STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEBRA L. PORTER,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 08-6113
	)	
DOCTORS' MEMORIAL HOSPITAL,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Upon due notice, a disputed-fact hearing was held in this case on July 20, 2009, in Tallahassee, Florida, before Ella Jane P. Davis, a duly-assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Paul M. Anderson, Esquire
Anderson, Fernandez & Hart, P.A.
1584 Metropolitan Boulevard
Tallahassee, Florida 32308

For Respondent: Bruce Culpepper, Esquire
Mark Schellhause, Esquire
Akerman Senterfitt
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STATEMENT OF THE ISSUE

Whether Respondent Employer committed a discriminatory employment practice against Petitioner on the basis of handicap, in violation of Section 760.10(1)(a), Florida Statutes.

PRELIMINARY STATEMENT

On April 2, 2008, Petitioner filed a Charge of Discrimination with the Florida Commission on Human Relations (FCHR). On November 7, 2008, FCHR entered a Notice of Determination: Cause. On November 12, 2008, FCHR issued a Determination: No Cause and an Amended Notice of Determination: No Cause. On December 1, 2008, Petitioner filed a Petition for Relief, and on or about December 5, 2008, the case was referred to the Division of Administrative Hearings (DOAH).

DOAH's case file reflects all pleadings, notices, and orders intervening before the disputed-fact hearing held July 20, 2009.

At hearing, the parties stipulated to admission of a notebook of exhibits marked, "Respondent's Exhibit 1," consisting of Bate-stamped documents numbered 0001 through 0174.

Petitioner testified on her own behalf and had Petitioner's Exhibits 19-22, admitted in evidence.

Respondent presented the oral testimony of Ann Gray, Diana McRory, and Lisa Story, and had Exhibits R-2 and R-3, admitted in evidence. Exhibit R-3 is the deposition of Dr. Ghulam Mohammed.

Joint Exhibit A, was also admitted. It contains FCHR's "Determinations" and notices thereof, which have been referred-to, supra. (See TR-21.)

FCHR abrogated its obligation to preserve the record, but the parties hired a court reporter, and a Transcript was filed on August 7, 2009.

Both parties filed Proposed Recommended Orders within an extended time frame and each proposal has been considered in preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is a Licensed Practical Nurse (LPN). She has worked as an LPN for Respondent Hospital on multiple dates. Her most recent employment with Respondent commenced on or about April 5, 2007, and gave rise to this case. Respondent is an "employer" as defined in Section 760.02(7), Florida Statutes.

2. Petitioner was first hired by Respondent on July 11, 1996, as an LPN, on a part-time, on-call, substitute, "as needed" basis. In the context of this case, "PRN" means "as needed." In other words, the discretion to summon a PRN nurse in to work or not to do so is solely that of the Employer, and the Employer can call in particular PRN nurses or not call them in as it sees fit, provided the reason a nurse is not called in is not a discriminatory reason.

3. Upon this first hire, Petitioner was required to attend a general orientation, which included a review of the Employee Handbook, verification by Petitioner of her ability to perform the minimum requirements and essential functions of an LPN,

execution of a PRN Agreement (see Finding of Fact 23), and completion of an Application for Employment.

4. During her first employment with Respondent, which lasted 19 months, Petitioner missed time from work to undergo neck surgery. Upon her return to work, Petitioner presented Respondent with a "returned to work with no restrictions" note from Dr. Shipman.

5. On March 5, 1998, Respondent discharged Petitioner over medication and/or behavior issues. Petitioner was essentially cleared of professional nursing error by an April 1, 1999, notification from the Florida Agency for Health Care Administration of a "no probable cause" determination.

6. In 1998, while employed as an LPN with a different employer, Petitioner suffered an injury to her back and knee when she slipped and fell trying to catch a patient.

7. Catching patients is a common way in which nurses are injured, and there is no way to accurately predict which patients will fall or when one will fall. A falling patient triggers a nurse's rescue response and he or she will react without stopping to assess the danger to him- or herself.

