on several occasions she noticed that Petitioner was talking on the telephone.

30. Elma Moore stated that Petitioner was using the telephone for personal calls frequently.

31. Elma Moore further testified that she knew that the responsibilities and duties of the proofreader did not require Petitioner to use the telephone.

32. Deanna Hartford noted in her affidavit that she personally observed that Petitioner was always on the phone.

33. Ms. Hartford also noted in her affidavit that other employees at the Clerk's office had complained to her about Petitioner's excessive use of the telephone.

34. Ms. Hartford advised her supervisor Ann Cole about Petitioner's excessive phone use.

35. In response to the complaint about Petitioner's excessive use of the telephone, Ms. Cole contacted DOAH's

information services department and requested that they audit all of the telephone extensions for the clerk's office.

36. The audit results for the clerk's office revealed that during the audit period, employees, excluding Petitioner, averaged 85.5 outgoing phone calls.

37. Petitioner, however, had 294 outgoing calls attributed to her extension during this period. Dr. Carol Ripandelli, the other proofreader, had 79 outgoing calls attributed to her extension during this same period.

38. The audit results for the clerk's office revealed that during the audit period, employees, excluding Petitioner, averaged 1.6 outgoing calls that exceeded ten minutes in duration.

39. The number of outgoing calls exceeding ten minutes in duration that were attributed to Petitioner's extension during the audit period totaled thirteen. Dr. Carol Ripandelli had only two outgoing calls that exceeded ten minutes in duration attributed to her extension during the audit period.

40. Petitioner denied having made the number of phone calls attributed to her extension. Petitioner also charged that it was possible that other employees could have made outgoing calls from the phone on Petitioner's desk.

41. Elma Moore testified that it was neither the practice nor the custom of employees of the clerk's office to regularly use the telephone of other employees.

INITIATIVE

42. Deanna Hartford, in her affidavit, noted that in July of 1997 she was asked by Ann Cole to provide additional training to the proofreaders.

43. Petitioner and the other proofreader were instructed to inform Ms. Hartford when they were caught up with their work so that the additional training could be provided.

44. Dr. Carol Rappendeli, the OPS proofreader, sought and received additional training in several areas including filing, assisting in the quarterly file purge and destruction, outgoing docketing procedures, and maintaining the Florida Administrative Code supplements.

45. Petitioner never sought additional training as requested.

46. Ann Cole observed Petitioner nodding off on at least three occasions while in an important proofreading standards meeting.

47. Ms. Cole observed Petitioner cutting coupons at her desk the morning of September 22, 1997, during business hours.

48. Elma Moore also testified to the fact that Petitioner, during business hours would frequently work on a personal book when she wasn't proofreading.

DISRUPTIVE AND RUDE BEHAVIOR

49. Ms. Cole testified that along with the attendance problems and telephone usage, Petitioner also had attitude problems.

50. On two occasions, Petitioner felt the need to apologize for rude comments made to her supervisor, Ms. Cole.

51. Ms. Cole observed rude behavior by Petitioner directed toward Dr. Ripandelli when they were discussing proofreading on a particular order.

52. Ms. Cole stated that when Petitioner gets in one of her moods, teamwork between Petitioner and Dr. Ripandelli is ineffective.

53. Ms. Cole testified that she had to speak with Petitioner about her radio and that it was so loud it caused a disturbance in the break room.

54. Dr. Ripandelli testified that Petitioner's radio was so loud that she bought herself headphones in order to drown out Petitioner's radio.

55. In contrast, Ms. Cole testified that Dr. Ripandelli gets along with all the judges and that Dr. Ripandelli interacts fine with her.

TERMINATION

56. Ms. Hartford stated that Petitioner never discussed with her any need to accommodate her for a disability or for her religion.

57. Ms. Hartford further stated that Petitioner never mentioned that she was being discriminated against for any reason. Ms. Hartford never observed Petitioner walk with a limp, or have sores or bandages on her legs.

58. Petitioner was terminated on September 30, 1997, due to her chronic tardiness, excessive use of the telephone, and her general failure to demonstrate initiative.

## CONCLUSIONS OF LAW

I. JURISDICTION

59. The State of Florida Commission on Human Relations has jurisdiction over the parties and subject matter of this cause, pursuant to the Florida Civil Rights Act of 1992.

II. THE RACE CLAIM

60. Under the provisions of Section 760.10 (1)(a), Florida Statutes, it is an unlawful employment practice for

an employer "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."

