STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JANE SEIDEN,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 06-2400
	)	
WEXFORD HEALTH SOURCES, INC.,[1]	)	
	)	
Respondent.	)	
_____	)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on September 20, 2006, by video teleconference, with sites in Tallahassee and Lauderdale Lakes, Florida, and Pittsburgh, Pennsylvania, before Florence Snyder Rivas, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, who presided in Tallahassee, Florida. The case was subsequently assigned to Larry J. Sartin, Administrative Law Judge, pursuant to Section 120.57(1)(a), Florida Statutes (2006).

APPEARANCES

For Petitioner: Scott M. Behren, Esquire
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For Respondent: Robert J. Sniffen, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether the Respondent terminated Petitioner's employment on the basis of a perceived disability, in violation of Section 760.10, Florida Statutes (2004),[2] the Florida Civil Rights Act of 1992, as amended.

PRELIMINARY STATEMENT

On November 30, 2005, Jane Seiden filed an Employment Complaint of Discrimination with the Florida Commission on Human Relations (hereinafter referred to as the "FCHR"), naming "Wexford Health Service, Inc." the Respondent. The parties, following the final hearing of this matter, filed a Joint Stipulation as to Correct Party, in which they agreed that the correct name of the Respondent is "Wexford Health Sources, Inc." The style of this case has been changed to reflect this stipulation.

In the Complaint, Petitioner stated the following basis for her charge:

> (1) I believe that I have been discriminated against by my former employer Wexford based upon my termination for me being regarded as having a disability and based upon my sexual orientation (lesbian). This discrimination was in violation of the Florida Civil Rights Act.
>
> (2) I first became employed as a nurse at the Broward Correctional Institute in 1988. I was retained at BCI as a nurse in 2001 when Wexford took over the medical operations at BCI. In October 2004, I was

> diagnosed with kidney cancer. I then took FMLA leave and short term disability leave. In October 2004, I was still not able to return to work since I needed additional surgery and was not yet cleared by my doctors to return to work. On October 18, 2005 [sic], I spoke with Ellie Ziegler in HR at Wexford and requested the paperwork for an extension of medical leave without pay. The papers arrived the week of October 25, 2004, and I had my doctor complete them on October 27, 2004. On November 1, 2004, I received a certified letter from Wexford terminating my employment. Other comparable employees were not terminated in similar circumstances so I believe that my termination was based upon discriminatory reasons. I was long time employee of BCI with a stellar work record, but was terminated even when additional leave paperwork was in process.

On May 30, 2006, the FCHR issued a Determination: No Cause, in which it stated that it had found that "no reasonable cause exists to believe that an unlawful employment practice occurred." Petitioner timely filed a Petition for Relief with the FCHR, in which she alleged that Respondent has "unlawfully discriminated against [her] in violation of Florida Statute § 760.10(1)(a) by terminating her employment based upon a perceived disability."

The FCHR forwarded the Petition for Relief to the Division of Administrative Hearings for assignment of an administrative law judge. The Petition was designated DOAH Case No. 06-2400 and was assigned to Administrative Law Judge Florence Snyder Rivas.

Pursuant to notice entered July 25, 2006, the final hearing was scheduled for September 20 and 21, 2006.

On July 25, 2006, Respondent filed a Motion to Dismiss Petition, arguing that Petitioner had failed to timely file her charge of discrimination with FCHR. It was also argued that, even if the Petition was not dismissed as untimely, it should be dismissed because Petitioner's demand for compensatory and punitive damages are not recoverable in this proceeding.

Respondent subsequently withdrew the portion of its Motion to Dismiss to the extent it had been alleged that Petitioner had untimely filed her charge of discrimination. Respondent withdrew the Motion, but did so without prejudice to raise the issue after the evidentiary hearing in this matter.

By Order dated September 5, 2006, Administrative Law Judge Rivas granted Respondent's Motion to Dismiss, as amended. The Order also allowed amendment of the Petition for Relief by interlineations to delete all references to compensatory and punitive damages.

At the hearing, Ms. Seiden testified in her own behalf, and presented the testimony of Ellie Ziegler and Arthur Victor, both employees of Respondent. Petitioner's Exhibits 1 through 15 were received into evidence. Respondent presented the testimony of Mr. Victor. Respondent's Exhibits 1 through 4 and 7 through

9 were received into evidence. Respondent's Exhibit 5 was withdrawn and Exhibit 6 was rejected.

There was a dispute during the hearing about some notes which were taken by Mr. Victor during in the hearing. Those notes were read into the record and were subsequently filed. They have been marked as Petitioner's Exhibit 16. The notes have been considered further in deciding whether a motion to strike, which Administrative Law Judge Rivas reserved ruling on, should be granted. Based upon a review of the transcript and the notes, the motion to strike is denied.

The Transcript of the proceedings was filed with the Division of Administrative Hearings on October 24, 2006. The parties were given until November 3, 2006, 10 days after the filing of the transcript, to file proposed recommended orders. Petitioner filed her Proposed Recommended Order on November 2, 2006. Respondent filed Respondent's Proposed Recommended Order and Respondent's Post-Hearing Brief on November 3, 2006.

