STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CINDY BURGHOLZER,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case Nos. 09-0999
	)	09-2441
COSTCO WHOLESALE CORP.,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

A final hearing was conducted in these consolidated cases on August 26 and 27, 2009, in Jacksonville, Florida, before Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Heather M. Collins, Esquire
Hnin N. Kaing, Esquire
Henrichsen Siegel, PLLC
1648 Osceola Street
Jacksonville, Florida 32204

For Respondent: John T. Murray, Esquire
Kathleen E. Mones, Esquire
Seyfarth Shaw, LLP
1545 Peachtree Street, Northeast
Suite 700
Atlanta, Georgia 30309-2401

STATEMENT OF THE ISSUES

The issues are whether Respondent committed an unlawful employment practice by discriminating against Petitioner based

on her disability and by retaliating against her, and if so, what, if any, relief is Petitioner entitled to receive.

PRELIMINARY STATEMENT

On August 13, 2008, Petitioner Cindy Burgholzer (Petitioner) filed a Charge of Discrimination with the Florida Commission on Human Relations (FCHR). The charge alleged that Respondent Costco Wholesale Corp. (Respondent) had discriminated against Petitioner by failing to make reasonable accommodations for Petitioner's disability and by placing Petitioner on an indefinite medical leave of absence in retaliation for her requests for accommodations.

On November 10, 2008, Petitioner filed a second Charge of Discrimination/Amended Charge with FCHR, alleging that Respondent retaliated against Petitioner by refusing to allow her to return to work and forcing her to apply for long-term disability.

On January 14, 2009, FCHR issued a Determination: No Cause on Petitioner's original charge. Petitioner filed a Petition for Relief on that charge on February 18, 2009. FCHR referred the petition to the Division of Administrative Hearings (DOAH) on February 20, 2009. The case was assigned to the undersigned as DOAH Case No. 09-0999.

On February 27, 2009, the parties requested additional time in DOAH Case No. 09-0999 to respond to the Initial Order. The

undersigned issued an Order Granting Extension of Time on March 2, 2009.

A Notice of Hearing dated March 10, 2009, scheduled DOAH Case No. 09-0999 for hearing by video teleconference on May 6, 2009.

On March 31, 2009, FCHR issued a Determination: No Cause on Petitioner's second/amended charge.

On April 10, 2009, the parties filed an Agreed Protective Order in DOAH Case No. 09-0999. On April 14, 2009, the undersigned issued a Protective Order incorporating the parties' agreement.

On April 15, 2009, the parties filed a Joint Motion to Stay Discovery and the May 6, 2009, Hearing in DOAH Case No. 09-0999. The motion sought a continuance of the hearing to allow Petitioner time to determine whether she would file a second petition. On April 16, 2009, the undersigned issued an Order Canceling Hearing and Placing Case in Abeyance.

On May 5, 2009, Petitioner filed a Petition for Relief on her second/amended charge.

FCHR referred Petitioner's second/amended petition to DOAH on May 11, 2009. The second case was assigned to Administrative Law Judge E.J. Davis as DOAH Case No. 09-2441.

On May 18, 2009, the parties filed a Status Report and Motion to Consolidate DOAH Case Nos. 09-0999 and 09-2441. On May 21, 2009, the undersigned issued an Order of Consolidation.

The parties filed an Amended Status Report on June 10, 2009. According to the report, the parties requested a two-day live hearing on August 26 and 27, 2009, in Jacksonville, Florida. Because there were no available hearing rooms on those dates, the parties agreed to make arrangements for the location of the hearing.

Pursuant to the agreement of the parties, the undersigned issued an Order Rescheduling Hearing dated July 22, 2009. The Order scheduled the hearing for August 26 and 27, 2009.

When the hearing commenced, the parties offered ten Joint Exhibits, JE1-JE10, which were accepted as evidence.

Petitioner testified on her own behalf and presented the testimony of four additional witnesses. Petitioner also presented ten specific pages of the deposition testimony of one witness in lieu of live testimony. Respondent's objections on the record to the deposition testimony are hereby overruled. Petitioner offered four Exhibits, P1-P4, which were accepted as evidence.

