STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CONSTANCE GATEWOOD,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 04-3893
	)	
DEPARTMENT OF CHILDREN AND FAMILY SERVICES,	)	
	)	
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 Marianna, Florida on January 3, 2005. The appearances were as follows:

APPEARANCES

For Petitioner: Constance Gatewood, pro se
Post Office Box 262
Campbellton, Florida 32426

For Respondent: Amy McKeever Toman, Esquire
Agency for Persons With Disabilities
Sunland Center
3700 Williams Drive
Marianna, Florida 32446

STATEMENT OF THE ISSUE

The issue to be resolved in this proceeding concerns whether the Petitioner was subjected to an unlawful employment

practice based upon her disability or based upon retaliation, in purported violation of Section 760.10, Florida Statutes.

PRELIMINARY STATEMENT

This cause arose upon the filing of a charge of employment discrimination by the above-named Petitioner. The charges were filed on May 17, 2004, and contained the allegation that the Petitioner had been discriminated against on the basis of race and disability. On September 27, 2004, a Notice of Determination of No Cause was entered by the Florida Commission on Human Relations (Commission). In that finding it was determined that there was no reasonable cause to believe that an unlawful employment practice had occurred. The Commission's decision was based on the investigative report dated September 14, 2004. Upon disagreeing with that decision the Petitioner filed a Petition for Relief on October 26, 2004. According to that petition, the Petitioner was discriminated against because of her disability and due to retaliation for filing a grievance. No issue of racial discrimination was raised. The petition was transmitted to the Division of Administrative Hearings and ultimately to the undersigned administrative law judge.

The cause come for hearing as noticed. The Petitioner adduced her own testimony and offered two other witnesses' testimony. The Petitioner also offered two exhibits which were

admitted into evidence. The Respondent presented the testimony of three witnesses and sixteen exhibits, all of which were admitted into evidence. Upon conclusion of the proceeding the parties requested a transcript of the record and elected to submit proposed recommended orders. The Proposed Recommended Orders were filed and have been considered in the rendition of this Recommended Order.

FINDINGS OF FACT

1. The Petitioner was employed as a Training Specialist II in the staff development department of the Sunland facility of the Department of Children and Families. (Now the Agency for Persons With Disabilities.) At times relevant hereto, in October 2003, the Petitioner, Constance Gatewood, was employed by "Sunland Marianna" (Sunland).

2. The Respondent Department of Children and Family Services is an agency of the State of Florida charged, as pertinent hereto, with implementing statutes, rules, and policies concerning persons with disabilities who are within its custody or otherwise.

3. A meeting was conducted with Sunland's management and the Petitioner on October 8, 2003, in which the Petitioner provided documentation from a physician confirming that she suffered from a condition triggered by exposure to certain chemicals or perfumes. This condition was described as

"potentially life threatening." The condition apparently primarily involved the Petitioner's respiration.

4. Sunland sought to accommodate this condition by instructing attendees to training sessions conducted by the Petitioner to refrain from using perfumes, colognes, etc., which might aggravate the Petitioner's condition. There is no dispute that the Petitioner has a disability of this nature. Sunland also provided each new employee who came for training with the Petitioner with a separate similar notification. Sunland also posted the notification in and around the staff development building, the Petitioner's primary work place. Sunland also relocated the Petitioner's office and ordered alternative non-irritating cleaning supplies in order to accommodate the Petitioner's condition.

5. Despite these accommodations the Petitioner's condition still sometimes became symptomatic. In an effort to minimize her exposure to perfumes or other chemicals the Petitioner on occasion would teach from her doorway, rather than standing in her accustomed place in front of the class. On occasion she would have to teach her class with all the doors opened, which sometimes created an uncomfortable draft in cold weather. On other occasions she would send students out of her class in the belief that they were wearing a perfume, cologne, or other chemical agent which was irritating her respiratory condition.

On one or more occasions she had to rely on a co-worker to perform a cleaning task for which she was responsible.

6. The Petitioner received a performance evaluation in March of 2004, which contained an overall rating of 4.33, a score which reflects that her performance exceeded expectations. On performance expectation number one, however, she received a grade of three rather than the four she had received the prior year. This was based upon a decline, in her employer's view, of her performance related to team work and respect for others.