On November 30, 2006, Administrative Law Judge Rivas left employment with the Division of Administrative Hearings without entering a recommended order in this case. Accordingly, pursuant to Section 120.57(1)(a), Florida Statutes (2006), the case was, due to the unavailability of Administrative Law Judge Rivas, assigned to the undersigned for entry of the Recommended Order based upon the record.

Attempts to locate the transcript of the final hearing after the departure of Administrative Law Judge Rivas were unsuccessful. Therefore, the undersigned requested that his administrative assistant contact Respondent's counsel, who is located in Tallahassee, and request that he allow a copy of Respondent's copy of the transcript to be made. On December 6, 2006, Respondent filed a copy of the Transcript.

The post-hearing proposed findings of fact and conclusions of law and argument of Respondent in its Brief have been fully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

A. Ms. Seiden's Relevant Employment.

1. Petitioner Jane Seiden is an individual who was employed by the Florida Department of Corrections at Broward Correctional Institute (hereinafter referred to as "BCI") from December 1988 until the end of March 1999 as a licensed practical nurse.

2. From April 1, 1999, until October 7, 2001, Ms. Seiden continued to work at BCI, but was employed by a private business, Prison Health Services.

3. On October 8, 2001, Respondent Wexford Health Sources, Inc. (hereinafter referred to as "Wexford") took over responsibility for providing medical services at BCI. Ms. Seiden became an employee of Wexford as of that date, after

having received a letter dated June 20, 2001, signed by Wendy Mildner, as Wexford's Director of Human Resources/Risk Management, offering her employment with Wexford effective October 8th. Ms. Seiden accepted the offer of employment on June 25, 2001.

4. Wexford is a provider of health care services to correctional facilities, including BCI.

5. Throughout Ms. Seiden's employment at BCI, she received excellent work performance reviews.

B. Wexford's Leave Policies.

6. Wexford's policies concerning employee "Family and Medical Leave" at the time of Ms. Seiden's initial employment with Wexford were contained in the Wexford Health Sources, Inc. Employee Handbook (Respondent's Exhibit 9) (hereinafter referred to as the "Employee Handbook"). The Family and Medical Leave policy was, in relevant part, as follows:

> Employees who are eligible for Family and Medical Leave may take up to 12 weeks of unpaid, job protected leave. Employees are eligible if they have worked for at least one year, and for 1,256 hours over the previous 12 months.
>
> Reasons for taking unpaid leave are:
>
> . . . .

? for a serious health condition that makes the employee unable to perform the employee's job.

. . . .

7. The Wexford Employee Handbook, Revised 09/01/04 (Petitioner's Exhibit 9) (hereinafter referred to as the "Revised Employee Handbook"), established policies governing "Time Off" in Section 5. Pursuant to Policy 5.3, all employees are allowed to apply for a leave of absence for medical reasons. The period of the absence is limited, however, to 12 weeks, consistent with the Family and Medical Leave Act (hereinafter referred to as the "FMLA"), unless the employee is eligible for "income replacement benefits," for example for a short-term disability pursuant to Section 4.5, which provides the following:

> Wexford provides some income protection for employees who are unable to work for an extended period of time due to illness or injury through its Short-Term Disability Leave (STD) insurance program.
>
> You are eligible for STD benefits if:
>
> - You Have completed one year of continuous service
> - You work a minimum of 30 hours per week and are covered by health insurance.
>
> Eligible employees are entitled to short-term leave for up to 26 weeks in a rolling 12-month period. The rolling 12-month period is calculated by counting backwards from the date of the leave request. For example, if you request a leave in November,

> the rolling 12-month period is from November of the previous year to November of the current year.
>
> You will be required to provide a medical doctor's certificate to qualify for short-term disability leave. STD runs concurrent with the Family and Medical Leave Act (FMLA). Your weekly benefit is 50% of your weekly salary to a maximum of $300, whichever is less.
>
> . . . .

8. Thus, Wexford policies, at the times relevant, allowed eligible employees to take up to 12 weeks of leave pursuant to the FMLA and 26 weeks of what Wexford termed "short-term disability" leave, the latter to run concurrently with the 12 weeks of family medical leave.

9. Policy 5.3 describes Wexford's policy concerning "When Return to Work is Not Possible":

> If following 26 weeks of medical leave you remain unable to return to work your employment will be terminated. If you are able to work at a later point in time, you are welcome to reapply for employment. Your past history and work background will be taken into consideration for reemployment purposes.

Consistent with this policy, Wexford does not grant extensions of the 26 week, short-term disability maximum absence. Also consistent with the policy, Wexford treats an employee as terminated at the end of the 26 week short-term disability absence if the employee does not return to work.

10. Policies 5.3 and 5.4 provide the procedural requirements for applying for a medical leave of absence (forms to file, providing health care professional certifications of illness, etc.) and other procedures and the conditions for which FMLA leave will be granted. Of relevance to this matter, one of the conditions for which FMLA leave will be granted is: "a serious health condition that makes you unable to perform the essential functions of your job." Policy 5.4.