Respondent presented the testimony of three witnesses. Respondent offered one Exhibit, R1, which was accepted as evidence.

The Transcript was filed on September 21, 2009. The parties subsequently requested two extensions of time to file their proposed recommended orders. On October 22, 2009, the parties timely filed their proposed findings of fact and conclusions of law. All references to Florida Statutes are to the 2007 Codification, unless otherwise indicated.

FINDINGS OF FACT

1. Petitioner is Respondent's former employee who began working for Respondent in 1993. Petitioner was most recently assigned to the warehouse in eastern Jacksonville, Florida, where she worked from October 2000 until September 2007.

2. When she first transferred to the warehouse, Petitioner worked as the Return-to-Vendor ("RTV") Clerk. As the RTV Clerk, Petitioner was responsible for shipping out returned merchandise to vendors and shipping salvaged items to the salvage companies.

3. In 2004, Petitioner transferred to the Receiving Clerk position. Petitioner remained in the Receiving Clerk position until September 19, 2007, when she began a medical leave of absence.

4. Jason Zook became the manager of the warehouse in May 2005. As the Warehouse Manager, Mr. Zook is responsible for overseeing the entire warehouse, including the Receiving Department. Mr. Zook is familiar with the requirements of the

Receiving Clerk position because he previously worked in that position at another warehouse.

5. Michael Sinanian is one of the Assistant Warehouse Managers. Mr. Sinanian transferred to the warehouse as an Assistant Warehouse Manager in 2002. Prior to becoming an Assistant Warehouse Manager, Mr. Sinanian worked in the Receiving Department at other warehouses for a little over two and a half years. During that time, Mr. Sinanian worked as a Receiving Manager, a Receiving Supervisor, an RTV Clerk, and a Receiving Clerk.

6. The Receiving Department is located at the back of the warehouse. The warehouse is approximately the length of a football field from front to back.

7. At all times material here, the Receiving Department at the warehouse had four positions: Receiving Manager, Receiving Clerk, Receiving Secretary, and Forklift Driver. In 2007, Deborah Lenox was the Receiving Manager, an employee named Sonya was the Receiving Secretary, Petitioner was the Receiving Clerk, and an employee named Valdean was the Forklift Driver.

8. The Receiving Secretary and the Receiving Clerk have different job responsibilities. The Receiving Secretary is responsible for answering the phone, making vendor appointments, logging the appointments, dealing with paperwork, creating and

printing out receiving tags, and logging shipment information into Respondent's computer system.

9. The Receiving Clerk is responsible for counting and checking merchandise against freight bills, opening boxes and cartons with a box knife to verify and count the product, stacking bed-loaded merchandise or merchandise from damaged or unacceptable pallets onto approved pallets, separating mixed items from pallets for checking, wrapping pallets with plastic wrap in preparation for movement onto the warehouse floor, loading merchandise and emptying pallets onto trucks using a manual pallet jack or hand cart, and cleaning and clearing the receiving dock of any debris and trip hazards. Each of these essential job functions requires standing, which is consistent with the job analysis for this position.

10. Respondent has written job analyses, which identify the essential functions of each job and are used to assist the Company, the employee, and the employee’s doctor in determining if the employee can perform the essential functions of his/her job with or without reasonable accommodations. Respondent does not remove or eliminate essential job functions, but will sometimes modify the manner in which the function is to be completed. Respondent will not displace another employee from his position in order to accommodate a disabled employee.

11. A pallet of merchandise can be as much as 60 inches high. A typical pallet coming in the warehouse is a 60-inch cube.

12. An electric pallet jack is a double pallet jack and is approximately 18 feet long. In order to operate an electric pallet jack, an employee has to stand and lean in the direction that she wants the machine to go and turn the handle. There is no seat on an electric pallet jack.

