

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

ALICIA HAYS, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 06-5073  
 )  
 DEPARTMENT OF CHILDREN AND )  
 FAMILY SERVICES AND AGENCY FOR )  
 PERSONS WITH DISABILITIES )  
 )  
 Respondents. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

This cause came on for formal hearing before Harry L. Hooper, Administrative Law Judge with the Division of Administrative Hearings, on May 8 and 9, 2007, in Chattahoochee, Florida.

APPEARANCES

For Petitioner: Erika E. Bush, Esquire  
Marie A. Mattox, P.A.  
310 East Bradford Road  
Tallahassee, Florida 32303

For Respondent: Sharon L. Ray, Esquire  
Agency for Persons with Disabilities  
3700 Williams Drive  
Marianna, Florida 32446

STATEMENT OF THE ISSUE

Whether Respondent engaged in an unlawful employment practice with regard to Petitioner because of Petitioner's asserted disability.

PRELIMINARY STATEMENT

Petitioner Alicia Hays (Ms. Hays) filed an Employment Charge of Discrimination with the Florida Commission on Human Relations (Commission) on May 26, 2006. She alleged that the Florida State Hospital (Hospital), a subordinate unit of the Department of Children and Family Services (Department), discriminated against her because of her disability or because management at the Hospital perceived that she was disabled.

On November 15, 2006, the Commission entered a "Notice of Determination: No Cause" in response to her Charge of Discrimination. On December 11, 2006, Ms. Hays timely filed a Petition for Relief alleging discrimination based on disability or perceived disability and alleged the Hospital refused to provide an accommodation for her disability. The matter was forwarded to the Division of Administrative Hearings and filed on December 13, 2006.

The case was set for hearing on February 28, 2007, in Chattahoochee, Florida. Pursuant to Petitioner's Consented Motion to Continue Final Hearing, the hearing was re-scheduled for May 8 and 9, 2007, and was heard as scheduled.

At the hearing, Ms. Hays testified and presented the testimony of seven witnesses and offered 19 exhibits into evidence and all 19 were accepted. Respondent presented the

testimony of three witnesses and offered two exhibits into evidence and both were accepted.

The three-volume Transcript was filed on May 29, 2007. After the hearing, counsel for Ms. Hays moved for an enlargement of time for the submissions of the proposed recommended orders. She requested a deadline of July 23, 2007. Counsel for the Department agreed, and the motion enlarging the time was granted. Both parties filed their Proposed Recommended Orders on July 23, 2007.

References to statutes are to Florida Statutes (2004) unless otherwise noted.

#### FINDINGS OF FACT

1. At the time of the hearing, Ms. Hays was 36 years of age and was unemployed. During times pertinent she lived in Chattahoochee, Florida.

2. The Hospital in Chattahoochee, Florida, is a large residential mental health facility operated under the auspices of the Department. The Hospital also administratively supports employees of the Agency for Persons with Disabilities. The Hospital is an employer as that term is defined in Subsection 760.02(7), and thus subject to the Florida Civil Rights Act of 1992.

3. Ms. Hays, prior to her employment with the Hospital, worked for various employers in clerical and secretarial positions.

4. She began working at the Hospital in 2000. She was employed in a temporary position in Unit 25 as a Clerk Typist Specialist. After two weeks on the job, she was moved to Unit 14 and worked as a Human Service Worker I. This was also a temporary position. In this latter position, she took care of elderly residents. She bathed them, fed them, and otherwise helped them with their daily needs. She also escorted them to off-campus appointments. She received a "Review and Performance Planning" document signed by her on June 19, 2000, which indicated that she was performing in a satisfactory manner.

5. She was hired in a full-time position as a Human Service Worker I in August 2000 in Unit 31/32. In this position her duties included assisting nurses in the medical unit of the Hospital. A "Review and Performance Planning" document signed by Ms. Hays on January 30, 2001, stated that she achieved standards and included some complimentary remarks.

6. In July 2001, she was moved to Unit 29 as a Human Service Worker I. Unit 29 is also known as the Mentally Retarded Defendant Program (MRDP) or MRDP 29. She received a "Review and Performance Planning" document that she signed on March 29, 2002. She received an overall evaluation of "3.81."

A performance rating of "4" means that she consistently met and often exceeded expectations. A "5" is the highest rating one can obtain at the Hospital.

7. Her next rating for the period March 2002 until July 2002, resulted in a grade of "4." During the period July 20, 2002, until March 1, 2003, she did not receive a rating because she was not working at the Hospital during the evaluation period. Nevertheless, Annette Bates, Ms. Hays' supervisor, noted that she was a good worker and an asset to MRDP 29.

