STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TERESA CAVANAUGH,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 03-2736
	)	
SPRINT-FLORIDA, INC.,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

This cause came on for final hearing, as noticed, before P. Michael Ruff, duly-designated Administrative Law Judge of the Division of Administrative Hearings. The hearing was conducted in Ocala, Florida, on November 14, 2003. The appearances were as follows:

APPEARANCES

For Petitioner: Teresa Cavanaugh, pro se
3010 Northeast Seventh Lane
Ocala, Florida 34470

For Respondent: Patrick M. Muldowney, Esquire
Akerman Senterfitt
Post Office Box 231
Orlando, Florida 32802-0231

STATEMENT OF THE ISSUE

The issue to be resolved in this proceeding concern whether the Respondent has been discriminated against on account of her handicap or disability in connection with her termination of

employment, in alleged violation of Section 760.10, Florida Statutes.

PRELIMINARY STATEMENT

This cause arose when the Petitioner, Teresa Cavanaugh, filed a charge of discrimination with the Florida Commission on Human Relations (FCHR) on October 16, 2001. Ms. Cavanaugh filed an amended charge with FCHR on November 16, 2001, and in the amended charge alleged that the Respondent, Sprint Florida, Inc. (Sprint) wrongfully terminated her employment because of her purported mental disability, which she identified at hearing as "depression, anxiety, bipolar, manic depressive . . . and borderline personality disorder."

On June 18, 2003, the Commission informed Ms. Cavanaugh that it had determined that there was no reasonable cause to believe an unlawful employment practice had occurred. In response to that determination Ms. Cavanaugh filed a Petition for Relief on July 23, 2003. The Petition contains allegations that Sprint terminated Ms. Cavanaugh because of her disability and made three unlawful inquiries into her disability status. The matter was transferred to the Division of Administrative Hearings and ultimately to the undersigned Administrative Law Judge.

The cause came on for hearing, as noticed, on November 14, 2003, in Ocala, Florida. Ms. Cavanaugh testified on her own

behalf, and had 44 exhibits admitted into evidence. Sprint called five witnesses and had ten exhibits admitted into evidence, as well as a transcript of Ms. Cavanaugh's deposition, taken on September 18, 2003, with disposition exhibits attached thereto. Upon conclusion of the proceedings, the parties were given an opportunity to file proposed recommended orders after a transcript was obtained. The Proposed Recommended Orders were filed and have been considered in the rendition of this Recommended Order.

FINDINGS OF FACT

1. The Petitioner, Teresa Cavanaugh, was employed by Sprint from 1985 through 2000. During 1999 and 2000, Ms. Cavanaugh held the position of Technical Analyst I, assigned to the Carrier Market's department at Sprint's National Access Service Center in Leesburg, Florida. In this position, Ms. Cavanaugh was responsible for assuring that orders for the use of Sprint's local telephone lines by long distance carriers such at AT&T were processed correctly.

2. Ms. Cavanaugh's immediate supervisor in this position was Robert Whittaker, the Customer Access Manager. Mr. Whitaker's immediate supervisor was Jackie Picard, the National Customer Service Manager.

3. On August 26, 1999, the Petitioner was arrested in Marion County, Florida and charged with two third-degree

felonies involving obtaining a controlled substance by fraud and possession of a controlled substance.

4. The Petitioner informed Sprint's house counsel, Susan Stucker, of her arrest on August 31, 1999. Ms. Cavanaugh explained the arrest to Ms. Stucker and Ms. Stucker informed Ms. Cavanaugh that she needed to report the arrest to her supervisor. Ms. Stucker also told the Petitioner that as long as the arrest was not related to work, she would be permitted to continue working for Sprint until such time as there was a disposition of the charges. After speaking with Ms. Stucker, the Petitioner informed Mr. Whitaker of her arrest.