61. The Florida Commission on Human Relations and the Florida courts have determined that federal discrimination law should be used as guidance when construing provisions of Section 760.10, Florida Statutes. See Brand v. Florida Power Corp, 633 So. 2d 504, 509 (Fla. 1st DCA 1994); Florida Department of Community Affairs v. Bryant, 586 So.2d 1205 (Fla. 1st DCA 1991).

62. The Supreme Court of the United States established in McDonnell- Douglass Corporation v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089 (1981), the analysis to be used in cases alleging discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sections 2000e, et seq., where there is no credible direct evidence of discrimination provided. This analysis was reiterated and refined in St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S.Ct. 2742 (1993).

63. Pursuant to this analysis, Petitioner has the burden of establishing by a preponderance of the evidence a prima facie case of unlawful discrimination. If a prima facie case is established, Respondent must articulate some legitimate, non-discriminatory reason for the action taken against Petitioner. Once this non-discriminatory reason is offered by Respondent, the burden then shifts back to Petitioner to demonstrate that the offered reason is merely a pretext for discrimination. As the Supreme Court stated in Hicks, before finding discrimination, "[t]he fact finder must believe the plaintiff's explanation of intentional discrimination." Id. at 519.

64. In Hicks, the Court stressed that even if the fact-finder does not believe the proffered reason given by the employer, the burden remains with Petitioner to demonstrate a discriminatory motive for the adverse employment action. Id.

65. In the instant case, Petitioner has claimed race discrimination based on her alleged disparate treatment in the workplace. In order to establish a prima facie case of disparate treatment based upon race, Petitioner must establish: (1) that she is a member of a protected class; (2) that she was qualified for her position; (3) that she suffered an adverse employment action; and (4) that she was

treated less favorably than similarly situated employees who were not members of her protected class. Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997).

66. Section 760.10, Florida Statutes, provides that race is a protected class. There is no dispute as to Petitioner's being African-American or being qualified for the position she held, or that her discharge was an adverse employment action.

67. Respondent, however, disputes that Petitioner was treated less favorably than similarly situated employees who were not members of Petitioner's protected class.

68. Respondent argues that Petitioner is unable to establish a prima facie case of discrimination because she is unable to identify a similarly situated person from a different class who was treated more favorably.

69. "In determining whether employees are similarly situated . . . it is necessary to consider whether the employees are involved in or accused of the same or similar conduct and are disciplined in different ways." Id.

70. Petitioner argues that Dr. Carol Rappendeli was a similarly situated Caucasian proofreader who was treated more favorably. The only similarity between Dr. Rappendeli and Petitioner is that they both worked at DOAH as proofreaders during the relevant time period.

71. The evidence presented at the hearing showed that Petitioner was frequently fifteen to twenty minutes late for work. However, the evidence presented at the hearing showed that Dr. Rappendeli, unlike Petitioner, arrived for work on a daily basis at least fifteen to twenty minutes prior to her scheduled start time of 8:00 a.m.

72. DOAH employees complained to Petitioner's supervisor about Petitioner being habitually late for work. There were no such complaints about Dr. Rappendeli.

73. Ann Cole testified that Petitioner fell asleep during a very important proofreader's standards meeting. Petitioner failed to offer any evidence of a similar "sleeping episode" by Dr. Rappendeli.

74. There were complaints made to Petitioner's supervisor about Petitioner always being on the telephone. Petitioner's supervisor, Ann Cole, stated that as a proofreader, "there would be no reason, really, for [a proofreader] to make external phone calls." However, when Petitioner's phone line was audited it was determined that she had more than three and a half times as many outgoing calls attributed to her phone when compared to the outgoing phone usage of Dr. Rappendeli. For the five-day audit period, Petitioner made twenty-seven long distance calls, thirteen calls in excess of ten minutes each, and four of

which were longer than twenty minutes. Petitioner's evidence that someone else was consistently using her phone is unsubstantiated and not convincing.

75. The evidence established that Petitioner was never caught up in her proofreading work, and never showed any initiative by asking for additional duties or any training. In contrast, Dr. Rappendeli had assisted with the quarterly purge; trained on the out-going docketing; maintained the Florida Administrative Code supplements; and ran all the mail room equipment.

76. The evidence presented demonstrates that Dr. Rappendeli's employment record was substantially better than Petitioner's when it came to issues related to tardiness, telephone usage, and showing initiative by seeking out additional training and work related assignments. Thus, Dr. Rappendeli and petitioner are not similarly situated employees.

