

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

LORRAINE SUPERGAN, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 09-5970  
 )  
 CHEP USA, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on February 18, 2010, in Orlando, Florida, and March 5, 2010, in Orlando and Tallahassee, Florida, by video teleconference, before Susan B. Harrell, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Lorraine Supergan, pro se  
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Orlando, Florida 32821

For Respondent: Tracey L. Ellerson, Esquire  
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STATEMENT OF THE ISSUE

The issue in this case is whether Respondent unlawfully discriminated against Petitioner based on an alleged disability in violation of the Florida Civil Rights Act of 1992.

PRELIMINARY STATEMENT

On April 6, 2009, Petitioner, Lorraine Supergan (Ms. Supergan), filed a Charge of Discrimination, alleging that Respondent, CHEP USA (CHEP), had discriminated against her based on her disability. On September 18, 2009, the Florida Commission on Human Relations (Commission) issued a Notice of Determination: No Cause, stating that the Commission had determined that no reasonable cause existed to believe that an unlawful employment practice had occurred.

On October 23, 2009, Ms. Supergan filed a Petition for Relief (Petition), alleging that CHEP had committed an unlawful employment practice by discriminating against her based on her disability. The Petition was forwarded to the Division of Administrative Hearings on October 28, 2009, for assignment to an Administrative Law Judge. The case was originally assigned to Administrative Law Judge R.B. McKibben, but was transferred to Administrative Law Judge Susan B. Harrell to conduct the final hearing.

The final hearing commenced on February 18, 2010; did not conclude on that date; and was resumed on March 5, 2010. At the final hearing, Ms. Supergan testified in her own behalf. Petitioner's Exhibits 1 through 4, 9, 10, 12, 13, and 14 were admitted into evidence. Petitioner's Exhibits 5 through 8 were

not admitted into evidence. Petitioner's Exhibits 11 and 15 are demonstrative exhibits.

At the final hearing, CHEP called the following witnesses: Thomasina Kennedy, Arren Quilal-Lan, and Bruce Zimmerman. Respondent's Exhibits 1 through 3, 5, 8, 12 through 14, 16 through 18, 20 through 23, 27, 34 through 36, 38 through 43, 45, 47, 49, 50, 52, 54, 55, 57, 59, 60, 62, 66, and 68 were admitted into evidence.

The two-volume Transcript was filed on April 10, 2010. The parties agreed to file their proposed recommended orders within ten days of the filing of the Transcript. The parties timely filed their proposed recommended orders, which have been considered in the preparation of this Recommended Order.

#### FINDINGS OF FACT

1. Ms. Supergan was employed by CHEP from January 1, 1999, to July 2, 2009, as a financial analyst.

2. CHEP is a pallet pooling business. CHEP leases wooden pallets to manufacturers and manages the supply chain.

3. In October 2008, Ms. Supergan was assigned to the Information Services (IS) Department at CHEP's headquarters in Orlando, Florida. The IS Department had several teams and subteams, including the sourcing team.<sup>1</sup> Ms. Supergan was assigned to the sourcing team and remained there until the termination of her employment.

4. In October 2008, Bruce Zimmerman was assigned to manage three teams in the IS Department at CHEP. One of the teams was the sourcing team. The IS sourcing team had three members, Ms. Supergan, Gloria Ruiz, and Chastity Lamm. When Mr. Zimmerman began managing the recently-formed sourcing team, each of the team members performed a particular function of the work assigned to the team.

5. Mr. Zimmerman's responsibility in managing the sourcing team was to define the roles of the team members and to build a cohesive unit to work together. He wanted to develop a cross-functional team so that each team member could cover for the other team members. His goal was to have the team members cross-trained so that each team member understood all aspects of the work of the sourcing team. In order to achieve a cross-functional team, Mr. Zimmerman observed and worked with the team members so that he could understand the different processes that made up the work of the sourcing team.

6. Beginning in October 2008, Ms. Supergan's job responsibilities included processing and tracking various IS invoices, purchasing hardware and software, and preparing a variety of financial reports. As of the date of the termination of Ms. Supergan's employment, her job descriptions included the following essential functions:

Prepares ad hoc financial and management reporting analysis as needed and seeks out new reporting needs and methods.