5. The Petitioner testified that Ms. Stucker informed her, in the above-described conversation, that her job would not be affected as long as adjudication was withheld with respect to the criminal charges. Ms. Stucker, however, denied telling that to Ms. Cavanaugh and instead testified that she would never have made such a statement because, pursuant to Sprint's unwritten policy, convictions for or pleas to felony charges are terminable offenses, regardless of whether adjudication is withheld. Ms. Stucker also told the Petitioner that Sprint's policy was to that effect in a subsequent conversation. This dispute in testimony is resolved in favor of that given by Ms. Stucker because of the respective demeanor of the witnesses and Ms. Stucker's undisputed testimony that on at least two

other occasions she approved terminations of persons who pled nolo contendere to felony charges. Her testimony was corroborated by documentation regarding the nolo contendere plea of one of the persons whose employment was terminated, Wilson Hinson. In fact, as with Ms. Cavanaugh, Mr. Hinson's records demonstrate that the court withheld adjudication of guilt regarding the charges against him.

6. Several weeks later, on Friday, September 17, 1999, the Petitioner sent an e-mail to Mr. Whitaker expressing that she was "losing control of her mind," was "spinning out of control," felt "helpless and desperate," was "going over the edge," and needed "some serious help." The Petitioner indicated also that she had an "overwhelming sense of helplessness and hopelessness." Ms. Cavanaugh stated in her e-mail, and in testimony at the hearing, that prior to this incident, she never had felt this way. She further testified that she had no prior history of mental illness.

7. After reading the Petitioner's e-mail, Mr. Whittaker became concerned that Ms. Cavanaugh could be a threat to herself or to co-workers. Based upon this concern, he shared the e-mail with Ms. Picard, and both Mr. Whittaker and Ms. Picard informed the Human Resources Department of Sprint of its contents. Mr. Whitaker, Ms. Picard and Colby Gilson, the Manager of Employee Relations, developed a plan whereby the Petitioner

would be placed on paid "crisis leave" and referred to Sprint's Employee Assistance Program (EAP) for evaluation as to her ability to safely perform her job.

8. Mr. Whittaker informed the Petitioner that she was being placed on leave and referred to EAP on the morning of her next scheduled work day, Monday, September 20, 1999. After meeting with Mr. Whittaker, the Petitioner was placed on leave and evaluated by the EAP. The Petitioner informed the psychiatrist who was evaluating her as part of the EAP process that her mood had improved after being placed on leave. The Petitioner was cleared to return to work on a part-time basis in late December 1999 or early January 2000. She was allowed to return to a full-time schedule in late January 2000.

9. On or about June 27, 2000, the Petitioner, on her own initiative, commenced a short-term disability leave. Because the leave was for an alleged mental condition, the Petitioner was asked to undergo an independent medical examination (IME) pursuant to Sprint's standard policy of verifying leaves for conditions that are difficult to review through objective medical evidence (e.g., mental conditions and soft tissue injuries). The Petitioner underwent the IME, which confirmed her need for leave. The Petitioner then remained on leave until October 17, 2000, at which time she returned to work on a part-time basis. She resumed a full-time schedule approximately one

week later, on October 23, 2000, with no restrictions on her ability to work.

10. Due to the amount of leave the Petitioner had taken to date, during September and October 2000, Sprint's Benefits Department in Kansas City sent the Petitioner two letters informing her regarding the availability of long-term disability benefits and disability retirement benefits, respectively, should she wish to apply for them. These letters were sent out pursuant to the Benefits department's standard practice of notifying employees who have been out comparable periods of time of the availability of such benefits so as to minimize the potential lapse in benefits should an employee exhaust all of his or her short-term disability leave.

11. After her return from leave, on or about October 31, 2000, the Petitioner told Mr. Whittaker that she was taking what she believed to be a very strong prescription that had been given to her by her doctor. Mr. Whittaker consulted with Mr. Gilson as to whether he needed to take any action in response to this information. Mr. Gilson informed Mr. Whittaker that he should require the Petitioner to provide a note from her doctor indicating whether or not she could continue at work while taking the medication. Mr. Whittaker followed Mr. Gilson's directions and requested that the Petitioner provide a note from her doctor. She submitted such a note to

Mr. Whittaker on November 2, 2000. According to that note, the Petitioner was cleared to work with no limitations or restrictions, "as long as she participates in treatment and maintains compliance with medications and scheduled appointments." The Petitioner has not established how any major life activities have been substantially limited by any alleged mental condition.

