STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JAMES P. SAEMENES, PERSONAL REPRESENTATIVE OF THE ESTATE OF BARBARA J. TAYLOR,	)	
Petitioner,	)	
vs.	)	Case No. 06-1650
CITY OF FORT WALTON BEACH,	)	
Respondent.	)	

RECOMMENDED ORDER ON REMAND

This cause came on for formal proceeding and hearing before P. Michael Ruff, a duly-designated Administrative Law Judge of the Division of Administrative Hearings. The formal hearing was conducted in Shalimar, Florida, on April 18, 2007. The appearances were as follows:

APPEARANCES

Petitioner: No Appearance

Respondent: Michael Mattimore, Esquire
Allen, Norton & Blue, P.A.
906 North Monroe Street
Tallahassee, Florida 32303

STATEMENT OF THE ISSUE

The issue to be resolved in this proceeding concern whether the Petitioner's decedent, Barbara J. Taylor, was discriminated against in an employment decision (termination) by the

Respondent based upon her gender and alleged disability.

PRELIMINARY STATEMENT

This cause arose upon remand from the Florida Commission on Human Relations and an Order accepting that Remand entered by the undersigned. Barbara J. Taylor, Petitioner, filed an original Complaint and Petition for Relief with the Florida Commission on Human Relations (Commission) prior to her death. Pursuant to that Petition under original Case No. 02-4317, a partial hearing was conducted, which had to be continued. Before the case could be re-set for hearing, and heard, it developed, upon motion by the then Petitioner, Barbara J. Taylor, that she had had a severe medical condition arise (ultimately terminal cancer) which required (without objection) a lengthy abatement of her case. The abatement lasted in excess of a year due to her medical situation, attested to by her physician. During the pendency of that abatement and before the case could be re-set for hearing, Ms. Taylor died. Thereafter, after issuing a show cause order concerning jurisdiction, an order was entered by the undersigned dismissing the case in essence for lack of jurisdiction and mootness. The matter then remained with the Commission for a substantial period of time, but was ultimately remanded to the Administrative law Judge based upon the Commission's determination that jurisdiction had not lapsed and, citing Section 46.021, Florida Statutes (2003),

the Commission took the view that the cause of action under Chapter 760 did not expire with the person who filed it and could still be prosecuted by the original Petitioner's Personal Representative.

Thereafter, an Order Accepting the Remand was entered by the undersigned, although the reasons and legal authority delineated in that Order were not the same as the reason the Commission elected to remand the matter to the Administrative Law Judge originally. The parties, by that Order were required to advise the undersigned within 21 days concerning their pleasure about prosecuting the decedent's claim, proceeding to hearing and the scheduling of a hearing. The Petitioner did not so respond and thereafter a Show Cause Order was issued on August 18, 2006, concerning the Petitioner's intention about prosecuting the claim. The Petitioner responded to the Show Cause Order and finally, with the parties' assent the case was scheduled again on December 19, 2006. It was again continued because two key witnesses could not be present. Thereafter, it was re-scheduled for February 1, 2007, but had to be continued once again because of a medical emergency experienced by counsel for the Respondent. The case thus finally came on for hearing on the above-referenced date.

During the pendency of this proceeding, Mr. Saemenes, the Personal Representative of the Estate of Barbara J. Taylor, had

moved to have the case decided upon the "evidence and papers" already submitted, indicating that he wanted the matter decided without hearing. Pursuant to an Order entered November 15, 2006, the undersigned explained that the evidence had not been completed in the earlier case and that the Respondent was entitled to an opportunity to put on its case. Consequently, the hearing was scheduled and conducted on the above date. The Petitioner elected not to appear at the hearing, after being duly and appropriately noticed at the Petitioner's last known address of record. Consequently, the evidence was concluded with the conclusion of the Respondent's case and such of the Petitioner's evidence (three witnesses and seven exhibits) as had been adduced at the original hearing, before the death of Barbara J. Taylor. The Respondent presented one witness and seven exhibits which were admitted into evidence.

Upon conclusion of the proceeding the Respondent announced its intent to order a transcript thereof and to submit a proposed recommended order. After granting an extension of time, the Proposed Recommended Order of the Respondent was timely submitted on May 21, 2007, and has been considered in the rendition of this Recommended Order.