Reviews all posted expense and CAPEX charges to ensure GL code compliance. Works with Finance to reassign incorrectly assigned items.

Performs audits to ensure forecast variance is understood.

Assists IS Leadership with budget issues, forecasts, or analytical requests.

Assists the IS Financial Analyst to complete and improve monthly financial reporting and management reviews.

Maintains documentation of all department finance and purchasing processes.

Performs other duties as needed.

7. Ms. Supergan processed the majority of the 75-to-100 invoices received from vendors in the United States (U.S.) each month. Invoices would arrive daily. Approximately 90 percent of these invoices were received in paper form. However, some of the invoices, which arrived in paper form, were available electronically in 2009, but approximately 20-to-30 invoices were not. Ms. Supergan would review the invoices and code or assign them to their proper cost center. If the invoices had incorrect cost centers listed, Ms. Supergan was responsible for correcting the errors. Once Ms. Supergan completed the processing of the invoices, she presented the invoices to her supervisor for approval and signature. After her supervisor signed off on the

invoices, Ms. Supergan delivered the invoices to accounts payable for payment.

8. The processing of the U.S. invoices could not be done at home because many of the invoices were in paper form. In order to process the U.S. invoices at home, CHEP would have to hand-deliver the invoices to Ms. Supergan and pick the invoices up when she completed the processing. Someone, other than Ms. Supergan, would have to deliver the processed invoices to Ms. Supergan's supervisor for approval and signature and then deliver the approved and signed invoices to accounts payable. Ms. Supergan suggested that the invoices could be scanned and sent to her at home via e-mail. However, someone other than Ms. Supergan would have to scan the e-mails, retrieve the processed invoices from e-mail, take the processed invoices to the supervisor for approval and signature, and then take the approved and signed invoices to accounts payable for payment. In other words, someone other than Ms. Supergan would be performing Ms. Supergan's job functions.

9. Ms. Supergan also processed some of the European telephone invoices. The processing of the European invoices could be done electronically because CHEP's European counterpart used a special software system, which was unavailable to CHEP in processing U.S. invoices.

10. Part of Ms. Supergan's job responsibilities included purchasing hardware and software for the IS Department. Although Ms. Supergan did not perform this function as often as she did the processing of the U.S. invoices, she was expected to be able to purchase hardware and software when needed. This job responsibility included receiving requisitions from CHEP employees. Some of the requisitions were sent by e-mail, but many times the requisitions would be received in a paper format. The purchased hardware and software would be received by CHEP employees along with a packing slip, which would be forwarded to Ms. Supergan so that she could verify and ensure that the employee properly received what had been ordered. Ms. Supergan was responsible for filing the packing slips for accounting and tracking purposes. The function of purchasing hardware and software could not be done at home without having someone either physically taking the paperwork to Ms. Supergan, returning the paperwork to CHEP, and filing the paperwork or having someone scanning the paperwork, e-mailing it to Ms. Supergan, receiving an e-mail from Ms. Supergan, and filing the returned paperwork. Either way, Ms. Supergan would not be fulfilling her job responsibilities.

11. Ms. Supergan's job responsibilities included preparing a variety of financial reports for the larger infrastructure team. Some of the information that she would need to complete

these reports was available in electronic form, but some of the information was not. In order to complete the reports, Ms. Supergan needed access to persons within CHEP and paper invoices, contracts, and purchase orders, which were maintained at CHEP. Part of Ms. Supergan's duties included meeting, in person, with a variety of infrastructure managers and directors to review these financial reports. The preparation of the financial reports required Ms. Supergan to be physically present at CHEP's office.

12. From January 2008 to July 2009, Ms. Supergan experienced severe infections, including Methicillin-resistant Staphylococcus aureus (MRSA). Ms. Supergan contends that the infections are a result of a low white blood count. There was no competent medical evidence to support her contention, but there is ample evidence to establish that she suffered from severe infections while employed at CHEP, and which affected her working.