11. Policy 5.7 of the Revised Employee Handbook is the established procedure for "Personal Leave of Absence - Unpaid." That Policy provides, in pertinent part"

> With the approval of management and the Vice President of Human Resources, you may be granted an unpaid personal leave for unusual, unavoidable situations requiring an absence from work. The unpaid personal leave is for a pre-determined period of time. Unpaid personal leaves of absence are awarded at the discretion of management and cannot be presumed or guaranteed.
>
> You must use *all* available PTO [personal time off] before requesting personal leave. . . .

12. As reasonably interpreted by Wexford, the Unpaid Personal Leave of Absence policy is not used or intended for use as a method of taking off time in addition to the time off allowed by Wexford's policies governing FMLA leave and short-term disability leave.

C. Ms. Seiden's Absence from Wexford.

13. Ms. Seiden, who acknowledged receipt of, and responsibility for reading, the Employee Handbook at the time she was employed by Wexford, was diagnosed with kidney carcinoma in 2004. As a result of her illness she did not rest comfortably and, therefore, woke up during the night, she could not sit for long periods of time, and, although not fully developed in the record, she required hospitalization.

14. As a result of her illness, Ms. Seiden was, due to a "serious health condition," "unable to perform the essential functions of [her] job." As a consequence, the last day that Ms. Seiden worked at BCI was April 26, 2004.

15. Ms. Seiden was provided a Memorandum dated May 6, 2004, from Tara M. DeVenzio, Risk Management/Leave Compliance Assistant (hereinafter referred to as the "May 6th Memorandum"). The May 6th Memorandum, which Ms. Seiden read, states that Wexford had been notified that she was requesting a leave of absence and is "in need of Family Medical Leave (FML) and Short Term Disability (STD) forms." Those forms were included with the May 6th Memorandum. The May 6th Memorandum goes on to explain the procedures Ms. Seiden was required to follow in making her request for leave and the extent of leave available to her.

16. The May 6th Memorandum also informed Ms. Seiden that, consistent with Wexford's written leave policies, the "[m]aximum amount of time allotted for Short Term Disability is 26-weeks on a rolling twelve (12) month period . . ." and that "[i]f you do not return when your leave has ended, you will be considered to have voluntarily terminated employment."

17. Consistent with the May 6th Memorandum and the policies of the Employee Handbook, Ms. Seiden completed the forms required by Wexford to apply for FMLA and short-term disability leave to begin in April 2004, and end in October 2004. Ms. Seiden executed a Wexford Family / Medical Leave of Absence Request (hereinafter referred to as the "Initial Leave Request") on May 10, 2004. (Petitioner's Exhibit 14). On the Initial Leave Request Ms. Seiden checked a box which indicated her reason for requesting leave was "Serious health condition that makes me, the employee, unable to perform the functions of my position." A space on the Initial Leave Request for "Date Leave of Absence to End" was left blank.

18. Also provided to Wexford with the Initial Leave Request, was a Certification of Health Care Provider (hereinafter referred to as the "Certification"), as required by Wexford's leave policies. The Certification was from Nine J. Pearlmutter, M.D. Dr. Pearlmutter reported on the Certification that Ms. Seiden's "serious health condition" was a "renal mass"

and that hospitalization was necessary. Dr. Pearlmutter also stated "yes at this time" in response to the following question on the Certification:

> If medical leave is required for the employee's absence from work because of the employee's own condition (including absences due to pregnancy or a chronic condition), is the employee unable to perform work of any kind?

19. Ms. Seiden's Initial Leave Request was approved and she was provided a Memorandum dated May 25, 2004, from Ms. DeVenzio, memoralizing the approval. Ms. DeVenzio informed Ms. Seiden that her leave was approved "to commence on April 26, 2004."

20. Ms. Seiden's 26-week period of leave began on April 26, 2004, ended October 25, 2004. Throughout this period, Ms. Seiden remained absent from BCI.

21. On October 22, 2004, a Friday, Ms. Seiden telephoned Ellie Zeigler a Human Resources Generalist for Wexford, and spoke to her about the pending end of her approved leave. Ms. Seiden informed Ms. Zeigler that she wanted to request an extension of her leave, which Ms. Zeigler had not authority to grant or deny.

22. Ms. Zeigler, who had not authority to approve or disapprove the request for an extension, told Ms. Seiden that she would send her forms, which she would have to file in order

to request additional leave. Ms. Zeigler also explained to Ms. Seiden that the maximum leave available to her had been exhausted, and that, because her physician had not released her for return to work, her employment with Wexford would be considered terminated if she did not return to work the following Monday. Ms. Zeigler also told Ms. Seiden that a letter to that effect would be sent to her.

23. Ms. Zeigler, as promised, sent Ms. Seiden a Wexford Family / Medical Leave of Absence Request. On Wednesday, October 27, 2004, two days after Ms. Zeigler's approved absence ended, Ms. Seiden executed the Wexford Family / Medical Leave of Absence Request (hereinafter referred to as the "Second Leave Request") which Ms. Zeigler provided to her. Again, she checked as the "Reason for Leave" the box indicating "Serious health condition that makes me, the employee, unable to perform the functions of my position" and the "Date Leave of Absence to End" space was left blank.

