STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

KATHLEEN SULLIVAN, Petitioner, vs. CLAY COUNTY BOARD OF COMMISSIONERS, Respondent.	)	Case No. 09-0033 AMENDED AS TO NOTICE OF RIGHTS

AMENDED SUMMARY FINAL ORDER

A formal hearing was conducted in this case on March 4, 2009, in Green Cove Springs, Florida, before Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Gaither L. Saunders, Jr.
Qualified Representative
1640B Vineland Circle
Fleming Island, Florida 32003

For Respondent: Margaret P. Zabijaka, Esquire
Lori K. Mans, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Respondent discriminated against Petitioner based on her disability by terminating her employment

and/or denying her a reasonable accommodation in violation of Section 760.10, Florida Statutes (2008).

PRELIMINARY STATEMENT

On or about June 18, 2008, Petitioner Kathleen Sullivan (Petitioner) filed an Employment Complaint of Discrimination with the Florida Commission on Human Relations (FCHR). The complaint alleged that Respondent Clay County Board of Commissioners (Respondent) terminated her employment and denied her a reasonable accommodation in violation of Section 760.10, Florida Statutes (2008).

On December 30, 2008, FCHR issued a Determination: No Cause. Petitioner filed a Petition for Relief on December 29, 2008.

FCHR referred the case to the Division of Administrative Hearings on January 6, 2009. A Notice of Hearing dated January 14, 2009, scheduled the hearing for March 4, 2009.

On January 21, 2009, Respondent filed a Motion for Summary Hearing pursuant to Section 120.574, Florida Statutes (2008). After a telephone conference on January 26, 2009, the parties filed a Joint Motion for Summary Hearing on January 27, 2009. The undersigned issued an Order Granting Summary Hearing on January 29, 2009.

During the hearing, the parties offered one joint Exhibit, JE1, which was accepted as evidence. The joint Exhibit contained stipulated facts.

Petitioner testified on her own behalf and presented the testimony of one additional witness. Petitioner offered one composite Exhibit, P1, containing 92 pages as evidence. Pages 1-34 and 37-73 of the composite Exhibit were accepted as evidence. Pages 35-36 and 74-92 of the composite Exhibit are hereby excluded because the material is unauthenticated, irrelevant, unsupported hearsay, and/or inappropriate material for official recognition.

Respondent presented the testimony of three witnesses. Respondent offered ten Exhibits, R1-R10, which were accepted as evidence.

Before the hearing adjourned, the parties agreed to file their proposed orders no later than 30 days after the filing of the hearing transcript. The court reporter filed the hearing transcript on April 14, 2009. Therefore, the parties' proposed orders were due to be filed on May 14, 2009.

Petitioner filed a proposed order on May 12, 2009. According to the records of the Clerk of the Division of Administrative Hearings, Respondent first attempted to file a proposed order by facsimile transmission beginning at 4:51 p.m. on May 14, 2009. The Clerk's office had received five pages of

the proposed order by 4:53 p.m. At 4:57 p.m., Respondent began to file 12 pages of its proposed order by facsimile transmission. The Clerk's office received the last of the 12 pages at 5:01:46 p.m.

At 8:20 a.m., on May 15, 2009, Petitioner filed an Objection to Late Filing by Respondent. Petitioner objected that Respondent had not filed its proposed order before 5:00 p.m., on May 14, 2009.

At 11:41 a.m. on May 15, 2009, Respondent again faxed its proposed order, in its entirety, to the Division of Administrative Hearings.

On May 19, 2009, Petitioner filed a second Objection to Late Filing by Respondent. That same day, Respondent filed a Response to Petitioner's Objection to Late Filing by Respondent. On May 20, 2009, Petitioner filed an Amendment to Objection Dated May 14, 2009.

Petitioner correctly asserts that Respondent's proposed order was untimely because it was not received in its entirety by 5:00 p.m., on May 14, 2009. However, it appears that Petitioner made a good faith effort to comply with Florida Administrative Code Rule 28-106.204. Additionally, it does not appear that Petitioner has suffered any undue prejudice. Therefore, Petitioner's request to strike Respondent's proposed order is hereby denied.