8. Ms. Hays was injured on November 27, 2001, while exiting the "big blue bus." She slipped on wet steps, and her lower back and neck impacted the steps. A physician, Dr. K. W. Richardson of Chattahoochee, reported that the injury sustained was a broken tail bone. He noted this in a "First Report of Injury or Illness" dated November 28, 2001. Ultimately the diagnosis was changed to two bulging disks. Pain medication was prescribed, but she never required surgery.

9. Wages paid to her, by the Hospital, \$751.63 bi-weekly, terminated on December 4, 2001. Subsequently, she was paid workers' compensation benefits. She was informed she could work, but could not lift more than ten pounds and could not have contact with patients. She was authorized to work only at a desk job.

10. Ms. Hays returned to work at the Hospital on January 18, 2002. She was placed on light duty and assigned to the Medical Records Section at MRDP. She filed documents and did other tasks as assigned. Her supervisor was a Ms. Lawrence.

11. On July 18, 2002, her light-duty status expired and because the Hospital could not accommodate her restrictions, she was sent home and provided workers' compensation benefits. She continued to receive workers' compensation benefits until December 2004, when she reached maximum medical improvement.

12. In December 2004, she was contacted by Tracy Wallace and as a result, Ms. Hays met with Margaret Forehand. Ms. Forehand, at that time, was the Hospital's Workers' Compensation Coordinator. She told Ms. Hays that a position was available in MRDP, Unit 29, and invited her to apply for it.

13. Ms. Hays completed a State of Florida Employment Application. She was thereafter employed as a "clerk typist specialist - F/C" at a salary rate of \$754.24, which was, on a bi-weekly basis, \$39.70 less than she was receiving before her injury. (The designation F/C means forensic corrections.)

14. Ms. Hays' Letter of Acceptance, dated December 7, 2004, and accepted by Ms. Hays on December 7, 2004, informed her that her position was probationary for 12 months. The letter was written on Department stationery, but was signed by David English, Program Operations Administrator, who worked for the

Agency for People with Disabilities. He has the ultimate hiring authority for the employees of MRDP.

15. Although termed a "demotion," the lower pay was actually the result of Hospital policy that was applied to all employees who returned from an absence subsequent to being placed on workers' compensation. This job was not preceded by an interview. The person who became her supervisor, Shellie Owens, was not involved in Ms. Hays' hiring process. Ms. Hays' ultimate employer was the Department.

16. Ms. Hays' duties as a "clerk typist specialist- F/C" included filing, typing, and answering and referring calls. She filed ward charts, "thinned charts," and ensured that ward charts and central files were maintained in accordance with Hospital policies, among other tasks. Her duties were set forth in a "Career Service System Position Description." Her section was denoted "MRDP."

17. She was physically able to perform these duties without an accommodation. Her daily work was not in the least affected by any injury or disability. The evidence indicates that both Ms. Hays and Ms. Owens' ultimate employer was the Agency for Persons with Disabilities. Ms. Owens was aware that Ms. Hays had been on workers' compensation for a time. Ms. Owens knew that Ms. Hays could not lift more than ten pounds

and was aware that the job did not require lifting more than ten pounds.

18. No evidence was adduced indicating that Ms. Owens perceived Ms. Hays as disabled.

19. Because entries are frequently entered in patients' ward charts, they would grow quite large if not managed. It is necessary for some of the information to permanently remain in ward charts, but a substantial portion may be stored elsewhere. The portions of the charts that are not required to remain in the ward are permanently stored in the Medical Records Office. The process of removing designated matter from the ward charts is called "thinning."

20. Thinning was an important part of Ms. Hays' job. She had to "thin" in accordance with a schedule. Some documents would be left in ward charts for three months, some would be kept if they were only the most recent of a type, and some were kept as long as needed. Some were permanent and, therefore, never removed. It was important also, as part of the process, that Ms. Hays ensure that documents in ward charts were arranged in the proper order.

21. For the rating period December 7, 2004, until March 1, 2005, Ms. Owens evaluated Ms. Hays as a "3." In the written portion of the evaluation, Ms. Owens noted that Ms. Hays had a pleasant personality and was willing to assist others.



22. Ms. Owens' job title is Health Information Specialist Supervisor. In addition to Ms. Hays, during times pertinent, Ms. Owens supervised from three to four other people.

23. On April 19, 2005, approximately six weeks after receiving her evaluation, Ms. Hays was counseled by Ms. Owens. Ms. Owens told her she needed to improve in some areas and that her desk was not tidy. She provided Ms. Hays with a schedule of daily assignments designed to help Ms. Hays improve.

