

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CANDICE BARNETT,)
)
 Petitioner,)
)
 vs.) Case No. 09-0615
)
 LIFESTREAM,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

This cause came on for final hearing before Harry L. Hooper, Administrative Law Judge with the Division of Administrative Hearings, on April 7, 2009, in Ocala, Florida.

APPEARANCES

For Petitioner: Candice Barnett, pro se
1850 Southeast 18th Avenue, No. 1601
Ocala, Florida 34491

For Respondent: Victoria McCloskey, Esquire
Albert Guemmer, Esquire
Guemmer & Ritt
3002 West Kennedy Boulevard
Tampa, Florida 33609

STATEMENT OF THE ISSUE

The issue is whether Respondent engaged in an unlawful employment practice.

PRELIMINARY STATEMENT

Petitioner Candice Barnett (Ms. Barnett) filed an Employment Complaint of Discrimination with the Florida

Commission on Human Relations (Commission) on July 16, 2008. She alleged that Respondent Lifestream Behavioral Center, of Leesburg, Florida (Lifestream), had discriminated against her based on a disability or handicap. On January 5, 2009, the Commission entered its determination that there was no cause to believe that an unlawful employment practice had occurred.

On January 30, 2009, Ms. Barnett filed a Petition for Relief with the Commission. The matter was duly forwarded to the Division of Administrative Hearings, and a hearing was completed on April 7, 2009.

At the hearing, Ms. Barnett testified, but offered no exhibits. Lifestream presented the testimony of Van Hargrove, Lifestream's human resources officer; Veronica Duarte; and Dr. John Lot III, and offered 35 exhibits into evidence. All were accepted.

A Transcript was filed on May 7, 2009. After the hearing, Respondent filed its Proposed Recommended Order on May 8, 2009. Petitioner filed her Proposed Recommended Order on May 9, 2009.

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

FINDINGS OF FACT

1. Ms. Barnett is a resident of Ocala, Florida. She executed Lifestream's employment application form on January 30, 2007. She claimed a bachelor's degree from Brooklyn College and

a Master's in Social Work from Upsala College in East Orange, New Jersey. Her application indicated that she was a social worker in New York from September 1987 until December 2003.

2. Ms. Barnett moved to Florida and was employed by the Marion County Drug Court, but quit, according to Ms. Barnett, because she had a heart attack in November 2005. Thereafter, she worked for a company named ResCare in Gainesville, Florida. Her job entailed working with mentally handicapped adults. She was discharged from this job for losing her temper.

3. Lifestream operates a detoxification facility and crisis stabilization unit among other things. It provides services to children, adults, and the elderly. Lifestream's mission is to provide quality life enrichment services through prevention, education, and treatment.

4. Ms. Barnett was employed as an emergency evaluator on or about February 15, 2007. An emergency evaluator works in the receiving area of the Lifesteam facility. Clients are brought to the facility by law enforcement or friends or family. Some clients appear voluntarily. Clients enter the facility at irregular hours.

5. As an emergency evaluator, it was Ms. Barnett's job to search new clients to ascertain if they possessed weapons, in order to ensure the safety of the client and staff, and to evaluate them for mental status using Diagnostic and Statistical

Manual IV. It was her job to notify the nursing supervisor of the health status of new clients and to prepare records.

6. Occasionally clients were violent, and at least once Ms. Barnett was attacked by a client. This attack occurred on May 3, 2007. She claimed that she had 17 injured discs in her back. She claimed that these injuries occurred in part while working for Lifestream, although she did not assert that all of these injuries occurred during the alleged attack.

7. Ms. Barnett also stated that she was scheduled for surgery and stated that a steel rod would be inserted in her back at Tampa General Hospital. Although there was no medical evidence introduced that corroborated her testimony, it was unrebutted and is accepted as true.

8. There was no proof that these claimed medical deficiencies resulted in a disability. In any event, the record is completely devoid of any evidence that anyone at Lifestream was aware of that Ms. Barnett might have been disabled or that anyone perceived her as disabled. Moreover, she never requested an accommodation.

