STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEBORAH MCRAE,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 09-6222
	)	
KASH N' KARRY, d/b/a SWEETBAY SUPERMARKET,	)	
	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to notice, the final hearing in this case was heard before Daniel M. Kilbride, Administrative Law Judge of the Division of Administrative Hearings, on May 18, 19, and 20, 2010, in Fort Myers, Florida.

APPEARANCES

For Petitioner: Geralyn Farrell Noonan, Esquire
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For Respondent: Peter W. Zinober, Esquire
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STATEMENT OF THE ISSUES

Whether Petitioner was subjected to age, marital status, and disability or perceived disability discrimination while

employed by Respondent, in violation of Subsection 760.10(1)(a), Florida Statutes (2009).[1]

Whether Petitioner was subjected to retaliation while employed by Respondent, in violation of Subsection 760.10(7), Florida Statutes.

PRELIMINARY STATEMENT

Petitioner filed her Charge of Discrimination with the Florida Commission on Human Relations (FCHR) on June 12, 2009. Following an investigation, a Notice of Determination: No Cause was issued on October 23, 2009. A Petition for Relief was timely filed, with the FCHR on November 10, 2010 and referred to the Division of Administrative Hearings on November 12, 2009, and discovery ensued. This matter was continued once at the request of Petitioner. Respondent's Motion to Strike Petitioner's Demand for Compensatory and Punitive Damages was granted.

At the hearing, Petitioner testified in her own behalf and presented the testimony of five fact witnesses and one expert witness, Everett Tessner, Ph.D. Respondent presented the testimony of 11 witnesses: Patrick Fung, Anna Lowry, Edward Pitts, Dina Harker, Carten D. Thomas, Nancy Nieradha, Erin Goffena, Opal Gagliardo, Diane Fagan, Christine Stills, and Anna Winters.

Petitioner offered three exhibits, which were admitted in evidence. Respondent offered nine exhibits, which were admitted.

The three-volume Transcript was filed on June 15, 2010. The parties timely filed their proposed recommended orders. They have been given careful consideration in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner, Deborah McRae, is a registered pharmacist, licensed in Florida and Georgia since January 25, 1978. Petitioner has been employed by Respondent, Kash N' Karry, d/b/a Sweetbay Supermarket (Sweetbay or Respondent), from January 2005 to the present. Petitioner is currently on an extended leave of absence, but remains employed by Respondent.

2. Respondent is an employer under the Florida Civil Rights Act (FCRA) of 1992.

A. Petitioner's Employment at the Daniels Parkway Store

3. From January 2005 until December 2008, Petitioner worked as an assistant pharmacy manager inside Sweetbay store located on Daniels Parkway in Fort Myers, Florida. Her job duties included filling and dispensing prescriptions, counseling customers, screening for drug interactions or patient allergies, communicating with physicians to clarify prescriptions, and contacting insurance companies when necessary.

4. Although the Daniels Parkway pharmacy was relatively slow, Respondent never promised Petitioner that she would not be required to work at a high-volume store. In fact, during the time she was employed at the Daniels Parkway store, she covered shifts at higher-volume stores, including the North Fort Myers store, whose pharmacy had at least double the weekly volume of the Daniels Parkway store.

5. Although upper management had not been informed of problems with Petitioner's job performance at the Daniels Parkway store, the pharmacy manager and store management received some complaints from customers about Petitioner being rude and providing poor customer service. Store management handled these complaints informally by speaking directly to Petitioner about them.

6. Petitioner's pharmacy manager at the Daniels Parkway store was Patrick Fung (Fung). In addition to a few customer complaints to Fung, Petitioner would leave a lot of tasks for Fung to complete the following day and would create difficulties with respect to the pharmacy schedule.

7. In February 2009, Respondent permanently closed the Daniels Parkway store. Earlier, in mid-January 2009, the company announced to the associates that the Daniels Parkway store would be closing.

8. In December 2008, Petitioner took a medical leave of absence for back surgery. Although she mentioned that she was having back surgery, Petitioner did not inform anyone in Respondent's management that she had a permanent disability concerning her back or that she had any other disability.

9. Respondent's management did not know Petitioner had, nor did it regard Petitioner as having, a permanent disability. Petitioner never asked for an accommodation for her back pain or any mental health disability. Indeed, Petitioner never submitted any documents to Respondent, stating that she had a disability or any type of mental health condition.

10. Petitioner never told Respondent that she had a mental health condition. No one in Respondent's management knew or thought that Petitioner had a mental condition and never saw any documentation to that effect.

11. Petitioner was still on a medical leave of absence in early February 2009, when the Daniels Parkway store closed.

B. Employment and Promotion to Pharmacy Manager Position at Lehigh Acres

12. In mid-January 2009, when the company announced the Daniels Parkway store closing, there were only two open pharmacy positions in the region: the assistant pharmacy manager position at the store in Lehigh Acres near Fort Myers, Florida,

and the assistant pharmacy manager position in the store in Estero, Florida.