24. A second Certification of Health Care Provider form (hereinafter referred to as the "Second Certification"), executed by Dr. Pearlmutter was provided with the Second Leave Request. Dr. Pearlmutter listed, among other things, carcinoma of the kidney as Ms. Seiden's illness. While Dr. Pearlmutter indicates a "2 month" duration for one of the listed conditions, she did not indicate when Ms. Seiden would be able to return to

work at the end of two months. Again, Dr. Pearlmutter answered "yes" to the question quoted in Finding of fact 18.

25. The Second Leave Request, which was sent by certified mail on Thursday, October 28, 2004, three days after the end of Ms. Seiden's approved leave, was received by Wexford on Monday, November 1, 2004, seven days after the end of her approved leave.

D. The Termination of Ms. Seiden's Employment.

26. On October 25, 2004, the last day of Ms. Seiden's approved absence, Arthur Victor, Wexford's Human Resources Manager, and Ms. Zeigler exchanged e-mails concerning Ms. Seiden. In response to an inquiry from Mr. Victor, Ms. Zeigler informed Mr. Victor that October 25, 2004, was the last day of Ms. Seiden's approved leave. In response to Ms. Zeigler's information, Mr. Victor wrote "[t]hen there is no extension. Six months is up 10/30/04. You need to talk to Ron Miller re. termination." This decision was consistent with Wexford's written policies and was based upon Ms. Seiden's failure to return to work on October 25, 2004.

27. Given Mr. Victor's statement that "there is no extension," it is found that Mr. Victor had been informed that Ms. Seiden intended to request an extension of her approved absence. It is also found that Wexford was aware of the reason for Ms. Seiden's absence: kidney cancer. Finally, it is found

that, by terminating Ms. Seiden's employment, Wexford denied the requested extension.

28. After receiving Mr. Victor's e-mail indicating that Ms. Seiden would be terminated, Ms. Zeigler wrote to Ron Miler and Judy Choate, Ms. Seiden's supervisor, and informed them of the following:

> I received a call from Jane last friday [sic] requesting an extension for her fmla. Jane's 26 weeks for her std/fmla has expired as of today (10/25/04). I just spoke with Jane and inform [sic] her that her Dr. has not released her for full duty and that she was exhausted all of her authorized fmla/std leave and that Wexford considers her to have resigned from her position. I told Jane that Judy will be sending her a letter confirming her of the above.

To Ms. Choate, Ms. Zeigler continued:

> The letter should be sent from you. Attached you will find a copy of the letter that Art has drafted for your [sic] to send to Jane regarding her std/fmla. . . . . Also, please complete the "Termination Processing From" and forward it to the Pittsburgh office so I can term her out of the system.

29. The draft termination letter provided to Ms. Choate and dated October 26, 2004, was signed by Ms. Choate and sent to Ms. Seiden. The letter (hereinafter referred to as the "Termination Letter") states, in part:

> As you are aware, you have exhausted all authorized Family and Medical/Short Term Disability leave. You were to return to work on October 25, 2004. Since you have

> not returned, Wexford Health Sources, Inc. considers you to have resigned your position as a Licensed practical [sic] Nurse, effective October 25, 2004.
>
> If you are in disagreement with this letter, please contact me immediately but no later than 4:00pm, on 10/28/02004 at . . . . If it is determined that there were extenuating circumstances for the absence and failure to notify, you may be considered for reinstatement.
>
> . . . .

30. Ms. Seiden received the Termination Letter on November 3, 2004. She did not contact Ms. Choate about the matter. Although she had been informed on October 22, 2004, that she would be terminated by Wexford during her telephone conversation with Ms. Zeigler, November 3, 2004, constitutes the first official notice of Wexford's adverse action which Ms. Seiden received.

31. The effective date of Ms. Seiden's termination was October 25, 2004.

E. The Reason for Ms. Seiden's Termination.

32. Ms. Seiden was terminated because, consistent with written Wexford policies which Ms. Seiden had been informed of on more than one occasion, Ms. Seiden had exhausted the maximum family medical leave and short-term disability leave she was authorized to take.

33. Having used the maximum authorized medical leave, Ms. Seiden was still unable to perform any of the functions and duties required of her position. Due to her illness, she was simply unable to perform any work at all during the period relevant to this case, a fact Wexford was aware of. While she testified at hearing that she had been told by her physician that she would be able to return to work in January 2005, that testimony constitutes hearsay upon which a finding of fact will not be made. More significantly, Wexford was never informed by Ms. Seiden or her physician that she would be able to work.

34. Wexford's policies gave Ms. Seiden leave in excess of the 12 weeks required by the FMLA. Wexford was not required to do more.

F. Ms. Seiden's Claim of Discrimination.

35. Ms. Seiden filed her Employment Complaint of Discrimination with the FCHR on November 30, 2005, or 392 days after being informed that she had been terminated and 401 days after her actual October 25, 2004, termination date.

36. After a Determination: No Cause was issued by the FCHR, Ms. Seiden filed a Petition for Relief in which she alleged that Wexford had "violated the Florida Civil Rights Act of 1992 by terminating [her] based upon a perceived disability." No allegation of failure to provide an accommodation for her disability was alleged in the Petition.

G. Summary.

37. The evidence proved that Ms. Seiden failed to file her complaint of discrimination with the FCHR within 365 days of the discriminatory act. She offered no explanation as to why she did not do so.