FINDINGS OF FACT

1. The Petitioner, James Saemenes, is the Personal Representative of the Estate of Barbara J. Taylor. Barbara J.

Taylor was the Petitioner's sister. Ms. Taylor, at times pertinent to the facts in this case, had been an employee of the Utilities Department of the City of Fort Walton Beach, working in the Utility Wastewater Treatment Facility Laboratory as Laboratory Manager. The Petitioner, Mr. Saemenes, did not participate in the hearing.

2. The City of Fort Walton Beach provides public utilities to its citizens including wasterwater operations. Mr. John Hofstad is employed as the utilities director for the city, and oversees the city's wastewater operation. Mr. Hofstad was Ms. Taylor's supervisor at times pertinent to this case. The wastewater operation is responsible for collection and treatment of raw waste to suitable discharge standards.

3. There are 13 individuals employed at the wastewater treatment facility. The positions consist of one plant supervisor, eight licensed wastewater treatment plant operators, one pre-treatment coordinator, two maintenance employees, and one laboratory manager. Ms. Taylor was the laboratory manager at times pertinent to this case and her immediate supervisor, Mr. Hofstad was responsible for evaluating her work and initiating any discipline against her, if necessary.

4. Her duties included managing the day-to-day activities of the laboratory, collecting samples throughout the facility, analyzing samples, managing the quality assurance and quality

control plan required by the State of Florida and associated daily paperwork. Her duties required effective cooperative interaction with other employees of the facility and the city on a daily basis.

5. Over a substantial period of time, Mr. Hofstad received numerous complaints and expressions of concern from almost every employee regarding the appropriateness of Ms. Taylor's conduct while at work. Employees complained that she was intimidating and abrasive toward them. She demeaned fellow members of the staff based upon their educational background or their level of knowledge about the operations and their jobs.

6. Mr. Hofstad counseled Ms. Taylor on a number of occasions regarding her co-workers' concerns. Mr. Hofstad witnessed Ms. Taylor harassing Mr. McDowell, the Pre-treatment Coordinator, while working in his office. Specifically, she physically placed an object in Mr. McDowell's pocket despite his previous request for her to refrain from distracting him. Mr. McDowell became visibly upset when Ms. Taylor thereafter made an obscene gesture towards him as she left the office area. Mr. Hofstad drafted a memorandum on December 6, 1996, pertaining to the aforementioned incident and provided a written disciplinary action form to Ms. Taylor because of it.

7. Mr. Hofstad executed a personnel evaluation regarding Ms. Taylor on December 9, 1996. She received an unsatisfactory

rating in the area of cooperation with fellow employees and team-work. Mr. Hofstad gave Ms. Taylor that rating due to numerous employee complaints indicating that Ms. Taylor had initiated confrontations.

8. Thereafter on March 6, 1998, Mr. Hofstad drafted a memorandum regarding a confrontation which had occurred the day before between Ms. Taylor and Mr. James Whitley. Without authorization Ms. Taylor directed Mr. Whitley to stop conducting certain tests because they would interfere with her job. Ms. Taylor possessed no supervisory authority over Mr. Whitley.

9. When Mr. Hofstad intervened in the situation Ms. Taylor spoke to him in a insubordinate loud and hostile fashion. She raised her voice at Mr. Hofstad and stated that he did not know how to do his job much like the other individuals employed by him. Mr. Hofstad considered her tone and manner to be inappropriate and insubordinate. He executed a Notice of Disciplinary Action based on Ms. Taylor's actions and demeanor and gave her a copy.

10. Thereafter on or about May 14, 1998, Mr. Hofstad was again verbally assaulted by Ms. Taylor. She spoke in an enraged, loud, and abusive manner in the presence of several subordinate employees.

11. Ms. Taylor stated that Mr. Hofstad had no control over the laboratory.

12. Following this incident which he also considered insubordination, Mr. Hofstad spoke to the Public Works Director his superior, Mr. Mark Tate, regarding Ms. Taylor's conduct. Mr. Tate reviewed Ms. Taylor's disciplinary history and in conjunction with Mr. Hofstad determined that the best course of action, after having tried graduated discipline was to terminate her employment.

13. Mr. Hofstad and Mr. Tate spoke with the Human Resources Department Director regarding Ms. Taylor's behavior and potential termination. The Director of Human Resources agreed that Ms. Taylor's termination was appropriate considering her history of progressive discipline and current misconduct amounting to repeated insubordination.

14. Thus Ms. Taylor's employment was terminated. Her termination was not based upon her gender. In fact, she was replaced in her position with another female, Ms. Harriett Holloway. The current laboratory manager, Melissa Woodall, is a female.