13. Petitioner’s original foot condition was due to osteomyelitis, an infection of the bone. Between 1998 and 1999, Petitioner had four surgeries to address her foot condition. A surgeon placed an artificial plastic bone in Petitioner's foot in July 1999.

14. In September 1999, Petitioner returned to work with medical restrictions that prevented her from standing for long periods of time and from lifting more than 25 or 35 pounds. At some point thereafter, while Petitioner was working at one of Respondent’s warehouses in Memphis, Tennessee, her podiatrist changed her restrictions to add limitations against cashiering, stocking, and inventory.

15. Petitioner understood that the reason for these additional restrictions was that she was not able to do these tasks to the extent they required her to stand for a prolonged period of time. Petitioner’s medical notes stated that she was

able to use her discretion as to her limitations, which Petitioner understood to mean that she could sit and rest her foot as needed. Each of these restrictions was permanent.

16. Mr. Zook, Ms. Lenox, and Mr. Sinanian were all aware that Petitioner had medical restrictions relating to her foot condition that prevented her from standing for prolonged periods of time. They were aware that Respondent had agreed to allow Petitioner to sit down when she felt it was necessary, without first having to ask for permission.

17. Despite her restrictions, Petitioner is able to ride her bike, go the grocery store, and work out at the gym. During the relevant time period, Petitioner worked out at the gym approximately four days a week. Her work-out routine included warming up on an elliptical machine for approximately 15-to-20 minutes or walking approximately one mile on the treadmill and using a leg press machine.

18. Respondent performs inventory twice a year. It takes an inventory at all warehouses in February and August.

19. The inventory process begins on Friday night and continues until the following Wednesday. The back-stock is counted on Friday night after closing and the stock on the sales floor is counted on Saturday night after closing. The post-audit process begins on Sunday morning before the warehouse opens to its members and continues on Monday morning.

20. The Saturday night inventory count is more labor-intensive and is considered “all hands on deck.” The Saturday night inventory requires the staff to count approximately $9 million worth of inventory during roughly a five-hour period.

21. On Saturday, Respondent assigns two employees to count the items in each aisle at the same time. The employees double-check each other’s counts. If there is a discrepancy between the employees’ counts, both will recount the items until their counts agree.

22. If there are discrepancies after the Saturday counts between the physical counts and the computer records, the items are recounted during the Sunday post-audit. If variances still remain after the three counts, then the variances are researched during the Monday post-audit.

23. For the Monday post-audit, Respondent only focuses on the larger-quantity, higher-dollar discrepancies. When researching the discrepancies from the variance reports, employees have to perform the following tasks: (a) count items on the floor or up in the steel racks; (b) verify bin tags; (c) research billing, shipment, and return-to-vendor records on Respondent’s computer system; and (d) check the receiving paperwork in an effort to locate and correct the source of the discrepancy.

24. Some items will have been sold between the Saturday night count and the Monday post-audit process. Therefore, the Monday post-audit team also may have to research the sales history on a computer and back out the Sunday sales from the total count.

25. The variance reports reflect the aisle where the item is located, the item count from the inventory count, the computer system count, and the amount of the variance. Employees are typically assigned to work in one department of the warehouse, which may require them to walk from aisle to aisle within that department.

26. In order to assist the Monday post-audit team, the team is permitted to use computers throughout the warehouse. Employees can sit down at the computers when they are researching the variances in item counts. It can take anywhere from 15-to-30 minutes to research one item.

27. The duties involved in the inventory post-audit process are similar to the job duties of the Receiving Clerk position. However, the post-audit does not require as much standing and is less physically demanding because the focus during post-audit is on researching the sources of the variances, rather than simply receiving, counting, and checking-in shipments.

28. In selecting employees to work on the Monday post-audit team, Respondent prefers to schedule people who are familiar with Respondent’s return-to-vendor and receiving processes. Respondent also selects employees who are knowledgeable about Respondent’s AS-400 computer system.

