STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GERTRUDE BERRIEUM,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 10-1176
	)	
DEPARTMENT OF CORRECTIONS,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

A formal hearing was conducted in this case on April 30, 2010, in Tallahassee, Florida, before Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Gertrude B. Berrieum, pro se
5032 North West Martin Luther King Road
Bristol, Florida 32321

For Respondent: Todd Studley, Esquire
Department of Corrections
2601 Blair Stone Road
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STATEMENT OF THE ISSUES

The issues are whether Respondent discriminated against Petitioner based on a perceived disability and retaliated against her in violation of Section 760.10, Florida Statutes.

PRELIMINARY STATEMENT

On August 28, 2009, Petitioner Gertrude Berrieum (Petitioner) filed an Amended Employment Complaint of Discrimination with the Florida Commission on Human Relations (FCHR). The complaint alleged that Respondent Department of Corrections (Respondent) had discriminated against Petitioner by failing to promote/rehire her as a correctional officer based on a perceived disability. The complaint also alleged that the Respondent retaliated against Petitioner by terminating her employment because she complained about alleged discrimination.

On or about January 28, 2010, FCHR issued a Determination: No Cause. Petitioner subsequently filed a Petition for Relief with FCHR on February 26, 2010.

On March 10, 2010, FCHR referred the Petition for Relief to the Division of Administrative Hearings. On March 30, 2010, the undersigned issued a Notice of Hearing. The notice scheduled the hearing for April 30, 2010.

During the hearing, Petitioner testified on her own behalf and presented the testimony of two witnesses. Petitioner offered three exhibits that were accepted as evidence.

Respondent presented the testimony of seven witnesses. Respondent offered 22 exhibits that were accepted as evidence.

The parties declined to file a copy of the hearing transcript. Respondent filed a Proposed Recommended Order on

May 4, 2010. As of the date that this Recommended Order was issued, Petitioner had not filed proposed findings of fact and conclusions of law.

Hereinafter, all references shall be to Florida Statutes (2009), unless otherwise noted.

FINDINGS OF FACT

1. At all times material hereto, Petitioner was employed by Respondent at the Liberty Correctional Institution (LCI). She was hired as a Correctional Officer in LCI's Security Department effective December 21, 1990.

2. In February 1991, Petitioner was counseled regarding her failure to report for duty or to notify the institution of an intended absence.

3. On April 1, 1996, Petitioner's supervisor counseled her regarding her failure to report to work in a timely manner. Petitioner had been tardy to work three times in March 1996.

4. On May 30, 2001, Respondent counseled Petitioner regarding her excessive absenteeism. Petitioner had five unscheduled absences.

5. Respondent promoted Petitioner to Correctional Officer Sergeant effective November 1, 2001.

6. In October 24, 2003, Respondent gave Petitioner an oral reprimand for abuse of sick leave. Petitioner had developed a pattern of absenteeism in conjunction with her regular days off.

7. In December 2004, Respondent gave Petitioner a written reprimand. The reprimand was based on Petitioner's failure to follow oral and/or written instruction, continued absenteeism, and abuse of sick leave.

8. On July 7, 2007, Petitioner sustained an on-the-job injury. The injury was diagnosed as carpel tunnel syndrome. Petitioner underwent surgery for this condition in December 2007.

9. On or about April 8, 2008, Petitioner reached statutory Maximum Medical Improvement (MMI). Petitioner had a Permanent Impairment Rating (PIR) of six percent.

10. On April 15, 2008, a functional capacity evaluation revealed that Petitioner was able to perform light work with lifting restrictions. The restrictions prevented Petitioner from performing the essential functions of a Correctional Officer.

11. Pursuant to policy, Respondent immediately conducted a job search. At that time, a Clerk Typist Specialist position was available at LCI. Petitioner was qualified to perform that job. She submitted an application for the position on or about June 5, 2008.

12. In a letter dated June 10, 2008, Respondent offered Petitioner the Clerk Typist Specialist position in LCI's Classification Department. On June 26, 2008, Petitioner signed

an Acknowledgement, accepting a voluntary demotion from Correctional Officer Sergeant to Clerk Typist Specialist and stating that she agreed to perform the duties of the new position to the best of her ability.