7. Because of this reduction from a four to a three on this category of her performance evaluation the Petitioner filed a Career Service Grievance. She contended that her performance had been based upon "confidential information," despite her supervisor's assurances that it was based on her supervisor's perception of problems the Petitioner had in the areas of cooperation with co-workers and respect for class attendees. Upon investigation, the Career Service Grievance was denied by a memorandum of April 8, 2004.

8. Dr. Clemmons, the superintendent of the Respondent's facility, continued efforts to accommodate the Petitioner and her disability. He offered the Petitioner a job in an open position as a social worker on or about April 1, 2004. This position would have no deleterious effect on the terms, conditions, privileges, or benefits of the Petitioner's

employment. The Petitioner was apparently pleased to have the job transfer to the new position and, in fact, volunteered to begin the position prior to the customary two week notice period.

9. The Respondent has continued to attempt to accommodate the Petitioner and her disability as she has raised issues regarding her disability upon assuming her new position. The Petitioner, however, did not identify in advance any accommodation-related issues to her employer prior to beginning work in her new position.

CONCLUSIONS OF LAW

10. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2004).

11. Section 760.10, Florida Statutes, provides that it is an unlawful employment practice to discharge or otherwise to discriminate against a person because of that persons "handicap."

12. Chapter 760, Florida Statutes, is patterned after Title VII of the Civil Rights Act of 1964, 42 USC 2000e-2 (Title VII) and the Americans With Disabilities Act of 1990, 42 USC 12101 et seq. (1994) (ADA). Federal employment discrimination law, including disability discrimination law, can be used for guidance in construing the provisions of Chapter 760, Florida

Statutes. Chanda v. Englehard/ICC, 234 F.3d 1219, 1221 (11th Cir. 2000); Fouraker v. Publix Supermarket, Inc., 959 F. Supp. 1504 (M.D. Florida 1997).

13. The Petitioner claims that her rights under the ADA were violated when she was "involuntarily transferred" as an accommodation for her disability. In order to establish a prima facie case of discrimination based upon disability the Petitioner must show that she is disabled; that she is otherwise qualified for the position in question; and that she was discharged or otherwise suffered discriminatory employment treatment because of her disability. See Brand v. Florida Power Corp., 633 So. 2d 504, 509-10 (Fla. 1st DCA 1994). The Petitioner has the burden of identifying an accommodation that would allow her to perform a job with her employer. The Petitioner bears the ultimate burden of persuasion to demonstrate that such an accommodation is reasonable and the she was discriminated against because of her disability. Stewart v. Happy Herman's Cheshire Bridge, Inc., 117 F.3d 1278 (11th Cir. 1997). The Petitioner has not established a prima facie case of disability discrimination because she has not established all those elements of proof.

14. There is no dispute, and the Respondent acknowledges, that the Petitioner does have a "disability" in that she has a

permanent physical impairment (not transitory) that substantially limits a major life activity, that is, breathing.

15. Concerning the second element of prima facie proof a "qualified individual" is one who, even with a disability can, with or without reasonable accommodation, perform the essential functions of the employment position that such an individual holds. 42 U.S.C. § 12111(8). The Petitioner in this case was not a qualified "individual" at least with respect to her former position as a Training Specialist II. The evidence shows that she frequently could not perform all the functions of her job as a Training Specialist II, even after the implementation of the accommodations that she suggested to her employer and which her employer willingly provided. Even if it be determined that she was minimally qualified for such position, the Petitioner did not establish the third element of a prima facie case of disability discrimination.