13. The regional pharmacy business supervisor during the relevant time period was Diane Fagan (Fagan). Fagan made an effort to place Petitioner and Fung into the two open pharmacy positions. Fagan felt both Fung and Petitioner were good pharmacists and wished to retain them with Respondent.

14. Because Fung was a pharmacy manager and actively on the payroll, he was given the option of accepting either of the two open assistant pharmacy manager positions or, alternatively, to accept a severance package. Fung voluntarily selected the Estero position, to become effective after the Daniels Parkway store closed. In doing so, Fung voluntarily accepted a demotion with a concomitant reduction in pay. It is undisputed that Fung was qualified for the Estero position, he was Petitioner's supervisor at the time, and, therefore, it was reasonable that he be offered the position first.

15. By allowing Fung to decide between the two positions, Fagan did not consider Petitioner's or Fung's age, marital status, or disability status. Petitioner failed to provide any evidence as to Fung's age, marital status or disability status, and whether they differed from Petitioner's. There is no evidence on this issue that demonstrated that any decisions made by Respondent regarding Petitioner's employment were made

because of age, her marital status, disability or the perception that she had a disability.

16. After Fung selected the Estero position, Petitioner was offered the remaining assistant pharmacy manager position at the Lehigh Acres store, to become effective after the Daniels Parkway store closed, and when she returned from medical leave. At the time, Petitioner did not yet have a projected release date to return to work. Alternatively, she was offered a severance package.

17. In late February 2009, the pharmacy manager at the Lehigh Acres store abruptly resigned her position. On March 5, 2009, the two positions were offered to Petitioner. The following day, Petitioner voluntarily accepted the position of pharmacy manager. This was a promotion for Petitioner, which came with an increase in salary and additional benefits.

18. During these discussions, Petitioner was offered the option of either a 30-hour or 36-hour work week (the 36-hour week came with the pro rata increase in pay). Petitioner voluntarily selected the 30-hour work week.

19. Petitioner expressed that a 30-hour work week would be a positive for her. Petitioner never informed Respondent that she could not go to the Lehigh Acres store or that working at the Lehigh Acres store, in any way, would or did affect her back condition or any other alleged disability she may have had.

20. Petitioner never informed Respondent that she had a permanent disability of any kind. Petitioner claims that she told Fagan that "she does not do well under stress." Assuming that to be true, that statement does not qualify as informing Respondent that she had a mental health disability, and Petitioner never asked for a reasonable accommodation for any mental condition or disability. She never filed a request in writing for reasonable accommodation. The discussions about the job transfer and promotion were communicated to Petitioner while she was out on leave for the back surgery. Petitioner never indicated that the phone calls made to her by Fagan were inappropriate or unwelcomed.

21. To the extent Petitioner contends the Lehigh Acres store was stressful due to high volume, the evidence shows that the Lehigh Acres pharmacy, although busier than the Daniels Parkway store, was a low-volume pharmacy, in comparison to other pharmacies in the region.

22. Petitioner started in her pharmacy manager position at the Lehigh Acres Pharmacy on March 15, 2009, after she had been released by her doctor to return to work without restrictions of any kind. The job duties of a pharmacy manager are substantially the same as the job duties of an assistant pharmacy manager, the position Petitioner held at the Daniels Parkway store. The primary additional duty was that Petitioner

was charged with the duty of working out the schedule between her and the assistant pharmacist and has input as to the pharmacy technician's work schedule.

23. Petitioner's assistant pharmacist at the Lehigh Acres store was Opal Gagliardo (Gagliardo). Petitioner presented no evidence as to Gagliardo's age or disability status, but testimony showed that she was married. In addition, Eron Goffena worked as a pharmacy technician at the Lehigh Acres pharmacy on Mondays and Tuesdays.

24. Shortly after Petitioner started at the Lehigh Acres store, Respondent started receiving customer complaints about her. These included complaints about disorganization, inaccurate and incomplete filling of prescriptions, failure to fill prescriptions in a timely manner, and talking on the phone while ignoring customers for extended periods of time. Some customers became so dissatisfied that they transferred their prescriptions to another store.

25. The Lehigh Acres pharmacy was open six days per week and was closed on Sundays. Petitioner was scheduled to work three 10-hour shifts per week. When Petitioner started at the Lehigh Acres store, Gagliardo was scheduled to work two 10-hour shifts per week, and the other shift was covered by another rotating pharmacist. Soon thereafter, in March 2009, Gagliardo

agreed to become full-time and, like Petitioner, worked three 10-hour shifts per week.

26. Consistent with normal practice, Petitioner and Gagliardo worked together to agree to a mutually-acceptable schedule: two-day-on/two-day-off, with each having every other weekend off. However, Petitioner later decided she no longer wanted to work this schedule and sought to make changes to it. This gave rise to an ongoing disagreement between Petitioner and Gagliardo regarding the schedule, which was not resolved by the time Petitioner went out on her second leave of absence.