13. CHEP had three policies potentially applicable to Ms. Supergan's medical condition: a Family and Medical Leave Act (FMLA) Policy, a Short-Term Disability (STD) Policy, and a Disability Policy.

14. Under CHEP's FMLA Policy, qualified employees seeking FMLA leave would submit their requests to Morneau Sobeco (Morneau), a third-party that administered CHEP's Benefit



Center. Upon receipt of such requests, Morneau analyzed the requests and determined whether the employees were eligible for FMLA leave. Although Morneau kept CHEP's Human Resources (HR) Department apprised of an employee's FMLA status, Morneau did not forward the employee's request for FMLA leave or any other paperwork it may have obtained from the employee or the employee's healthcare provider to HR.

15. Under CHEP's STD Policy, qualified employees seeking STD benefits submitted their requests and necessary paperwork to Morneau, who delivered the paperwork to The Prudential Insurance Company of America (Prudential), CHEP's third-party STD carrier. After Prudential received the paperwork, it worked directly with the CHEP employee and the employee's healthcare provider to determine whether the employee was eligible for healthcare benefits. Prudential did not submit the employee's paperwork to CHEP. In Ms. Supergan's case, she did not sign a release allowing Prudential to advise CHEP of her medical information.

16. The CHEP Employee Handbook does not specifically speak to the procedure that an employee is to follow when requesting an accommodation for a medical condition. The handbook does state that, if an employee has a question about a particular policy, the employee may obtain additional information from the employee's supervisor or HR. Additionally, Mr. Zimmerman had

referred Ms. Supergan to HR for questions relating to medical conditions and leave.

17. CHEP's leave of absence policy, effective May 20, 2008, provides:

The employee is responsible for obtaining the appropriate medical release and forwarding the RTW [Return to Work] paperwork to Morneau Sobeco prior to returning to work. The employee cannot return to work without an appropriate healthcare provider's release, indicating that they may return to work. The release must also indicate any work restrictions or accommodations.

\* \* \*

Morneau Sobeco is responsible for communicating to the HRBL [Human Resources Benefits Liaison] and the Human Resource Manager (HRM) any work restrictions or critical issues for the RTW once the employee has notified them and prior to the employee coming back to work.

\* \* \*

Prudential will communicate to Morneau Sobeco any work restrictions or critical issues and provide any updated information to the Prudential reports website on changes to Advice to Pays.

18. Between January 2008 and July 2009, Ms. Supergan requested and was granted leave on eight separate occasions: January 5, 2008, to January 28, 2008; February 26, 2008, to April 14, 2008; June 3, 2008, to June 23, 2008; July 18, 2008, to August 25, 2008; August 27, 2008, to October 8, 2008,

January 5, 2009, to January 27, 2009; February 27, 2009, to March 15, 2009; and May 11, 2009, to July 2, 2009. During this 18-month period, Ms. Supergan missed 192 work days, or more than 38 work weeks.

19. Ms. Supergan signed a claimant statement dated September 24, 2008, and sent it to Prudential for the leave that she took in July and August 2008. On the claimant statement form, Ms. Supergan was asked to list any accommodations she felt would enable her to work. Ms. Supergan replied "work from home." CHEP never received this information from either Prudential or Morneau. No evidence was presented to establish whether Morneau was aware of the request.

20. Neither Prudential nor Morneau had the authority to grant requests for accommodations by CHEP's employees. CHEP's HR Department had the authority and was responsible for determining whether a request for an accommodation could be granted.

21. At the end of Ms. Supergan's leave from July 18, 2008, to August 25, 2008, Ms. Supergan's physician, Dr. Maach, released her to return to work. The release stated: "Patient can go back to work on 8/25/8." There were no restrictions on the release and no list of accommodations that would be required for Ms. Supergan to continue working.

22. Dr. Maach signed another release for Ms. Supergan to return to work after her leave of absence from August 27, 2008, to October 8, 2008. The release stated: "Patient can go back to work on 10/8/8." Again no restrictions or accommodations were listed by the physician.