77. Petitioner has completely failed to produce any evidence that an employee outside of Petitioner's classification was similarly situated and treated more favorably.

78. Petitioner has failed to satisfy her burden of establishing a prima facie case, and thus, her claim of racial discrimination must fail. Even if Petitioner had

established a prima facie case, DOAH articulated legitimate, nondiscriminatory reasons for her termination. The evidence presented by DOAH established that Petitioner was chronically late to work, she slept during a very important meeting, she used the phone excessively and she generally lacked initiative. Any one of these reasons, standing alone, would satisfy Respondent's burden. Petitioner failed to produce competent evidence that demonstrates that the reasons advanced by DOAH for its decision to terminate Petitioner were pre-textual.

III. THE RELIGION CLAIM

79. Under decisions of lower federal courts, an employee seeking redress for discharge based on religious discrimination has the burden to establish a prima facie case by proving that: (1) she had a bona fide religious belief; (2) she informed her employer of her religious views and that they were in conflict with her responsibilities as an employee; and (3) she was discharged because of her observance of that belief. Proctor v. Consol. Freightways Corp. of Delaware, 795 F.2d 1472, 1475 (9th Cir. 1986). To the same effect, see Anderson v. General Dynamics Convair Aerospace Division, 589 F.2d 397, 401 (9th Cir. 1978), cert. den., 442 U.S. 921, 99 S.Ct.

921; see also Turpen v. Missouri-Kansas-Texas Railroad Company, 736 F.2d 1022, 1026 (5th Cir. 1984).

80. Under federal statutory law, it is "an unlawful employment practice for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of his employees . . . " Trans World Airlines Inc. v. Hardison, 432 U.S. 63, 74, 97 S.Ct. 2264 (1977).

81. As previously indicated, if a prima facie case is established, a presumption of discrimination arises and the burden shifts to Respondent to advance a legitimate, non-discriminatory reason for the action taken against Petitioner. However, Respondent does not have the ultimate burden of persuasion but merely an intermediate burden of producing a nondiscriminatory reason for the adverse action. Once Respondent offers justification, the burden shifts back to Petitioner. Petitioner must then demonstrate that the offered reason was merely a pretext for discrimination.

82. Petitioner failed to establish a prima facie case of religious discrimination because she did not present any evidence that the decision-maker knew of her religion. Ann Cole, Petitioner's supervisor, testified that she was not aware of Petitioner's religious affiliations. The only evidence that Petitioner offered that even remotely relates

to religion was her testimony that she would often times listen to a Christian radio station and read the Bible during her work breaks. However, there was no testimony offered by Petitioner that her religious beliefs were communicated to Ann Cole and that Petitioner was terminated because of her religious beliefs or practices. Petitioner offered no evidence demonstrating that her religious beliefs in any way conflicted with her duties as an employee of DOAH. Petitioner has not demonstrated any nexus between her religion and the decision by DOAH to terminate Petitioner from her employment.

83. Applying these criteria to the evidence presented, Petitioner has failed to meet the threshold requirement of showing that she had a bona fide religious belief that was communicated to DOAH and that she was fired by DOAH because of her religious beliefs or practices.

84. Since the Petitioner has failed to meet her burden on this issue the Respondent is relieved of its burden of having to produce evidence to rebut this allegation.

85. Petitioner did not bring forth credible evidence demonstrating that her termination was in any way related to her religious beliefs. Even if Petitioner had established a prima facie case, DOAH articulated

legitimate, nondiscriminatory reasons for her termination. The evidence presented by DOAH established that Petitioner was chronically late to work, she slept during a very important meeting, she used the phone excessively and she generally lacked initiative. Any one of these reasons, standing alone, would satisfy Respondent's burden. Petitioner failed to produce competent evidence that demonstrates that the reasons advanced by DOAH for its decision to terminate Petitioner were pre-textual.

IV. THE MARITAL STATUS CLAIM

86. Under the Florida Civil Rights Act (FCRA), the elements of a claim of marital discrimination are: (1) marital status; (2) performance of employment position in satisfactory manner; and (3) despite such performance, condition or privilege of employment was affected by marital status. West's F.S.A. § 760.01 et seq.

87. Marital status is defined as: the "state of being married, single, divorced, widowed, or separated, and does not include specific identity or actions of individual's spouse." Donato v. American Telephone and Telegraph Co., 767 So.2d 1146, 1155 (Fla. 2000).

88. Petitioner has established that she is divorced and single, thereby satisfying the first element of a marital discrimination claim.