15. Mr. Hofstad never discouraged Ms. Taylor from filling out complaint forms during the course of her employment. In fact, he provided such forms to Ms. Taylor in the event that she had a complaint. Her termination was not related to any complaint filed by her, or for engaging in any other protected

activity such as applying for vocation rehabilitation benefits or assistance.

16. Further, her termination was not related to any health conditions she possessed. Mr. Hofstad at the time was unaware of any disability or health condition endured by Ms. Taylor. He did not perceive her as disabled. She was fully capable of performing the duties of her job in terms of her physical abilities and would have continued to be employed but for the misconduct referenced above. She never requested any accommodations for any disability or impairment in the workplace from Mr. Hofstad or others in a supervisory role.

17. Neither Mr. Hofstad, nor any other witness, described any occasion where Ms. Taylor was harassed by operations staff. According to unrefuted evidence of record, Ms. Taylor was always the harasser of other employees. Moreover, when Ms. Taylor sought assistance from Mr. Hofstad, he promptly addressed her concerns in a reasonable, unbiased way. The Petitioner never testified in this proceeding.

CONCLUSIONS OF LAW

18. 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. (2006).

19. The Petitioner has the initial burden of establishing a prima facie case of gender or disability discrimination or

retaliation and bears the ultimate burden of persuasion in this case. St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993). In order to prove a valid claim of gender discrimination, the Petitioner must prove her prima facie case either through direct evidence of discriminatory intent or by creating an inference of discrimination through circumstantial evidence. See, e.g., Earley v. Champion Int'l Comp., 907 F.2d 1077, 1081 (11th Cir. 1990). Direct evidence in an employment discrimination case is evidence which, if believed, "establishes discriminatory intent without inference or presumption." Earley, 907 F.2d at 1081; Clark v. Coats & Clark, Inc., 990 F.2d 1217, 1226 (11th Cir. 1993). "Only the most blatant remarks whose intent could only be to discriminate constitute direct evidence." Earley, supra at 1081 (citing Carter v. City of Miami, 870 F.2d 578, 581-582 (11th Cir. 1989). Evidence which only suggests discrimination, leaving the trier of fact to infer discrimination based on the evidence is circumstantial evidence. Earley, supra at 1081-82.

20. In order to establish a prima facie case of gender discrimination, the Petitioner must prove:

> 1. She was a member of a protected group;
> 2. That an adverse employment action occurred; and
> 3. An individual who was not in the protected group received the position after the Petitioner's termination.

McDonnell-Douglas Corporation v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L. Ed. 2d 668, 677 (1973); Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); Carter v. City of Miami, supra.

21. If a Petitioner establishes a prima facie case of gender discrimination, the burden of production shifts to the Respondent employer, who must articulate a legitimate, non-discriminatory reason for the adverse employment action. Texas Department of Community Affairs v. Burdine, supra. See also Pace v. Southern Railway System, 701 F.2d 1383, 1391 (11th Cir. 1983). If a Respondent thus articulates a legitimate, non-discriminatory reason for its action, the Petitioner must "put on sufficient evidence to allow a fact-finder to disbelieve an employer's proffered explanation for its actions." Combs v. Plantation Patterns, 106 F.3d 1519 (11th Cir. 1997); see also St. Mary's Honor Center v. Hicks, supra. Therefore, if a prima facie case is established, the case will turn on whether a Respondent has articulated a legitimate, non-discriminatory reason for the action and correspondingly whether the Petitioner has provided sufficient evidence for a fact-finder to believe that the Respondent's actual motivation in taking the action against the Petitioner is pre-textual and actually involved discriminatory motives.

22. In the case at hand the Petitioner in the underlying original proceeding, Barbara J. Taylor, (Petitioner) alleged that her termination was motivated by gender and disability discrimination. She failed to produce any direct evidence of discrimination associated with her discharge and therefore must prove the case, if at all, through circumstantial evidence. Moreover, the Petitioner was replaced by a member of her own protected class, a female. Thus she cannot meet that part of the test for her prima facie case of gender discrimination. Ms. Taylor was replaced by a female, Harriett Halloway, and, as of the time of the most recent hearing, the current lab manager is Melissa Woodall, a female.

23. Absent direct evidence of discrimination, the Petitioner has the burden of establishing a prima facie case of gender discrimination in employment by showing: (1) that the Petitioner is a member of a protected class, female; (2) Petitioner was qualified for the job for which she was terminated; (3) that the Petitioner was terminated despite her job qualifications; and (4) that an employee outside the protected class replaced the Petitioner, or employees outside the protected class were treated differently than the Petitioner. Hawkins v. CECO Corp., 883 F.2d 977, 982, 984 (11th Cir. 1989); Bush v. Barnett Bank of Pinellas County, 916 F. Supp. 1244 (M.D. Fla. 1996).