FINDINGS OF FACT

1. Petitioner began her employment with Respondent on December 12, 2007. Respondent hired her as a full-time library clerk at the Green Cove Springs Library. Respondent paid Petitioner at the rate of $8.4250 per hour.

2. Respondent provided Petitioner with paid annual and sick leave benefits. She began accruing these benefits immediately upon the start of her employment. Petitioner was able to use accrued paid leave after completing an introductory ninety-day probationary period. Respondent also paid for the entire cost of Petitioner's health insurance premium in the approximate amount of $448 per month.

3. Petitioner received a copy of her job description when she began her employment. As a library clerk, Petitioner was responsible for the following functions: (a) assisting patrons; (b) administering the circulation of library materials; (c) tracking inventory; (d) processing inter-library loan requests; (e) retrieving and shelving books; (f) processing payments for lost or overdue materials; and (g) assisting with library programming. Petitioner's job description indicates that regular attendance is an essential function of the library clerk position.

4. Early in April 2008, Petitioner was informed of an abnormality on her lung. Petitioner was hospitalized for

further examination. The last day that Petitioner reported to work was April 4, 2008.

5. Lana Helms was Petitioner's immediate supervisor. Petitioner kept Ms. Helms informed about her illness on a weekly basis.

6. Because Petitioner had not worked as a library clerk long enough to accrue substantial paid leave, she exhausted her paid leave on April 10, 2008. On or about April 14, 2008, Petitioner was diagnosed with cancer.

7. On or about April 28, 2008, Respondent's Human Resource Director, Richard O'Connell, directed Jennifer Bethelmy, Respondent's Human Resource Coordinator, to contact Petitioner by telephone and request medical documentation regarding Petitioner's condition.

8. When Ms. Bethelmy called, Petitioner understood that Respondent would cancel her insurance unless Respondent received a letter from her physician immediately. Petitioner replied that she had made several prior similar requests of the oncologist and would do so again.

9. On April 28, 2008, Respondent received a letter from Petitioner's physician. The letter stated as follows:

> Mrs. Sullivan is a patient of mine that has been recently diagnosed with metastatic lung cancer with involvement of the brain. This disease is considered incurable. She will be treated with daily radiation therapy to

> the lung and brain and she will also receive systemic chemotherapy. The radiation treatments are on an average six weeks long and the chemotherapy is initially given every week for the first several weeks then every three weeks. The chemotherapy treatments are expected to last between four to six months.
>
> For additional information please feel free to contact my office.

Respondent never contacted Petitioner or her doctor to determine whether Petitioner would be able to work at least part-time during or between her cancer treatments.

10. Even though Petitioner was not entitled to additional leave after April 10, 2008, Respondent provided her with unpaid leave from April 11, 2008, through May 10, 2008. Respondent also gratuitously paid for Petitioner's health insurance for the month of May 2008.

11. Mr. O'Connell's decision to terminate Petitioner was based in part on the physician's letter. Mr. O'Connell also based his decision on his understanding of the following: (a) Petitioner's cancer was incurable; (b) Petitioner would not be able to return to work at a set time in the future, if ever; and (c) Respondent needed to fill Petitioner's position.

12. In a letter dated May 5, 2008, Mr. O'Connell advised Petitioner as follows:

> Due to a medical condition, you have not been able to work at your assigned position at the Green Cove Springs Library since

> April 4th, 2008. Since April 11th, 2008, you have been on leave without pay status, having exhausted all accrued leave.
>
> It is our understanding that you will not be released to return to full duty in the near future. While it is unfortunate that your condition does not allow you to work, the County must maintain a workforce to sufficiently serve the public. As you are not eligible to apply for Family Medical Leave or a Leave of Absence due to your hire date of December 12th, 2007, the County will terminate your employment effective May 10th, 2008.
>
> You will receive notification in the mail of your eligibility to continue medical coverage through COBRA.

Petitioner received this letter on May 8, 2008.

13. At the time of Petitioner's termination, Respondent was under a "soft" or "selective" hiring freeze due to financial difficulties. Thus, when Mr. O'Connell sought the permission of County Manager Fritz Behring to fill Petitioner's position, Mr. Behring denied the request based on fiscal constraints.