8. After her 1998 injury, Petitioner underwent several back surgeries which were successful in correcting damage to one nerve. However, since that time, Petitioner has continued to have residual pain and numbness.

9. Petitioner returned to work with Respondent in 2003. In connection with her 2003, application, Petitioner provided Respondent with a workers' compensation DWC-9 Form, completed by orthopedic surgeon, Dr. Charles Wingo. This form indicated that, effective December 3, 2003, Dr. Wingo had determined, for workers' compensation purposes, that Petitioner had reached "maximum medical improvement"; was permanently impaired at a rating of nine percent of the body as a whole; and could return to full-time employment as of January 5, 2004. Dr. Wingo further opined that Petitioner should observe one hour-restrictions on sitting, standing, and walking, with infrequent bending, squatting, crawling, climbing, and reaching. In his opinion, Petitioner could continuously lift up to 10 pounds, frequently lift up to 20 pounds, and occasionally lift up to 100 pounds. He stated that she could continuously carry up to 10 pounds, frequently carry up to 20 pounds, and occasionally carry 100 pounds.

10. Despite the foregoing medical opinion, Respondent re-hired Petitioner on or about December 22, 2003, without challenging her ability to perform her duties as an LPN and without requiring that she first provide a full duty medical release with no restrictions.

11. Upon this second hiring, on January 5, 2004, Petitioner signed for, and acknowledged reading, Respondent's

Employee Handbook and Respondent's LPN job requirements, and assured Respondent that she understood the Handbook and that she could perform the job requirements. Upon her three-month review, dated April 15, 2004, Petitioner again acknowledged she could perform the job requirements.

12. Petitioner resigned in May, 2004, due to back problems, but her resignation letter to Respondent was less specific, stating only that she was resigning for "medical reasons" and hoped to be re-hired when the medical reasons were resolved.

13. The Social Security Administration determined on January 31, 2006, that Petitioner had become "a disabled person," effective August 1, 2004, and awarded her disability benefits. Thereafter, Petitioner continued, and still continues to receive these benefits. (Cf. Finding of Fact 16.)

14. In 2006-2007, Petitioner wanted to "ease back into" full-time employment without losing her Federal disability benefits until she was certain she could handle full-time employment. She repeatedly approached Lisa Story, Respondent's Intensive Care Unit (ICU) Supervisor, about employment with Respondent.

15. Eventually, Ms. Story advised Petitioner that Respondent Hospital wanted to avoid paying overtime to its

presently employed LPNs by hiring a new LPN willing to work PRN in ICU for only three shifts per month.

16. Petitioner notified the Social Security Administration of the arrangement described by Ms. Story and was approved for a trial work period. During the trial work period, Petitioner would continue to receive Federal disability benefits, provided she earned an amount below the earnings cap set by the Social Security Administration. She also continued to receive her Federal medical benefits.

17. There is no evidence that Petitioner presented any Social Security disability documents to either Ms. Story or Respondent's Human Resources Department in 2007.

18. Although she knew Petitioner continued to receive disability benefits, Ms. Story believed Petitioner's physical problems had been resolved. At all times material, Ms. Story believed that hiring Petitioner for only three shifts per month would fulfill Respondent Hospital's needs, while accommodating Petitioner in terms of how much Petitioner could earn under Social Security guidelines.

19. Ms. Story recommended to her superiors that Petitioner be hired, but Ms. Story had no independent authority to hire anyone for Respondent. The position was posted, and Petitioner was requested to come in to apply.

20. In connection with her third hiring in 2007, Petitioner filled out a series of papers for Respondent on two occasions: once on March 29, 2007, just before her first day on the job, and once on or about June 4, 2007, when the next "new employee orientation" became available.

21. Because Petitioner passed an examination on Respondent's basic employer/employee requirements, Respondent allowed Petitioner to start work in April 2007, without taking the usual orientation program and without receiving/completing all the paperwork required by Respondent for new employees.