29. In February 2007, Petitioner worked the Saturday night inventory. During that time, she counted the bread then worked at the control desk. Petitioner's job at the control desk was to key-in inventory count sheets into Respondent’s computer system. Petitioner did not view this assignment as inconsistent with her restrictions against working inventory because she was seated for most of the time.

30. In August 2007, Mr. Sinanian was responsible for the post-audit processes, including the scheduling of employees to work post-audit. Due to the requirements of post-audit, Mr. Sinanian selected people who, like Petitioner, were familiar with Respondent’s AS-400 computer system. Approximately 20 employees worked during the Monday post-audit.

31. Mr. Sinanian and Ms. Lenox knew that Petitioner could use her discretion to sit down whenever she felt it was necessary. They had no reason to believe that the post-audit process was inconsistent with Petitioner’s medical restrictions. Therefore, she was selected to work the Monday post-audit.

32. On Saturday, August 25, 2007, Petitioner was again assigned to count bread and then assist with keying inventory count sheets into the system. Petitioner was able to sit down while she was working at the control desk keying the inventory count sheets. Petitioner did not consider her Saturday assignments inconsistent with her restrictions.

33. Petitioner did not work or perform any inventory or post-audit, inventory-related duties on Sunday, August 26, 2007.

34. On Monday, August 27, 2007, the post-audit process lasted from approximately 5:00 a.m. until 10:00 a.m. Petitioner's shift began at 5:00 a.m.

35. After Petitioner clocked in, she reported to the control desk, where Mr. Sinanian assigned her to check variances for approximately 6 items in Department 14, the sundries department. The sundries department runs along the back right side of the building near the Receiving Department.

36. The sundries department includes items like paper towels, cleaning chemicals, laundry detergent, water, juice, and soda. Petitioner was assigned to research variances between the physical counts and the computer system's counts for Swiffers, dog bones, dog beds, water, soda, and paper towels.

37. During the August 2007 post-audit process there were at least 18 computers for the employees to use. The computers were located in the Receiving Department, the front office, at

the membership desk, and at the podium on the front-end. Employees were free to use any available computer and were able to sit down at most of the computers while researching items.

38. Petitioner never had to wait to use a computer. Petitioner went to whichever computer was closest to her at the time to verify items.

39. After she finished researching all of the items on her variance sheet, Petitioner, like all of the other employees who worked post-audit, met with Mr. Sinanian at the control desk at the front of the store to explain her findings. There was a chair at the control desk for Petitioner to sit in while meeting with Sinanian.

40. The process of meeting with Mr. Sinanian took anywhere from 10-to-30 minutes. Other than discussing her assignment for the day and the post-audit research results, Mr. Sinanian did not have any other discussions with Petitioner on August 27, 2007.

41. Petitioner was able to use her discretion to sit down during post-audit. She was never told that she could not sit down nor was she reprimanded for sitting down. Petitioner admits that she used her discretion to sit down at least twice during post-audit and to kneel down a couple of times. Petitioner also took a 15-minute break during the post-audit process, during which she sat down.

42. After Petitioner finished working post-audit at approximately 10:00 a.m. on August 27, 2007, she returned to the Receiving Department, but left shortly thereafter to take her lunch break. Petitioner's lunch break lasted for approximately a half-hour. Petitioner walked from the back of the warehouse, where the Receiving Department is located, to the front of the warehouse, where the break room is located, to take her lunch and walked all the way back after the end of her break to return to work.

43. After returning from lunch, Petitioner began working on the UPS shipment. It was a busy day in the Receiving Department, as the UPS shipment had arrived with approximately 72 packages stacked on one pallet that was taller than Petitioner. Because Petitioner felt unable to stand, she could not check in the entire UPS shipment. As a result, Petitioner took it upon herself to take the UPS invoices and input the invoices into Respondent's computer system, which is one of the Receiving Secretary's job responsibilities.

44. At some point thereafter, Ms. Lenox asked Petitioner why she was logging in items into Respondent's computer system, rather than receiving the UPS shipment. Petitioner told Ms. Lenox that her foot was hurting and that she could not stand. Ms. Lenox told Petitioner to take her break and, when

she returned from break, they would see how Petitioner's foot was feeling.