14. In a letter dated May 20, 2008, Petitioner responded to Mr. O'Connell's termination letter. She requested a reconsideration of the termination, a grievance committee hearing, and an exit interview.

15. Petitioner also prepared a written complaint directed to the grievance board members. In that letter, Petitioner detailed her medical condition and treatment. She made it clear that returning to work at the public library during treatment

with radiation and chemotherapy would not be in her best interest because her immune system was vulnerable.

16. Petitioner's May 20, 2008, complaint indicated that Petitioner's treatment was going better than expected. Petitioner requested a modification to Respondent's personnel policies to allow a reasonable amount of time for employees with a serious illness, who are not eligible for a leave of absence, to seek medical help and return to work. Petitioner requested reinstatement of her employment in a leave without pay status. Petitioner did not request that Respondent continue to pay her insurance premium.

17. In a letter dated May 30, 2008, Respondent's counsel addressed Petitioner's May 20, 2008, correspondence. The letter advised Petitioner that pursuant to Respondent's Grievance Procedure, Policy No. 10.01, the grievance procedure is not available for suspensions or dismissals.

18. The May 30, 2008, letter stated that when Petitioner was terminated, it was uncertain whether Petitioner's position would be impacted by the hiring freeze. According to the letter, Respondent had not filled the position but that decision might change.

19. The May 30, 2008, letter advised Petitioner that an exit interview would not take place. Instead, Petitioner would receive an exit survey via mail.

20. Finally, the May 30, 2008, letter denied Petitioner's request to be placed on an unpaid leave of absence with continuing medical benefits. Petitioner was advised that she remained eligible for rehire if she became able to work. The letter invited Petitioner to apply for any vacancies for which she was minimally qualified.

21. In a letter dated June 3, 2008, Petitioner provided Mr. Behring with her response to the May 30, 2008, letter. Primarily, Petitioner found fault with Respondent's policies and procedures that she believed failed to address her particular circumstances, i.e., the right to be placed on a leave without pay status until well enough to resume employment.

22. Petitioner's June 3, 2008, letter included the following statement: "Also, to perform my essential functions would constitute a direct threat to my health, safety and possibly impede the progress of success. These [cancer] treatments are horrible! Why would anyone sane risk prolonging them?"

23. On or about August 1, 2008, Respondent advertised a job vacancy for a part-time library clerk. The advertisement was an in-house posting for the job. It was not made available to the public until August 6, 2008.

24. In a letter dated August 15, 2008, Mr. O'Connell advised Petitioner that he had received a requisition from the

library director and approval by Mr. Behring to fill a full-time library clerk position. Mr. O'Connell unconditionally offered to rehire Petitioner in this position if her medical condition would allow her to perform the duties of a full-time library clerk. Petitioner did not respond to Respondent's August 15, 2008, offer.

25. On August 26, 2008, Respondent posted an in-house advertisement for a full-time library clerk. The posting became available to the public on August 31, 2008. Petitioner did not inquire about the job and has never contacted Respondent to discuss any vacancies.

26. Petitioner applied for short-term disability benefits and has received such benefits since December 2008. Petitioner receives about $900 per month in benefits.

CONCLUSIONS OF LAW

27. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to Section 120.569, 120.57(1), and 760.11, Florida Statutes (2008).

28. In Florida, claims of disability-based discrimination arising under the Florida Civil Rights Act of 1992 (FCRA), Part 1, Chapter 760, Florida Statutes (2008), are construed in conformity with the provisions of the Americans with Disabilities Act (ADA), 42 U.S.C. Section 12101, et seq. and its

related regulations. See Greene v. Seminole Electric Cooperative, Inc., 701 So. 2d 646, 647 (Fla. 5th DCA 1997), citing Brand v. Florida Power Corp., 633 So. 2d 504, 509-510 (Fla. 1st DCA 1995).

29. The ADA was recently amended to substantially change the evaluation of ADA claims and the definition of "disability" under the ADA. See ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008). The ADA Amendments Act expressly provides that its provisions shall not take effect until January 1, 2009. As such, all citations to law and corresponding discussions reference the law in effect during the time of Petitioner's employment, prior to January 1, 2009.

