STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CHERYL LENARD,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 05-2975
	)	
A.L.P.H.A. "A BEGINNING" INC.,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the final hearing in this proceeding on December 6, 2005, in St. Petersburg, Florida, on behalf of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Phyllis J. Towzey, Esquire
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For Respondent: Theresa A. Deeb, Esquire
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STATEMENT OF THE ISSUE

The issue for determination is whether Respondent discriminated against Petitioner on the basis of a handicap, in violation of Section 760.10, Florida Statutes (2003).

PRELIMINARY STATEMENT

On January 5, 2005, Petitioner filed an Employment Charge of Discrimination with the Florida Commission on Human Relations (Commission). On June 29, 2005, the Commission issued a Determination: No Cause. Petitioner timely requested a final hearing by filing a Petition for Relief with the Commission on August 3, 2005, and the Commission referred the matter to DOAH to conduct the hearing.

At the hearing, Petitioner testified, called five other witnesses, and submitted seven exhibits for admission into evidence. Respondent called one witness and submitted 28 exhibits for admission into evidence.

The identity of the witnesses and exhibits, and any rulings regarding each, are reported in the one-volume Transcript of the hearing filed with DOAH on December 27, 2005. The parties timely filed their respective Proposed Recommended Orders (PROs) on January 9 and 6, 2005.

At the hearing, Respondent made an ore tenus motion on the record to exclude evidence submitted by Petitioner that Petitioner did not disclose seven days prior to the hearing in violation of the pre-hearing Order previously entered in this proceeding. The motion is denied for lack of prejudice to Respondent. The evidence submitted by Petitioner has not resulted in unfair surprise to Respondent. Respondent was

entitled to address any unfair surprise through procedures less onerous than the exclusion of evidence, including a request to keep the record open for rebuttal evidence, and did not avail itself of any less onerous procedure.

FINDINGS OF FACT

1. Respondent operates a residential program for young, homeless women who are pregnant or have infants. Respondent is required by applicable state law to maintain minimum staffing requirements or expose its license to disciplinary action.

2. Respondent employed Petitioner as a residential staff assistant (RSA) from sometime in August 2002 until February 2, 2004. Petitioner worked five days a week during shift hours that varied during her employment.

3. As an RSA, Petitioner's duties included assisting residents with care for their babies, babysitting, assisting residents with meal planning and budgeting, writing staff notes for parent and child, driving residents to and from medical appointments, and otherwise "assist mother and child in anyway." With the exception of excessive absences discussed hereinafter, it is undisputed that Petitioner was able to perform the essential functions of her job and did so satisfactorily to Respondent.

4. Sometime in May 2003, Petitioner suffered a back injury while riding a horse. Petitioner suffered a herniated disc located at L5-S1.

5. After the injury, Petitioner experienced right-side pain and sought treatment initially from chiropractic therapy and acupuncture. However, Petitioner's symptoms persisted.

6. Petitioner sought medical treatment sometime prior to July 2003. An MRI conducted on July 21, 2003, diagnosed the herniated disc, and Petitioner subsequently underwent surgery on September 11, 2003, identified in the record as a laminectomy.

7. By a physician's note on a prescription pad dated October 29, 2003, the treating physician authorized Petitioner to return to work on November 2, 2003. The physician's note did not prescribe any limitations for Petitioner. Petitioner returned to work on the prescribed date.

8. On November 10, 2003, a director for Respondent required Petitioner and a co-worker to close the security gate to the facility. The electric motor for the gate was not functioning, and the two co-workers had to close a heavy security gate by manually pulling until the facility was secure.

9. By a physician's note on a prescription pad dated November 14, 2003, the treating physician prescribed "light duty" for Petitioner. The light-duty restrictions were limited to "no pulling." A preponderance of evidence does not support a

finding that Respondent required Petitioner to perform any "pulling" after November 10, 2003.