27. In addition, Petitioner failed to complete many of her daily pharmacist duties. The testimony is credible that she failed to consistently fill the prescriptions that came in during her shift; instead, leaving them for the next shift's pharmacist. Petitioner was disorganized and did not follow the proper workflow procedures. This resulted in customers' prescriptions not being completed in a timely manner. Additionally, Petitioner did not answer the telephone often while she was working, failed to put up the stock that came in during her shift, left the pharmacy messy, and would not empty her garbage, leaving it overnight for the next pharmacist to do.

28. Petitioner did not work well with her coworkers and, unlike other pharmacists, delegated problems and insurance issues to the pharmacy technicians, or left them for Gagliardo.

29. On Saturday, March 21, 2009, Gagliardo wrote a note to Petitioner setting forth her concerns about her work and customer complaints, and how it was affecting Gagliardo's working conditions. Gagliardo left the note next to the pharmacy computer for Petitioner to read during her next scheduled shift.

30. When Fagan learned of customer complaints about Petitioner and issues regarding the timeliness of processing prescriptions, she asked her pharmacy specialist, Christine Stills (Stills), to visit the store to introduce the company's pharmacy workflow program to Petitioner, in order to reduce the level of stress and improve customer service.

31. On March 23, 2009, Stills, Anna Winters (Winters), and Petitioner met in Winters' office to discuss the workflow procedures. In response, Petitioner indicated that she wanted additional technician hours to help with the workflow. Petitioner did not express or suggest that her desire for more technician hours was, in any way, due to, or a request for accommodation for any disability.

32. Respondent has company-wide guidelines for determining the number of pharmacy technician hours that can be used in each store, based on the number of prescription filled by the store per week. The staffing at the Lehigh Acres pharmacy was consistent with these guidelines and was consistent with

staffing before and after Petitioner worked there. Although Petitioner disagreed with the guidelines, Petitioner's pharmacy technician hours actually exceeded the company guidelines.

33. Pursuant to the guidelines, a pharmacy with Lehigh Acres' volume was allotted six hours of technician help per week. During Petitioner's tenure, the Lehigh Acres pharmacy was provided at least 13 hours of technician help. In addition, Petitioner had a trainee helping her on the cash register for at least two days. The Lehigh Acres pharmacy also was staffed similarly pursuant to the guidelines under the previous pharmacy manager, Anna Lowry. The customer volume (and number of technician hours) at the Lehigh Acres pharmacy has remained approximately the same since Petitioner went out on a second leave of absence.

34. Following the March 23, 2009, meeting, Petitioner went back to the pharmacy and found the note Gagliardo had left by the computer. Petitioner returned to Stills and accused Gagliardo of "sabotaging" her. Petitioner also called Gagliardo at home that evening and was very belligerent, accusing Gagliardo of "sabotage" and stating that Gagliardo had "crucified her" and "nailed her to the cross."

35. On Friday, April 3, 2009, a meeting was held at the Lehigh Acres store between Petitioner, Fagan, Stills and Winters. This meeting was to be a fact-finding meeting to let

Petitioner know her performance was not at the expected level, to discuss the customer complaints and concerns, and to get some feedback from Petitioner as to why this was happening.

36. During this meeting, Petitioner was counseled with respect to the customer complaints about her. In response, Petitioner blamed Gagliardo for at least one of the complaints and again accused Gagliardo of "sabotaging" her. The only example Petitioner could provide of purported "sabotage" was that a box of paper clips she had placed on the pharmacy counter had been moved, and she believed that Gagliardo hid them (although the paper clips later were found in a drawer marked "pharmacy supplies"). Fagan asked Petitioner for other examples of "sabotage," to which Petitioner pulled out a bundle of notes, which, she suggested may reflect additional examples, but Petitioner would not turn them over or allow anyone to read them.

37. Petitioner also responded that the pharmacy manager duties were overwhelming. When asked for specifics, she could not provide any examples of duties she had as a pharmacy manager that were over and above what she previously had as the assistant pharmacy manager. Instead, Petitioner again requested that she needed more pharmacy technician hours. The pharmacy staffing guidelines were again explained to her, and her request was denied. Near the conclusion of the meeting, Fagan asked

Petitioner if she had any questions or comments in response to what had been presented, but Petitioner did not offer any questions or comments. At no time during the meeting did Petitioner say anything about age or disability discrimination, or retaliation.

38. At no time during the meeting was Petitioner ever told that her employment was being terminated, that she was being suspended or demoted, or that she was being subjected to a reduction in salary or benefits, or any other adverse employment action. Petitioner's counseling had no tangible impact on terms, conditions, or privileges of her employment. Petitioner was never suspended, her employment was not terminated, and her salary and benefits were not reduced.

39. Following the meeting, Petitioner went to the store pharmacy, gathered her personal belongings and pharmacy license, packed them up, and left the store. She was not asked to do this, nor was it even suggested; rather, she took it upon herself to behave as if she would not be returning to the store.

40. A Counseling Memo was prepared specifying the concerns and issues shared with Petitioner during the meeting. A Counseling Memo is a document on which company management highlights an issue related to job performance. It coaches an associate, as to, how that issue can be addressed and resolved. Neither the meeting nor the Counseling Memo were in any way

based on Petitioner's age, marital status, disability or any perceived disability.