30. Petitioner has not provided any direct evidence of disability-based discrimination. Therefore, she must establish a prima facie case of discrimination under the FCRA and ADA by showing the following: (a) she has a disability; (b) she is a qualified individual; (c) she was unlawfully discriminated against because of her disability. See Reed v. Heil Co., 206 F.3d 1055, 1061 (11th Cir. 2000).

31. If Petitioner establishes a prima facie case, the burden of production shifts to Respondent to articulate some legitimate, nondiscriminatory reason for its action. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Should Respondent articulate such a reason, the burden shifts

back to Petitioner to show that the reason is a pretext for discrimination. See McDonnell Douglas Corp. v. Green, 411 U.S. at 803.

32. At 42 U.S.C. Section 12102, the ADA defines a "disability" as follows in pertinent part:

> As used in this Act:
> (1) Disability. The term "disability" means, with respect to an individual--
> (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
> (B) a record of such an impairment; or
> (C) being regarded as having such an impairment (as described in paragraph (3)).
> (2) Major life activities.
> (A) In general. For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.
> (B) Major bodily functions. For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.
> (3) Regarded as having such an impairment. For purposes of paragraph (1)(C):
> (A) An individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not

> the impairment limits or is perceived to limit a major life activity.
>
> (B) Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.
>
> (4) Rules of construction regarding the definition of disability. The definition of "disability" in paragraph (1) shall be construed in accordance with the following:
>
> (A) The definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.
>
> (B) The term "substantially limits" shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.
>
> (C) An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.
>
> (D) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

33. The greater weight of the evidence indicates that Respondent believed Petitioner's cancer was incurable and that she would not be able to work in the foreseeable future, if ever. Therefore, Petitioner established the first prong of her prima facie case because Respondent perceived her as having a disability. See 42 U.S.C. § 12102(1)(c).

34. Regarding the second prong of the prima facie case, Petitioner testified that she was able to return to work in mid-May. Her testimony in this regard is contradicted by her

statements in letters that she was unable to work. However, Petitioner's testimony together with consideration of Respondent's failure to ever discuss the possibility of some reasonable accommodation is sufficient to establish that she was a "qualified individual with a disability." The ADA defines such an individual as "an individual who, with or without a reasonable accommodation, can perform the essential functions of the employment position that such person holds or desires." See 42 U.S.C. § 12111(8).

35. Petitioner fails to prove the third prong of her prima facie case. It is undisputed that Petitioner's circumstances did not fall within any policy providing for unpaid leave. Even so, Petitioner did not show that Respondent treated her differently than any other similarly situated employees without a disability. No employees requesting indefinite leave without pay for whatever reason were treated more favorably than Petitioner. Likewise, Respondent treated Petitioner the same as any other employee with respect to the process used for an exit interview and the availability of the grievance procedure.

36. On the other hand, Respondent articulated a legitimate, non-discriminatory reason for its decision. Respondent terminated Petitioner because she had used her accumulated leave with pay, she could not say exactly when she

would be able to return to work, if at all, and her position at the library needed to be filled.

37. Petitioner did not prove that Respondent's reason for terminating her was really a pretext for discrimination. In early May 2008, Mr. O'Connell believed that Respondent needed a full-time library clerk who could attend work on a regular basis. An "employer may lawfully fire an employee for a good reason, a bad reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason." See Abel v. Dubberly, 210 F.3d 1334, 1339 n.5 (11th Cir. 2000), citing Nix v. WLCY Radio/Rahall Communications, 738 F.2d 1181 (11th Cir. 1984).

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED the Petition for Relief is dismissed with prejudice.

DONE AND ORDERED this 12th day of June, 2009, in Tallahassee, Leon County, Florida.

SUZANNE F. HOOD
Administrative Law Judge
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Filed with the Clerk of the
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this 12th day of June, 2009.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a Notice of Appeal with the agency clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the appellate district where the party resides. The Notice of Appeal must be filed within 30 days of rendition of the order to be reviewed.