38. Ms. Seiden failed to establish a prima facie case of unlawful employment discrimination. While she did prove that she suffered from kidney cancer and that, as a result of her illness she was unable to perform the duties of her position, which may constitute a disability, she ultimately failed to prove that she was a "qualified individual" with or without an accommodation. From April 2004 through October 22, 2004, when she orally informed Wexford that she desired an extension of leave, her termination from employment on October 25, 2004, and on November 1, 2004, when her formal request for an extension of leave was received by Wexford, Ms. Seiden, along with her physician, reported to Wexford that she was unable to carry out her employment duties.

39. Ms. Seiden also failed to prove that she was terminated because of her illness, on the basis of a perceived disability.

40. Finally, Wexford proved a non-pretextual, non-discriminatory reason for terminating Ms. Seiden's employment.

CONCLUSIONS OF LAW

A. Jurisdiction.

41. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2006).

B. Ms. Seiden's Charge.

42. Ms. Seiden has alleged that Wexford violated Section 760.10, Florida Statutes, part of the Florida Civil Rights Act of 1992, as amended, which provides in pertinent part:

> (1) It is an unlawful employment practice for an employer:
>
> (a) To discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges or employment, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.

Florida courts routinely rely on decisions of the federal courts construing Title VII of the Civil Rights Act of 1964, codified at Title 42, Section 2000e et seq., United States Code, ("Title VII"), when construing the Florida Civil Rights Act of 1992, "because the Florida act was patterned after Title VII." Harper v. Blockbuster Entertainment Corp., 139 F.3d 1385, 1387 (11th Cir. 1998), citing, inter alia, Ranger Insurance Co. v. Bal Harbor Club, Inc., 549 So. 2d 1005, 1009 (Fla. 1989), and

Florida State University v. Sondel, 685 So. 2d 923, 925, n. 1 (Fla. 1st DCA 1996).

43. Ms. Seiden has alleged that Wexford violated Section 760.10, Florida Statutes, by terminating her employment due to a perceived disability, in particular kidney cancer. Although not precisely pled, Ms. Seiden has alleged that Wexford terminated her employment rather than grant her a reasonable accommodation, a requested extension of medical leave.

C. The Burden of Proof.

44. Ms. Seiden has the burden of proving by a preponderance of the evidence that she was the victim of employment discrimination, which she can establish either through direct evidence of discrimination or through circumstantial evidence, which is evaluated within the framework of the burden-shifting analysis first articulated in McDonald Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973). See Logan v. Denny's Inc., 259 F.3d 558, 566-67, 567, n. 2 (11th Cir. 2006).

45. Under a McDonnell Douglas analysis, a petitioner has the burden of establishing by a preponderance of the evidence a prima facie case of unlawful employment discrimination. If the prima facie case is established, the burden then shifts to employer to rebut this preliminary showing by producing evidence that the adverse action was taken for some legitimate, non-

discriminatory reason. If the employer rebuts the prima facie case, the burden shifts back to petitioner to show that the employer's articulated reasons for its adverse employment decision were pretexual. See Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981).

D. Ms. Seiden's Complaint was Not Timely.

46. Before completing a McDonnell Douglas analysis in this case, a preliminary matter must be addressed. That matter involves the question of whether Ms. Seiden complied with Section 760.11(1), Florida Statutes.

47. Section 760.11(1), Florida Statutes, provides that a person who claims to have been the victim of an "unlawful employment practice" must file a charge of discrimination with the FCHR, the federal Equal Employment Opportunity Commission, or "any unit of government of the state which is a fair-employment-practice agency under 29 C.F.R. ss. 1601.70-1601.80" "within 365 days of the alleged violation," in order for the person to pursue relief from FCHR.

48. Before proceeding with a claim of employment discrimination, an aggrieved party must first exhaust administrative remedies by filing "a complaint with the FCHR within 365 days of the alleged violation." Woodham v. Blue Cross and Blue Shield of Florida, Inc., 829 So. 2d 891, 894

(Fla. 2002)(citing Section 760.11(1), Florida Statutes); Caraballo v. South Stevedoring, Inc., 932 F. Supp. 1462, 1464 (S.D. Fla. 1996)("Section 760.11 requires that a putative plaintiff file a charge of discrimination with the FCHR within 365 days of the alleged discrimination.").

49. The issue of whether Ms. Seiden's complaint was timely filed was raised by Wexford prior to the final hearing of this case and in Respondent's Pre-Hearing Stipulation. The evidence proved that she failed to comply with the foregoing requirement.

50. The evidence in this case proved there are a number of potential dates upon which the 365-day period should be considered to have started:

a. The earliest date is May 6, 2004, the date she was informed that she would be terminated from her employment if she did not return to work at the end of her leave period;

b. The next potential date is October 22, 2004, when Ms. Ziegler informed Ms. Seiden that she was going to be terminated on October 25, 2004, if she failed to report for work;

c. The next potential date is October 26, 2004, the date of the Termination Letter;

d. The next potential date is November 1, 2004, the date she first reported the FCHR that she was terminated; and

e. The last potential date is November 3, 2004, the date she actually received the Termination Letter.

