STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BARBARA MARTIN,
     Petitioner,
vs. — Case No. 05-3079
WOODLAND EXTENDED CARE, INC.,
     Respondent.

RECOMMENDED ORDER

A formal hearing was conducted in this case on November 8, 2005, in Deland, Florida, before Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Barbara Martin, pro se
635 West Hubbard Avenue
Deland, Florida 32720

For Respondent: Kelly V. Parsons, Esquire
Cobb and Cole
Post Office Box 2491
Daytona Beach, Florida 32115-2491

STATEMENT OF THE ISSUE

The issue is whether Respondent committed an unlawful employment action against Petitioner by discriminating against her based on her disability in violation of Section 760.10, Florida Statutes (2005).

PRELIMINARY STATEMENT

On May 12, 2005, Petitioner Barbara Martin (Petitioner) filed an Employment Complaint of Discrimination with the Florida Commission on Human Relations (FCHR). The complaint alleged that Respondent Woodland Extended Care, Inc. (Respondent) had discriminated against Petitioner by terminating her employment based on an alleged disability.

On August 3, 2005, FCHR issued a Determination: No Cause. On August 19, 2005, Petitioner contested FCHR's determination by filing a Petition for Relief. On August 23, 2005, FCHR referred the Petition for Relief to the Division of Administrative Hearings (DOAH).

On September 7, 2005, Administrative Law Judge Don Davis issued a Notice of Hearing. The notice scheduled the hearing for November 8, 2005. DOAH subsequently transferred the case to the undersigned.

During the hearing Petitioner testified on her own behalf and presented the testimony of two additional witnesses. Petitioner offered two exhibits, which were excluded as inadmissible hearsay.

Respondent presented the testimony of three witnesses. Respondent offered two exhibits, which were accepted as evidence.

The court reporter filed a copy of the Transcript on November 16, 2005. On November 28, 2005, Respondent filed a Proposed Recommended Order. As of the date of this Recommended Order, Petitioner had not filed proposed findings of fact and conclusions of law.

FINDINGS OF FACT

1. Respondent is a 120-bed skilled nursing home. Respondent is licensed by the State of Florida and certified by Medicare and Medicaid.

2. Petitioner is and has been a Certified Nurse Assistant (CNA) since 1975. In January 2005, Petitioner worked for Elder Care, sitting with one of Respondent's resident's from 7:00 a.m. to 3:00 p.m. Toward the end of the month, she began looking for another job because her hours as a sitter were being cut back.

3. Petitioner learned that Respondent had an opening for a floor technician (floor tech). Petitioner had experience cleaning floors, so she applied for the job on January 31, 2005.

4. Petitioner gave her application to Respondent's receptionist. Respondent then sent the application, to Teresa Engram, Respondent's Assistant Director of Housekeeping. The application included a health checklist/assessment. Petitioner indicated on the form that she suffered from high blood pressure, back pain, and asthma.

5. Ms. Engram reviewed Petitioner's application, and, during an interview, inquired whether Petitioner would be able to perform the necessary work. Ms. Engram explained that the person hired for the job would have to work a flexible schedule because the facility's floors could only be stripped and waxed at night when the patients were asleep.

6. Petitioner assured Ms. Engram that she would be able to do the job. Petitioner did not reveal that she suffered from depression. Petitioner did not tell Ms. Engram that her health problems, such as asthma, would prevent her from working around the strong chemicals used in stripping floors. Petitioner told Ms. Engram she would be able to work at nights with advance notice so that she could arrange a babysitter for her grandchild.

7. Petitioner passed the required medical test and background check. She began working on or about February 1, 2005. Her regular hours were from noon to 8:00 p.m., Sunday through Thursday, with the understanding that she would have to work scheduled night shifts.

8. Petitioner initially trained with another floor tech, Johnnie Betsy. After a few days, Petitioner worked on one side of the facility and Mr. Betsy worked on the other. Her duties included sweeping, mopping, and buffing the floors, as well as taking out the trash.

9. At least once a year, Respondent's floor techs strip and wax the floors in the facility. The project takes about a month from start to finish. The work is performed at night. The waxing and stripping project was already underway for 2005 when Petitioner began working for Respondent.

10. Ms. Engram made several attempts to schedule a night shift for Petitioner so that she could train with Mr. Betsy and help him strip and wax floors. Petitioner let Ms. Engram know that she did not want to work the night shift. Additionally, Petitioner was unhappy with her salary and complained that she should be making more money. Ms. Engram discussed Petitioner's complaints with Rhonda Cheney, Respondent's Director of Laundry and Housekeeping.