23. On March 9, 2009, Dr. Maach released her to return to work. The release stated: "Patient is ill & needs time off [sic] can go back to work 3/16/9." Ms. Supergan believes that this form was sent to Morneau. The physician also completed a Prudential Attending Physician Statement on March 9, 2009, stating that Ms. Supergan "prefer[s] to work @ home because of recurrent infection." CHEP was not given a copy of the Prudential Attending Physician Statement nor was there any evidence that Morneau had received the statement. No evidence was provided to show whether Ms. Supergan had provided Morneau, as required by CHEP's leave policy, with a physician statement that Ms. Supergan could return to work but with limitations or accommodations.

24. During the latter part of 2008 and the early part of 2009, some disputes arose concerning the payment of Ms. Supergan's claims to Prudential and some personal leave time, which had been deducted from Ms. Supergan's leave account. Thomasina Kennedy, who was CHEP's HR liaison, spoke with Ms. Supergan during this time period concerning the payment of

claims and leave time, and Ms. Supergan did not mention her request for an accommodation to Ms. Kennedy during these discussions.

25. Because of the difficulty in resolving the payment of claims and leave time issues, Ms. Supergan retained an attorney, Lee Karina Dani, to get the issues resolved. By letters dated March 10 and March 17, 2009, Ms. Dani wrote directly to CHEP concerning the issues, but never discussed a request for an accommodation to work at home.<sup>2</sup> By letters dated March 24 and April 27, 2009, Ms. Dani communicated with CHEP's attorney and did not discuss a request for an accommodation.

26. On March 25, 2009, Ms. Supergan filed a Charge of Discrimination with the Commission, alleging that she had requested and been denied the accommodation of working at home and that she believed that she had been discriminated against in violation of the Americans with Disabilities Act.

27. Ms. Supergan contends that she had advised her supervisor, Mr. Zimmerman, of her need to work at home because of her medical condition. However, her communications with Mr. Zimmerman via e-mail do not support her contention. By e-mail dated May 11, 2009, Ms. Supergan wrote:

As I'm sure you probably know, when I returned to work this last time it was with the stipulation that I was to only be working from home so that I would be limiting my exposure to other people's germs

and illnesses. This was never allowed and now I am sick again . . . makes me pretty angry if you know what I mean.

28. In response to Ms. Supergan's May 11th e-mail,

Mr. Zimmerman replied:

Thanks for letting me know but I have never been aware of your medical conditions and as far as I am aware this is confidential information due to US laws. I have copied Tommie [Kennedy] to keep her informed of your situation and if any actions need to be taken.

29. On May 13, 2009, Mr. Zimmerman sent Ms. Supergan an e-mail which stated:

I am not aware of any detail regarding your illness nor of any formal request to work from home. Please can I ask you speak to HR in this regard.

30. On May 14, 2009, Ms. Supergan sent an e-mail to Mr. Zimmerman, stating:

While I understand that you have been kept in the dark about my situation, you are my boss and need to understand so that you can staff accordingly.

So, here's the scoop . . . this is the second time that the doctor has told you folks, (via the forms submitted to Morneau and Prudential) that I should be working from home. It's simply about exposure-mine to the endless bunch of sick folks who come to work everyday infecting us with their germs and others by limiting their exposed [sic] to this nasty MRSA bug. Also, I did "formally" tell you what the doctor stated and you answered by saying no to my request.

31. The earliest that CHEP could have been made aware of a request for an accommodation was the receipt of the March 17, 2009, letter from Ms. Dani to Ms. Kennedy, in which Ms. Dani attached the Prudential Attending Physician Statement dated March 9, 2009. Ms. Kennedy did not review the attachments, but sent them to Prudential. The physician statement did not contain sufficient information to determine whether working at home was medically necessary because the physician stated "prefer to work @ home," and Ms. Supergan returned to work on March 16, 2009, based on a release from the treating physician that did not contain any limitations or accommodations.

32. On May 11, 2009, Ms. Supergan sent the following e-mail to Mr. Zimmerman:

Afternoon,

Just got back from the doctor's office and he is absolutely firm on me not being in the building exposing others to MRSA. Honestly, I am quite confused by the position CHEP is taking on this. MRSA has been epidemic in our area for over a year now and is far more deadly than the swine flue outbreak-in other words, more people have died from MRSA than swine flu in our area.