10. Petitioner's back condition is an impairment within the meaning of the Americans with Disabilities Act, 42 U.S.C. Section 12112, et seq. (ADA), and the Florida Civil Rights Act, Chapter 760, et seq., Florida Statutes (2003) (FCRA). After surgery, Petitioner continued to experience pain in her right side and, due to inactivity, gained approximately 100 pounds. Petitioner's resulting impairment has limited her ability to work by impairing her ability to sit for long periods, pull, lift, bend to retrieve files from lower file drawers, and drive.

11. Petitioner's impairment is permanent. The surgery did not eliminate Petitioner's impairment, and Petitioner is relegated to physical therapy and pain medication as the sole medical treatment for her condition. After more than two years of such treatment, Petitioner's impairment persists.

12. Petitioner's impairment did not prevent her from satisfactorily performing her job duties other than attendance. Disputed requests for accommodations in the form of a particular chair that was comfortable for Petitioner and in the form of the location of files in higher drawers for easier access by Petitioner were not necessary for Petitioner to perform the essential functions of her job. It is undisputed that

Petitioner satisfactorily performed her job duties without those accommodations.

13. Petitioner's impairment caused her to be absent from work six of 20 workdays between November 2 and 30, 2003, and nine of 52 workdays between December 4, 2003, and February 2, 2004. The first six absences were excessive pursuant to Respondent's written Policy HR 103. In addition, Petitioner did not provide a supervisor with prior notice or cause of absences. However, each absence was required for Petitioner to either attend physical therapy or for Petitioner to recover from physical therapy. After the first absence, Respondent knew the causes of the absences.

14. On December 3, 2003, Petitioner and Respondent executed a Corrective Action Plan (CAP) in which Petitioner agreed there would be no further unscheduled absences. Respondent agreed to reduce the time required in HR 103 for prior notice from eight to six hours. After executing the CAP, Petitioner had nine unscheduled absences during approximately 52 workdays between December 3, 2003, and February 2, 2004.

15. Petitioner was unable to call in to her supervisors because of problems with telephones and voicemails, including those at the facility and cellular telephones maintained by supervisors. However, Petitioner knew of the telephone problem and knew her therapy schedule. A preponderance of evidence does

not support a finding that Petitioner requested Respondent either to utilize an alternative method of communication or to arrange her work schedule to accommodate Petitioner's therapy schedule.

16. On January 30, 2003, Respondent notified Petitioner that Respondent was changing Petitioner's employment status to "on-call" because Petitioner was unable to satisfy the attendance requirements of an RSA. Petitioner refused to accept the change in status due to the uncertainties of pay and the loss of benefits. On February 2, 2004, Respondent terminated Petitioner from her employment.

17. Petitioner's impairment is neither a "disability" nor a "handicap" within the meaning of the ADA and FCRA, respectively. The impairment did not substantially limit Petitioner's ability to perform the major life activity of working. Petitioner's impairment did not prevent her from satisfactorily performing her job duties other than attendance.

18. A preponderance of evidence does not support a finding that Petitioner's impairment precludes her from either a class of jobs or a broad range of jobs. Petitioner showed that she has made a reasonable effort to secure other employment without success. However, a preponderance of evidence does not support a finding that Petitioner's impairment is the cause of her inability to obtain employment.

19. The Social Security Administration denied Petitioner's disability claim. The agency found that Petitioner has received treatment for her impairment and that the impairment does affect her ability to work. However, the agency found that Petitioner is "still capable of performing" the duties of an RSA.

CONCLUSIONS OF LAW

20. DOAH has jurisdiction over the parties and the subject matter of Petitioner's claim for relief under the FCRA. §§ 120.569 and 120.57(1), Fla. Stat. (2005). DOAH provided the parties with adequate notice of the final hearing.

21. Florida courts construe disability discrimination actions under the FCRA in conformity with the ADA. Judicial decisions by federal courts are controlling in this proceeding. Wimberly v. Securities Technology Group, Inc., 866 So. 2d 146 (Fla. 4th DCA 2004); Tourville v. Securex, Inc., 769 So. 2d 491 n.1 (Fla. 4th DCA 2000); Greene v. Seminole Electric Coop., Inc., 701 So. 2d 646 (Fla. 5th DCA 1997).