11. Eventually, Petitioner learned that Respondent had an opening for a CNA position. Petitioner told Ms. Engram and Ms. Cheney that Petitioner was going to apply for the CNA position because it involved fewer hours, two days on and four days off.

12. At some point in time, Petitioner received Social Security disability benefits. There is no competent evidence to show what disability Petitioner had that entitled her to disability benefits. Apparently, Petitioner lost her disability benefits before she started working for Respondent because she made too much money at a prior job.

13. Petitioner wanted the new CNA position even though she would make less money than a full-time floor tech. Petitioner believed she could reestablish her disability benefits if she earned less money.

14. Sometime during the first week of March 2005, Ms. Engram advised Petitioner that she would have to work the night shift beginning 9:00 p.m. on March 6, 2005, till 5:00 a.m. on March 7, 2005. Petitioner agreed to work as scheduled, with the understanding that she and Mr. Betsy would strip and wax hall floors.

15. Petitioner testified that she told Ms. Engram that she should have an ambulance present on the night of March 6, 2005, in case Petitioner had an asthma attack from the strong chemicals used to strip the floors. Petitioner's testimony in this regard is not persuasive. The greater weight of the evidence indicates that Petitioner never verbally discussed her mental or physical health problems with Ms. Engram.

16. On March 3, 2005, Petitioner learned from Mr. Betsy that there was not enough wax to complete the job planned for the evening of March 6, 2005. Even without the wax, Petitioner and Mr. Betsy had plenty of work to do stripping floors. The floors did not have to be waxed the same night they were stripped.

17. Petitioner decided to work her regular hours on March 6, 2005, from noon to 8:00 p.m. Petitioner made this decision without Ms. Engram's knowledge or approval.

18. Mr. Betsy worked alone on the March 6, 2005, night shift. He spent the evening stripping floors, using the wax that was available to polish a small area, and performing other routine tasks.

19. On March 7, 8, and 9, 2005, Petitioner worked her regular hours. Ms. Engram did not discover that Petitioner had not worked her scheduled shift on March 6, 2005, until Ms. Engram made a routine check of the time cards on or about March 9, 2005.

20. Petitioner was still hoping to get the new CNA position on March 9, 2005. That evening, Petitioner was working as a floor tech when she noticed that Sid Roberts, Respondent's interim administrator, was working late. Petitioner approached Mr. Roberts to tell him about her application for the CNA position and why she needed the new job. During that conversation, Petitioner told Mr. Roberts that she suffered from depression and that she had previously received disability benefits for that condition.

21. On or before March 10, 2005, Ms. Engram consulted with Ms. Cheney about Petitioner's decision not to work her scheduled shift on March 6, 2005. Ms. Engram and Ms. Cheney did not

discuss Petitioner's alleged disability or health problems. Ms. Engram was not aware that Petitioner had any health problems that needed to be accommodated. Ms. Cheney was not aware that Petitioner had any health problems at all.

22. After consulting with Ms. Cheney, Ms. Engram made the decision to terminate Petitioner's employment. Ms. Engram took this action because Petitioner did not work from 9:00 p.m. on March 6, 2005, to 5:00 a.m. on March 7, 2005, as agreed, but unilaterally and without Ms. Engram's knowledge, decided to work her regular hours on March 6, 2005.

23. Subsequently, Mr. Roberts attended a meeting with Ms. Cheney. Inquiring about Petitioner's employment status, Mr. Roberts learned that Ms. Engram already had terminated Petitioner. Mr. Roberts did not have any part in the decision to hire or fire Petitioner. Mr. Roberts did not tell Ms. Cheney or Ms. Engram about his conversation with Petitioner on the evening of March 9, 2005, until after Ms. Engram terminated Petitioner's employment. Mr. Roberts' knowledge that Petitioner suffered from depression did not contribute to the decision to terminate Petitioner's employment.

CONCLUSIONS OF LAW

24. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this

case pursuant to Sections 120.569, 120.57(1), and 760.11, Florida Statutes (2005).

25. It is an unlawful employment practice for an employer to discriminate against any employee with respect to compensation, terms, conditions, or privileges of employment, because of such individual's disability or handicap. See § 760.10(1), Fla. Stat.(2004)

26. The provisions of Chapter 760, Florida Statutes, are analogous to those of the Americans With Disabilities Act (the "ADA"), 42 U.S.C. Section 12101, et seq. Cases interpreting the ADA are, therefore, applicable to Chapter 760, Florida Statutes. See Razner v. Wellington Regional Medical Ctr., Inc., 837 So. 2d 437, 440 (Fla. 4th DCA 2002).

27. A petitioner in a discrimination case has the initial burden of proving a prima facie case of discrimination. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).