22. Respondent hired Petitioner as an LPN/PRN employee at will by a contract dated March 29, 2007, and assigned her to the new three-shifts-per-month slot in ICU. Respondent did not view this as a "light duty" position. Respondent has no "light duty" positions for any type of direct patient care personnel, including nurses of any description, unless they are already Respondent's employees who have been injured on the job and are covered by Respondent's workers' compensation plan/policy, pursuant to Chapter 440, Florida Statutes. (See Finding of Fact 30.)

23. In fact, Respondent's March 29, 2007, LPN/PRN contract which Petitioner signed, specified, in pertinent part:

> I further understand that to maintain my PRN employment, it is required the employee work at least 2 (two) shifts per month and not

> refuse to work or call off more than 3 (three) times in a one year period.
>
> Recognizing that Doctors' Memorial Hospital provides care on a continuous basis, I further commit to floating to other areas to which I have been oriented during my assigned shifts.

24. As part of her initial hiring process in March-April 2007, Petitioner also filled out an Equal Opportunity Voluntary Self-identification Current Employee Survey, denying that she was a disabled individual "defined as an individual who has a mental or physical impairment which substantially limits one or more major life activities, has a record of such impairment or who is perceived as having such impairment." The foregoing language tracks the definition of "disability" originating in the Americans With Disabilities Act (ADA) and adopted as the definition of "disability" under the progeny of case law arising from the ADA and adopted as the definition of "handicap" under the progeny of case law arising from Chapter 760, Florida Statutes.

25. Petitioner also did not specify any accommodations she needed from Respondent in the blanks provided for such accommodation requests on this Equal Opportunity Voluntary Self-identification Current Employee Survey.

26. Petitioner testified that by declaring that she was not a disabled individual and stating that her physical

impairments did not limit one or more of her major life activities, she intended to convey that her life activities (like "activities of daily living": eating, cooking, bathing, doing housework) were not limited by her physical condition, even if her lifting (of patients, etc.) ability was limited.

27. Petitioner signed and dated a "Position Description, Annual Appraisal" form on March 29, 2007, wherein she verified that, "I have reviewed these job requirements and verify that I can perform the minimum requirements and essential functions of this position." Part of this document sets out the physical requirements of the LPN position, which included medium, heavy, and very heavy work. The form defines "medium work" as exerting up to 50 pounds force occasionally and/or up to 20 pounds frequently and /or up to 10 pounds constantly." The form defines "heavy work," as exerting up to 100 pounds force occasionally and/or up to 50 pounds frequently and/or 20 pounds constantly. The form defines "very heavy work" as exerting over 100 pounds force occasionally and/or over 20 pounds constantly." The form also sets out the minimum or essential requirements of the position which include standing for five hours, sitting for two hours, and walking for five hours, and requirements to engage in occasional bending, crouching, squatting, reaching, pushing/pulling up to 10 pounds, lifting/carrying up to 10 pounds, and lifting from floor and waist level.

28. Ms. McRory, Respondent's Director of Human Resources, testified that with regard to lifting or pushing, Respondent's LPN requirements meant that an LPN had to exert force of 100 pounds occasionally and 50 pounds frequently, but the requirements for "standing for five hours, sitting for two hours, and walking for five hours," were cumulative, rather than continuous requirements.

29. Petitioner admitted at hearing that she signed the declaration when she was hired in 2007 stating that she had read and met the job requirements but that she would not have been able to perform work requiring her to exert 50 to 100 pounds of force occasionally. Her assessment was confirmed by Dr. Ghulam Mohammed. (See Findings of Fact 35 and 43.)

