STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CHERYL MASK-BROCKMAN,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 09-4005
	)	
FLORIDA STATE UNIVERSITY,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

A formal hearing was conducted in this case on October 21, 2009, in Tallahassee, Florida, before Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Cheryl Mask-Brockman, pro se
536 West 5th Avenue
Tallahassee, Florida 32303

For Respondent: Brian F. McGrail, Esquire
Florida State University
424 Wescott Building
222 South Copeland Street
Tallahassee, Florida 32306

STATEMENT OF THE ISSUE

The issue is whether Respondent committed an unlawful employment practice by discriminating against Petitioner based on an alleged disability.

PRELIMINARY STATEMENT

On February 3, 2009, Petitioner Cheryl Mask-Brockman (Petitioner) filed an Employment Complaint of Discrimination with the Florida Commission on Human Relations (FCHR). The complaint alleged that Respondent Florida State University (Respondent) had discriminated against Petitioner by harassing her and subjecting her to a hostile work environment that resulted in a constructive discharge based on an alleged disability, carpel tunnel of the wrist.

On June 24, 2009, FCHR issued a Determination: No Cause.

On July 23, 2009, Petitioner filed a Petition for Relief. FCHR referred the case to the Division of Administrative Hearings on July 24, 2009.

A Notice of Hearing dated August 12, 2009, scheduled the hearing for September 1, 2009.

On August 31, 2009, the parties filed a Joint Motion for Continuance. That same day, the undersigned issued an Order Granting Continuance.

On September 30, 2009, the parties filed a Case Status Report. On October 1, 2009, the parties filed an Amended Case Status Report.

On October 5, 2009, the undersigned issued a Notice of Hearing. The notice scheduled the hearing for October 21, 2009.

During the hearing, Petitioner testified on her own behalf and presented the testimony of two witnesses. Petitioner offered 16 exhibits that were received into evidence.

Respondent presented the testimony of seven witnesses. Respondent offered eight exhibits that were received into evidence.

A hearing Transcript was filed with the Division of Administrative Hearings on November 4, 2009. Respondent timely filed its Proposed Recommended Order on November 16, 2009.

Petitioner filed an untimely Proposed Recommended Order on November 25, 2009. Respondent filed a Motion to Strike Petitioner's Proposed Recommended Order on November 30, 2009. The undersigned issued an Order granting the motion on December 2, 2009.

Petitioner filed a Motion to Move Forward on December 2, 2009. The undersigned issued an Amended Order on December 7, 2009, confirming that Respondent's Motion to Strike was granted.

FINDINGS OF FACT

1. Respondent is a Carnegie I residential and coeducational university of approximately 40,000 students and over 13,000 full and part-time faculty and staff located in Tallahassee, Florida.

2. The Office of Financial Aid (OFA) is responsible for the overall administration of student financial aid, including

federal, state, and institutional financial aid. Of the approximate 40,000 students, 25,000 on average receive some form of financial aid in the amount of approximately $300 million dollars per year.

3. OFA hired Petitioner on August 7, 1990, as a secretary. Thereafter, Petitioner worked for OFA for almost 18 years.

4. During her 18 years of employment, Petitioner resigned from OFA on three occasions. She resigned in 1996 and again in 2006, only to be rehired by the same OFA Director each time. Petitioner submitted her third resignation and notice of retirement on September 19, 2008, effective September 30, 2008.

5. With one exception, Petitioner did not make Respondent aware of any complaints or allegations of unfair treatment prior to her ultimate retirement from OFA. She never complained to anyone that she was being stalked, monitored, or overworked more than her co-workers. She did complain on one occasion that Joann Clark, OFA's Assistant Director, was walking by her office/work station and knocking on the wall/desk/counter.

6. All new employees receive Respondent's policies and procedures relative to retirement and employee benefits eligibility. The policies and procedures include sections on the Americans with Disability Act (ADA), Family Medical Leave Act (FMLA) and Workers' Compensation (WC).

7. On July 13, 2005, Petitioner had surgery for carpel tunnel of the wrist. Petitioner did not inform her immediate supervisor of the scheduled surgery until July 12, 2005, even though Petitioner's doctor scheduled the surgery on June 13, 2005.