Additionally, you sent me home 2 days in a row this past week because I was coughing and people were complaining. You then allowed me to work from home 2 more days for the same reason. I'm sorry . . . I don't get why working from home now is not acceptable when MRSA is far more deadly than swine flu!!

Anyway, I have already called CHEP Benefits, Prudential as well as my attorney. At this point . . . there is no return date.

33. Mr. Zimmerman forwarded the e-mail to Ms. Kennedy in HR. At that time, Ms. Kennedy lacked the information needed to determine whether, or for how long, a work-from-home accommodation might be necessary or appropriate. She, therefore, examined various websites, including the Center for Disease Control's website, for guidance on what accommodations might be necessary when an employee has MRSA, only to discover that, ordinarily, employees with such infections should not be excluded from a workplace unless: (a) they have a wound with drainage that cannot be covered with a clean and dry bandage or (b) they do not have good hygiene practices. At the time of Ms. Supergan's May 11, 2009, request to work at home, there was nothing to suggest that Ms. Supergan had a wound with drainage, which could not be covered with a clean and dry bandage or that Ms. Supergan did not have good hygiene practices.

34. Because the need for, or type of, accommodations was not obvious, CHEP asked Ms. Supergan to participate in the interactive process. On May 21, 2009, Ms. Kennedy wrote to Ms. Supergan, asking for her assistance. To help CHEP's HR Department identify what, if any reasonable accommodations might be appropriate, Ms. Kennedy asked Ms. Supergan to have her



physician answer, on or before June 11, 2009, the following questions:

1. Can you please describe the nature and severity of Ms. Supergan's condition? Is this a chronic condition?
2. If so, how often and with what frequency do you expect flare ups of the chronic condition? How long do you expect an individual flare up to last?
3. Ms. Supergan currently works as a Financial Analyst. This job requires, among other things, that Ms. Supergan interact with other CHEP employees at CHEP's headquarters. In view of Ms. Supergan's condition, do you have any concerns with her ability to interact with other CHEP employees?
4. If so, when are the times that you have such concerns and why?
5. Does Ms. Supergan currently pose a threat to herself or others? If so, how?
6. If your answer to question number 4 is no, are there times when you believe that Ms. Supergan poses a threat to herself or others? If so, when do you believe Ms. Supergan poses a threat to herself or others? How?
7. In view of the foregoing, does Ms. Supergan require any accommodation to allow her to perform the essential functions of her job without posing a threat to herself or others? If so, what kind of accommodation(s) are necessary?
8. If you believe an accommodation is necessary, please indicate your best estimate as to how long such accommodation will be required.

35. Ms. Supergan initially told Ms. Kennedy to contact Ms. Supergan's attorney. However, Ms. Supergan eventually took the form to Dr. Maach to be filled out and returned to Ms. Kennedy. Dr. Maach failed to respond to the request.

36. In May 2009, Ms. Supergan requested that CHEP extend her leave of absence for an additional month. Ms. Kennedy advised Ms. Supergan that CHEP was temporarily extending her leave of absence for one month, conditioned on a determination that her request to extend her leave of absence would be granted pending a determination of whether Ms. Supergan was eligible for further leave under FMLA and the receipt of Dr. Maach's responses to the questions posed by Ms. Kennedy on May 21, 2009.

37. On June 15, 2009, Ms. Kennedy again wrote to Ms. Supergan, requesting that Ms. Supergan's physician respond to the questions by June 19, 2009. On June 17, 2009, Dr. Maach responded, stating that Ms. Supergan had a chronic MRSA infection, which would flare up about once a month. He further stated that Ms. Supergan would be a medical threat to others in terms of infecting others with MRSA. He "recommend[ed] working from home so not to infect other employees with MRSA" for "as long as necessary." It should be noted that the recommendation of working at home was to keep others from becoming infected and not as an accommodation to keep Ms. Supergan from becoming reinfected.