30. A pertinent part of each Employee Handbook that Petitioner received, including the ones she had received during previous employments and the one she signed-for during orientation in June 2007, provided:

> Upon request, DMH [Respondent] provides reasonable accommodation to employees or applicants for employment with known disabilities as required under the employment provisions (Title I) of the Americans with Disabilities Act, or ADA. Employment opportunities shall not be denied because of the need to make reasonable accommodations to an individual's disability. To request a reasonable accommodation, make your request known by completing the Reasonable Accommodation

> Based on Disability Request Form in Human Resources Department.
>
> Accommodation is not reasonable for direct patient care employees. For the direct patient care employee's safety and DMH risk management, they must be physically able to perform their position's job requirements and job duties with no limitations. However, a direct patient care employee may request or be offered to transfer to any available positions with job requirements they are physically able to perform. (Emphasis supplied.)

31. When Petitioner underwent orientation in June 2007, she was required to complete a Health Information Form. In completing this form, Petitioner answered "yes" to a question asking if she had ever had a problem with her back; "yes" to a question asking if she had ever been hurt on the job; and "yes" to a question asking if she had ever had a back ailment. She further described having undergone a partial diskectomy with stabilizing plate and knee surgery. In answering a question as to whether she had any "physical disability or impairment," she answered "back injury and chronic pain." She also appended a page upon which she wrote "Back trouble. Had surgery 10/03 on lumbar area to relieve pressure on a nerve. 100 percent successful"; "knee trouble to repair torn meniscus (no further problem)"; and "neck trouble—stabilizer plate in cervical area 1998." This was Petitioner's first clear statement during her 2007, employment with Respondent that she might have some

continuing inability to perform Respondent's requirements for LPN employment.

32. Petitioner worked for Respondent in its ICU between April 2007, and October 2007. During that time, Petitioner worked just three 12-hour shifts per month, always on the first three Wednesdays of each month. She worked during that period without any physical problems. She was able to do the work required of her there.

33. During this period of employment, Petitioner did not work the same shifts as Lisa Story, but it was Ms. Story who reviewed Petitioner's work, and at her three-month probationary review on September 9, 2007, Ms. Story graded Petitioner highly and recommended her for retention as an employee. Petitioner graduated at that point from probationary to regular employee.

34. In late September 2007, after her "excellent" evaluation of Petitioner, Ms. Story requested that Petitioner obtain a statement from a physician outlining her work capabilities. Ms. Story had been instructed to do this by one of her superiors. All of the reasons for this request offered by Respondent at hearing are either incredible due to the timeline of other events or constitute unsupported hearsay, but Petitioner did not initially object to providing the statement.

35. On or about September 24, 2007, Petitioner obtained a written statement from Dr. Ghulam Mohammed that read:

> Debra is followed by me for her medical problems for years. Medically she is able to work one shift a week as a nurse. (in ICU of Doctors Memorial Hospital, Perry FL.) (Corrected to close parentheses and for capitalization.)

36. Petitioner hand-delivered copies of Dr. Mohammed's letter to Respondent's Interim Director of Nursing, Jeannie Harris, and to Ms. Story. She placed copies of the letter in the mailboxes of Diana McRory, Human Resources Director, and of Sarah Ann Gray, Interim Director of Nursing and Risk Manager.

37. Ms. Story testified that she saw the letter and thought it was adequate for the work Petitioner would be doing in ICU. No one else consulted her on her opinion.

38. Dr. Mohammed's letter was reviewed by Diana McRory. She found it unacceptable because it did not state "no restrictions."

39. Having considered all the evidence, and particularly the competing and sometimes internally contradictory evidence, it is found that Petitioner was never advised by Respondent until after Petitioner had been terminated, that Dr. Mohammed's September 24, 2007, letter was unacceptable or that she must provide the Employer with a doctor's letter stating that she was currently able to work "with no restrictions."

40. However, Petitioner did not return with such a letter even after she was advised what was needed. This was apparently because she believes the unique slot she had been filling in the ICU had been created for her and that was the only amount and conditions of work she felt she could handle.

41. Respondent's Interim Director of Nursing and Risk Manager, Ms. Gray, testified that Respondent has a policy of requiring the equivalent language of "no work restrictions" because to do otherwise would be to risk liability to patients and employees alike.