12. On or about November 29, 2000, the Petitioner informed Mr. Whittaker that her probation officer would be calling him to verify that she worked at Sprint and was coming to work on a regular basis. According to Whittaker, at no time prior to that conversation had the Petitioner informed him of any final disposition of the felony charges filed against her. Mr. Whittaker informed Mr. Gilson of this conversation, and Gilson then asked Stacy Smith, a security investigator, to contact the court in Marion County to determine whether there had been any final disposition of the charges lodged against the Petitioner in August 1999.

13. Mr. Smith, who as part of his regular job duties had been tracking the proceedings against the Petitioner and other Sprint employees subject to criminal charges, contacted the Marion County Clerk's office which provided documents showing that, in October 2000, the Petitioner pled nolo contendere to the two felony charges. The documents Mr. Smith received also

showed that the court had withheld adjudication on the basis of that plea. The information Mr. Smith received from the court ultimately was provided to Mr. Gilson, Ms. Stucker, Mr. Whittaker and Ms. Picard.

14. Based upon Sprint's unwritten policy regarding terminations for felony convictions or pleas, Mr. Whittaker recommended the termination of the Petitioner's employment. Ms. Picard concurred with Mr. Whittaker's recommendation, as did Picard's immediate supervisor, Krystal Barr.

15. Mr. Whittaker's recommendation was reviewed by Ms. Stucker, Mr. Gilson, and David Sapenoff, Mr. Gilson's immediate superior. Each of these individuals concurred in the decision to terminate the Petitioner’s employment.

16. On the basis of Mr. Whittaker's recommendation, and the above-mentioned concurrences, the Petitioner's employment was terminated on December 14, 2000. Although the Petitioner claims that she was never told the basis for her termination, both Mr. Whitaker and Ms. Picard testified that the Petitioner was told that she was terminated because of her felony plea. This dispute in testimony is resolved in favor of that of Mr. Whittaker and Ms. Picard, given both the respective demeanor of the witnesses and the fact that the records of the Florida Department of Labor and Employment Security indicate that the Petitioner stated in an interview, regarding her entitlement to

unemployment compensation benefits, that she was terminated because of her felony conviction.

CONCLUSIONS OF LAW

17. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. § 120.57(1), Fla. Stat. (2003).

18. The burden of proof in this proceeding is on the Petitioner, who must establish by a preponderance of evidence that her termination from employment constituted unlawful discrimination within the purview of Chapter 760, Florida Statutes. See Florida Department of Transportation v. J.W.C. Company, 396 So. 2d 778, 788 (Fla. 1st DCA 1981); Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349, 350 (Fla. 1st DCA 1977). In a proceeding wherein a Petitioner asserts an unlawful employment practice, although the burden of going forward with the evidence may shift, the ultimate burden of persuasion to establish proof of an unlawful employment practice remains on the Petitioner. St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

19. Because the Florida Civil Rights Act (FCRA) is patterned after federal civil rights law, federal case law interpreting the federal civil rights statutes applies to interpreting the provisions of Chapter 760, Florida Statutes, the FCRA. See Green v. Burger King Corporation, 728 So. 2d 369,

370-71 (Fla. 3rd DCA 1999); School Board of Leon County v. Hargis, 400 So. 2d 103, 108 n. 2 (Fla. 1st DCA 1981); see also Greene v. Seminole Electric Cooperative, Inc., 701 So. 2d 646, 647 (Fla. 5th DCA 1997) (FCRA "should be construed in conformity with" the federal Americans with Disabilities Act of 1990 [the "ADA"], 42 U.S.C. § 12101 et seq., and related regulations).

20. Intentional discrimination can be proven by two means, either by direct evidence of discriminatory intent or through circumstantial evidence. See McDonnell-Douglas Corporation v. Green, 411 U.S. 792, 804 (1973). In the instant case, the Petitioner has failed to produce direct evidence of bias. See Jones v. Bessemer Carraway Medical Center, 151 F.3d 1321, 1323 (11th Cir. 1998) ("This court has marked severe limits for the kind of language to be treated as direct evidence of discrimination"); Burrell v. Board of Trustees of Georgia Military College, 125 F.3d 1390, 1393-94 (11th Cir. 1997) ("[d]irect evidence is 'evidence, which, if believed, proves existence of fact in issue without inference or presumption'") (citation omitted by the court).

