STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SHERI L. MCINTOSH,	)	
Petitioner,	)	
vs.	)	Case No. 08-6258
DOLLAR GENERAL,	)	
Respondent.	)	

RECOMMENDED ORDER

This cause came on for final hearing before Harry L. Hooper, Administrative Law Judge with the Division of Administrative Hearings, on December 16, 2009, in Bronson, Florida.

APPEARANCES

For Petitioner: Melanie A. Mucario, Esquire
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For Respondent: Alva Cross Hughes, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Respondent engaged in an unlawful employment practice, specifically whether Respondent failed to accommodate Petitioner's alleged disability.

PRELIMINARY STATEMENT

Petitioner Sheri McIntosh filed an Employment Complaint of Discrimination with the Florida Commission on Human Relations (the Commission) on April 22, 2008. She alleged, among other things, that Respondent Dolgencorp, Inc., n/k/a Dolgencorp, LLC, (Dollar General or Respondent) discriminated against her based on a disability or handicap. In this regard, Ms. McIntosh alleges that Dollar General denied her a reasonable accommodation during her employment. On October 23, 2008, the Commission issued its determination finding cause that an unlawful employment practice had occurred concerning Respondent's failure to accommodate Petitioner's disability. The Commission found no cause that Petitioner's employment had been terminated based upon retaliation. On December 1, 2008, Ms. McIntosh filed a Petition for Relief with the Commission. In her Petition, Ms. McIntosh only sought redress for Respondent's alleged failure to accommodate her alleged disability. Ms. McIntosh did not contest the termination of her employment, or any other issues on which the Commission found no cause. Thus, the only issue before this tribunal is Ms. McIntosh's failure to accommodate claim.

The matter was duly forwarded to the Division of Administrative Hearings, and a hearing was completed on December 16, 2009.

At the hearing, Petitioner testified on her own behalf and called Donna Myers, Robert Barnes, Alain Arrendell, and David Harbison. Respondent examined Ms. Myers, Mr. Barnes, Mr. Arrendell, and Mr. Harbison as its own witnesses while they were on the stand at the request of Petitioner. The parties jointly offered Exhibits 1-12 into evidence. Petitioner also offered one exhibit into evidence, a composite of her medical records, to which Respondent objected. Judge Hooper reserved ruling on Petitioner's Exhibit 1. The undersigned finds that exhibit to be relevant to the issue of showing the time frame for Petitioner's injuries and to the issue of what damages, if any, should be awarded in this matter. The parties also offered a joint Pre-Hearing Stipulation, which limited the issue in the case to whether Respondent failed to accommodate Petitioner's claim of a disability.

Between the date of the final hearing and the filing of the transcript, Judge Hooper retired from government service. This matter was thereafter transferred to the undersigned to review the record and issue a Recommended Order. The Transcript was filed on February 16, 2010. Petitioner and Respondent filed their Proposed Findings of Fact and Conclusions of Law on March 1, and February 26, 2010, respectively.

References to statutes are to Florida Statutes (2008) unless otherwise noted.

FINDINGS OF FACT

1. Petitioner was hired by Dollar General in December 2006 as the second shift Human Resources (HR) Representative I for Dollar General's Alachua Distribution Center. As the second shift HR Representative I, part of Petitioner's responsibilities was to interact with the employees who worked on the second shift.

2. Petitioner's immediate supervisor throughout her employment was Donna Myers, Senior Human Resource Manager.

3. Ms. Myers interviewed and hired Petitioner.

4. Petitioner's job as a HR Representative required her to conduct interviews, drug tests, participate in committees, interact with employees, transfer employees, and other employee-related duties.

5. Petitioner was qualified for the position as HR Representative, having a master's degree in human resources management.

6. Some concern existed among management as to whether Petitioner could be as effective in her job if she were to use a golf cart. The concern was whether she would be less approachable by employees when driving around rather than walking up to the areas where they worked.

7. Since there was an "open door" policy for employees to approach Petitioner, she could always meet them in her office if they had enough time during a break.

8. Company policy dictates that at least 10 percent of the HR Representative's time should be spent "walking the floor." Petitioner understood the walking requirement to be at least an hour per shift.

9. Dollar General maintains and enforces an Anti-Discrimination and Harassment Policy, which prohibits, among other things, discrimination based on an employee's disability.