16. Concerning the third part of establishing prima facie proof of disability discrimination, although the failure to provide a reasonable accommodation for a qualified individual can constitute unlawful discrimination, one "reasonable accommodation" specifically identified by the ADA and case law is "reassignment to a vacant position." Adams v. Henderson, 45 F. Supp. 2d 968 (M.D. Florida 1999). See also 42 U.S.C. § 12111(9). In the instant situation, although the Petitioner

could not perform all the essential functions of her former job as a Training Specialist II, even with accommodation, the Respondent identified a vacant position for which she was also qualified and offered her that position at an alternative reasonable accommodation. There was no adverse effect on the terms, conditions, privileges, or benefits of her employment occasioned by her assuming the new offered position as an alternative accommodation. The Petitioner voluntarily accepted that position and even asked and was allowed to enter and begin working in that position earlier than the normal two week notice period. Thus, the third element of the prima facie case has not been proven because the Petitioner could not demonstrate that she suffered discrimination or an adverse employment decision as a result of her disability.

17. The ADA does not require an employer to "offend or alienate other valued employees in order to accommodate a disabled employee. . . " Llanes v. Sears Roebuck and Company, 46 F. Supp. 2nd 1300 (S.D. Florida 1997). Additionally, a disabled employee cannot force an employer to make a particular accommodation if another reasonable accommodation is available and offered to the employee. Id. If an employer offers a reasonable accommodation, its obligation under the ADA is fulfilled and it cannot be charged with discrimination. Id. In this case the Respondent offered a reasonable accommodation to

the Petitioner amounting to transfer to the vacant position for which she was qualified. Thus, it cannot be established that the Respondent committed discrimination by doing so.

18. The Petitioner contends also that the Respondent's failure to prospectively identify accommodations to be made in her new position amounted to discrimination as well. It is the Petitioner's burden to identify an accommodation that will allow her to perform a job, however, as well as to demonstrate that the accommodation is a reasonable one. Stewart v. Happy Hermons Cheshire Bridge, Inc. supra. The Petitioner herein could not have known what if any accommodations might be necessary in her new position since she had not yet begun performing in her new position, nor could she identify a reasonable one that would allow her to do the new job. She thus cannot sustain a claim that discrimination occurred because the Respondent purportedly failed to accommodate her before she ever began her job in the new position.

19. The Petitioner contends also that the Respondent did not engage in an "interactive process" as required by the ADA regulations which "envision an interactive process that requires participation by both parties." Willis v. Conopco, Inc. 108 F.3d 282 (11th Cir. 1997). See also § 29 CFR 1630.2(o)(2)(ii). The court for the eleventh circuit has held, however, that failure to engage in such a process in an of itself, does not

constitute discrimination. Id. In any event the evidence establishes that the Respondent made efforts to work cooperatively with Ms. Gatewood both before and after her transfer to the new position, and other than her statement, there is no persuasive evidence to the contrary. Clearly the discussion between the Respondent supervisor and the Petitioner before and after her transfer to the new position constituted an "interactive process."

20. The Petitioner contends she was transferred to the new position in retaliation for filing a Career Service Grievance regarding her March 2003 performance evaluation. In order to establish a prima facie case of retaliation discrimination the Petitioner must show that she engaged in a "statutorily protected expression" (i.e. the filing of the grievance); that an adverse employment decision resulted from that action and that a causal connection between the protected expression and the adverse employment action existed. Stewart v. Happy Herman's Cheshire Bridge, Inc. supra.

21. In this case, although the filing of the grievance may be a statutorily protected expression it was not demonstrated that a transfer to the vacant position was an "adverse employment decision" made in response to the filing of the grievance. Contrarily, the transfer was the result of the ongoing effort to accommodate the Petitioner in a reasonable

way. It was otherwise unrelated to the Career Service Grievance. The timing of the transfer, as it relates to the filing of the grievance, according to the persuasive evidence was no more than coincidental. Such does not give rise to any inference of retaliation on the basis of "suspect timing" of the employment decision. Id. The new position was offered to the Petitioner because her disability, made it difficult if not impossible, for her to continue in her job as a Training Specialist II, not because she filed a grievance. Thus, a prima facie showing of retaliation-based discrimination has not been established and the claim should be dismissed.

22. In summary, the Petitioner failed to establish a prima facie case of discrimination based upon disability or upon retaliation. Consequently, the charges against the Respondent should be dismissed.

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 dismissing the Petition in its entirety.

DONE AND ENTERED this 1st day of April, 2005, 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 1st day of April, 2005.

COPIES FURNISHED:

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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.