21. In the absence of direct evidence, the Petitioner must put forth a prima facie case, which consists of the following: (a) that she is handicapped; (b) that she performed or is able to perform her assigned duty satisfactorily; and (c) that despite her satisfactory performance, she was terminated from

employment. Clark v. Jackson County Hospital, 20 F.A.L.R. 1182, 1184 (FCHR 1997).

22. If the Petitioner is able to establish a prima facie case, the burden of production (although not persuasion) shifts to the Respondent to show a legitimate, non-discriminatory reason for the adverse action taken. McDonnell-Douglas Corporation, supra. Sprint need not persuade the fact finder that it was actually motivated by the proffered reason, but must merely set forth, through the introduction of evidence, the reasons for its actions. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254-255 (1981). Thereafter, the Petitioner retains the burden of persuasion and must prove "by a preponderance of the evidence that the legitimate reasons offered by [Sprint] were not its true reasons, but were a pretext for discrimination." Burdine, 450 U.S. at 253. In determining pretext, the Petitioner must demonstrate "such weakness, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its actions that a reasonable finder of fact could find them unworthy of credence." Wallace v. School Board of Orange County, Florida, 41 F. Supp. 2d 1321, 1330 (M.D. Fla. 1998).

23. Concerning the question of a prima facie case, the definition of handicap has been held to be substantially the same as the definition of disability set forth in the ADA.

Green, 701 So. 2d at 647. The ADA defines disability as: (a) a physical or mental impairment that substantially limits one or more major life activities of such individual; (b) a record of such impairment; or (c) being regarded as having such an impairment. 42 U.S.C. § 12102(2).

24. Examples of major life activities include caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working. 29 CFR § 1630.2(i). The United States Supreme Court has stated that corrective and mitigating measures for an 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, 482 (1999).

25. The Petitioner has failed to identify how her alleged mental condition substantially limited any major life activity, nor has she provided evidence showing how any major life activity has been so limited. Standard v. A.B.E.L. Services, Inc., 161 F.3d 1318, 1327 (11th Cir. 1998) ("[m]erely proving the existence of [an]. . . impairment, without addressing any limitation on a major life activity, is not sufficient to prove disability under the [ADA]"). The Petitioner's own doctor stated in his November 2, 2000, note to Sprint, that the Petitioner had no limitation on her ability to work as long as

she participated in treatment and maintained compliance with medications and scheduled appointments.

26. The Petitioner did not provide any evidence that she had a record of such an impairment, especially given her admission that she had no history of mental illness prior to her e-mail of September 17, 1999, to her supervisor. Hilburn v. Murata Electronics North America, 181 F.3d 1220, 1229 (11th Cir. 1999) (record-of-impairment standard satisfied only if petitioner "actually suffered" an impairment that substantially limited one or more of her major life activities). The fact that the Petitioner was on two employer–approved medical leaves during 1999-2000 does not create a record of impairment. Id. at 1229.

27. The Petitioner presented no persuasive evidence that Sprint regarded her as having such an impairment. Sprint's requests for mental evaluations and placement of Cavanaugh on leave do not constitute evidence that it regarded her as suffering from a FCRA-protected handicap, given the grounds upon which the actions were based. Williams v. Motorola, Inc., 303 F.3d 1284, 1290 (11th Cir. 2002) (perception claim based upon suggested medical examination "fails"); Cody v. Cigna Healthcare of St Louis, Inc., 139 F.3d 595, 599 (8th Cir. 1999) (request for mental evaluation "not equivalent to treatment of the employee as though she were substantially impaired");

Johnson v. Boardman Petroleum, 923 F. Supp. 1563, 1568 (S.D. Ga. 1996) (offer of leave of absence showed concern for employee's well-being, not treatment of the employee as disabled). The inquiries triggered by the e-mail that the Petitioner sent to Mr. Whittaker and her informing Whittaker of her concerns about her medication were both lawful because they were based upon Sprint's concern as to whether Cavanaugh could safely and effectively do the essential functions of the job in which she was employed. See Williams, 303 F.3d at 1291 (employer may require employee to undergo mental examinations and provide information regarding psychiatric health if job-related and reflect "concern with the safety of . . . employees"); Cody, 139 F.3d at 599 ("employers need to be able to use reasonable means to ascertain the cause of troubling behavior without exposing themselves to ADA claims"). The mental examination requested while the Petitioner was on her self-initiated leave, was merely an effort to determine whether in fact the Petitioner was able to perform the essential functions of her job at the time, which is another permissible inquiry. 29 C.F.R. § 1630.14(c); see generally, Florida Statutes Section 760.10(8)(b),(nothing in the FCRA shall "preclude such physical and medical examinations of applicants and employees as an employer may require of applicants and employees to determine fitness for the job or position sought or held").