10. Dollar General's Anti-Discrimination and Harassment Policy also contains a provision which provides, in pertinent part, that it intends to comply with the Americans with Disabilities Act by providing reasonable accommodations to qualified individuals with disabilities.

11. Dollar General's Anti-Discrimination and Harassment Policy includes a procedure that allows and urges any employee who believes that that he or she is the subject of or has been the subject of discrimination to report the alleged discrimination by contacting a toll-free number.

12. Ms. McIntosh was an employee of Dollar General, was aware of Dollar General's policy prohibiting discrimination and harassment in the workplace based on disability, and

acknowledged receipt of Dollar General's Anti-Discrimination and Harassment Policy.

13. Dollar General's Anti-Discrimination and Harassment Policy applies to all employees. As an employee, Dollar General's Anti-Discrimination and Harassment Policy applied to Ms. McIntosh.

14. All of Dollar General's management team, who testified at hearing, were aware of the company's Anti-Discrimination and Harassment Policy.

15. Dollar General's Anti-Discrimination and Harassment Policy instructs employees to speak with their supervisor or to call the Employee Response Center to request an accommodation or report any type of discrimination.

16. Ms. McIntosh took medical leave in October 2007. In the October 25, 2007, certification for her medical leave, Ms. McIntosh's treating physician estimated that the probable duration of her condition was one to two weeks. Further, in the November 15, 2007, recertification, Ms. McIntosh's physician estimated that the probable duration of her condition was two to three months.

17. Effective November 24, 2007, Ms. McIntosh's physician released her to return to work without any restrictions. The release does not indicate that Ms. McIntosh was unable to climb stairs or walk for extended periods of time.

18. Ms. McIntosh was physically able to do her job when she returned from medical leave.

19. Ms. McIntosh identified the disabilities for which she requested accommodations as arthritis in hips and knees, a dislocated disk, and a pinched nerve.

20. Ms. McIntosh claims that her disabilities limited her ability to walk, stand, and climb stairs.

21. Petitioner recalls making her first request for an accommodation to her direct supervisor, Donna Myers, to use the golf cart to tour the million-square-foot facility, and to be excused from climbing in September 2007 after being diagnosed with arthritis in her hips and knees. Petitioner reports being told that the golf carts were no longer allowed for use by HR personnel.

22. Ms. Myers denied this exchange taking place, and testified that the golf cart was available for Petitioner's use at any time.

23. Robert Barnes, the distribution center manager, confirmed Petitioner's understanding that the designated HR golf cart was no longer used in HR.

24. Petitioner also reported her October 2007 injury to Ms. Myers.

25. Petitioner was even seen at the emergency room by Mr. Barnes.

26. The medical leave paperwork was submitted to Ms. Myers by Petitioner. Dollar General had knowledge of Petitioner's injuries and medical condition.

27. Upon her return to work in December 2007, Petitioner again asked Ms. Myers about using the golf cart and decreasing the amount of time she was required to spend on the floor of the distribution center. This request was denied. Again, Ms. Myers denied that this exchange took place between Petitioner and her.

28. Petitioner began to use a cane or walking stick to help her get around the distribution center. Ms. Myers acknowledged seeing Petitioner walking with aid of the stick.

29. Petitioner is firm in her testimony that she informed her supervisor and others up the chain of command of her condition and her need for an accommodation. Nevertheless, Ms. Myers denies that Ms. McIntosh asked to use a golf cart, to be relieved of her responsibility to walk the facility to interact with employees, or to be excused from walking up and down the stairs to meet with employees.

30. A series of correspondence and emails supports Petitioner's claim that Dollar General's management was aware on some level of the seriousness of her physical limitations. Medical records that were submitted to Ms. Myers in October 2007 by Petitioner describe her knee pain and inability to walk up

stairs. Those records estimate two weeks before Petitioner's return to work.

31. The October medical report led to a November 9, 2007, letter from Ms. Myers to Petitioner requesting an updated medical certification. Petitioner complied and provided a medical certification showing the knee injury to be more serious than first thought and accompanied by a herniated disc. This report evidenced a return to work time of two to three months after physical therapy and additional diagnostic procedures.

32. Finally, Dollar General received a Fitness for Duty form from Petitioner's health care provider stating a return to work date of November 24, 2007. Petitioner convinced her physician to clear her for work under the belief she had to be qualified at 100 percent in order to return.