24. Ms. Owens memorialized her discussion with Ms. Hays in a memorandum dated April 19, 2005. In the memorandum, she noted that Ms. Hays had been provided with the MRDP Worksite Orientation Requirement Worksheet on February 25, 2005, and that Ms. Hays understood her duties and acknowledged that by signing it. The memorandum recited that Ms. Hays' work was backed up and that her desk had food and drink on it that could have been spilled on documents which were on the desk. The memorandum also reminded Ms. Hays that she was a probationary employee.

25. Ms. Owens also gave Ms. Hays a "daily schedule" that had an effective date of April 25, 2005. Ms. Hays and Ms. Owens both signed it. The "daily schedule" informed Ms. Hays exactly what she was to do every day of the week. In Ms. Hays' opinion, she followed "every word" of the schedule, and Ms. Owens did not indicate that there was any problem with her work immediately subsequent to the implementation of the "daily schedule."

26. Ms. Owens conducted an audit of the charts maintained by Ms. Hays on May 20, 2005, and reduced the results to writing. The information developed in the audit caused Ms. Owens to conclude that Ms. Hays' work was not improving. Ms. Owens believes that medical records are extremely important and keeping them in good order is a necessity. Her audit found that Ms. Hays was not keeping them in good order. She found her work to be unacceptable.

27. She discussed the matter with Les Smith, the Residential Services Director of Forensic Corrections. He was her immediate supervisor. Ms. Owens then talked to Amy Bryant the Hospital's Employee Relations Counselor with regard to procedures to be followed in terminating an employee. She wanted to comply with procedures. Ultimately a meeting occurred attended by Ms. Owens, Les Smith, David English, and an attorney for the hospital, Amy Tillman. During this process, the decision to offer Ms. Hays the opportunity to resign in lieu of being fired, was finalized.

28. On May 24, 2005, Ms. Hays was ordered by Ms. Owens to report to Mr. Smith's office. Mr. Smith is Ms. Owens' supervisor. When she arrived, she was given the choice of resigning or being fired. If she had not resigned, she would have been fired immediately. Ms. Hays was surprised when she was informed of this choice. She resigned in a handwritten

letter dated May 24, 2005. This was her last day of work at the Hospital. As a probationary employee, she had no right to appeal what amounted to a discharge.

29. Bernice King worked at the Hospital with Ms. Hays. She was a Human Service Worker II in MRDP 29. She had an opportunity to observe Ms. Hays' work. Ms. King used the charts maintained by Ms. Hays, and she found them to be in good order.

30. Danielle Rene Shaw worked at the Hospital with Ms. Hays. She was a Human Service Worker II in MRDP 29. She had an opportunity to observe Ms. Hays' work. Ms. Shaw used the charts maintained by Ms. Hays, and she found them to be in good order. She thought Ms. Hays was a hard worker.

31. Mark Flodin, M.D., worked as a physician in MRDP 29 when Ms. Hays was working there, and he had an opportunity to observe her performance. He noted that she was a hard worker and had a professional attitude. He said she maintained the ward charts in an orderly fashion. He was surprised when she was terminated.

32. Ms. Hays' position was filled by Ms. Ryan Smith, who came to the Hospital from another state agency. She was paid at the rate of \$828.17 bi-weekly.

33. Ms. Hays applied for over a hundred jobs with the State of Florida using the state's website, MyFlorida.com. She also sought employment with 15 private employees. She was

interviewed twice, but received no job offers. She was never offered an interview at the Hospital. She received unemployment compensation for about six months after she left the Hospital.

34. Subsequent to her departure from the Hospital, and her inability to secure other employment, she had to have her depression medicine, Zoloft, increased, but she still feels depressed and worthless. She is also taking Chlonzepam, an anti-anxiety drug, and Wellbutrin.

35. Ms. Hays' mother works at the Hospital, as a licensed practical nurse, and her husband was once employed there also. Her father is retired from employment at the Hospital, and her grandmother and grandfather worked there.

#### CONCLUSIONS OF LAW

36. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. §§ 120.569, 120.57(1), and 760.11 Fla. Stat.

37. Subsection 760.10(1), Florida Statutes, provides as follows:

§ 760.10. Unlawful employment practices

(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 of employment, because of such individual's race, color, religion, sex,

national origin, age, handicap, or marital status.

38. The Merriam-Webster Online Dictionary defines "handicap" as: "2 a.: a disadvantage that makes achievement unusually difficult; b. a physical disability." Accordingly, "handicap" and "disability" are words meaning the same thing for purposes of this case.