8. On July 12, 2005, Petitioner's supervisor was Lassandra Alexander. Ms. Alexander provided Petitioner with copies of, ADA, FMLA, and WC forms and reviewed them with her as soon as Ms. Alexander became aware of the surgery scheduled for the next day. Petitioner told Ms. Alexander that she was not going to worry about applying for an accommodation under the ADA, for leave under FMLA, or WC benefits.

9. Petitioner failed to timely file for WC in July 2005. She was not eligible to receive Workers' Compensation benefits because she did not comply with the proper protocol and procedures.

10. Petitioner returned to work on August 29, 2005, with a doctor's statement recommending her for "light duty." On September 23, 2005, Petitioner presented a doctor's statement recommending her to work half time, four days a week.

11. Respondent complied with the doctor's recommendations. Respondent divided Petitioner's work among other co-workers and also allowed Petitioner to take breaks as needed.

12. On October 26, 2005, Petitioner presented a doctor's statement, allowing her to return to work full time. After October 26, 2005, Petitioner never submitted any further medical documentation to indicate that she had continuing work restrictions.

13. After October 26, 2005, Petitioner did not formally request an accommodation or furnish medical documentation indicating a need for an accommodation. Even so, Respondent continued to provide Petitioner with support and assistance as requested.

14. On July 25, 2008, Petitioner signed a letter confirming her appointment to a full-time position. That same day, Petitioner signed a Memorandum of Understanding that advised her about the FMLA, Respondent's Sexual Harassment and Non-discrimination Policies, and Respondent's Workers' Compensation Program Guidelines. Petitioner's testimony that she never received copies of these documents and that she was unaware of benefits and eligibility forms at any time during her several hires by OFA is not persuasive.

15. There is no competent evidence that Petitioner was substantially limited in performing the essential functions of her job or that she suffered from a disability as defined by the ADA after October 2005. Additionally, Petitioner never informed her supervisors of an alleged on-going disability and never

provided medical certification to substantiate her current allegations. Therefore, it is clear that Petitioner's co-workers and supervisors did not regard her as having an impairment.

16. Petitioner's work evaluations for her entire 18-year employment with OFS were above standards. Petitioner's supervisors valued her work ethic and production in the office.

17. The greater weight of the evidence indicates that Respondent's staff did not intentionally discriminate against Petitioner. They did not harass Petitioner by any means, including stalking her, excessively monitoring her work habits, isolating her to her office, giving her more work than her co-workers, tampering with her office computer, refusing to investigate her allegations of vandalism to her car in the parking lot, and refusing to give her a new office chair and computer mouse that she requested on an office "wish list." Petitioner's testimony to the contrary is not credible.

18. At some point in time, Petitioner complained to Willie Wideman, OFA's Associate Director, that Assistant Director Joanne Clark was knocking on the wall to her office/workspace/counter. Mr. Wideman spoke to Ms. Clark, determining there was no validity to Petitioner's allegations.

19. Petitioner also complained to her friend and co-worker, Joann Smith, that she was irritated because people were

knocking on her counter. Ms. Smith admitted she had knocked on Petitioner's counter as a means of friendly communication, a way to say hello in passing. Later, Ms. Smith became aware of the "no knocking" sign on Petitioner's desk.

20. Petitioner's two letters of resignation and her notice of retirement clearly demonstrate that she did not perceive any discrimination, harassment or hostile work environment from her fellow employees or supervisors. All of Petitioner's colleagues were shocked when they learned about Petitioner's complaint and read the allegations.

CONCLUSIONS OF LAW

21. The Division of administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to Sections 120.569, 120.57(1), and 760.11, Florida Statutes (2009).

22. Section 760.10(1)(a), Florida Statutes, provides that it is unlawful for an employer to discriminate against any individual based on such individual's handicap.

23. 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).

24. Petitioner has the initial and ultimate burden of proving intentional discrimination by a preponderance of the evidence. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and St. Mary's Honor Center, et al. v. Hicks, 509 U.S. 502 (1993).

Harassment and Hostile Work Environment

25. To prove a prima facie case of discrimination by harassment or the creation of a hostile work environment, based on an alleged handicap or disability, Petitioner must show the following: (a) she is a qualified individual with a disability under the ADA; (b) she was subject to unwelcome harassment or a hostile work environment; (c) the harassment or hostile work environment was sufficiently severe or pervasive to alter her working conditions and create an abusive environment; and (d) Respondent knew or should have known of the harassment or hostile work environment, failed to correct the problem, and therefore is liable under a theory of direct or vicarious liability. See Razner v. Wellington Regional Medical Center, Inc., 837 So. 2d 437 (Fla. 4th DCA 2002); Miller v. Kenworth of Dothan Inc., 277 F.3d 1269, 1275 (11th Cir. 2002).