13. Petitioner returned the Acknowledgement to Respondent. At the same time, Petitioner questioned whether she would be able to perform the duties of a Clerk Typist Specialist due to her carpel tunnel condition.

14. In a letter dated June 27, 2008, Respondent requested that Petitioner take an essential functions form to a July 8, 2008, doctor's appointment. Respondent wanted the physician to complete the essential functions form and return it to Respondent by July 18, 2008. The purpose of the evaluation was to determine whether Petitioner was able to perform as a Clerk Typist Specialist.

15. On or about July 24, 2008, Petitioner advised Respondent that she was going to have a nerve conduction test on July 30, 2008. She advised Respondent that she would provide the results to Respondent as soon as possible.

16. In a letter dated August 20, 2008, Respondent advised Petitioner that, pending the results of a pre-determination conference, Petitioner could be dismissed from her employment as a Correctional Officer effective September 11, 2008. Respondent proposed this action because Petitioner had not provided

Respondent with a doctor's report regarding Petitioner's ability to perform the essential functions of a Clerk Typist Specialist.

17. A pre-determination conference was held on August 27, 2008. In a letter dated September 12, 2008, Warden Douglas advised Petitioner that she would not be dismissed because she had provided medical documentation of her ability to perform the position of a Clerk Typist Specialist. Petitioner began working in that capacity on September 19, 2008.

18. In December 2008, Petitioner sent an e-mail to Respondent's Secretary, Walt McNeil. In the e-mail, Petitioner complained that Respondent had not returned her to work as a Correctional Officer Sergeant after being medically cleared to work in that capacity.

19. There is no persuasive evidence that Petitioner had been medically released to work as a Correctional Officer in December 2008. Additionally, there is no evidence that Petitioner had made a request or filed an application to return to work as a Correctional Officer at that time.

20. Respondent subsequently requested Petitioner's doctor to provide an updated opinion regarding Petitioner's ability to work as a Correctional Officer. On or about January 15, 2009, Petitioner's doctor approved Petitioner's return to work as a Correctional Officer with no restrictions.

21. In a memorandum dated February 9, 2009, Respondent advised Petitioner that she was medically cleared to work as a Correctional Officer but that she would need to apply for openings. The memorandum stated that Petitioner had to be reprocessed as a Correctional Officer, including having a drug test and physical examination.

22. The February 9, 2009, memorandum also reminded Petitioner that she would be required to serve another probationary period if she received an appointment as a Correctional Officer. There is no promotion track between the Security Department and the Classification Department.

23. Petitioner applied for four Correctional Officer positions between February and May 2009. Two of the applications were for positions located at LCI. The third application was for a position at Calhoun Correctional Institution (CCI). The fourth application was for a position at Franklin Correctional Institution (FCI).

24. On February 10, 2009, Warden Chris Douglas at LCI declined to interview or rehire Petitioner as a Correctional Officer for position number 7002037. Warden Douglas made this decision based on Petitioner's previous and current employment history showing attendance problems. Petitioner's testimony that she never applied for this position is not persuasive.

25. Petitioner's application for a Correctional Officer position at FCI was never completely processed. In a letter dated April 9, 2009, Respondent advised Petitioner that she needed to provide additional information to support her application for employment in position number 70039564 at FCI. Petitioner did not respond to the request because she decided that she did not want to commute to work so far from her home.

26. On April 23, 2009, Petitioner received her Performance Planning and Evaluation. Her direct supervisor, Kim Davis, Respondent's Classification Sentence Specialist, rated Petitioner as performing "Above Expectation" in all applicable categories.

27. On April 30, 2009, Petitioner requested Warden Douglas to let her complete her mandatory firearm training because her weapons qualification was about to expire. Warden Douglas promptly responded that she could be scheduled to take the next firearms class. Petitioner re-qualified with specified weapons on May 11, 2009.

28. On May 28, 2009, Petitioner was interviewed for a position as a Correctional Officer at LCI. She gave correct and appropriate answers to all questions during the interview. Even so, Warden Douglas decided not to hire Petitioner due to her past and current attendance problems.

29. Warden Adro Johnson did not give Petitioner an interview for Correctional Officer position number 70041507 at CCI. He made his decision in July 2009 based on information indicating that Petitioner was already employed at LCI.