38. Based on Dr. Maach's response, Ms. Kennedy had additional questions concerning whether there were other accommodations available and whether Ms. Supergan would need to work at home on a permanent basis or for a more limited period of time. On June 19, 2009, Ms. Kennedy sent the following questions to Ms. Supergan to be answered by Dr. Maach on or before June 24, 2009:

1. In your answers to our letter, dated May 21, 2009, you state that you "recommend" that Ms. Supergan work from home. Is it medically necessary that she do so, or are there other forms of accommodations that can be made? For example, could Ms. Supergan work at CHEP provided that she covers her infection with a dry, clean bandage? Under this scenario, would it be necessary for CHEP to provide her with extra break(s) so that she can change her bandages? If so, how often? Or, if CHEP were to modify Ms. Supergan's workstation so as to minimize her contacts with other employees, could she return to work?

2. Also, in your answers to our letter, you state that Ms. Supergan is a "medical threat to others in terms of infecting others [with] MRSA." Is this threat a permanent threat, or are there limited--but specific--times when she poses such a threat? If this threat is not a permanent one, when does Ms. Supergan pose such a threat? What are the circumstances that make her a threat?

3. Finally, in your answers to our letter, you state that an accommodation will be required "as long as necessary." What do you mean by this? Are you stating that Ms. Supergan needs to work from home indefinitely? Are there any periods of time in the foreseeable future when Ms. Supergan

will be able to report to work at CHEP? If Ms. Supergan need only work from home when she suffers from a MRSA "flare-up," how long do you estimate that it will take her to recover from such a "flare-up?"

39. By e-mail dated June 25, 2009, Ms. Supergan notified Ms. Kennedy that her next appointment with Dr. Maach was July 1, 2009, and, at that time, she would ask her doctor to answer the additional questions posed on June 19, 2009, and would ask about a return-to-work date.

40. On July 1, 2009, Ms. Supergan sent an e-mail to Ms. Kennedy, stating: "The doctor has not released me to return to work in the office. . . . Dr. Maach suggested that you call him during his regular office hours to discuss the reasons for his decisions." At this point, Ms. Supergan had not given Ms. Kennedy authorization to contact her doctor directly to discuss her health conditions. Ms. Kennedy e-mailed Ms. Supergan, asking when she would be able to return, to which Ms. Supergan responded, "You will need to speak with the doctor."

41. On July 2, 2009, Ms. Kennedy called Dr. Maach's office and was advised that he was not available. Ms. Kennedy asked the doctor's office staff to contact him and ask him to return her call. She was advised that the office staff would try, but Ms. Kennedy received no return call from the doctor.

42. Having received no follow-up information from Dr. Maach and given Ms. Supergan's refusal to discuss the issue of a return date with Ms. Kennedy, Ms. Kennedy wrote to Ms. Supergan on July 2, 2009, terminating Ms. Supergan's employment with CHEP.

43. Ms. Supergan contends that she has worked at home in the past, and, therefore, there is no reason why she should not be allowed to do so indefinitely. Ms. Supergan had been allowed to work at home at times when there were special projects that could be performed at home and when needed to be home to meet repairmen. When her supervisor learned that Ms. Supergan could not work from home and be on family medical leave at the same time, he advised Ms. Supergan that she could not work at home while on medical leave. When Ms. Supergan worked at home, it was for short periods of time and for special projects which could be performed from home.

44. CHEP did have one employee who worked from home for approximately a year while recovering from an injury. The employee did not perform the same job duties as Ms. Supergan, and that employee's work could be performed at home. Additionally, it was not intended that the employee who worked from home would be doing so on a permanent basis.

CONCLUSIONS OF LAW

45. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat. (2009).

46. Ms. Supergan has alleged that CHEP discriminated against her based on a handicap by failing to make a reasonable accommodation for her alleged disability and by terminating her employment. Subsection 760.10(1)(a), Florida Statutes (2008),<sup>3</sup> provides that it is an unlawful employment practice for an employer to discharge or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's handicap. Subsection 760.10(8)(a), Florida Statutes, provides that it is not an unlawful employment practice to "[t]ake or fail to take any action on the basis of . . . handicap . . . in those certain instances in which . . . absence of a particular handicap . . . is a bona fide occupational qualification reasonably necessary for the performance of the particular employment to which such action or inaction is related."