41. Because Petitioner had removed her possessions from the pharmacy, management was concerned she may not be returning for her next scheduled shift: Monday, April 6, 2009. Thus, Stills (who was responsible for insuring pharmacy coverage) called Petitioner and asked her if she was reporting to work on Monday. Winters also called Petitioner to see how she was doing. Although Petitioner was offended, these calls did not constitute adverse employment actions.

42. Petitioner reported to work for her next shift on Monday, April 6, 2009, where she was presented the Counseling Memo. Petitioner was not being demoted, fired, suspended or otherwise suffering adverse employment action. In response, Petitioner wrote management, stating that she "did not realize the full responsibilities of pharmacy manager," but did not make any reference to age or disability discrimination, or retaliation.

C. Petitioner's Second Leave of Absence

43. The following day, April 7, 2009, was the last day Petitioner worked before going back out on a medical leave of absence. The reason for this second leave of absence was a recurrence of her back pain. Prior to taking this leave of

absence, Petitioner had not told anyone that her back condition was bothering her while at the Lehigh Acres store.

44. Since going out on this second leave of absence, Petitioner has not submitted any documentation to Respondent, which indicated that she is able to return to work in any capacity. Petitioner did testify that she expects to be released to return to work in the future. In June 2009, Petitioner did receive documentation from her physician indicating she was able to return to light-duty work, but Petitioner never submitted this documentation to Respondent and never requested Respondent to provide her any kind of light-duty work. Instead, she went to a different doctor, who stated that she was unable to return to work at that time, and submitted that documentation to Respondent.

45. Petitioner remains employed by Respondent and is still on a leave of absence. She received short-term disability benefits of 100 percent of her salary for six months after going out on a leave of absence on April 7, 2009. Following the expiration of short-term disability benefits, and up to the present, Petitioner has received long-term disability benefits equivalent to one-third of her monthly salary.

46. Since going out on a leave of absence, Petitioner has not sought any other employment except to submit an application

for employment to Publix. She did not disclose to Publix that she had a disability.

D. Alleged Discrimination/Retaliation

47. Respondent has an anti-discrimination policy, which contains a complaint procedure under which employees are required to report any discrimination that they feel they are experiencing in the workplace. Petitioner was familiar with this policy and knew how to report perceived discrimination.

48. Petitioner never reported any form of discrimination to Respondent. Therefore, no decisions made by Respondent regarding Petitioner's employment were made in retaliation for reporting discrimination.

49. The evidence does not show that any decisions made by Respondent's officials regarding Petitioner's employment were made due to her age, marital status, disability, or any perceived disability. Petitioner speculates that Respondent's management may have viewed her personal pharmacy records and saw that she took anti-depressants and/or anti-anxiety medication and, from that, concluded that she suffered from a mental disability. Petitioner introduced no evidence supporting this theory. Petitioner admitted that she has no personal knowledge whether Respondent's management viewed her personal pharmacy records.

50. Petitioner admits that the conditions she alleges were discriminatory (e.g., the allegedly stressful environment at the Lehigh Acres store) were not in any way related to her back condition. Rather, Petitioner theorizes that the allegedly stressful environment exacerbated her alleged mental condition.

51. Petitioner failed to prove that she suffered age, marital status, or disability discrimination.

CONCLUSIONS OF LAW

52. DOAH has jurisdiction over the parties to and the subject matter of this proceeding pursuant to Section 120.569 and Subsections 120.57(1) and 760.11(6), Florida Statutes.

53. Section 760.10, Florida Statutes, provides that:

> (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.
>
> (b) To limit, segregate, or classify employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities, or adversely affect any individual's status as an employee, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.

54. Section 760.10, Florida Statutes, is a remedial statute and should be liberally construed. Speedway Super America, LLC v. Dupont, 993 So. 2d 75, 86 (Fla. 5th DCA 2006).

55. Florida courts have long determined that decisions under the Florida Civil Rights Act of 1992 (FCRA) should be analyzed using the same framework as cases under Title VII of the Civil Rights Act of 1964 (Title VII), as amended. Brand v. Florida Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994).

56. In Nadler v. Harvey, 2007 U.S. App. LEXIS 20272 (11th Cir. Aug. 24, 2007), the court stated:

> A plaintiff may prove (handicap) discrimination in two ways, disparate treatment and a failure to make a reasonable accommodation . . . Disparate treatment involves discriminatory animus or intent and occurs when a disabled individual is treated differently than a non-disabled or less disabled individual because of his disability. By contrast, a failure to make reasonable accommodation claim requires no animus and occurs when a covered entity fails to fulfill its affirmative duty to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, without demonstrating that the accommodation would impose an undue hardship on the operation of the business.

See also Norris v. University Hospital, Case No. 09-6130, at paragraph 66 and 67 (DOAH April 12, 2010, FCHR June 25, 2010).

57. Petitioner did not assert a failure to provide reasonable accommodation claim in her charge of discrimination,

and, indeed, admitted during the hearing that she did not request a reasonable accommodation for any known physical or mental limitations. Accordingly, this aspect of the case has not been considered.