51. It is concluded that the most reasonable and appropriate date is October 25, 2004. Ms. Seiden had been, at a minimum, told twice that she would be terminated from her position effective on the last date of her approved absence if she did not return to work. The last time she was reminded of this, was October 22, 2004, when Ms. Zeigler told her she would be terminated October 25, 2004, and that a letter to that effect would be sent to her. She was, therefore, fully aware of the date of the alleged discriminatory act, the October 25, 2004, employment termination, and the subsequent receipt of the Termination Letter was nothing more than a formality as far as putting her on notice of the event. See Dring v. McDonnell Douglas Corp., 58 F.3d 1323, 1328 (8th Cir. 1995)("the actual accrual date is simply the date on which the adverse employment action is communicated to the plaintiff.").

52. Ms. Seiden was, consequently, required to file her complaint of discrimination with FCHR 365 days from October 25, 2004, or October 25, 2005. This she failed to do under any view of the evidence as to when her complaint was filed.

53. The date she is considered to have filed her complaint is not November 30, 2005, the date she first filed her formal charge of discrimination with FCHR; it is actually November 1,

2005, the date when she filed, through counsel, a completed Technical Assistance Questionnaire for Employment Complaints (hereinafter referred to as the "FHCR Questionnaire"). The FHCR Questionnaire specifically states the following:

> * SPECIAL NOTE: If today's date is within 21 days of required final filing date (365 days . . . from date of alleged discrimination stated in item 2.b.[sic]), I desire to submit this questionnaire as a formal complaint and authorize the Commission to fill out a formal complaint form and send to Respondent and provide a copy for me to sign and return immediately upon request.

The date of discrimination listed in item 3.b. on the FCHR Questionnaire is November 1, 2004.

54. While the FCHR Questionnaire was filed on the 365th day after the date Ms. Seiden reported in the FCHR Questionnaire as the date of the discriminatory act (November 1, 2004), that date is incorrect. The date upon which the 365-day limitation period began to run was October 25, 2004, the date she was actually terminated from her employment.

55. October 25, 2004, is also the date upon which Ms. Seiden's request for an accommodation is considered to have been rejected. She had informed Wexford, through Ms. Zeigler, on October 22, 2004, that she wished to have her leave extended. Despite that verbal notice to Wexford, her position was

terminated, thus effectively denying her requested accommodation.

56. Ms. Seiden's complaint, having been filed on November 1, 2004, was not filed within 365 days of the date of alleged discrimination and her Petition should be dismissed for that reason.

E. Ms. Seiden Failed to Present a Prima Facie Case.

57. Even if it is assumed that Ms. Seiden's complaint was timely made, Ms. Seiden has presented no persuasive direct evidence that she was discriminated against because of handicap, and she must, therefore, rely on the presumption set forth in McDonald Douglas to establish a prima facie case of discrimination by showing that (1) she has a disability; (2) she was a qualified individual; and (3) she was discriminated against because of her disability. See Haas v. Kelly Servs. Inc., 409 F.3d 1030, 1035 (8th Cir. 2005); Chapman v. AI Transp., 229 F.3d 1012, 1024 (11th Cir. 2000).

Ms. Seiden's "Disability."

58. Ms. Seiden has argued that her kidney carcinoma constitutes a disability. In support of her argument, she has cited EEOC Questions and Answers About Cancer in the Workplace and the Americans with Disabilities Act, at www.eeoc.gov/facts/cancer.html, at page 2 (hereinafter referred to as the "EEOC Web Site"). Ms. Seiden's reliance upon the

information found at the EEOC Web Site is misplaced for a number of reasons. First, the EEOC Web Site does not constitute precedent in any form. Secondly, what the web site says about whether cancer is a disability merely describes the types of things which must be considered in order to determine whether cancer is a disability:

> **2. When is cancer a disability under the ADA?**
>
> Cancer is a disability under the ADA when it or its side effects substantially limit(s) one or more of a person's major life activities.
>
> **Example:** Following a lumpectomy and radiation for aggressive breast cancer, a computer sales representative experienced extreme nausea and constant fatigue for six months. She continued to work during her treatment, although she frequently had to come in later in the morning, work later in the evening to make up the time, and take breaks when she experienced nausea and vomiting. She was too exhausted when she came home to cook, shop, or do household chores and had to rely almost exclusively on her husband and children to do these tasks. This individual's cancer is a disability because it substantially limits her ability to care for herself.
>
> **Example:** A telephone repairman with an advanced form of testicular cancer has chemotherapy and surgery that render him sterile. He is an individual with a disability under the ADA because he is substantially

limited in the major life activity of reproduction.

Even when the cancer itself does not substantially limit any major life activity (such as when it is diagnosed and treated early), it can lead to the occurrence of other impairments that may be disabilities. For example, sometimes depression may develop as a result of the cancer, the treatment for it, or both. Where the condition lasts long enough (i.e., for more than several months) and substantially limits a major life activity, such as interacting with others, sleeping, or eating, it is a disability within the meaning of the ADA.

Cancer also may be a disability because it was substantially limiting some time in the past.

. . . .