47. The Florida Civil Rights Act of 1992 is patterned after the Americans with Disabilities Act, 42 U.S.C. Section 12101, et seq. (the ADA), and Florida courts have recognized that a "disability discrimination cause of action [under Florida law] is analyzed under the ADA." Wimberly v. Securities

Technology, Group, Inc., 866 So. 2d 146, 147 (Fla. 4th DCA 2004); Razner v. Wellington Regional Medical Center, Inc., 837 So. 2d 437, 440 (Fla. 4th DCA 2002); Smith v. Avatar Properties, Inc., 714 So. 2d 1103, 1106 (Fla. 5th DCA 1998).

48. In order to establish a prima facie case of an unlawful employment practice for discrimination based on a disability, Ms. Supergan must establish by a preponderance of the evidence that: (1) she is disabled; (2) she is a qualified individual; and (3) she was discriminated against by CHEP because of her disability. See D'Angelo v. ConAgra Foods, Inc., 422 F.3d 1220, 1236 (11th Cir. 2005); Lucas v. W.W. Grainger, Inc., 257 F.3d 1249, 1255 (11th Cir. 2001). Ms. Supergan claims that CHEP failed to make a reasonable accommodation for her disability and terminated her employment because of her disability.

49. Other than Ms. Supergan's contention, there is no competent medical evidence to support that Ms. Supergan had an immune system failure. However, there was sufficient information that Ms. Supergan had chronic bouts with infections like MRSA, which affected her ability to work around other employees because of the risk of infecting her fellow employees. The evidence establishes that Ms. Supergan had a physical impairment that substantially limited a major life activity--working.

50. Ms. Supergan did not establish that she is a qualified individual. A qualified individual is an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds. 42 U.S.C. § 1211(8); see Davis v. Florida Power & Light Co., 205 F.3d 1301, 1305 (11th Cir. 2000)("[I]f [the petitioner] is unable to perform an essential function of his . . . job even with an accommodation, he is, by definition, not a 'qualified individual' and, therefore, not covered under the ADA. . . . [Petitioner] must show either that he can perform the essential functions of his job without accommodation, or failing that, show that he can perform the essential functions of his job with a reasonable accommodation.").

51. In Kvorjak v. Maine, 259 F.3d 48, 55 (1st Cir. 2001), the court discussed the meaning of the term "essential function" and stated:

An "essential function" is a fundamental job duty of the position at issue. The term does not include "marginal" tasks, but may encompass "individual or idiosyncratic characteristics" of the job. In the absence of evidence of discriminatory animus, courts generally give "substantial weight" to the employer's judgment as to what functions are essential. Other evidence also is relevant, including: "written job descriptions, consequences of not requiring the function, work experience of past incumbents, and work experience of current incumbents."  
(Citations omitted)



52. There was extensive testimony concerning the essential functions of Ms. Supergan's position. Substantial weight is given to the employer's view of the job requirements of a position.

The ADA requires us to consider "the employer's judgment as to what functions of a job are essential[.]" 42 U.S.C. § 1211(8). The employer describes the jobs and functions required to perform that job. Anderson v. Coors Brewing Co., 181 F.3d 1171, 1177 (10th Cir. 1999). We will not second guess the employer's judgment when its job description is job-related, uniformly enforced, and consistent with business necessity. . . . In short, the essential function "inquiry is not intended to second guess the employer or to require the employer to lower company standards." Tate v. Farmland Indus. Inc., 268 F.3d 989, 993 (10th Cir. 2001).

Mason v. Avaya Communs., Inc., 357 F.3d 1114, 1119 (10th Cir. 2004).