42. It is axiomatic that the Hospital Employer does not wish to incur workers' compensation liability to employees or medical malpractice/premises liability to patients. (See Findings of Fact 7, 30, and 41.)

43. Dr. Mohammed testified that Petitioner is incapable of performing the medium, heavy, and very heavy work outlined in the Respondent's job requirements for an LPN.

44. Petitioner was removed from Respondent's payroll on September 27, 2007, because she had not brought in an acceptable return to work with no restrictions note from a doctor. This resulted in Petitioner's badge not permitting her to clock-in, but through a variety of fiats and authorizations, various superiors and/or administrative officials overrode the system to

allow her to do so. Accordingly, Petitioner worked as an LPN for Respondent on October 10, 2007, and on October 17, 2007.

45. Although Petitioner testified that she thought she earned $20-21 per hour working for Respondent, depending on whether a particular shift did or did not span midnight, Respondent's records appear to show that she was paid $17.00 per hour, during her probationary period and $18.00 per hour after her first evaluation on September 9, 2007. As a PRN employee, she was not receiving retirement and other emoluments to which a full-time employee was entitled.

46. Respondent did not offer Petitioner more sedentary work until after Petitioner filed her complaint with FCHR.

47. Petitioner began work as a Senior LPN for the Department of Corrections at the Mayo Correctional Institution on or about July 25, 2008. In that capacity, she does no significant lifting, pulling, pushing, or twisting.

48. Petitioner testified that between October 17, 2007, and beginning work for the Department of Corrections, she was not gainfully employed; she was in school. (TR-60)

CONCLUSIONS OF LAW

49. The Division of Administrative Hearings has jurisdiction of the parties and subject matter of this cause, pursuant to Sections 120.569, 120.57(1) and Chapter 760, Florida Statutes (2009).

50. Although this process, in this forum, may not adjudicate any rights under Federal law, it is appropriate to interpret Subsection 760.10(1)(a), Florida Statutes, by reference to federal case law under the Civil Rights Act (Title VII), the Rehabilitation Act, and the ADA. School Board of Leon County v. Weaver, 556 So. 2d 443 (Fla. 1st DCA 1990); Hunter v. Winn-Dixie Stores, Inc., FCHR Case 82-0799 (February 23, 1983).

51. Petitioner must prove the following in order to establish a prima facie case of handicap discrimination:

> (a) She is handicapped within the meaning of the Florida Civil Rights Act;
> (b) She was otherwise qualified for his job, with or without reasonable accommodation; and
> (c) She was harassed or terminated solely by reason of his handicap.

See Hilburn v. Murata Electronics North America, Inc., 181 F.3d 1220 (11th Cir. 1999); Gordon v. E. L. Hamm & Assoc., Inc., 100 F.3d 907 (11th Cir. 1999); and Brand v. Florida Power Corporation, 633 So. 2d 504 (Fla. 1st DCA 1994).

52. In Brand, the court adopted the definition of handicap found in Section 504 of Title V of the Rehabilitation Act of 1973, and stated:

> Section 504 specifically refers to 29 U.S.C. Sec. 706(8)(B) for the definition thereof. The latter defines an "individual with handicaps," subject to certain exceptions not applicable to this case as one "who (i) has a physical or mental impairment which substantially limits one or

> more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." Examples of major life activities include caring for oneself, walking, seeing, speaking, breathing, learning, and working. (Emphasis supplied.)

Id. at 510, n. 10.

53. The same definition of "disability" is set out in the ADA. In Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 112 S. Ct. 681 (2002), the United States Supreme Court, in a unanimous decision, provided guidance, for purposes of the ADA, as to how "handicap/disability" is to be proven:

* * *

> Merely having an impairment does not make one disabled for purposes of the ADA. Claimants also need to demonstrate that the impairment [substantially] limits a major life activity. (Bracketed material added for clarity.) . . .

* * *

> "Major life activities" thus refers to those activities that are of central importance to daily life. . . .