33. Prior to raising the issue of her medical condition, Petitioner had a stormy relationship, at times, with her supervisor, Ms. Myers. An exchange of emails occurred in March and April of 2007 between Petitioner and Mr. Harbison detailing Petitioner's issues with Ms. Myers.

34. Petitioner did not ask Mr. Harbison, who was in her direct chain of command, to modify the responsibilities of her job in any way, nor did she mention -- until her suspension in March 2008 -- that she allegedly requested and was denied a reasonable accommodation.

35. Petitioner did not call Dollar General's Employee Response Center to request an accommodation for her medical condition. Petitioner believed that hotline to be only for hourly employees, although Dollar General's written policies did not dictate any such restriction.

36. When Petitioner returned to work in December 2007 after receiving treatment for her knee and back injuries, she experienced difficulties in standing for extended periods, in walking, and in climbing stairs. The pain she experienced was intense when engaging in any of these activities. She was able, despite the pain, to perform tasks of daily living, such as bathing and dressing herself, which allowed her to go to work.

37. In addition to not being permitted to use the golf cart to perform her job, Petitioner had a broken chair in her office which made it more difficult for her to get relief when she was not walking the distribution center floor. She was first able to get a chair from the office next door to hers, and then Mr. Arrendell allowed her to bring in a chair from the conference room.

38. Petitioner recalls many instances of interaction with her supervisors and managers about her physical limitations, including discussions about her inability to walk in a Christmas parade and her inability to stand up without leaning against a wall during a staff presentation she made. Dollar General's

witnesses were not able to recall the substance of these interactions, except for remembering that Petitioner had an issue of some sort regarding the parade.

39. Petitioner was suspended in early March 2008, pending an investigation, and her employment was ultimately terminated on March 11, 2008, for conduct unbecoming of an HR professional. No evidence was produced at hearing as to the circumstances leading to her dismissal.

40. Petitioner did not have surgery related to her back or knee conditions until after she left the employ of Dollar General. She received pain management until she had surgery on her back. She received a consultation for her knee injury, but never had surgery performed.

41. Upon leaving her employment, she had no insurance to cover her medical bills. The medical bills amounted to approximately $200,000, with the hospital bill for her surgery being $106,000 by itself.

42. Petitioner has suffered financial losses which led her to borrow money for food, for her electric bill, losing her truck, losing her home insurance, and becoming three months behind on her mortgage.

43. Petitioner has suffered emotionally as well. She suffers anxiety attacks and has had suicidal thoughts.

44. Petitioner tried to return to work after leaving Dollar General. She secured a manager's job with Cato, a women's fashion store. The job did not require any heavy lifting or climbing of stairs. Her salary there was approximately half of her $43,000 salary at Dollar General. She worked at Cato for less than six months, earning gross pay of $11,600. She left when she suffered pain that required a trip to the emergency room which resulted in her having her back surgery. She did not return to work at Cato.

45. Petitioner's only other earnings after leaving Dollar General were unemployment compensation benefits of $498 every two weeks, plus a $25 bonus from the federal stimulus package.

46. Petitioner could have performed the essential functions of her employment if a reasonable accommodation had been made for her physical limitations.

47. Dollar General has made accommodations for employees with physical limitations in the past, generally in the context of a workers' compensation injury.

CONCLUSIONS OF LAW

48. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. §§ 120.569, 120.57(1), and 760.01 et seq., Fla. Stat.

49. Petitioner is an "aggrieved person," and Respondent is an "employer" within the meaning of Subsections 760.02(10) and (7), Florida Statutes, respectively. Section 760.10, Florida Statutes, makes it unlawful for Respondent to discharge or otherwise discriminate against Petitioner based on an employee's disability.

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

51. "Handicap" is defined in Subsection 760.22(7), Florida Statutes, as follows:

> (a) A person has a physical or mental impairment which substantially limits one or more of major life activities, or he or she has a record of having, or is regarded as having, such physical or mental impairment;
> . . . .

52. This definition is essentially similar to the definition in the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101-12213, which defines a disability as:

> (a) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;
> (b) A record of such an impairment;
> (c) Being regarded as having such an impairment.