58. In the absence of direct evidence of discriminatory intent, a complainant may attempt to prove discriminatory intent through circumstantial evidence. Where a complainant attempts to prove intentional discrimination using circumstantial evidence, the burden-shifting framework established by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981), is applied.

59. First, Petitioner must establish a prima facie case of handicap or age discrimination under the FCRA. Petitioner must prove: (1) she was qualified for the position and belongs to a protected class (e.g., is a "qualified individual with a disability"); (2) she suffered an adverse employment action; and (3) Respondent treated similarly-situated employees outside the protected class more favorably. See McDonnell Douglas, 411 U.S. at 802; Davidson v. Iona-McGregor Fire Protection & Rescue Dist., 674 So. 2d 858, 860 (Fla. 2d DCA 1996).

60. Petitioner's discrimination claims fail, because she has not proven all three prongs of the prima facie test. Petitioner: (1) did show that she was a qualified pharmacist,

but not that she was an otherwise "qualified individual with a disability" or, if so, that she ever informed Respondent of the nature of her disability; (2) did not suffer an adverse employment action; and (3) has not proven that Respondent treated similarly-situated employees outside of her protected class more favorably.

E. Petitioner Did Not Suffer an Adverse Employment Action

61. To constitute an adverse employment action, "The employer's action must impact the terms, conditions or privileges of Petitioner's job in a real or demonstrable way", Crawford v. Carroll, 529 F.3d 961 (11th Cir. 2008); Davis v. Town of Lake Park, 245 F.3d 1232, 1239 (11th Cir. 2001). See also McCaw Cellular Comm. v. Kwiatek, 763 So. 2d 1063, 1066 (Fla. 4th DCA 1999) (requiring material change in terms and conditions of employment).

62. When Petitioner transferred to the Lehigh Acres store, she received a promotion to the position of pharmacy manager and an increase in salary and benefits. Obviously, this was not an adverse employment action. Moreover, although she was counseled at the new store for performance deficiencies and customer complaints, it is well established that negative performance evaluations, discipline or counseling, standing alone, do not constitute adverse employment action. Lucas v. W.W. Grainger, Inc., 257 F.3d 1249, 1261 (11th Cir. 2001) ("To the extent

that . . . Petitioner alleges age and disability discrimination, the 'discipline' about which she complains falls short of the type of 'adverse employment action' needed to support such an allegation . . ."). Petitioner's counseling had no tangible impact on terms, conditions, or privileges of her employment. She was never suspended, her employment was not terminated, and her salary and benefits were not reduced. "Where negative performance evaluations d[o] not result in any effect on [Petitioner's] employment, [and Respondent] d[oes] not rely on the evaluations to make any employment decisions," no adverse employment action occurs. Lucas, 257 F.3d at 1261; see also Davis, 245 F.3d at 1239 (even "undeserved" negative job evaluations do not constitute an adverse action where that criticism has no tangible impact on terms, conditions, or privileges of employment); Brown v. Sybase, 287 F. Supp. 2d 1330 (S.D. Fla. 2003) (placing employee on performance improvement plan does not constitute adverse action); Akins v. Fulton County, Ga., 420 F.3d 1293 (11th Cir. 2005) (threat of job loss is not adverse action).

63. To the extent Petitioner is claiming her promotion to the Lehigh Acres store, and the counseling that followed, somehow constituted a constructive discharge, the 11th Circuit Court stated: "[t]o show constructive discharge, the employee must prove that his working conditions were so difficult or

unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." Wardwell v. School Bd. of Palm Beach County, 786 F.2d 1554, 1557 (11th Cir. 1986) (affirming judgment notwithstanding the verdict, because evidence of reprimands, criticism, and supervisor's withdrawal of support was insufficient to prove constructive discharge). In evaluating a claim of constructive discharge, courts have given us an objective standard that does not consider the Petitioner's subjective feelings. Hipp v. Liberty Nat'l Life Ins. Co., 252 F.3d 1208, 1231 (11th Cir. 2001).

64. Petitioner has not proven that her working condition was intolerable, or so difficult or unpleasant that a reasonable person in her shoes would have felt compelled to resign. Indeed, the undisputed evidence reflects that she did not resign and, in fact, still remains employed by Respondent, albeit on an extended leave of absence.

65. Moreover, Respondent claims that the workload at the Lehigh Acres Pharmacy was excessive and that the staffing was insufficient. These assertions were contradicted by the evidence, which undisputedly showed that staffing at the Lehigh Acres pharmacy was consistent with, or in excess of, company guidelines, based on the number of prescriptions filled per week, and consistent with staffing before and after Petitioner worked there. Moreover, the assistant pharmacy manager and

pharmacy technician at the Lehigh Acres store both testified that the working conditions in the Lehigh Acres pharmacy are acceptable and have continued to work there to the present, with no complaints. The evidence simply fails to establish constructive discharge.