26. A disability is a "physical or mental impairment that substantially limits one or more of the major life activities of [an] individual." See 42 U.S.C. § 12102(2)(A). Major life activities include "functions, such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." See 29 C.F.R. § 1630.2(i). Moreover, to be substantially limited, a person must be either unable to perform a major life function or be "significantly restricted as to the condition, manner or duration" under which the individual can perform a particular function, as compared to the average person in the general population. See 29 C.F.R. § 1630.2(j). Any determination of a disability must take into account any remedial measures, such as medication or surgery that correct the impairment. See Sutton v. United Air Lines, Inc. 527 U.S. 471 (1999).

27. To prove a harassment claim, Petitioner must show that she subjectively perceived the harassment to be severe or pervasive, and that objectively, a reasonable person in her position would consider the harassment likewise. See Johnson v. Booker T. Washington Broadcasting Service, Inc., 234 F.3d 501, 509 (11th Cir. 2000). The objective prong of the test requires consideration of the following four factors: (a) the frequency of the conduct; (b) the severity of the conduct; (c) whether the conduct is physically threatening or humiliating, or a mere

offensive utterance; and (d) whether the conduct unreasonably interferes with the employee's job performance. Mendoza v. Borden, Inc., 195 F.3d 1238 (11th Cir. 1999).

28. The conduct at issue must be so extreme as to "amount to a change in terms and condition of employment." See Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998).

29. In this case, Petitioner did not prove that she was handicapped or disabled or that Respondent's staff perceived her as being disabled. Petitioner was not subjected to unwelcome harassment; however, to the extent Petitioner erroneously believed her co-workers were picking on her by knocking on her wall/counter, such alleged behavior was not based on Petitioner's purported disability and was not sufficiently severe or pervasive to alter her working conditions and create a hostile environment.

30. Finally, Petitioner complained to Respondent about the knocking and put up a sign saying "no knocking." Respondent performed an appropriate investigation and found no merit to Petitioner's allegations. The only person who knocked on Petitioner's counter before Petitioner posted her sign was her good friend, Ms. Smith.

31. Petitioner has not met her initial or ultimate burden of proving that Respondent intentionally discriminated against her by harassing her and creating a hostile work environment

because she was disabled. Petitioner did not establish a single act or pattern of conduct by Respondent's staff that was intentionally discriminatory. She did not show by competent evidence that she was disabled or that Respondent's staff perceived her as such.

Constructive Discharge

32. Because Petitioner failed to demonstrate discrimination by harassment or a hostile work environment, she cannot meet the threshold requirement to demonstrate constructive discharge, i.e. that the work conditions were so intolerable that a reasonable person under the same circumstances would feel compelled to resign. A claim of discrimination resulting in constructive discharge requires proof, under an objective standard, that the employer, by its illegal discriminatory acts, made working conditions so difficult that a reasonable person in the employee's position would feel compelled to resign. See McCaw Cellular Communications of Florida, Inc. v. Kwiatek, 763 So. 2d 1063 (Fla. 4th DCA 1999), citing Steele v. Offshore Shipbuilding, Inc., 867 F.2d 11311, 1317 (11th Cir. 1989).

33. Petitioner's employment record does not support a claim. Instead the record shows that Darryl Marshall, Director of OFA, had an open door policy toward all of OFA's employees.

There is no evidence that OFA turned down a request made by Petitioner over an 18-year employment relationship.

34. During that 18-year time frame, Petitioner resigned from OFA on two occasions, only to be rehired by Mr. Marshall. In September 2008, Petitioner announced her "retirement" and is currently receiving retirement benefits. Petitioner's letters of resignation express a cordial and collegial relationship with her co-workers and supervisors. Moreover, Petitioner's performance evaluations over the years clearly indicate that her services were highly valued by OFA.

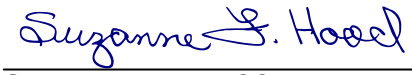
RECOMMENDATION

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

RECOMMENDED:

That the Florida Commission on Human Relations enter a final order dismissing the Petition for Relief.

DONE AND ENTERED this 22nd day of December, 2009, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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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.