STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LYDIA BREEDLOVE,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 10-8859
	)	
OPERATION PAR, INC.,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on December 3, 2010, in Clearwater, Florida, before J. D. Parrish, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Lydia Breedlove, pro se
305 Belleair Place
Clearwater, Florida 33756

For Respondent: Cynthia L. May, Esquire
Greenberg Traurig, P. A.
625 East Twiggs Street, Suite 100
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STATEMENT OF THE ISSUE

The issue in this case is whether Respondent, Operation Par, Inc. (Respondent), discriminated against Petitioner, Lydia Breedlove (Petitioner), on the basis of handicap.

PRELIMINARY STATEMENT

On September 2, 2010, the Florida Commission on Human Relations (FCHR), transmitted a Petition for Relief to the Division of Administrative Hearings (DOAH). Petitioner filed the petition, and alleged that Respondent had discriminated against her on the basis of her disability. Presumably, Petitioner's disability would be considered a handicap under the Florida law. Petitioner's request for an administrative hearing was based upon her disagreement with FCHR's decision in the matter. After its investigation of Petitioner's original complaint against Respondent, FCHR entered a determination of no cause. FCHR decided preliminarily that Petitioner did not establish discrimination in the matter.

Respondent filed a Motion to Dismiss for Lack of Jurisdiction on September 21, 2010, and asserted that DOAH does not have jurisdiction in the cause as Petitioner's claim results from a termination of employment subsequent to leave taken, pursuant to the Family Medical Leave Act (FMLA). Respondent maintains that any claim related to the FMLA is not encompassed within chapter 760, Florida Statutes (2010). After review of the motion, it was denied with leave to renew subsequent to the hearing.

At the hearing, Petitioner testified on her own behalf, and offered testimony from Frederica Willis. Respondent presented

testimony from Kay Doughty, Geneviere Gerard-Phaire, Stella C. Shult, and Richard Neubert. The exhibits received into evidence are listed and fully identified on page four of the Transcript. The Transcript of the proceedings was filed with DOAH on December 30, 2010. Thereafter, Respondent timely filed a Proposed Recommended Order that has been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Respondent is an employer within the definition of chapter 760. Respondent operates prevention, intervention, and treatment programs for individuals who are addicted to, or are at risk of addiction to alcohol, drugs, or other substances.

2. Petitioner was employed by Respondent on or about October 27, 2003, and was assigned to different duties within Respondent's business organization.

3. Petitioner worked on Respondent's Emergency Response Team (ERT) in 2008. Work with the ERT required Petitioner to travel to clients' homes and conduct interviews and evaluations. Subsequent to her assignment with ERT, Petitioner voluntarily transferred to the Cornerstone of Success and Achievement (COSA) program. The COSA assignment did not require travel, and allowed Petitioner to be stationed within an office setting.

4. During her time with ERT, Petitioner was counseling at a client's home when she fell ill and was unable to continue her

assignment. From the client's home, Petitioner was transported to the hospital, and was absent from work from April 14, 2008, through May 19, 2008. Petitioner used her sick leave or personal leave time for this absence.

5. Petitioner obtained a medical excuse for the absence and was able to return to work after the incident described above.

6. In October 2008, Petitioner again fell ill and missed two days of work. Following this absence, Petitioner obtained a doctor's excuse that allowed her to return to work.

7. It was following the October illness that Petitioner sought and was given a transfer to the COSA program. Petitioner hoped that the COSA program would better suit her medical issues.

8. Shortly after the assignment to COSA, Petitioner again fell ill, and was hospitalized and placed in an intensive care unit (ICU). During this time, Petitioner was not able to perform her work duties. Because she was to be out of work for an extended time, Respondent facilitated Petitioner going on FMLA leave. Because she exercised this option, Petitioner was allowed twelve weeks of leave to afford her an opportunity to regain her health.

9. Petitioner attempted to return to work in February 2009, but once again fell ill. This time Petitioner was hospitalized and unable to perform her work duties.

10. From February 6, 2009, until February 20, 2009, Petitioner did not contact Respondent to explain the latest round of illness. Petitioner was unable to perform her work duties during this time and could not obtain a doctor's excuse to return to work.

11. During the February illness, Petitioner did not seek an accommodation that would allow Petitioner to return to work. In fact, as of the date of the hearing, Petitioner was unable to work.