Finally, cancer is a disability when it does not significantly affect a person's major life activities, but the employer treats the individual as if it does.

Example: An individual with a facial scar from surgery to treat skin cancer applies to be an airline customer service representative. The interviewer refuses to consider him for the position because she fears that his scar will make customers uncomfortable. In basing her decision not to hire on the presumed negative reactions of customers, the interviewer is regarding the applicant as substantially limited in working in any job that involves interacting with the public.

Example: After making a job offer, an employer learns that an applicant's genetic profile reveals an increased

> susceptibility to colon cancer. Although the applicant does not currently have and may never in fact develop colon cancer, the employer withdraws the job offer solely based on concerns about productivity, insurance costs, and attendance. The employer is treating the applicant as if he has a disability.
>
> Under the ADA, the determination of whether an individual currently has, has a record of, or is regarded as having a disability is made on a case-by-case basis.

Finally, and most importantly, Ms. Seiden failed to offer sufficient evidence to prove by a preponderance of the evidence that her condition comes within the foregoing discussion.

59. In order for Ms. Seiden to prevail on this issue, she was required to present adequate proof that she meets the statutory definition of "disability" under the ADA (and consequently a "handicap" under the FCRA). She was required to prove that, as a result of the cancer, she suffered from "a physical or mental impairment that substantially limits one or more of the major life activities the individual." 42 U.S.C. § 12102(2)(A). Merely proving a physical illness or a physical impairment, such as cancer, alone is not enough.

60. First, Ms. Seiden offered no proof to establish that Wexford considered her disabled as a result of her illness. The evidence clearly proved that Ms. Seiden was terminated, not with regard to what her illness was, but because Wexford's policies

called for her termination when she failed to return to work after a 26-week absence.

61. Whether she also failed to prove that her illness was a physical or mental impairment that substantially limited one or more of her major life activities is a more difficult issue. The case of Dogmanits v Capital Blue Cross, 413 F. Supp. 2d 452 (E.D. Pa. 2005), is a case almost directly on point with this one. While the court in Dogmanits did not resolve the issue of whether Plaintiff's cancer constituted a disability, the court does explain the issue:

> To qualify as "disabled" under the ADA, a claimant must establish that he or she has a physical or mental impairment that substantially limits major life activities. *Toyota Motor Mfg., Inc. v. Williams, 534 U.S. 184, 195, 151 L. Ed. 2d 615, 122 S. Ct. 681 (2002).* EEOC regulations created for interpreting the ADA define "substantially limit" as "Unable to perform a major life activity that the average person in the general population can perform"; or "significantly restricted as to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." *Id. At 195-196* (quoting *29 C.F.R. § 1630.2(j).*). The nature and severity of the impairment, the duration or expected duration of the impairment, and the actual or expected permanent or long-term impact of the impairment should also be considered. *Id. At 196* (quoting *29 C.F.R. § 1630.2(j)(2)(i)-(iii)*).
>
> There is little question that the life-threatening, debilitating effects of cancer and its subsequent treatment can qualify as

> an "impairment" under the ADA. However, the determination of whether an individual is "disabled" is not based solely on a name or the stereotypical nature and character of an impairment, but rather on the "effect of that impairment on the life of the individual." *Id. At 198*. . . .

Dogmanits at 458.

62. While Ms. Seiden offered limited testimony about her inability to rest comfortably or to sit for long periods, she offered virtually no details as to the extent of her illness. For example, the record is silent as to what medical procedures were performed while she was in the hospital or after. The record is also silent as to what side effects she has suffered from, if any. Finally, she offered no evidence as to her long- or short-term prognosis.

63. The only possible "impairment" Ms. Seiden proved was her inability to work, the same type of impairment suffered by the plaintiff in Dogmanits. While it would appear that the inability to work would constitute an "impairment" which would lead to the conclusion that an individual has a "disability," the failure of the court in Dogmanits to address the issue causes doubt. Consequently, like the court in Dogmanits, it is concluded that this issue need not be resolved because Ms. Seiden has failed to carry her burden as to the other prongs of a prima facie case.

Ms. Seiden's Qualification to Work

64. Ms. Seiden has argued, in support of the second issue she was required to establish in order to prove a prima facie case, that she was a "qualified individual" if she should had been granted the additional extension of leave she requested. Again, she relies, not on case law, but the EEOC Web Site. Like the issue of whether she has proved that she has a disability, the EEOC Web Site offers little support as to whether she was a "qualified individual."

65. Again, the Dogmanits case is on point. In Dogmanits the plaintiff was, like Ms. Seiden, unable to perform the essential tasks of her job. In addressing the issue, the court states, in part:

> The ADA defines a "qualified individual" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." *42 U.S.C. § 12111(8)*.
>
> Determining whether someone is a qualified individual is a two-part inquiry. First, the plaintiff must demonstrate that he or she possess the skill, experience, or education necessary to adequately perform the job. . . . Next, a plaintiff must establish that he or she can perform the essential functions of the position, with or without reasonable accommodation. Id. "This decision is to be made at the time of the employment decision." *White v. Stroh Brewery Co., 15 F. Supp. 2d 734, 737 (E.D. Pa. 1998). . . .*

> Upon learning of an employee's disability, an employer has a duty to engage in a good faith interactive process with the employee to seek reasonable accommodations. *Williams, 380 F.3d at 761*. . . . In some circumstances, a leaves [sic] of absence for medical treatment can also be considered as a reasonable accommodation. *Shannon v. City of Philadelphia, 1999 U.S. Dist. LEXIS 18089 at *20-23 (E.D. Pa. Nov. 23, 1999)*(citing cases from the First, Sixth, and Tenth Circuits as well as EEOC guidelines for interpreting the ADA, *29 C.F.R. § 1630.2(o)* App.).