9. Ms. Barnett's alleged disability first surfaced in Ms. Barnett's Employment Complaint of Discrimination, subsequent to her termination, which occurred on December 15, 2007.

10. During the approximately 10 months of employment at Lifestream, Ms. Barnett was absent for her scheduled shift on 56

days. She did not inform Lifestream in advance that she was not going to appear for work and as a result, Lifestream found it necessary to replace her with other employees. This often resulted in Lifestream bearing the cost of overtime pay.

11. When Ms. Barnett did work, her performance was poor, and she was counseled about it. The charts that she was required to maintain often failed to contain necessary documentation and signatures. During the course of her employment, she received five verbal and written reprimands addressing her poor job performance.

12. Lifestream's constant uncertainty regarding Ms. Barnett's attendance at work, an essential part of her job, coupled with her poor performance, culminated in her being removed from the work schedule in October 2008. She was not formally discharged until December 2008. She remains eligible for re-hire at Lifestream.

CONCLUSIONS OF LAW

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

14. Sections 760.01-760.11 and 509.092, Florida Statutes, comprise the "Florida Civil Rights Act of 1992." § 760.01(1), Fla. Stat.

15. Lifestream is an "employer" pursuant to Subsection 760.02(7), Florida Statutes.

16. 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.

17. "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; . . .

18. This definition is essentially similar to the definition in the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C.A. Section 12101-12213, which provides that disability is:

(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.

19. Disability discrimination claims under the Florida Civil Rights Act are analyzed under the same framework as ADA claims. D'Angelo v. ConAgra Foods, Inc., 422 F.3d 1220 (11th

Cir. 2005). Thus, the provisions of Chapter 760, Florida Statutes, are analogous to those of the ADA.

20. A petitioner in a disability discrimination case has the initial burden of proving a prima facie case of discrimination under the ADA by demonstrating that (1) she has a disability under the Florida Civil Rights Act; (2) that she is a qualified individual, meaning she is able to perform the essential functions of the position with or without accommodation; and, (3) that she was discharged because of a disability. See Terrell v. USAir, 132 F.3d 621, 624 (11th Cir. 1998).

21. The ADA identifies three categories of disability that place an individual within the statute's protections. In order to be disabled as defined by the ADA, a person: (1) must have a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (2) must have a record of such impairment; (3) or must be regarded as having such impairment. See 42 U.S.C. § 12102(2).

22. 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).

23. 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).

24. Ms. Barnett did not attempt to persuade Lifestream during her employment that she was disabled. She was not regarded as disabled. Moreover, she did not offer any persuasive evidence at the hearing that she was disabled as defined by the ADA. It is found as a fact that during her employment with Lifestream, she was not disabled nor was she regarded as disabled.

25. Ms. Barnett was unable to satisfy the second prong of the test for disability discrimination because she did not demonstrate that she was a qualified individual able to perform the essential functions of her position with or without accommodation. Attendance is an essential function of the position she held. The evidence demonstrated that she did not report to work as assigned. Her poor job performance indicates that Ms. Barnett cannot be considered qualified. See Waggoner v. Olin Corporation, 169 F.3d 481, 483 (7th Cir. 1999), where the court found the petitioner was "not a qualified individual with a disability because of her spotty attendance record."

26. Proof of the third prong, that Ms. Barnett was discharged because of a disability, was entirely absent.

27. Since Ms. Barnett was unable to prove a prima facie case of discrimination, Lifestream is not required to offer any legitimate reasons for its termination decision. The record is abundantly clear, nevertheless, that the termination was based on Ms. Barnett's absenteeism and poor job performance and was not at all motivated by any discrimination based on disability. Her absenteeism and poor job performance provided ample nondiscriminatory reasons for discharging her. These were certainly not pretextual reasons.

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 dismissing the Petition of Candice Barnett.

DONE AND ENTERED this 19th day of May, 2009, in
Tallahassee, Leon County, Florida.



HARRY L. HOOPER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of May, 2009.

COPIES FURNISHED:

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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.