89. In order to be successful in this claim, Petitioner must also demonstrate that she performed the duties of her position in a satisfactory manner. There is an overwhelming amount of credible evidence relating to Petitioner's job performance. Unfortunately for the Petitioner, the wealth of evidence demonstrates that her performance was undeniably *unsatisfactory*. Petitioner's unsatisfactory job performance is documented by:

a) The importance of promptness within the office and Petitioner's habitually late arrival times, which began on Petitioner's first day of work and continued even after a discussion about her poor attendance.

b) Evidence of Petitioner's attitude problems and rude behavior toward other employees.

c) Evidence of the Petitioner falling asleep at an important proofreading standards meeting.

d) Evidence of various complaints from supervisors and co-workers about Petitioner's constant telephone use, and that Petitioner frequently used the telephone for personal phone calls.

e) Evidence demonstrating Petitioner's general lack of initiative in the workplace. Instances such as Petitioner's history of not communicating with her supervisor, clipping coupons at 9:00 a.m. instead of

working, writing a personal book during work hours, and the Petitioner's failure to attend training sessions that were expected of her all tend to establish Petitioner's lack of initiative.

90. The evidence presented plainly demonstrates that Petitioner failed to establish that she performed her duties in a satisfactory manner.

91. Petitioner has also failed to establish that the condition or privilege of her employment was affected by her marital status. Petitioner bases her marital discrimination claim on three distinctive sets of facts: 1) she was told by her supervisor that she was wearing a short skirt; 2) the personnel director queried her about her children's different last names and wanted to know if they were adopted; and 3) the fact that she received a paycheck that indicated she received child support. There is not one sliver of credible evidence that reveals a connection between Petitioner's termination and these three incidents.

92. Because Petitioner has failed to establish that the performance of her employment duties were of a satisfactory nature and that her employment was affected by her marital status, her claim of marital discrimination under the FCRA must fail, and she is barred from receiving relief under the FCRA. Even if Petitioner had established

a prima facie case, DOAH articulated legitimate, nondiscriminatory reasons for her termination. The evidence presented by DOAH established that Petitioner was chronically late to work, she slept during a very important meeting, she used the telephone excessively and she generally lacked initiative. Any one of these reasons, standing alone, would satisfy Respondent's burden. Petitioner failed to produce competent evidence that demonstrates that the reasons advanced by DOAH for its decision to terminate Petitioner were pre-textual.

V. THE DISABILITY CLAIM

93. Petitioner claims to have been wrongfully terminated due to the fact that she is physically disabled. Petitioner's asserted disabilities consist of a leg rash and the alleged perception that there is a problem with her immune system.

94. In order to establish a prima facie violation of the Florida Civil Rights Act and the Americans With Disabilities Act (ADA), Petitioner must present evidence that she: (1) has a disability, (2) is a qualified individual, and (3) was discriminated against because of the disability. 42 U.S.C. § 12112(a); see Reed v. Heil Co., 206 F.3d 1055, 1061 (11th Cir. 2000). In order to be entitled to relief all three elements must be satisfied.

95. For Petitioner to be successful in her claim, she must first demonstrate that she had a physical disability at the time of her employment. The ADA states that, "disability" means "being regarded as having a physical or mental impairment that substantially limits one or more of the major life activities of such individual." Goldsmith v. Jackson Memorial Hospital Public Health Trust, 33 F.Supp.2d 1336, 1340-1341 (S.D. Fla. 1998.). "Major life activities refers to functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." Id.

96. Petitioner brought forth no credible evidence that tends to establish that she had an impairment that limited one of her major life activities:

a) There was no credible evidence that demonstrated Petitioner could not carry out a major life function due to her leg rash. Petitioner testified that this rash caused a limp, but no other testimony corroborated this evidence. In fact, no other witnesses knew of the rash's existence, or noticed the limp that Petitioner complained of. Petitioner's alleged disabilities had no affect upon her ability carry out a major life function, and thus,

they cannot be classified as disabilities under the ADA.

b) The other impairment that Petitioner claims to have been the basis of discrimination is the alleged perception that her immune system has problems. There is a vast absence of credible evidence to support this claim. Petitioner brought forth no evidence illustrating how this suspicion would limit her ability to perform major life functions. As such, it cannot be defined as a disability under the ADA.