53. Factors to consider when determining whether an individual is "substantially limited include: (1) the nature

and the severity of the impairment; (2) the duration or expected duration of the impairment; and (3) the permanent or long-term impact, or the expected permanent or long-term impact of or resulting from the impairment." See 29 C.F.R. § 1630.2(j)(2).

54. An impairment's minor interference in major life activities does not qualify as a disability. See Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002).

55. Petitioner has the ultimate burden to establish discrimination either by direct or indirect evidence. Direct evidence is evidence that, if believed, would prove the existence of discrimination without inference or presumption. Carter v. City of Miami, 870 F.2d 578, 581-82 (11th Cir. 1989).

56. This is a case involving both direct and circumstantial evidence of Petitioner's disability. Therefore, a discussion of both evidentiary standards is in order.

57. The burden of proof in discrimination cases involving circumstantial evidence is set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973). Federal discrimination law may be used for guidance in evaluating the merits of claims arising under Chapter 760. Tourville v. Securex, Inc., 769 So. 2d 491 (Fla. 4th DCA 2000); Greene v. Seminole Electric Co-op., Inc., 701 So. 2d 646 (Fla. 5th DCA 1997); Brand v. Fla. Power Corp., 633 So. 2d 504 (Fla. 1st DCA 1994).

58. Florida courts have recognized that actions for discrimination on the basis of disability are analyzed under the same framework as Americans with Disabilities Act (ADA) claims. Chanda v. Englehard/ICC, 234 F.3d 1219 (11th Cir. 2000). The ADA defines a disability as a physical or mental impairment that substantially limits one or more of the major life activities of an individual. Id. at 1221.

59. If Petitioner succeeds in making a prima facie case, the burden shifts to Respondent to articulate some legitimate, nondiscriminatory reason for its conduct. If Respondent carries this burden of rebutting Petitioner's prima facie case, Petitioner 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.

60. Applying the required standard of proof, Petitioner has established a prima facie case of disability discrimination which requires that she 1) have a disability; 2) she is qualified to perform the essential functions of the position either with or without reasonable accommodations; 3) she identified reasonable accommodations; and 4) she was unlawfully discriminated against because of her disability. Schwertfager v. City of Boynton Beach, 42 F. Supp. 2d 1347, 1357 (S.D. Fla. 1999) (citing Willis v. Conopca, Inc., 108 F.3d 282, 283 (11th Cir. 1997)). Petitioner must satisfy all elements of a prima

facie case under the ADA in order to meet her burden. She has done so.

61. Once Petitioner has established a prima facie case of discrimination, Respondent's burden on rebuttal is to produce a legitimate, nondiscriminatory reason for the challenged employment decision. See McDonell Douglas, 411 U.S. at 802. "This burden is merely one of production, not persuasion, and is exceedingly light." See Texas Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981); Lee v. Russell County Bd. of Education, 684 F.2d 769, 773 (11th Cir. 1982). Petitioner requested two accommodations: 1) that she be allowed to use a golf cart to get around the million-square-foot facility; and 2) that she not be required to climb the stairs due to her knee and back pain. Respondent offered testimony that the golf carts were no longer available for use in the HR Department due to their needed use elsewhere. Also, Respondent believes it important for its HR Representatives to climb the stairs and have access to all areas where employees might be working. However, diverting the use of a golf cart to accommodate Petitioner could hardly be seen as creating an undue hardship. Also, the employees could come down the stairs to visit with Petitioner which was not shown to create either an undue hardship or interfere with the business of Dollar General. Even if Respondent chose not to accommodate Petitioner by allowing

use of the golf cart, they could have at least limited the time she was required to walk the floor of the center. Employees could have been allowed to visit Petitioner in her office or in a more central place in the center to minimize time away from their jobs. Simply put, Respondent's reasons for not making the accommodations are weak, at best.

62. Clearly, Respondent failed to reasonably accommodate Petitioner's disability as required by the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq., which requires covered entities, including private employers, to provide reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship. 42 U.S.C. § 12112(b)(5)(A). Toyota Motor Mfg., Kentucky, Inc. v. Williams, 534 U.S. 184 (2002). The accommodations requested in this case, namely the use of the golf cart and less time spent walking the floor of the distribution center, would not result in an undue hardship to Respondent.