24. In order to establish a prima facie case of disability discrimination, the Petitioner must establish that he or she was disabled, that he or she was qualified to perform the job in question and was discriminated against by the employer for reasons of the disability. See Reid v. Heil Co., 206 F.3d 1055, 1061 (11th Cir. 2000). The Petitioner has not established the elements of a prima facie case of disability discrimination. The Petitioner must prove that she was disabled and the city was aware of her condition. Claims under the Florida Civil Rights Act, Chapter 760, Florida Statutes (2006), for disability discrimination are analyzed under the same framework as Americans With Disabilities Acts (ADA) claims. See Chanda v. Engelhard/ICC, 234 F.3d 1219 (11th Cir. 2000); O'Loughlin v. Pinchback, 579 So. 2d 788 (Fla. 1st DCA 1991). See also Reid, supra at 1061. The Petitioner has not presented evidence which establishes a disability under either the Florida Civil Rights Act (FCRA) or the ADA. A physical impairment alone is not a disability under the ADA or the FCRA. See Pritchard v. Southern Co. Servs., 92 F.3d 1130, 1132 (11th Cir. 1996), amended in part on rehearing by 102 F.3d 1118 (11th Cir. 1996). Disability is defined as: (1) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (2) having a record of such impairment; or (3) being regarded as having such an impairment, i.e. being regarded

by the employer as having such an impairment. See 42 U.S.C. § 12102(2).

25. Although the Petition alleges an impairment, the Petitioner has not established that the impairment substantially limited any of her major life activities. Additionally, Mr. Hofstad was not made aware of any impairments suffered by the Petitioner during the period of her employment.

26. Moreover, at final hearing, the Petitioner did not provide any testimony that identified a major life activity in which she had a substantial limitation at times pertinent to her employment and the employment decision at issue. In order to be considered "substantially limited," the Petitioner must demonstrate that she was: (1) unable to perform a major life activity that the average person and the general population can perform; (2) was significantly restricted as to the condition, manner, or duration under which the individual can perform a major life activity, as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity. See 29 C.F.R. § 1630.2(j)(1). Major life activities are defined as functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. See 29 C.F.R. § 1630.2(i)(2001). The Petitioner's failure to identify a major life activity that was substantially

limited by an alleged impairment during employment is fatal to the claim in this case. There is no evidence concerning how the Petitioner, Ms. Taylor, was restricted in any manner in performing any major life activity during the time she was employed and the employment decision at issue was made and carried out.

27. The Petitioner has not presented evidence that she had a record of having a substantially limiting impairment, or that the Respondent regarded her as having such an impairment or disability. The Petitioner's failure to identify a major life activity which was limited by any impairment in a substantial way, bars a disability claim. See, e.g., Federov v. Board of Regents for the University of Georgia, 194 F. Supp. 2d 1378 (S.D. Georgia 2002) (holding that a Petitioner's claim, regarded as an ADA claim, was barred where the Petitioner failed to establish a substantial limitation in a major life activity).

28. The Petitioner did not testify in the hearing in this case. Although she produced witnesses who testified to their perceptions of her conditions (the Petitioner declined to call any treating physician as a witness), no witness testified to any such condition being known by any representative of the Respondent or to observing any discriminatory act on the part of the Respondent. Likewise, no witness rebutted the evidence that Ms. Taylor was not qualified to continue in her employment as a

result of her repetitive acts of insubordination and her failure to work cooperatively and appropriately with other city employees. Thus, for this reason she was not qualified for her position, although intellectually and physically, at the time, she was capable of performing it. Therefore she failed to establish a prima facie case of either gender or disability discrimination for the above reasons.

29. Assuming arguendo that the Petitioner had established a prima facie case of gender or disability discrimination, the burden of production would shift to the Respondent who must articulate a legitimate, non-discriminatory reason for the adverse employment action taken. Texas Department of Community Affairs v. Burdine, supra; Pace v. Southern Railway System, supra. If the Respondent meets this burden, then the Petitioner must put on evidence sufficient to allow the fact-finder to disbelieve the employer's reason or proffered explanation. Combs, supra. The question would thus remain whether the Respondent established a sufficient articulation of a legitimate, non-discriminatory reason for the employment action and whether the Petitioner provided sufficient evidence in order to believe that the reason for the employment action advanced by the Respondent is, in reality, pre-textual and, instead, was based upon a discriminatory motivation.