12. Subsequently, Respondent facilitated obtaining disability benefits for Petitioner. The company health and life insurance plans allowed Petitioner to continue her life insurance at no cost, and allowed her to receive approximately 60 percent of her wages while she was unable to work. Later, Petitioner also qualified for and received Social Security disability benefits.

13. Petitioner became upset because Respondent terminated her employment with the company on or about February 20, 2009. Petitioner's life insurance and disability benefits were not terminated. As Petitioner was unable to perform her job duties, Respondent was obligated to employ someone who could get

Petitioner's work assignments completed. Respondent considered Petitioner a valued employee, and had she been able to return to work, she would have been allowed to do so. Regrettably, Petitioner's health did not permit her to return. Should Petitioner become able to work, Respondent would be willing to consider her for future employment.

14. Petitioner's job with Respondent required that she engage in interpersonal relations. Further, given the nature of the job programs, Petitioner's work required that she handle stressful situations. According to her disability claim, Petitioner is unable to handle stress.

15. Additionally, Petitioner's physician verified that she is unable to return to work due to the stressful nature of the work, and her need for rehabilitation. Petitioner's medical condition caused her to be limited in the scope of activities she can perform.

16. Petitioner mistakenly believed Respondent was not interested in helping her when, in fact, the company assisted in the procurement of benefits for Petitioner.

17. Petitioner may apply for a job with Respondent whenever she is able to return to work. To date, she is not able to do so.

18. Respondent's programs (ERT and COSA) were negatively impacted by the shortage of support when Petitioner was not able

to work. The best interests of the company and its clients required that an employee who could perform the work be placed in the job.

19. Petitioner claimed that the assignment to COSA negatively impacted her health; however, such assertion is not supported by medical evidence. It was Petitioner's conjecture that the assignment to the COSA site caused her subsequent illness, because she had to work in a converted garage with only a space heater for heat. The latter claim is not supported by the weight of the credible evidence.

20. Finally, it is determined that Respondent terminated Petitioner's employment based upon the company's need to complete work assignments that were critical to the business operations of the entity.

21. Petitioner timely filed a complaint with the FCHR, and alleged that her termination by Respondent was based upon her disability. Respondent articulated and proved business considerations that required the termination. Such considerations were not a pretext for an otherwise impermissible act.

22. Further, Respondent did not terminate Petitioner's employment in retaliation for Petitioner's use of FMLA leave, or because she alleged the work environment contributed to her medical condition. To the contrary, Respondent assisted

Petitioner in claiming FMLA leave so that she could document her extended absences from work. Respondent allowed Petitioner to return to work on every occasion she presented a doctor's excuse for her absence. Petitioner was not able to perform her work duties at the time of the termination.

CONCLUSIONS OF LAW

23. DOAH has jurisdiction over the parties to and the subject matter of these proceedings. §§ 120.57(1) and 760.11, Fla. Stat. (2010).

24. The Florida Civil Rights Act of 1992 (the Act) is codified in sections 760.01 through 760.11, Florida Statutes. "The Act, as amended, was [generally] patterned after Title VII of the Civil Rights Acts of 1964 and 1991, 42 U.S.C. § 2000, et seq., as well as the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623. Federal case law interpreting [provisions of] Title VII and the ADEA is [therefore] applicable to cases [involving counterpart provisions of] the Florida Act." Fla. St. Univ. v. Sondel, 685 So. 2d 923, 925 (Fla. 1st DCA 1996); see Joshua v. City of Gainesville, 768 So. 2d 432, 435 (Fla. 2000)("The [Act's] stated purpose and statutory construction directive are modeled after Title VII of the Civil Rights Act of 1964.").

25. The Act makes certain acts prohibited "unlawful employment practices," including those described in section 760.10, which provides, 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.
>
> (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.

26. The Act gives the FCHR authority to issue an order prohibiting the practice, and providing affirmative relief from the effects of the practice, including back pay, if it finds, following an administrative hearing, that an unlawful employment practice has occurred. See § 760.11, Fla. Stat. To obtain relief from the FCHR, a person who claims to have been the victim of an "unlawful employment practice" must, "within 365 days of the alleged violation," file a complaint ("contain[ing] a short and plain statement of the facts describing the violation and the relief sought") with the FCHR. § 760.11(1).

It is concluded that Petitioner's complaint, filed on February 18, 2010, was within the statutory time limitation.

27. Petitioner's complaint alleged that she was subjected to discrimination based upon her disability. Petitioner alleged that Respondent's claim of excessive absenteeism was a pretext.