45. Petitioner walked to the front of the warehouse, where she took her second 15-minute break in the break room. Petitioner was able to sit with her foot up during her break.

46. After returning from her break, Petitioner reported to the Receiving Department and told Ms. Lenox that she did not feel she could not stand any longer that day. Petitioner asked if there was something she could do other than her receiving duties.

47. Ms. Lenox told Petitioner that if she could not stand, then Ms. Lenox did not have any more work for her and told her that she should go home. Accordingly, Petitioner went home approximately one hour before her shift ended.

48. Petitioner reported to work the following day, Tuesday, August 28, 2007, at 5:00 a.m. and worked her entire shift. At some point after her shift started that day, Petitioner told Mr. Sinanian that Ms. Lenox would not allow her to take a break during post-audit. Petitioner also told Mr. Sinanian that her foot was swollen and hurting. She took off her shoe to show him her foot.

49. Mr. Sinanian did not see anything unusual about Petitioner's foot. He did not see any swelling, graying, or a red bump. From the conversation with Petitioner, Mr. Sinanian

did not understand that her foot was hurting due to a new injury. Therefore, Mr. Sinanian did not fill out an incident report. Petitioner's and Mr. Sinanian's conversation lasted approximately two minutes.

50. At some point after speaking with Petitioner, Mr. Sinanian asked Ms. Lenox if, at any point during post-audit, she told Petitioner that Petitioner could not take a break. Ms. Lenox denied Petitioner's allegation. Mr. Sinanian had no reason to doubt Ms. Lenox.

51. Petitioner continued to work her job as Receiving Clerk after August 28, 2007. She continued to use her discretion to rest her foot on an as-needed basis. When possible she would sit in a chair to work. She used the electric pallet, letting her foot hang off the platform.

52. Petitioner waited three weeks to seek medical treatment from her podiatrist in West Palm Beach, Florida. She finally saw her doctor on Monday, September 17, 2007.

53. At her appointment, Petitioner's podiatrist gave her a note that stated, "DUE TO ARTHRITIC CONDITION, CYNTHIA IS UNABLE TO STAND FOR LONG PERIODS OF TIME AND IT IS MEDICALLY NECESSARY FOR HER TO BE OFF HER FOOT FOR 3 WEEKS. DUE TO THE FLARE UP."

54. Petitioner understood that her podiatrist wanted her to stay off her foot for a few weeks and to be in a sedentary position during that time. Petitioner also understood that

these temporary restrictions were more limiting than her prior permanent restrictions.

55. Petitioner reported to work on September 18, 2007, and told Ms. Lenox that her doctor did not want her standing. Ms. Lenox told Petitioner that they would need to speak with Mr. Zook about her restrictions when he arrived at work that day.

56. In the meantime, Ms. Lenox permitted Petitioner to sit down and work on summary sheets. After returning from lunch, Petitioner met with Mr. Zook about her new temporary restrictions. The meeting lasted about an hour or more.

57. Based on Mr. Zook's prior experience working as a Receiving Clerk, his understanding of the essential job functions of that position, and Petitioner's podiatrist's statement that she needed to be off her foot for three weeks, he did not believe that Petitioner could perform the essential functions of that position without violating her doctor's restrictions. Mr. Zook, nevertheless, asked Petitioner how she thought she could do her job from a seated position. Petitioner did not have any suggestions.

58. There were no available sedentary positions in the warehouse at that time that could have accommodated Petitioner's no-standing restrictions. As a result, Mr. Zook explained to Petitioner that based on her doctor's restrictions, which

required her to be in a sedentary position, he did not have any work for her at that time.

59. Mr. Zook did not believe that Petitioner's temporary no-standing restrictions prevented her from working in any capacity. Mr. Zook explained to Petitioner that she could take a leave of absence and return to work after her temporary restrictions expired. Because Petitioner's restrictions were temporary, Mr. Zook did not contact Respondent's Human Resources Department to schedule a job accommodation meeting.