39. Chapter 760, Florida Statutes, is patterned after Title VII of the Civil Rights Act of 1964, Title 42 U.S.C. § 2000e-2 and the Americans with Disabilities Act of 1990, Title 42 U.S.C. 12101, et seq. (1994) (ADA). Federal employment discrimination law, including disability discrimination law, can be used for guidance in construing the provisions of Chapter 760, Florida Statutes. See Chanda v. Englehard/ICC, 234 F.3d 1219, 1221 (11th Cir. 2000); Fouraker v. Publix Supermarket, Inc., 959 F. Supp. 1504 (M.D. Florida 1997). See also Brand v. Florida Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994); Florida Dept. of Community Affairs v. Bryant, 586 So. 2d 1205, 1209 (Fla. 1st DCA 1991).

40. No direct evidence of discrimination based on disability was adduced during the hearing.

41. In McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973), the Supreme Court articulated a burden of proof scheme for cases involving allegations of discrimination under

Title VII, where the plaintiff relies upon circumstantial evidence. The McDonnell Douglas decision is persuasive in this case, as is St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506-07 (1993), in which the Court reiterated and refined the McDonnell Douglas analysis.

42. Pursuant to this analysis, the complainant has the initial burden of establishing by a preponderance of the evidence a prima facie case of unlawful discrimination. Failure to establish a prima facie case of discrimination ends the inquiry. See Ratliff v. State, 666 So. 2d 1008, 1012 n. 6 (Fla. 1st DCA), aff'd, 679 So. 2d 1183 (1996) (citing Arnold v. Burger Queen Systems, 509 So. 2d 958 (Fla. 2d DCA 1987)).

43. If the plaintiff succeeds in making a prima facie case, then the burden shifts to the Hospital to articulate some legitimate, nondiscriminatory reason for its conduct. If the defendant carries this burden of rebutting the plaintiff's prima facie case, then the plaintiff must demonstrate that the proffered reason was not the true reason, but merely a pretext for discrimination. McDonnell Douglas, 411 U.S. at 802-03; Hicks, 509 U.S. at 506-07.

44. In Hicks, the Court stressed that even if the trier-of-fact were to reject as incredible the reason put forward by the defendant in justification for its actions, the burden nevertheless would remain with the plaintiff to prove the

ultimate question of whether the defendant intentionally had discriminated against him. Hicks, 509 U.S. at 511. "It is not enough, in other words, to disbelieve the employer; the fact finder must believe the plaintiff's explanation of intentional discrimination." Id. at 519.

45. In order to establish a prima facie case of discrimination based upon disability, Ms. Hays must show: (1) that she is a handicapped individual under the act; (2) that she is otherwise qualified for the position sought or hired; and (3) that she was terminated solely by reason of her handicap. See Brand v. Florida Power Corp., 633 So. 2d 504 (Fla. 1st DCA 1994).

46. Ms. Hays must as a threshold prove that she is disabled. To be disabled means that one's physical limitation "substantially limits major life activities." The term "substantially limits" means, among other thing, "[u]nable to perform a major life activity that the average person in the general population can perform"; or "[s]ignificantly restricted as to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." (citation omitted) Finally, "[m]ajor [l]ife [a]ctivities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking,

breathing, learning, and working." (citation omitted) See Sutton v. United Airlines, 527 U. S. 527 (1999).

47. There was no evidence that Ms. Hays could not perform manual tasks, walk, see, hear, or breathe. For that matter there was no testimony that she could not "thin" files. To the contrary, there was ample evidence, including testimony by Ms. Hays, that she had no problem "thinning" files. Consequently, she was not disabled or perceived to be disabled and, therefore, did not prove a prima facie case.

48. Even if one assumes arguendo that she proved a prima facie case, the Hospital offered acceptable nondiscriminatory reasons for discharging her. Ms. Owens considered her work unacceptable. Ms. Hays did not offer any evidence demonstrating that Ms. Owens' actions were a pretext for underlying discrimination.

49. An "employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason." Abel v. Dubberly, 210 F.3d 1334, 1339 (11th Cir. 2000). So whether it was good managerial practice to discharge Ms. Hays is of no consequence. Likewise, it is of no consequence that fellow employees had an opinion of Ms. Hays' work that differed from that of Ms. Owens.



RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law,  
it is

RECOMMENDED that the Florida Commission on Human Relations  
dismiss the Petition of Alicia Hays.

DONE AND ENTERED this 25th day of July, 2007, in  
Tallahassee, Leon County, Florida.



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HARRY L. HOOPER  
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 25th day of July, 2007.

COPIES FURNISHED:

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

Carolyn Dudley, Assistant Staff Director  
Department of Children and Family Services  
1317 Winewood Boulevard  
Building 1, Room 101F  
Tallahassee, Florida 32399-0700

Sharon L. Ray, Esquire  
Agency for Persons with Disabilities  
3700 Williams Drive  
Marianna, Florida 32446

Erika E. Bush, Esquire  
Marie A. Mattox, P.A.  
310 East Bradford Road  
Tallahassee, Florida 32303

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

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.