53. Some of the essential functions of Ms. Supergan's position required her to deal with the review of U.S. invoices. Some of the necessary information was contained in a paper format rather an electronic format. In order to be able to gather the paperwork and to present the paperwork to her supervisor for approval, Ms. Supergan would have to physically be able to get the paperwork and deliver it to her supervisor. Ms. Supergan contends that other employees could scan the paper work and send it to her by e-mail and that other employees could

make certain that the invoices were approved by the supervisor and sent on to accounting for payment. An employer is not required to accommodate a disability "by reallocating essential functions to make other workers' jobs more onerous." Feliciano v. State of Rhode Island, 160 F.3d 780, 785 (1st Cir. 1998). In order to be able to deal with the information that was communicated by paper, Ms. Supergan needed to be present at the CHEP headquarters.

54. Although, Ms. Supergan did not consider the purchasing of hardware and software to be an essential function of her job, it was. As a member of the sourcing team, Ms. Supergan, as well as the other team members, were expected to be able to purchase hardware and software as part of their job functions. In order to perform this job function, the employee needed to be physically at CHEP's headquarters.

55. Ms. Supergan was responsible for meeting with different managers and supervisors to review different reports and documents. Some of the meetings were scheduled, and some were not. Because the meetings required a review and examination of reports and other paper documents, it was necessary that Ms. Supergan be physically present at the meetings.

56. Ms. Supergan was very knowledgeable about her job, and many coworkers would come to her for information. Sometimes,

she could respond by electronic means, but many times the requests for information required a review of paper materials, which required Ms. Supergan's presence at the office.

57. After Ms. Supergan's request to Mr. Zimmerman to work at home in May 2009, CHEP began discussions with Ms. Supergan to determine what accommodations could be made for Ms. Supergan. Ms. Supergan takes the position that the only reasonable accommodation that could be made is to allow her to work at home indefinitely. Ms. Supergan claims that she is getting better, but there is still no time frame in which she could see when she would no longer need to work at home.

58. There was no medical evidence that Ms. Supergan is getting MRSA from being at work. Based on Dr. Maach's contention that Ms. Supergan needs to work at home in order to keep from infecting others, Ms. Kennedy's follow-up questions on what other accommodations could be made to keep coworkers from becoming infected was reasonable. There has been no further documentation from Dr. Maach if there are other accommodations that could be made, and no evidence was presented from Dr. Maach that working at home is the only accommodation that could be made to keep other coworkers from becoming infected.

59. The employee has the burden to identify a reasonable accommodation. See Earl v. Mervyns, Inc., 207 F.3d 1361, 1367 (11th Cir. 2000). An employee is not required to accommodate

the employee only in the manner which the employee desires. Id.  
The accommodation of working at home is not a reasonable accommodation because it requires CHEP to eliminate essential functions of Ms. Supergan's position, would require other employees to perform the work which should have been performed by Ms. Supergan, and prevents the functioning of the sourcing team as a team.

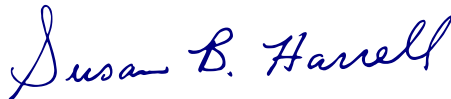
60. Ms. Supergan has failed to show that CHEP discriminated against her for failure to allow her to work at home. Ms. Supergan has failed to establish that CHEP terminated her employment based on her disability. Ms. Supergan was given ample leave time for her medical conditions during 2008 and 2009. By July 2009, she had missed 192 days. Ms. Supergan could not perform the essential functions of her job because she was not on the job, and there was no definite date of when she could return to the job. Additionally, Ms. Supergan was not as forthcoming as she could have been in coming up with a reasonable accommodation that would allow her continue to perform the essential functions of her job. Her termination was not an unlawful employment practice.

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered finding

that CHEP did not commit any unlawful employment practice and dismissing Ms. Supergan's Petition for Relief.

DONE AND ENTERED this 17th day of May, 2010, in Tallahassee, Leon County, Florida.



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SUSAN B. HARRELL  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 17th day of May, 2010.

ENDNOTES

- <sup>1/</sup> The sourcing team was also referred to as the purchasing team.
- <sup>2/</sup> Ms. Dani attached documentation to the letter concerning Ms. Supergan's leave request for February and March 2009. One of the attachments was a statement from Ms. Supergan's physician on Prudential's Attending Physician Statement, which stated: "prefer to work @ home because of recurrent infection."
- <sup>3/</sup> Unless otherwise indicated, all references to the Florida Statutes are to the 2008 version.

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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.