F. Petitioner Has Not Established She Has a Disability

66. To prevail on a handicap discrimination claim, a complainant must prove that, at the time in question, she had a "handicap." When a charge of discrimination is based on a handicap, the FCRA has construed that term in accordance with the definition of "disability" under the Americans with Disabilities Act (ADA). Razner v. Wellington Reg'l Med. Ctr., Inc., 837 So. 2d 437 (Fla. 4th DCA 2002). In relevant part, the ADA defines "disability" as a physical or mental impairment that substantially limits one or more major life activities, a record of such an impairment, or having been regarded as having such an impairment. See 42 U.S.C. § 12102(1).

67. "The term 'substantially limits' means '[u]nable to perform to major life activity that the average person in the general population can perform' or is [s]significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner and duration under which the average person in the general population can perform that same

major life activity." Lenard v. A.L.P.H.A. "A Beginning",Inc., 945 So. 2d 618, 621 (Fla. 2d DCA 2006).

68. "Factors to consider when determining whether an individual is 'substantially limited' include: (1) 'the nature and severity of the impairment'; (2) 'the duration or expected duration of the impairment'; and (3) 'the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment'"; Wimberly v. Securities Tech. Group, Inc., 866 So. 2d 146, 147 (Fla. 4th DCA 2004).

69. "[A] temporary impairment, such as recuperation from surgery, will generally not qualify as a disability under ADA. An impairment simply cannot be a substantial limitation on a major life activity if it is expected to improve in a relatively short period of time." Pollard v. High's of Baltimore, Inc., 281 F.3d 462, 468 (4th Cir. 2002) (citation omitted); see also Rinehimer v. Cemcolift, Inc., 292 F.3d 375, 380 (3d Cir. 2002) (a temporary, non-chronic impairment of short duration is not a disability covered by the ADA); Danyluk-Coyle v. St. Mary's Med. Ctr., 2001 U.S. Dist. LEXIS 24574 *5 (E.D. Pa. Apr. 5, 2001) ("Petitioner herself alleges that her impairment began in August of 1999 when she fractured her ankle and began a period of recuperation. Only four months later . . . Petitioner was authorized by her doctor to return to work . . . 'without any restrictions.' During the four-month period, Petitioner elected

to take leave . . . and received Short Term Disability benefits. As Petitioner offers no substantial or persuasive evidence that Petitioner's fractured ankle was anything more than a temporary, non-chronic impairment, we find, as a matter of law, Petitioner was not actually disabled within the meaning of the ADA.").

70. Petitioner has presented no credible evidence that she has a physical or mental impairment that substantially limits one or more major life activities. Nor is there any evidence that she had a record of, or was regarded as having, such an impairment. Indeed, the only medical condition of which Petitioner informed Respondent of was the back surgery for which she took a leave of absence. However, Petitioner's back condition was temporary; she went out on leave of absence in December 2008 and was authorized by her doctor to return to work less than four months later, on March 16, 2009, without any restrictions. She went out again in April 2009 and has testified that she intends to return to work. This is not a disability for purposes of the FCRA.

71. The only evidence, other than Petitioner's own testimony, in support of her claim that she has a mental health disability was the testimony of Everett Tessmer, Ph.D. (Tessmer). He was qualified as an expert only in the area of rehabilitation counseling. Tessmer is not a physician or psychiatrist and admitted he was not qualified to diagnose

medical or mental conditions or disabilities. Moreover, Tessmer did not perform a single physical or mental health examination of Petitioner and relied exclusively on documents hand-picked by Petitioner, without performing any independent research, or asking for additional relevant documents. Accordingly, Tessmer's testimony, with respect to whether Petitioner has a disability or impairment, is not credible.

G. Petitioner Never Informed Respondent that She had a Disability

72. Petitioner admits that the conditions she alleges were discriminatory (e.g., the allegedly stressful environment at the Lehigh Acres store) were not in any way related to her back condition. Rather, the theory that has evolved during these proceedings is that she was discriminated against because she has a mental disability (e.g., she allegedly was intentionally promoted to the pharmacy manager position, because Respondent knew the allegedly stressful environment at the Lehigh Acres store would exacerbate an alleged mental condition). However, Petitioner admits that she never informed Respondent and never submitted any documents reflecting that she suffered from a mental condition. Petitioner also never informed Respondent that her temporary back pain was a disability. At most, Petitioner claims she told Fagan that "she does not do well

under stress" and that Fagan should have deduced from this statement that she suffered from a mental disability.

73. This theory was rejected in the similar case of Keeler v. Florida Dep't of Health, 324 Fed. Appx. 850 (11th Cir. 2009), in which the petitioner admitted that she did not disclose her mental disabilities to her supervisors until after the alleged adverse employment action had been taken. Nonetheless, the petitioner argued that the respondent should have known of her mental disability, because she took lots of notes, cried while speaking to her supervisor about her transfer, and advised her supervisor that her position was "too stressful" and that the "stress and volume" of work was "overwhelming." The court ruled "[t]his behavior was not . . . sufficient to put the [Respondent] on notice that [the Petitioner] was disabled because it in no way suggested that [the Petitioner] was substantially limited in any major life activity." Id. The court concluded that "[b]ecause the [Respondent] did not have sufficient knowledge of Petitioner's mental impairments, the district court correctly concluded that the Respondent could not be liable [under the ADA]." See also Cordoba v. Dillard's Inc., 419 F.3d 1169, 1186 (11th Cir. 2005) (holding that, in discriminatory discharge case, employer could not have fired the employee, "because of" a disability that she knew nothing about).