22. Petitioner has the initial burden to make a prima facie showing that Respondent discriminated against Petitioner on the basis of a disability. Petitioner must show by a preponderance of the evidence that she is a handicapped person, she is a qualified employee, Respondent took an adverse employment action against Petitioner solely because of the handicap, and Respondent had knowledge of the disability or

considered Petitioner to be disabled. Gordon v. E.L. Hamm & Associates, 100 F.3d 907, 910 (11th Cir. 1996).

23. A preponderance of evidence shows Petitioner is a qualified employee able to perform the essential functions of her job, including attendance, with or without reasonable accommodations within the meaning of 42 U.S.C. Section 12112(a). Wood v. Green, 323 F.3d 1309, 1312 (11th Cir. 2003); Cramer v. Florida, 117 F.3d 1258, 1264 (11th Cir. 1997).

24. A preponderance of evidence does not support a finding that Petitioner is either disabled or handicapped within the meaning of the ADA or FCRA, respectively. An impairment is not synonymous with a disability or handicap. Wimberly v. Securities Technology Group, Inc., 866 So. 2d at 147. An employee who suffers an impairment from back pain following surgery and post-surgical medical treatment, cannot sit or stand in one place for more than an hour, and experiences excessive absences due to her impairment does not have a disability within the meaning of the ADA. Dupre v. Charter Behavioral Health Systems of Lafayette Inc., 242 F.3d 610 (5th Cir. 2001).

25. If Petitioner's impairment were found to prevent her from performing her job, that finding alone would not prove that Petitioner is disabled. Petitioner must further show that her back injury precluded her from a class of jobs or a broad range

of jobs. Dupre, 242 F.3d at 614. Petitioner failed to establish the essential prerequisites of a disability.

26. If Respondent were found to have a disability or handicap, a preponderance of evidence does not show that Respondent took the adverse employment action against Petitioner solely because of Petitioner's disability. Minimum staffing levels are conditions of Respondent's license. § 409.175, Fla. Stat. (2003); Fla. Admin. Code R. 65C-14.079. Unscheduled absences by staff expose Respondent to license discipline for failure to maintain minimum staff requirements.

27. Apart from the staffing requirements for Respondent's license, attendance is an essential job function. An employer may terminate employment for excessive absence. Earl v. Mervyns, Inc., 207 F.3d 1361, 1366 (11th Cir. 2000); Schwertfager v. City of Boynton Beach, 42 F. Supp. 2d 1347, 1362 (S.D. Fla. 1999).

28. Petitioner was well aware of the her therapy schedule and the difficulty of communicating by telephone with her supervisors. Petitioner failed to show that she requested Respondent to utilize an alternate means of communication or to schedule Petitioner's work around her therapy. Petitioner must request an accommodation before an employer can deny the accommodation. Schwertfager, 42 F. Supp. 2d at 1362.

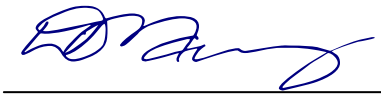
29. If Petitioner were found to have requested modifications in the form of a particular chair that was comfortable for Petitioner and in the form of relocated files for easier access, those modifications are not "reasonable accommodations" because they were not necessary for Petitioner to perform the essential functions of her job. The term "reasonable accommodation" must be construed to mean an accommodation that presently, or in the immediate future, enables Petitioner to perform the essential functions of his job. Wood, 323 F.3d at 1312-1314. It is undisputed that Petitioner satisfactorily performed her job duties without the disputed modifications.

RECOMMENDATION

Based on the foregoing Findings of Facts and Conclusions of Law, it is

RECOMMENDED that the Commission enter a final order finding that Respondent did not discriminate against Petitioner on the basis of a disability or handicap.

DONE AND ENTERED this 31st of January, 2006, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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this 31st day of January, 2006.

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.