63. Petitioner suffered damages as a result of Respondent's denial of a reasonable accommodation, and she attempted to mitigate those damages. She sought medical help for the original pain in her knees in order to be able to

perform the essential functions of her employment with Dollar General. She sought medical treatment for the job-related injuries to her knee and back so that she could continue her work. The greater weight of the evidence supports the fact that Respondent knew or should have known of Petitioner's physical limitations and should have made reasonable accommodations to allow her to continue to perform her job as HR Representative. Respondent's claims that Petitioner would be less effective and less approachable if she were to do her job in a golf cart rather than limping across the floor of the million-square-foot distribution center fail to refute her claim that the use of the cart would allow her to continue performing her job. What makes a person a good employee in the field of human resources is not her ability to walk briskly across the plant, but how that person interacts with and helps solve the problems of her employees. Petitioner proved she could do her job with the accommodations. Respondent's attempt to prove to the contrary did not.

64. Since Petitioner has, by stipulation, limited the issue in this case to whether an act of discrimination has occurred by Respondent's failure to reasonably accommodate her, but does not claim she was terminated as a result, an administrative claim for damages is significantly limited.

65. The ultimate burden of persuading the trier of fact that there was intentional discrimination by the respondent remains at all times with the petitioner. Burdine, 450 U.S. at 253 (1981).

66. Petitioner offered proof that she was disabled. The evidence demonstrated that from December 2007 until she was terminated in March 2008, she was somewhat able to conduct major life activities (including working, caring for herself, walking, standing, and climbing stairs) while in pain. Ms. McIntosh testified that she was physically able to do the job, even in pain, from December 2007 (when she returned from medical leave) until March 2008 when she was terminated. However, limping and experiencing severe pain while performing a job that she must have in order to support herself does not mean she does not need an accommodation. The evidence demonstrated that her conditions might not be permanent, but her return to work was not without pain and her inability to perform her job at a high level was without accommodation.

67. Petitioner returned to work in December 2007, even though she was not fully recovered from her injuries. She did this because she feared she might be fired if she did not return. The evidence establishes that she was not fully recovered from her injuries and needed further treatment and, ultimately, surgery. From the personal descriptions of her

injuries, as well as the medical records provided, Petitioner's supervisors should have clearly witnessed her inability to walk, to climb stairs, and even to sit for extended periods of time in her chair. Petitioner's injuries were severe enough to manifest themselves in clearly identifiable behaviors on her part. She was entitled to reasonable accommodations which were not provided.

68. Subsection 760.11(6), Florida Statutes, provides, in pertinent part, as follows:

> If the administrative law judge, after the hearing, finds that a violation of the Florida Civil Rights Act of 1992 has occurred, the administrative law judge shall issue an appropriate recommended order in accordance with chapter 120 prohibiting the practice and providing affirmative relief from the effects of the practice, including back pay.

69. Since Petitioner's employment was terminated in this case, she has rendered any claim for back pay moot. Petitioner has neither challenged the termination in this matter nor attempted to link the termination to a discriminatory employment practice. Accordingly, the limitations on relief afforded pursuant to Subsection 760.11(6), Florida Statutes, are even further limited here. Nevertheless, a discriminatory employment practice has occurred. Since Petitioner no longer works for Respondent, a ruling that Dollar General shall cease and desist from the unlawful practice and make reasonable accommodations

for Petitioner's disability will serve no measurable purpose other than to validate Petitioner's well-founded belief that she was the victim of a discriminatory practice at the hands of Respondent. This is a hollow victory indeed. Petitioner has cited no authority, nor has any been found by the undersigned, that would permit the award of compensatory and punitive damages in an administrative proceeding. Further, Petitioner has not cited, nor has the undersigned found, any authority to allow an award to Petitioner of her medical expenses, including the cost of expensive surgery necessary to correct her ailing back suffered as a result of her injuries while employed with Dollar General. Such an award may only be made in a court of competent jurisdiction pursuant to Subsection 760.11(5), Florida Statutes, unless the Commission determines otherwise.

RECOMMENDATION

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

RECOMMENDED that the Florida Commission on Human Relations enter a final order finding that an unlawful employment practice occurred; that Respondent should have provided a reasonable accommodation for Petitioner's disability; awarding attorney's fees to Petitioner in accordance with a Title VII action and costs; and such other relief as the Commission shall deem appropriate.

DONE AND ENTERED this 4th day of March, 2010, in Tallahassee, Leon County, Florida.

ROBERT S. COHEN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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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.