74. Here, Petitioner never informed anyone that she suffered from a mental condition or any permanent disability, and the uncontradicted evidence reflects that Respondent's management had no independent knowledge or perception of any such condition.

H. Petitioner is not a "Qualified Individual with a Disability"

75. To state a prima facie claim of handicap discrimination under the FCRA, Petitioner also must prove she is a "qualified individual with a disability." A "qualified individual with a disability" under the FCRA is 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." 42 U.S.C. § 1211(8); 29 C.F.R. § 1630.2(m); Holbrook v. City of Alpharetta, Ga., 112 F.3d 1522 (11th Cir. 1997). "Essential functions" are the fundamental job duties of the position and do not include marginal functions of the position. 29 C.F.R. § 1630.2(n).

76. Petitioner testified that, due to her back condition, she was unable to perform the essential functions of her job after she went on leave. "If a plaintiff is unable to perform the essential functions of the job, the "Plaintiff" has the burden of proving that reasonable accommodations were available and that with these accommodations he could perform the essential functions of the job." Reed v. Heil Co., 206 F.3d

1055, 1062 (11th Cir. 2000). Yet, Petitioner never asked for any reasonable accommodation for her back pain. Where an employee fails to identify a reasonable accommodation, the employer has no duty to investigate whether one exists. Earl v. Mervyn's, Inc., 207 F.3d 1361, 1365 (11th Cir. 2000).

I. Petitioner Did Not Prove that Similarly-Situated Employees Outside the Protected Class Were Treated More Favorably

77. Petitioner also did not establish that similarly-situated employees outside her protected class were treated more favorably. "In order to meet the comparability requirement a plaintiff is required to show that [s]he is similarly situated in all relevant aspects to the non-minority employee." Silvera v. Orange County Sch. Bd., 244 F.3d 1253, 1259 (11th Cir.), cert. denied, 534 U.S. 976 (2001). In other words, Petitioner must be "matched with a person or persons who have very similar job-related characteristics and who are in a similar situation." MacPherson v. Univ. of Montevallo, 922 F.2d 766, 776 (11th Cir. 1991).

78. Petitioner has testified that she felt that she, rather than Fung, should have been transferred to the Estero store after the closure of the Daniels Parkway store. However, there was no evidence presented during the hearing regarding Fung's age or disability status. Moreover, to the extent, Petitioner is now claiming that Gagliardo is a comparator.

Petitioner also failed to present any evidence to Gagliardo's age or disability status. Therefore, Petitioner has not proven that Fung or Gagliardo are employees outside Petitioner's protected class.

79. Regardless, neither Fung nor Gagliardo is similarly-situated. Fung and Petitioner held different positions, as he was Petitioner's manager at the Daniels Parkway store. At the time the Estero position needed to be filled, Petitioner was on leave for back surgery and had not yet informed Respondent when she was going to return from leave. In contrast, Fung was available to fill the position at the time, whereas Petitioner was not, and there were no open pharmacy positions at the Estero store when Petitioner returned from leave. Moreover, Gagliardo held the assistant pharmacy manager position at the Lehigh Acres store, a position that Petitioner did not request. Further, Petitioner seems to be arguing that, because Gagliardo was married, she received more favorable treatment. However, there is no evidence that Gagliardo received more favorable treatment in any way.

J. Petitioner Failed to Establish a Prima Facie Retaliation Claim

80. In addition to accusing Respondent of age and disability discrimination, Petitioner alleged that Respondent

engaged in retaliation prohibited by Subsection 760.10(7), Florida Statutes.

81. Subsection 760.10(7), Florida Statutes, provides, in pertinent part:

> (7) It is an unlawful employment practice for an employer, an employment agency, a joint labor-management committee, or a labor organization 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.

82. Petitioner's retaliation claim under the FCRA must also be appropriately analyzed using the same framework as that used in analyzing retaliation claims under Title VII of the Federal Act. See, e.g., Sanders v. Mayer's Jewelers, Inc., 942 F. Supp. 571, 573 (S.D. Fla. 1996). An employee can establish that she suffered retaliation under FCRA by proving: (1) she engaged in an activity protected by the FCRA; (2) she suffered an adverse employment action; and (3) there was a causal connection between the protected activity and the adverse employment action. Pennington v. City of Huntsville, 261 F.3d 1262, 1266 (11th Cir. 2001); Russell v. KSL Hotel Corp., 887 So. 2d 372, 379 (Fla. 3d DCA 2004).