60. Despite Mr. Zook's statement, Petitioner returned to work the following day and performed some work for a period of time. After Mr. Zook arrived at the warehouse, he went back to the Receiving Department and asked Petitioner why she was at work. Mr. Zook reminded Petitioner that he did not have any work for her to do at that time and that he could not allow her to work in violation of her doctor's restrictions.

61. After speaking with Mr. Zook, Petitioner clocked out, signed some paperwork, and left the building. Petitioner did not return to work after September 19, 2007.

62. On October 15, 2007, Petitioner saw her podiatrist again. Petitioner's podiatrist extended her temporary no-standing restriction for another six weeks. Petitioner understood, however, that her no-standing restrictions remained temporary at that time.

63. Petitioner applied for and received short-term disability ("STD") benefits beginning around the end of September 2007. Petitioner used paid time off until the STD period benefits began.

CONCLUSIONS OF LAW

64. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Sections 120.569, 120.57(1), and 760.11, Florida Statutes (2009).

65. Section 760.10(1), Florida Statutes, states as follows in pertinent part:

> (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.
>
> * * *
>
> (7) It is an unlawful employment practice for an employer . . . to discriminate against any person because that person has opposed any practice which is an unlawful employment practice under this section, or because that person has made a charge, testified, assisted, or participated in any manner in an investigation proceeding, or hearing under this section.

66. The Florida Civil Rights Act (FCRA), Sections 760.01 through 760.11, Florida Statutes (2008), as amended, was patterned after Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000 et seq. Disability discrimination claims brought pursuant to the FCRA are analyzed under the same framework as claims brought pursuant to the Americans with Disabilities Act of 1990, as amended, 42 U.S.C. Section 12101 et seq. (ADA). See Sicilia v. United Parcel Srvs., Inc., 279 Fed. App'x 936, 938 (11th Cir. 2008).

67. Petitioner has limited the relevant time period at issue here to events occurring between August 8, 2007, and October 15, 2007. Therefore, Petitioner has the burden of proving by a preponderance of the evidence that Respondent discriminated against her based on her alleged disability and retaliated against her by placing her on medical leave during that period of time. See Florida Dep't of Transportation v. J.W.C. Company, Inc. 396 So. 2d 778 (Fla. 1st DCA 1981).

68. Absent direct or statistical evidence of discrimination, neither of which was offered here, claims of discrimination and retaliation are evaluated by using the test for circumstantial evidence, as set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). In McDonnell Douglas, 411 U.S. at 792, and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981), the United States Supreme Court first

articulated the framework for use by trial courts in evaluating the merits of discrimination claims of disparate treatment based upon circumstantial evidence, including the basic allocation of burdens and order of presentation of proof.

69. Under this analytical framework, the employee bears the initial burden of establishing a prima facie case of unlawful discrimination. See Burdine, 450 U.S. at 253. Only if the employee establishes a prima facie case does the burden of production shift to the employer to articulate a credible, legitimate, non-discriminatory explanation for its decision. See Burdine, 450 U.S. at 253.

70. Once the employer articulates such an explanation, "the presumption [of discrimination] raised by the prima facie case is rebutted and drops from the case." See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507 (1993). The burden of production then shifts back to the employee and merges with the employee's ultimate burden to prove that he or she has been the victim of intentional discrimination. See Burdine, 450 U.S. at 252.

71. In a claim for failure to accommodate a disability, the McDonnell Douglas analyses is modified, requiring the employee to establish the following elements of a prima facie case: (1) she is a disabled individual; (2) she is a qualified individual; and (3) the employer unlawfully discriminated

against her because of her disability. See Raytheon Co. v. Hernandez, 540 U.S. 44, 49, n.3 (2003); Dangelo v. ConAgra Foods, Inc., 422 F.3d 1220, 1225-26 (11th Cir. 2005).