28. Assuming arguendo that the Petitioner was able to prove that she suffered from a protected handicap and otherwise established her prima facie case, the Respondent has articulated a legitimate, non-discriminatory reason for its termination of her employment – i.e., her nolo contendere plea to felony charges in October, 2000. The Petitioner failed to meet her burden of showing that this reason was a pretext for unlawful discrimination.

29. The absence of any handicap-related bias is shown by the fact that other individuals who have pled nolo contendere to felony charges have been terminated, even when adjudication has been withheld based upon the plea. The Petitioner failed to identify any alleged non-disabled person who, upon pleading nolo contendere to a felony charge, was allowed to remain employed by Sprint. Nix v. WLCY Radio/Rahall Communications, 738 F.2d 1181, 1185 (11th Cir. 1984) (to show prima facie case of discrimination, plaintiff must show that person outside protected class who engaged in "nearly identical" conduct was treated more favorably).

30. The Petitioner contends that the termination was unlawful because her arrest was more than a year prior to her termination; however, the record is clear that it was her plea regarding that arrest, which was not discovered until December 2000, upon which Sprint based its decision. Moreover, she

alleges that she consistently received good performance reviews, had just completed 15 years with Sprint, and had been allowed to pick her vacation time shortly before her termination. None of these alleged facts support a finding of handicap discrimination in light of the evidence that Sprint terminated her employment pursuant to a consistently-applied policy and practice regarding terminations for felony pleas. Chapman v. AI Transport, 229 F.3d 1012, 1030 (11th Cir. 2000) ("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," nor is a fact-finder permitted to "second-guess" the business judgment of an employer); see also Nix, 738 F.2d at 1187 ("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").

31. Concerning the Petitioner's claim that Sprint's notices to her of the availability of long-term disability and disability retirement benefits demonstrated anti-handicap bias, Sprint has put forward sufficient, credible evidence to demonstrate that these letters were automatically sent to the Petitioner merely to inform her of the availability of such benefits, given the amount of time she had been out on leave.

This evidence demonstrates that Sprint was merely attempting to assist her in assuring that should she need additional benefits, she would not suffer any lapse in benefits because she had failed to timely start the application process. Such a ministerial act does not suggest an anti-handicap motivation.

32. The Petitioner attempted to point to the three medical inquiries made by Sprint as evidence of anti-handicap bias. This attempt must fail because Sprint provided sufficient justification for each inquiry, as discussed above. Concerning her claims that the three medical inquiries constitute independent violations of the FCRA, any claims related to those inquiries made in September 1999 and August 2000 are not actionable because they occurred more then 365 days prior to the Petitioner's filing of her charge of discrimination with the FCHR in October 2001. National Railroad Passenger Corporation v. Morgan, 536 U.S. 101 (2002) (claims regarding discrete acts occurring outside of period for filing a charge of discrimination are barred). Moreover, to the extent that the ADA's prohibition on medical inquiries are applicable to claims under the FCRA, each inquiry was made for a job-related reason consistent with business necessity, as described and concluded above.

RECOMMENDATION

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 denying the Petition in its entirety.

DONE AND ENTERED this 9th day of February, 2004, in Tallahassee, Leon County, Florida.

P. MICHAEL RUFF
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 9th day of February, 2004.

COPIES FURNISHED:

Teresa Cavanaugh
3010 Northeast Seventh Lane
Ocala, Florida 34470

Denise Crawford, Agency Clerk
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

Patrick M. Muldowney, Esquire
Akerman Senterfitt
Post Office Box 231
Orlando, Florida 32802-0231

Cecil Howard, General Counsel
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

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.