* * *

> . . . the manual tasks unique to any particular job are not necessarily important parts of most people's lives. As a result, occupation-specific tasks may have only limited relevance to the manual task inquiry.

* * *

> The Court, therefore, should not have considered respondent's inability to do such manual work in her specialized assembly line job as sufficient proof that she was substantially limited in performing manual tasks.
>
> * * *
>
> Yet household chores, bathing, and brushing one's teeth are among the types of manual tasks of central importance to people's daily lives, and should have been part of the assessment of whether respondent was substantially limited in performing manual tasks.

54. Given the foregoing, it was not unreasonable that a confused Petitioner might declare to the Employer that she was not a disabled person and later claim to be discriminated against on the basis of handicap. Even skilled legal minds become confused in distinguishing impairments from disabilities. This is one reason that detailed employee questionnaires are the norm for employers trying to discern whether an employee can fulfill the requirements of a particular position.

55. It is helpful to an analysis of handicap discrimination to synopsize the critical facts: Herein, Petitioner had been previously employed by Respondent and had a good working knowledge of the physical requirements of PRN/LPNs. Respondent had knowledge of some of Petitioner's past physical impairments and work restrictions, but when Petitioner was hired in 2007, she signed papers stating that she was not permanently

impaired or disabled and could meet all the Employer's job requirements. The Employer wanted to avoid paying overtime because it was cheaper to hire a new LPN/PRN than to pay one or more regular full-time LPNs to work a specific 36 hours per month. The Employer did not create a tailor-made job position for Petitioner. Rather, the Employer made a managerial decision based on the Federal Wage and Hours Act and its own corporate pocketbook and invited Petitioner to apply for the position. Petitioner did not ask for any specific accommodations.

56. Petitioner acknowledged to the Employer that she knew she could be placed on other shifts and that if she repeatedly did not come in when called PRN-as needed, she could be terminated. She further acknowledged that she could be floated at any time to a different job setting within the hospital.

57. What triggered the Employer to question Petitioner's ability or safety on the job in late September 2007 (five months after hiring; three months after she made her full disclosure in June of past injuries, operations, and limitations; and approximately three weeks after she was rated as an exceptional ICU nurse and taken off probation) is not clear in this record.

58. Petitioner clearly did a good job in the ICU, but even there, the chance existed of a patient falling and getting injured if Petitioner instinctively sought to protect herself due to prior injury or impairment status. A chance of

Petitioner's being injured if she did not protect herself from a falling patient also existed. In light of Petitioner's June 2007 papers, the Employer's request for a medical release was not unreasonable.

59. The Employer has treated Petitioner shabbily by not timely explaining to her a second time what type of release-to-work papers were needed from her doctor, but the evidence clearly shows that explaining further would not necessarily have made it possible for Petitioner to get a full medical release.

60. Petitioner is clearly handicapped, but she has not proven a prima facie case of discrimination, because she has not established that she can perform the full duties of the job description with or without accommodation. See cases, supra.

61. Assuming arguendo, but not ruling, that a prima facie case has been made, Respondent has produced evidence to the contrary which has not been disproven.

62. Additionally, it is noted that Petitioner probably would be entitled to no award beyond job reinstatement even if she had proven a discriminatory termination, because she chose to go to school rather than mitigating any loss of salary by seeking alternative employment between her termination by Respondent and the date she assumed her current position with the Department of Corrections. Even so, any money damages to which she might have been entitled if a discriminatory

termination had been proven would have to be based on $18.00 per hour for only 36 hours per month, lasting only for those periods of time after termination that she was actually seeking employment, and based on the difference between the two rates of pay if she were paid less than $18.00 per hour once she found employment.

RECOMMENDATION

Based upon 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 and Charge of Discrimination.

DONE AND ENTERED this 3rd day of November, 2009, in Tallahassee, Leon County, Florida.

ELLA JANE P. DAVIS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of November, 2009.

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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.