72. Additionally, in a failure to accommodate claim, the Petitioner "must also identify a reasonable accommodation that would allow her to perform the job." See Terrell v. USAir, 132 F.3d 621, 624 (11th Cir. 1998). "Once the employee has met this additional burden, the employer may rebut the claim by presenting evidence that the requested accommodation imposes an undue hardship on the employer." Id. Evidence of pretext plays no role in the analysis of a claim based exclusively on failure to accommodate. See Holly v. Clairson Industries, L.L.C., 492 F.3d 1247, 1262-63 (11th Cir. 2007).

73. In order to establish that she was a disabled individual, Petitioner was required to prove by a preponderance of the evidence that: (1) she had a physical or mental disability that substantially limited one or more of the major life activities; (2) she had a record of such impairment; or (3) she was regarded as having such an impairment. See 42 U.S.C. § 12102(2).

74. Here, Petitioner did not present competent persuasive evidence that she was substantially limited in the major life activity of standing. However, she provided Respondent with

medical documentation that referred to her inability to stand for prolonged periods of time.

75. Petitioner also proved that Respondent regarded Petitioner as being impaired. For years, Respondent accepted Petitioner's physical limitations as permanent and allowed her to use her discretion to rest her foot when necessary without having to request permission.

76. Mr. Zook certainly accepted that Petitioner's condition had at least temporarily become more disabling when he received Petitioner's September 17, 2007, doctor's note, stating that she had to be off her foot for three weeks. At that time, Mr. Zook told Petitioner to stay at home on medical leave until her doctor lifted the restriction against standing.

77. To establish the second prong of the prima facie case, the ADA defines a "qualified individual with a disability" as an "individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." See 42 U.S.C. § 12111(8).

78. The evidence establishes that as of September 17, 2007, and as to the Receiving Clerk position, Petitioner was not a qualified individual with a disability due to her no-standing restrictions. Petitioner offered no evidence at the hearing to rebut Respondent's position that the Receiving Clerk position

requires frequent standing and that there was no way that she could perform all of the essential functions of that job from a seated position. Accordingly, Petitioner failed to establish that she was a qualified individual with a disability as of September 17, 2007.

79. Petitioner has challenged Respondent's decisions to require her to work post-audit on August 27, 2007, and to accommodate her temporary, no-standing restrictions by providing her with a medical leave of absence. Turning first to Respondent's decision to require Petitioner to work post-audit inventory, the evidence at the hearing establishes that Respondent had no reason to believe that Petitioner could not perform inventory post-audit, as that process was in many respects similar to her responsibilities as the Receiving Clerk, but less physically demanding.

80. Additionally, Respondent established that Petitioner could have used her discretion to sit when she needed to during that process just as she always did in the Receiving Department. Accordingly, Petitioner failed to prove by a preponderance of the evidence that Respondent failed to accommodate her no-prolonged standing restriction during the post-audit process.

81. With respect to Petitioner's claim that Respondent's decision to accommodate her temporary, no-standing restrictions, by placing her on medical leave was somehow unlawful, her

argument is misplaced. An otherwise qualified individual is not entitled to the accommodation of her choice, but only to a reasonable accommodation. See Stewart v. Happy Herman's Cheshire Bridge, Inc., 117 F.3d 1278, 1285-86 (11th Cir. 1997). A medical leave of absence can be a reasonable accommodation. See Stewart, 117 F.3d at 1286-87.

82. A reassignment to a vacant position may also qualify as a reasonable accommodation. However, Respondent offered testimony, which Petitioner failed to rebut, that there were no available sedentary positions for which Petitioner was otherwise qualified. Thus, it was entirely appropriate for Respondent to accommodate Petitioner by offering her a leave of absence. See Id.

83. Moreover, while Petitioner testified that the Receiving Department personnel worked together as a team, Respondent was not required to reallocate essential functions of her position to other employees in order to accommodate Petitioner's restrictions. See Earl v. Mervyns, Inc., 207 F.3d 1361, 1367 (11th Cir. 2000) ("an employer is not required by the ADA to reallocate job duties in order to change the essential functions of a job."); Holbrook v. City of Alpharetta, 112 F.3d 1522, 1528 (11th Cir. 1997).