30. In July 2009, Respondent's supervisor counseled Petitioner regarding her attendance. She had been absent for four unscheduled absences in the past 90 days. She had missed approximately 40 work days or eight weeks of work during the 11 months she was in the position of Clerk Typist specialist.

31. On August 3, 2009, Petitioner filed her initial complaint with FCHR.

32. Ms. Davis was the person who trained Petitioner as a Clerk Typist Specialist. Petitioner's job included filing documents related to approval or disapproval of inmate visitation. The original documents were sent to the inmates. Respondent was supposed to file copies of the documents in the inmates' classification files.

33. During the time that Petitioner worked as a Clerk Typist Specialist, Ms. Davis had to counsel Petitioner approximately ten times regarding the filing of the inmate visitation documents. Ms. Davis stressed the importance of Petitioner completing her work and filing the documents in a timely manner. Additionally, Ms. Davis noted that Petitioner occasionally failed to properly file the documents.

34. Petitioner was trained to remove duplicate copies of documents from inmate files. Duplicate copies of documents could be shredded.

35. Petitioner was not instructed to shred the inmate visitation documents. If the documents were not legible, another copy was supposed to be made, using the copy machine to darken the print.

36. Willie Brown is one of the Assistant Wardens at LCI. His office was close to Petitioner's work area. Assistant Warden Brown occasionally counseled Petitioner regarding the need to file the papers on her desk.

37. On August 18, 2009, Assistant Warden Brown observed a large amount of paperwork that Petitioner had not filed. Once again, Assistant Warden Brown told Petitioner that she needed to file on a timely basis. He explained that Petitioner could file on the schedule she developed, but that it might be necessary to file everyday.

38. Later on August 18, 2009, Heather Barfield, a Correctional Sentence Specialist, observed Petitioner feeding a large amount of paper into a shredder, causing the shredder to jam. Ms. Barfield subsequently attempted to clear the shredder jam and noticed that the papers belonged in the inmates' files.

39. Ms. Barfield reported her observations to Assistant Warden Brown and Cynthia Swier, the Classification Supervisor.

Assistant Warden Brown confirmed that the partially shredded documents were legible and should have been filed.

40. Ms. Davis was informed about the shredding incident when she returned to work the following day. Ms. Davis verified that the shredded documents had been legible and were not duplicates of documents in the inmates' files.

41. The greater weight of the evidence indicates that Petitioner intentionally shredded the documents in order to clear her desk. Petitioner's testimony that she was shredding them because they were not legible is not credible and contrary to more persuasive evidence.

42. On August 26, 2009, Respondent terminated Petitioner employment as a Clerk Typist Specialist. Because she was on probationary status, she had no appeal rights.

CONCLUSIONS OF LAW

43. 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.

44. Section 760.10, Florida Statutes, states as follows in pertinent part:

> (1) It is an unlawful employment practice for an employer:
> (a) To discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with

> respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.
>
> * * *
>
> (7) It is an unlawful employment practice for an employer . . . to discriminate against any person because that person has opposed any practice which is an unlawful employment practice under this section, or because that person has made a charge, testified, assisted, or participated in any manner in an investigation proceeding, or hearing under this section.

45. 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).

46. Absent direct or statistical evidence of discrimination, neither of which was offered here, claims of discrimination and retaliation are evaluated using the test for circumstantial evidence, as set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). In McDonnell Douglas, 411 U.S. at 792, and Texas Dept. of Community Affairs v. Burdine,

450 U.S. 248, 253 (1981), the United States Supreme Court first articulated the framework for use by trial courts in evaluating the merits of discrimination claims of disparate treatment based upon circumstantial evidence, including the basic allocation of burdens and order of presentation of proof.

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

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

49. Under the ADA, a physical impairment that substantially limits one or more major life activities is a disability. See 42 U.S.C.S. § 12102(2)(A). A qualified individual with a disability is a person with a handicap who,

with or without reasonable accommodation, can perform the essential functions of the employment position that such person holds or desires. See 42 U.S.C.S. § 12111(8).