97. Because Petitioner has failed to bring evidence forward proving that she had a disability at the time of her employment, she has failed to establish a prima facie violation of the FCRA or the ADA and is therefore barred from receiving relief under ADA and FCRA. Even if Petitioner had established a prima facie case, DOAH articulated legitimate, nondiscriminatory reasons for her termination. The evidence presented by DOAH established that Petitioner was chronically late to work, she slept during a very important meeting, she used the phone excessively and she generally lacked initiative. Any one of these reasons, standing alone, would satisfy Respondent's burden. Petitioner failed to produce

competent evidence that demonstrates that the reasons advanced by DOAH for its decision to terminate Petitioner were pre-textual.

VI. THE RETALIATION CLAIM

98. In order to establish a prima facie case of retaliation, Petitioner must show that: (1) she engaged in statutorily protected activity, (2) an adverse employment action occurred, and (3) the adverse action was casually related to her protected activities. Little v. United Technologies, 103 F.3d 956, 959 (11th Cir. 1997).

99. Florida Statutes Section 760.10(7) helps explain what types of conduct are statutorily protected activities. It provides that it is unlawful to discriminate "against any person because that person has opposed any practice which is an unlawful employment practice under this section, or because that person has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section."

100. Petitioner's evidence of unlawful retaliation is that her supervisor, Ann Cole, displayed negative body language when she learned that Petitioner was riding to work with a DOAH employee who had filed a grievance against Ms. Cole. Carpooling to DOAH with a co-worker is not a statutorily protected activity encompassed by Florida

Statutes, Section 760.10(7). Thus, Petitioner has failed to satisfy the first prong of the retaliation analysis.

101. There is no disputing the fact that Petitioner was terminated from DOAH on September 30, 1997. By bringing forth evidence demonstrating that she was terminated, Petitioner has satisfied the second prong of the retaliation analysis, proving that an adverse employment action occurred.

102. However, Petitioner has failed to bring forth any credible evidence demonstrating that her termination was related to any statutorily protected conduct. Even if carpooling with another office member could be construed as a protected act, there is still absolutely no credible evidence that casually connects the carpooling with Petitioner's termination. Petitioner has failed to establish that her termination was related to anything but her poor job performance. Accordingly, Petitioner has failed to meet the third prong of this analysis.

103. The evidence presented established that Petitioner did not: 1) engage in any statutorily protected act, or 2) show a link between her termination and any protected act. Because Petitioner has failed to meet her burdens of production and persuasion, she has failed to establish a prima facie retaliation claim.

104. Even if Petitioner had established a prima facie retaliation claim, DOAH articulated legitimate, nondiscriminatory reasons for her termination.

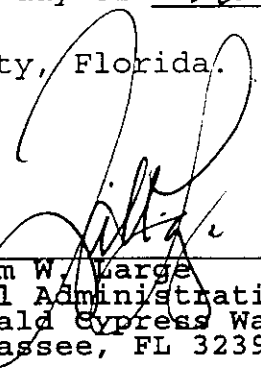
105. Once an employee establishes her prima facie case of retaliation, the employer must proffer a legitimate, nondiscriminatory reason for the adverse employment action. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

106. In summary, Petitioner's position that she suffered discrimination based on retaliation for engaging in an activity protected by Section 760.10(7), Florida Statutes, is not supported by a preponderance of the evidence. Even if Petitioner had established a prima facie case, DOAH articulated legitimate, nondiscriminatory reasons for her termination. The evidence presented by DOAH established that Petitioner was chronically late to work, she slept during a very important meeting, she used the telephone excessively and she generally lacked initiative. Any one of these reasons, standing alone, would satisfy Respondent's burden. Petitioner failed to produce competent evidence that demonstrates that the reasons advanced by DOAH for its decision to terminate Petitioner were pre-textual.

## RECOMMENDATION

In the present case, Respondent showed a legitimate reason for discharging Petitioner. Petitioner failed to establish a prima facie case of discrimination based upon her race, religion, disability or marital status. Petitioner also failed to demonstrate that Respondent discriminated against her in retaliation for Petitioner engaging in an activity that was protected by Section 760.10(7), Florida Statutes. Having considered the foregoing Findings of Fact, Conclusions of Law, the evidence of record, the candor and demeanor of the witnesses, and the pleadings and arguments of the parties, it is, therefore RECOMMENDED that a Final Order be entered by the Florida Commission on Human Relations dismissing the Petition for Relief in its entirety.

DONE AND ENTERED this 2d day of December, 2003, in Tallahassee, Leon County, Florida.



William W. Large
Special Administrative Law Judge
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Filed with the clerk of the
Florida Commission of Human
Relations this 2nd day of December
2003.

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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.