84. Petitioner asserts that she should have been permitted to work, exercising her discretion to rest her foot as needed,

after receiving her doctor's sedentary restrictions. This suggestion is illogical as it would expose Petitioner to further injury and Respondent to liability.

85. Petitioner argues that Respondent failed to provide her a reasonable accommodation because Mr. Zook purportedly did not engage in the interactive process with her during their September 18, 2007, meeting or at any point thereafter. This argument is without merit because Respondent provided Petitioner with a reasonable accommodation in the form of a medical leave of absence. Therefore, the alleged failure to engage in a dialog beforehand does not give rise to liability. See Lucas, 257 F.3d at 1256.

86. To the extent that Petitioner's claim is based on outright discrimination, as opposed to an alleged failure to accommodate, it nevertheless fails. Petitioner did not establish that Respondent's legitimate, non-discriminatory reasons for assigning her to work post-audit inventory or placing her on a medical leave of absence were pretextual.

87. In order to establish her retaliation claim, Petitioner was required to prove that: (1) she engaged in statutorily protected activity; (2) she suffered an adverse action; and (3) there was a causal link between the adverse action and her protected activity. See Lucas v. W.W. Grainger, Inc., 257 F.3d 1249, 1260 (11th Cir. 2001).

88. It is arguable that Petitioner engaged in statutorily protected expression when she complained about her foot to Ms. Lenox on August 27, 2007, after the post-audit, and to Mr. Sinanian on August 28, 2007. Therefore, Petitioner has proved the first prong of her retaliation claim.

89. With respect to the second prong of the retaliation claim, an employment action is considered "adverse" if "a reasonable employee would have found the challenged action materially adverse, which . . . means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." See Burlington Northern & Santa Fe Ry. v. White, 548 U.S. 53, 68 (2006).

90. A failure to provide a requested accommodation, including light duty work, or a failure to engage in the interactive process does not constitute an adverse employment action. See Lucas, 257 F.3d at 1261; Stewart v. Happy Herman's Cheshire Bridge, Inc., 117 F.3d 1278, 1288 (11th Cir. 1997) ("The acts Stewart describes relate directly to her 'reasonable accommodation' discrimination claim, not her retaliation claim, and accordingly provide no basis for denying summary judgment on that issue.").

91. Similarly, requiring an employee to take a medical leave of absence cannot establish a claim for retaliation when the employer can provide legitimate, non-retaliatory reasons for

the leave. See Basith v. Cook Cty., 241 F.3d 919, 933 (7th Cir. 2001).

92. As discussed above, Petitioner failed to establish that Respondent's decision to accommodate her temporary, no-standing restrictions by allowing her to take a leave of absence was pretextual. Accordingly, because Petitioner did not identify any challenged actions that constitute an adverse employment action, she failed to establish the second prong of her prima facie case.

93. Respondent had no sedentary position for Petitioner that would comply with her doctor's orders. The only reasonable accommodation that Respondent could make was to place Petitioner on medical leave. That decision was not based on retaliation.

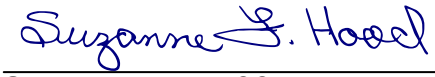
RECOMMENDATION

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

RECOMMENDED:

That the Florida Commission on Human Relations enter an order dismissing the Petitions for Relief in these consolidated cases.

DONE AND ENTERED this 24th day of November, 2009, in Tallahassee, Leon County, Florida.



SUZANNE F. HOOD
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of November, 2009.

COPIES FURNISHED:

Hnin N. Khaing, Esquire
Henrichsen Siegel, PLLC
1648 Osceola Street
Jacksonville, Florida 32204

Kathleen Mones, Esquire
Seyfarth Shaw LLP
1545 Peachtree Street Northeast, Suite 700
Atlanta, Georgia 30309

Larry Kranert, General Counsel
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

Denise Crawford, Agency Clerk
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.