50. Under 42 U.S.C.S. Section 12102(2), one can establish the existence of a disability by showing the following:

> (1) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
> (2) a record of such impairment; or
> (3) being regarded as having such an impairment.

51. Merely having an impairment does not make one disabled for purposes of the ADA. See Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184, 195 (2002). The disability or perceived disability must be a substantial limitation. See Id. at 195.

52. Pursuant to 29 C.F.R. Sections 1630.2(j)(2)(i) through 1630.2(j)(2)(iii), the following factors should be considered when determining whether an individual is substantially limited in a major life activity:

> (i) The nature and severity of the impairment;
> (ii) The duration or expected duration of the impairment; and
> (iii) The permanent or long-term impact, or the expected permanent or long-term impact of or resulting from the impairment.

53. In order to sustain a charge of discrimination based on a perceived disability, Petitioner must establish a prima

facie case of discrimination. See Rosenbaum v. Southern Manatee Fire and Rescue District, 980 F. Supp. 1469 (M.D. Fla. 1997); Andrade v. Morse Operations, Inc., 946 F. Supp. 979, 984 (M.D. Fla. 1996).

54. Petitioner must show by a preponderant of the evidence that: (a) she is a member of a protected class; (b) she suffered one or more adverse employment actions; (c) she received disparate treatment from other similarly situated individuals in a non-protected class; and (d) that there is sufficient evidence of bias to infer a causal connection between her perceived disability and her disparate treatment. See Andrade, 946 F. Supp. at 982. Petitioner has not established the first, third, and fourth prongs of her prima facie burden.

55. First, Petitioner failed to prove that she is the member of a protected class, i.e. an individual perceived by Respondent as having a disability. There is no evidence that Respondent perceived Petitioner as having a substantial limitation of a major life activity.

56. At MMI, after surgery for carpel tunnel syndrome, Petitioner's PIR was a mere six percent. Respondent properly relied on essential function evaluations to determine whether Petitioner was able to perform the duties of a Clerk Typist Specialist or a Correctional Officer. Apart from the results of those evaluations, no one on Respondent's staff perceived that

Petitioner was substantially limited in her ability to perform particular functions of a specific job or a broad class of jobs.

57. As to the third prong, Petitioner did not show that she received less favorable treatment than employees who were not disabled. Respondent simply followed its policy to accommodate Petitioner's initial medical problem until she reached MMI. Because Respondent could not perform the duties of a Correctional Officer at that time, Respondent identified another job that Petitioner was able to perform. When Petitioner's physician released Petitioner to work as a Correctional Officer, Respondent agreed that Petitioner could apply and compete for such a position.

58. Regarding the fourth prong, Petitioner did not establish a causal connection between Respondent's knowledge of Petitioner's carpel tunnel condition and Respondent's failure to promote/rehire Petitioner as a Correctional Officer. Petitioner submitted no direct evidence or indirect evidence of such a connection apart from Respondent's adherence to policies regarding employees who suffer an on-the-job injury.

59. To the extent that Petitioner met her prima facie burden, Respondent provided legitimate non-discriminatory reasons for not promoting/rehiring Petitioner. As for CCI, Warden Johnson believed Petitioner was already working at LCI. Warden Douglas at LCI based his decision on Petitioner's past

and current employment history, especially as it relates to Petitioner's attendance problems.

60. On the other hand, Petitioner has not proved that Respondent's reasons for not letting her work as a Correctional Officer are mere pretext for intentional discrimination. The greater weight of the evidence shows that Respondent did not discriminate against Petitioner based on a perceived disability.

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

62. Petitioner engaged in statutorily protected activity when she complained to Secretary McNeil in December 2008 and when she filed her complaint with FCHR in August 3, 2009. She suffered an adverse action when she was terminated later in August 2009. However, Petitioner’s retaliation claim fails because there is no causal link between the adverse action and the protected activity. Respondent terminated Petitioner because she attempted to shred a large volume of documents that she was supposed to file. Petitioner's termination was not related in any way to Petitioner’s initial discrimination complaint.

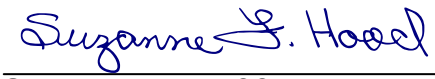
RECOMMENDATION

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 11th day of May, 2010, in Tallahassee, Leon County, Florida.



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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.