K. Petitioner Did Not Engage in Protected Conduct

83. To establish a violation of Subsection 760.10(7), Florida Statutes, a complainant must show, as a threshold matter, that she engaged in activity protected by the FCRA (by having "opposed any practice, which is an unlawful employment practice under this section," or by having "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section"). "Merely complaining in general terms of discrimination or harassment, without indicating a connection to a protected class or providing facts sufficient to create that inference, is insufficient [to constitute protected activity under FCRA]." Tomanovich v. City of Indianapolis, 457 F.3d 656, 663 (7th Cir. 2006); see also Cavazos v. Springer, 2008 U.S. Dist. LEXIS 58317, at *25-26 (S.D. Tex. Aug. 1, 2008) ("in order for an employee's complaint to a supervisor to constitute protected activity necessary to establish a prima facie case of retaliation under the opposition clause of Section 2000e-3(a), the complaint must concern, and be in opposition to, conduct made unlawful by Title VII").

84. Petitioner admitted at the hearing that she never complained of discrimination to anyone in Respondent's management, despite the fact that she was aware of Respondent discrimination policy and knew how to report discrimination, if

it had occurred. Absent evidence that Petitioner opposed any discrimination, she has failed to establish a prima facie case in retaliation.

L. Petitioner Did Not Suffer an Adverse Employment Action

85. In addition, a complainant alleging retaliation in the FCRA must also show that she suffered an "adverse employment action" and that there was "a causal connection between the participation in the protected expression and the adverse action." Russell, 887 So. 2d at 379. As discussed above, supra, Petitioner did not suffer an adverse employment action.

M. Petitioner has Failed to Prove Causation

86. Having admitted that she did not engage in protected activity and having presented no evidence demonstrating that she suffered adverse employment actions, Petitioner is unable to prove the third prong of a prima facie case of retaliation: a causal connection between the participation in the protected expression and the adverse action.

87. During the hearing, Petitioner called Tessmer, an expert on a variety of topics, one of which was potential damages. To the extent Tessmer testified with respect to alleged emotional distress or related damages, this tribunal has already ruled in limine that neither DOAH nor the FCHR has authority to award compensatory or punitive damages. Nor is such relief available under the applicable provision of the

FCRA. See also §§ 760.10 and 760.11(6), Fla. Stat. (available relief does not include compensatory or punitive damages); City of Miami v. Wellman, 976 So. 2d 22, 27 (Fla. 3d DCA 2008) ("non-quantifiable damages . . . are uniquely within the jurisdiction of the courts"); Southern Bell Tel. & Telegraph Co. v. Mobile Am. Corp., 291 So. 2d 199 (Fla. 1974) (an administrative agency (as opposed to a court) has no authority to award money damages).

88. To the extent Tessmer testified with respect to alleged back pay damages, Tessmer did not take into consideration the fact that Petitioner's employment has not been terminated, and, therefore, Petitioner is not entitled to back pay. Tessmer also failed to consider Petitioner's receipt of disability benefits and her failure to otherwise mitigate back pay damages.

89. It is well established that Petitioner has a duty to mitigate back pay damages. Ford Motor Co. v. EEOC, 458 U.S. 219 231 N.15 (1982) (stating the general rule that, "it is incumbent upon the [person wronged] to use such means as are reasonable under the circumstances to avoid or minimize the damages. The person wronged cannot recover for any item of damage which could thus have been avoided."). As a result, Petitioner failed to mitigate and, therefore, is not entitled to back pay damages.

90. Even if Petitioner had been unlawfully terminated, if a petitioner is unable to mitigate back pay damages, due to a disability not caused by a discriminatory employer that disability cuts off back pay liability. Latham v. Dep't of Children & Page Youth Servs., 172 F.3d 786, 794 (11th Cir. 1999) ("Courts exclude periods where a plaintiff is unavailable to work, such as periods of disability, from the back pay award."). Petitioner testified, and has represented to Respondent's disability carrier, that she has been unable to work due to back and leg pain. Accordingly, back pay is not available for the entire period of time since she went out on her second leave of absence. Moreover, Respondent would be entitled to a set-off against any back pay liability for all disability benefits paid to Petitioner while on a leave of absence.

91. Petitioner failed to prove a prima facie case of handicap/disability or age discrimination under the FCRA. In that she failed to show: that she suffered an adverse employment action, that she has a disability, that she never informed Respondent that she had a disability, that she is a "qualified individual with a disability" under the FCRA, or that Respondent treated similarly-situated employees outside of her protected class more favorably.

92. Petitioner failed to prove a prima facie case of retaliation under the FCRA in that: she failed to show that she

engaged in any statutorily-protected conduct, that she suffered an adverse employment action, or that there was a causal connection between protected conduct and the adverse action.

RECOMMENDATION

Based upon the above Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Florida Commission on Human Relations enter a final order dismissing Petitioner's petition for age and disability discrimination and retaliation under the Florida Civil Rights Act.

DONE AND ENTERED this 29th day of October, 2010, in Tallahassee, Leon County, Florida.

DANIEL M. KILBRIDE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of October, 2010.

ENDNOTE

[1/] All references to Florida Statutes are to Florida Statutes (2009), unless otherwise indicated.

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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.