30. Mr. Hofstad, at the final hearing testified, as the city's utilities director, to the reasons why termination was necessary. Specifically, he disciplined the Petitioner for repeated acts of insubordination, hostility, and aggressive actions toward the Petitioner's co-workers. The Petitioner routinely belittled her colleagues and engaged in conduct that was perceived as demeaning and threatening to them. Mr. Hofstad documented several instances of such behavior and counseled with the Petitioner about it on multiple occasions. Although the Petitioner would accept the warnings and modify her behavior for a short time or a few days, she would inevitably return to inappropriate conduct and, in fact, increased her aggressive behavior over time. Following an incident in front of subordinate employees, the Petitioner was terminated for berating her supervisor in an insubordinate manner. The Petitioner's gender or health was not a factor in the termination decision.

31. Even if the Petitioner established the presence of a disability, which was not done because the Petitioner did not meet the above definitional requirements for establishing a disability, the Respondent did not have any knowledge of the disability, so it could not have been a factor in the decision to terminate her. Rather, the termination was based upon

repeated disciplinary offenses and insubordination towards her supervisor.

32. Moreover, there is no showing that any accommodation for any supposed disability was ever requested of the Respondent and the claimant for a disability must affirmatively request an accommodation. See Gaston v. Bellingrath Gardens & Home, Inc., 167 F.3d 1361, 1363 (11th Cir. 1999). The Petitioner herein never requested an accommodation for any alleged disability from the Respondent and there was not shown to be any duty on the part of the Respondent to provide her with any reasonable accommodation. She had no record of a disability at that time.

33. The Respondent's burden to show a legitimate, non-discriminatory reason for the employment action is merely one of production or articulation of such a reason. It need not persuade the court that it was actually motivated by the proffered reason. See Texas Department of Community Affairs v. Burdine supra, Combs, supra.

34. The Respondent has presented evidence regarding the repeated disciplinary actions necessary to be taken against the Petitioner, which culminated in her termination. Although the Petitioner was capable of performing the technical aspects of her job, the job also required that she work effectively and cooperatively with other staff members. She was unable to perform this necessary aspect of the laboratory manager

position. She repeatedly mocked, belittled, and demeaned her co-workers. She created confrontations and distracted others from their work. This became the subject of numerous complaints and concerns expressed by co-workers. The Petitioner was repeatedly advised to moderate her behavior. She did not moderate her behavior in a satisfactory way. Her repeated infractions and insubordination, as described more particularly in the above Findings of Fact, ultimately led to her termination. As such the Respondent has articulated, asserted, and, in fact, proven by preponderant evidence, a legitimate, non-discriminatory reason for termination of the Petitioner, Ms. Taylor.

35. Accordingly, in order to prevail, the Petitioner must establish that the articulated, legitimate reasons were a pre-text to mask what was really unlawful discrimination. See Turlington v. Atlanta Gas Light Company, 135 F.3d 1428 (11th Cir. 1998). There is no evidence in this record to indicate that the reasons for the Petitioner's termination advanced by the Respondent in its evidence were not compelling and legitimate ones. There is no showing in the evidence that there was any motive in the employment decision and in the progressive discipline run-up to that decision that involved discrimination on account of gender or on the basis of disability for the above-found and concluded reasons.

36. In summary, the Petitioner has failed to establish a prima facie case of discrimination based upon gender, disability or retaliation. She was terminated due to legitimate non-discriminatory reasons as found and concluded above after receiving progressive discipline before the termination decision was made. She was replaced by a member of her protected class and has not established that any alleged impairment substantially limited one of her major life activities; that her employer knew, or was on notice, of her disability or that her employer denied a reasonably requested accommodation for any disability. Nor has the Petitioner adduced any evidence to show that the employment action taken was in retaliation for the Petitioner asserting any protected right or status. There is no evidence that the action was taken based upon any prior complaints the Petitioner may have submitted, or because she may have availed herself of any opportunity for vocational rehabilitation rights or benefits.

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 for Relief in its entirety.

DONE AND ENTERED this 31st day of July, 2007, 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 31st day of July, 2007.

COPIES FURNISHED:

Michael Mattimore, Esquire
Allen, Norton & Blue, P.A.
906 North Monroe Street
Tallahassee, Florida 32303

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

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

James P. Saemenes, Personal Representative
46 Higgins Road
Brighton, Tennessee 38011-3602

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.