Dogmanits, at 460.

66. Like the plaintiff in Dogmanits, Ms. Seiden at all times relevant to this matter was unable to return to work. On this point, both Ms. Seiden and her physician informed Wexford that she was unable to perform any of the functions of her employment from the date she originally applied for leave up until the date she filed her second leave request. She was, therefore, not a qualified individual unless, as she argues, Wexford should have granted her request for extended leave as a reasonable accommodation, an issue which, while not specifically articulated in any of her pleadings, is a necessary part of the issue she did raise: was she discriminated against due to her disability. Proving that issue necessarily requires proof that she was a "qualified individual" with or without accommodation, and, therefore, she effectively placed Wexford on notice that accommodation was an issue in this case.

67. Going to the merit of the reasonable accommodation issue, it is concluded that Ms. Seiden failed to meet her burden. What she proved was that she requested an open-ended extension of her approved leave. No projected date for her return was given by her or her physician. While she testified that her physician had told her she would be able to return to work in January 2005, that testimony was hearsay. Additionally, even if it has been proved in this case that she could have returned in January 2005, the evidence failed to prove that Ms. Seiden or her physician ever informed Wexford of any projected return date. Therefore, the accommodation she sought was to allow her to remain absent from her position until some unspecified future date, a date beyond the six months she had already been absent from her employment. Indeed, she asked that she be allowed further leave without any assurance that she would ever return.

68. The Dogmanits case addressed this very issue. After recognizing that a leave of absence may constitute a reasonable accommodation, the court goes on to state:

> However, leave time must enable the employee to perform his or her essential job functions ***in the near future***. *Conoshenti v. Pub. Serv. Elec. & Gas Co., 364 F.3d 135, 151 (3d Cir. 2004).* The weight of th4e autority in the Third Circuit, as well as other Circuits, clearly establishes that a leave of absence for an indefinite duration is not a reasonable accommodation. See

> e.g., *Fogleman v. Greater Hazelton Healht Alliance, 122 Fed. Appx. 581, 2004 KWL 2965392 at *3 (3d Cir. 2004)*(holding that an indefinite or open-ended leave "does not constitute a reasonaqble accommodation"); *Peter v. Lincoln Technical Inst., 255 F. Supp. 2d 417, 437 (E.D. Pa. 2002)*(citing to Fourth, Fifth, Sixth, and Tenth Circuits in concluding that "an indefinite leave is inherently unreasonable").

Dogmanits, at 460-461.

69. It is, therefore, concluded that an open-ended extension of leave does not constitute a reasonable accommodation. Ms. Seiden was, consequently, not a "qualified individual" because she failed to prove that she could "perform the essential functions of the position, with or without reasonable accommodation."

The Lack of Discrimination

70. Finally, Ms. Seiden failed to prove the third prong of a prima facie case: that she was terminated because of a disability. Instead, the evidence proved that, like any other employee of Wexford, she was given a maximum of 26 weeks of medical leave and that, failing to return at the end of the 26 week period, she was terminated. This treatment is spelled out in Wexford's written policies and applies to all individuals. Even if she were considered to have a disability, she failed to prove that her disability played any direct part in Wexford's decision to terminate her.

F. The Ultimate Burden of Proof.

71. Based on the findings of fact herein, Ms. Seiden failed to meet her burden of establishing a prima facie case of disability discrimination. Even if she had, Wexford met its burden of establishing a legitimate, non-discriminatory reason for terminating Ms. Seiden's employment: she had used all of the medical leave allowed to employees pursuant to Wexford's written policies. Consistent with those polices, which, again apply to all employees, her employment was terminated when she failed to return to work after she had exhausted her approved leave.

72. Finally, the evidence offered by Ms. Seiden was not sufficient to establish that the reasons given by Wexford for the termination of her employment were pretext. Ms. Seiden, therefore, did not prove by a preponderance of the evidence that Wexford discriminated against her on the basis of a perceived disability when it terminated her employment.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations enter a final order dismissing the Petition for Relief filed by Jane Seiden.

DONE AND ENTERED this 18th day of January, 2007, in Tallahassee, Leon County, Florida.

LARRY J. SARTIN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 18th day of January, 2007.

ENDNOTES

[1]/ The Respondent was originally incorrectly identified as "Wexford Health Services, Inc." The correct corporate name of the Respondent is "Wexford Health Solutions, Inc." On September 21, 2006, the parties filed a Joint Stipulation as to Correct Party agreeing to the correct name of Respondent. The style of this case has been changed to reflect this stipulation.

[2]/ All references to the Florida Statutes shall be to the 2004 edition unless otherwise indicated.

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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.