28. For purposes of a claim of discrimination based upon "disability," it must constitute a handicap. Florida courts have recognized that actions under the Florida Civil Rights Act are analyzed under the same framework as the Americans with Disabilities Act found at 42 U.S.C. §§ 12101, et seq. (ADA). See Chanda v. Engelhard/ICC, f.k.a. Ciba-Geigy, 234 F.3d 1219 (11th Cir. 2000). Accordingly, Petitioner must establish that she is a qualified individual with a disability. A disability is an impairment that substantially limits a major life activity. Whether someone is substantially limited requires that the individual be unable to perform a major life activity that the average person in the general population can perform, or be significantly restricted as to the condition, manner, or duration under which the individual can perform a particular major life activity as compared to the manner in which the average person can perform the same major life activity. Life activities are considered daily skills that one performs to care for oneself. Major life activities include, but are not limited to, dressing oneself, feeding oneself, manual tasks such as

combing one's hair, walking, speaking, seeing, and hearing. A diminished ability for normal daily activities such as lifting, running, or performing manual tasks does not constitute a disability under the ADA. See Chanda, supra.

29. It is concluded, Petitioner was not discriminated against on the basis of handicap. Petitioner was not medically able to perform the tasks required by her job. Petitioner exhausted her medical leave time and her doctor did not clear her to return to work. As of the date of the hearing, Petitioner was not able to return to work. Should Petitioner become physically able to perform the duties associated with a job with Respondent, she is eligible to seek re-employment. In the meanwhile, Petitioner receives life insurance and disability benefits provided through Respondent's employee insurance. Employers are not required to hire or retain persons who are unable to perform the job duties the work requires. An otherwise qualified handicapped person cannot be discharged based upon the handicap. In this instance, Petitioner was simply no longer qualified to do the work.

30. Petitioner has the burden of proving the allegations asserted. "Discriminatory intent may be established through direct or indirect circumstantial evidence." Johnson v. Hamrick, 155 F. Supp. 2d 1355, 1377 (N.D. Ga. 2001).

31. Direct evidence is evidence that, if believed, would prove the existence of discriminatory intent without resort to inference or presumption. See Wilson v. B/E Aero., Inc., 376 F.3d 1079, 1086 (11th Cir. 2004). In this case, Petitioner failed to prove discrimination either by direct or indirect evidence.

32. Moreover, although victims of discrimination may be "permitted to establish their cases through inferential and circumstantial proof," Petitioner similarly failed to present credible inferential or circumstantial proof. See Kline v. Tennessee Valley Auth., 128 F.3d 337, 348 (6th Cir. 1997).

33. Had Petitioner established circumstantial evidence of discrimination, the burden would have shifted to Respondent to articulate a legitimate, non-discriminatory reason for its action. If the employer successfully articulates a reason for its action, then the burden shifts back to the complainant to establish that the proffered reason was a pretext.

34. In this case, Petitioner never established she was able to perform the duties associated with her job. A doctor has yet to clear her to return to work, Respondent had legitimate business needs to address, and Petitioner exhausted her leave. Respondent is not required under the law to hold Petitioner's job open indefinitely until she is able to return

to work. Given Petitioner's eligibility for Social Security disability income, she may never be able to return to work.

35. In this case, the persuasive evidence established that Petitioner's employment was terminated due to her inability to perform the duties associated with the job. No accommodation would allow Petitioner to attend work given the severity of her health problems.

36. In light of the foregoing, Petitioner's employment discrimination complaint must be dismissed.

37. Finally, to address Respondent's claim that DOAH does not have jurisdiction, Petitioner's claim of discrimination did not allege a violation of the FMLA. Respondent rightly asserts that DOAH does not have jurisdiction with regard to the FMLA. However, Petitioner alleged that because she took FMLA, Respondent somehow decided to take retaliatory action against her based upon her handicap. Petitioner failed to establish such discrimination. If anything, Respondent assisted Petitioner to qualify for FMLA. By doing so, Petitioner was assured her job was secure for the time of medical leave. Afterwards, Respondent helped Petitioner obtain disability benefits. There is no credible evidence that Respondent did anything contrary to law in this cause.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law it is RECOMMENDED that the Florida Commission on Human Relations enter a final order dismissing Petitioner's claim against the Respondent.

DONE AND ENTERED this 4th day of April, 2011, in Tallahassee, Leon County, Florida.

J. D. PARRISH
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 4th day of April, 2011.

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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.