28. If the petitioner proves a prima facie case, the burden shifts to the respondent to proffer a legitimate non-discriminatory reason for the actions it took. See Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). Respondent's burden is one of production, not persuasion, as it always remains Petitioner's burden to persuade the fact-finder that the proffered reason is

a pretext and that Respondent intentionally discriminated against Petitioner. See Burdine, 450 U.S. at 252-256.

29. To prove a prima facie case of handicap discrimination, Petitioner must establish the following elements: (a) she was a disabled person within the meaning of the Florida Civil Rights Act and the ADA; (b) she was able to perform her assigned duties satisfactorily with or without accommodation; and (c) Respondent did not accommodate Petitioner's disability and/or discharged Petitioner despite her satisfactory performance. Swenson-Davis v. Orlando Partners, Inc., 16 F.A.L.R. 792, 798 (FCHR 1992).

30. A person is disabled when: (a) he or she has a physical or mental impairment that substantially limits one or more major life activities; (b) he or she has a record of having an impairment; or (c) he or she is regarded as having an impairment. 42 U.S.C. § 12102(2); 29 C.F.R. § 1630.2(g)(I).

31. A qualified individual with a disability must establish that he or she is able to perform the essential functions of the job with or without reasonable accommodation. LaChance v. Duffy's Draft House, Inc., 146 F.3d 832, 835 (11th Cir. 1998). "The employee retains at all times the burden of [persuasion] . . . that reasonable accommodations were available." Moses v. American Nonwovens, Inc., 97 F.3d 446, 447 (11th Cir. 1996).

32. An employer unlawfully discriminates against a qualified individual with a disability when the employer fails to provide "reasonable accommodations" for the disability - unless doing so would impose undue hardship on the employer. See 42 U.S.C. § 12112(b)(5)(A); 29 C.F.R. § 1630.9(a).

33. An employee cannot be terminated for a discriminatory reason unless the decision maker has actual knowledge of the disability. See Cordoba v. Dillard's Inc., 419 F.3rd 1169, 1185 (11th Cir. 2005).

34. Petitioner did not present competent medical evidence that she is disabled. Instead, she presented unsupported testimony that she suffers from depression, asthma, high blood pressure, and back pain. Petitioner claimed that she is disabled by depression and not her other alleged health problems.

35. Depression, by itself does not constitute a disability. See Pritchard v. Southern Co. Services, 92 F.3rd 1130 (11th Cir. 1996). Petitioner presented no evidence that her alleged depression limited her activities to any extent.

36. Respondent did not regard Petitioner as having mental or physical problems. Ms. Engram and Ms. Cheney did not know about Petitioner's alleged depression when they fired her. The information that Petitioner provided on the health checklist did not cause Ms. Engram to treat Petitioner any differently than

Mr. Betsy, or any other employee. Ms. Engram hired Petitioner, fully expecting her to be able to perform the required duties of a floor tech.

37. Petitioner presented testimony that she had been qualified to receive disability benefits at some point in time. According to Petitioner, the only reason she lost her benefits was because she made too much money. Petitioner's testimony in this regard is insufficient to establish a record of an impairment during the time relevant here. Moreover, there is no evidence that Ms. Engram and Ms. Cheney knew that Petitioner had ever received disability benefits before they hired and fired her.

38. If Petitioner's alleged disabilities prevented her from safely working around the chemicals used to strip floors, then she was unable to perform one of the essential functions of her job. Petitioner never requested accommodations for any of her alleged mental or physical conditions. More important, Petitioner presented no evidence that such accommodations exist.

39. In sum, Petitioner has not proved her prima facie case of handicap discrimination. She has not proved the following: (a) that she had a disability; (b) that she was able to perform her duties satisfactorily with or without accommodation; (c) that she asked for an accommodation; and (d) that Respondent

failed to accommodate her disability and/or discharged her despite her satisfactory performance.

40. On the other hand, Respondent presented evidence of a legitimate non-discriminatory reason to terminate Petitioner's employment, i.e. Petitioner failed to work a scheduled night shift. Instead of following Ms. Engram's schedule for March 6, 2005, Petitioner unilaterally decided to work her regular shift. Petitioner's excuse that she and Mr. Betsy did not have to follow the schedule because there was no wax does not justify her failure to follow her supervisor's instructions. Petitioner has not shown that Respondent's reason was a pretext for discrimination.

RECOMMENDATION

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

RECOMMENDED:

That FCHR enter a final order dismissing the Petition for Relief.

DONE AND ENTERED this 30th day of November, 2005, in Tallahassee, Leon County, Florida.

SUZANNE F. HOOD
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 30th day of November, 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.