

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SANDRA A. JONES,

Petitioner,

vs.

Case No. 12-2550

ORANGE COUNTY CLERK OF COURTS,

Respondent.

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RECOMMENDED ORDER

A final hearing in this cause was held on April 25, 2013, by video teleconference before the Division of Administrative Hearings by its designated Administrative Law Judge Linzie F. Bogan in sites between Orlando and Tallahassee, Florida.

APPEARANCES

For Petitioner: Sandra A. Jones, pro se
2652 Cedar Bluff Lane
Ocoee, Florida 34761

For Respondent: Donna M. Hansen, Esquire
Dean, Ringers, Morgan and Lawton, P.A.
Post Office Box 2928
Orlando, Florida 32802

STATEMENT OF THE ISSUE

Whether Respondent violated the Florida Civil Rights Act of 1992, as alleged in the Charge of Discrimination filed by Petitioner on December 9, 2011.

PRELIMINARY STATEMENT

On December 9, 2011, Petitioner, Sandra A. Jones (Petitioner), filed with the Florida Commission on Human Relations (FCHR) a Charge of Discrimination and alleged therein that her former employer, Office of the Orange County Clerk of Courts, committed an unlawful employment practice in violation of section 760.10, Florida Statutes (2010).^{1/} The allegations were investigated, and on June 27, 2012, FCHR issued its Determination: No Cause. A Petition for Relief was filed by Petitioner on July 24, 2012.

FCHR transmitted the case to the Division of Administrative Hearings on July 27, 2012. Following the granting of motions for continuance, a Notice of Hearing by Video Teleconference was issued setting this case for final hearing on April 25, 2013.

At the hearing, Petitioner testified on her own behalf. Respondent presented the testimony of Tracy Gasinski, Marlene Muscatello, and Amy Gardner. The parties jointly presented the deposition testimony of Jacquelyn Clarke (Joint Ex. 94). Petitioner's Exhibits 8, 10, 13 through 18, 20, 21, 22, 27, 28, 33, 34, 35, 37 through 40, 92, and 93 were admitted into evidence. Respondent's Exhibits 3, 56, 72 through 75, 77, 78, 84, 85, 87, and 90 were admitted into evidence.

A Transcript of the proceeding was filed with the Division of Administrative Hearings on June 3, 2013. The parties timely

filed proposed recommended orders, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner commenced her employment with Respondent in November 1997. On December 9, 2010, Petitioner ceased being employed by Respondent.

2. In her Charge of Discrimination, Petitioner alleges that Respondent discriminated against her on the basis of "disability" and "retaliation." Exhibit A to the Charge of Discrimination provides as follows:

I was employed with Orange County Clerk of Courts since November 1997. During my tenure with Orange County Clerk of Courts, I served as a Supervisor and satisfactorily and/or above satisfactorily performed the essential job duties of my position. Notwithstanding my performance, I was subjected to discrimination based on my handicap and/or disability, as further described below.

In 1999 I injured my back while on the job and in 2003 I had surgery for same. I had 2 rods and 4 screws placed in my back. On September 27, 2010, I was on FMLA leave until December 8, 2010, and I requested an extension until December 27, 2010, but it was denied. While out on FMLA leave I had the rods removed from my back, which is why I was not able to return to work on December 9, 2010. The reason I was out of work all this time was a direct result from the workers compensation injury I sustained in 1999. Many of my colleagues that were unable to report to work were provided the opportunity to work from home, however I was not. I feel that I was targeted for termination even though such non-handicapped and/or disabled

employee was not subject to any adverse employment action.

Based on the foregoing actions of Orange County Clerk of Courts described herein, I believe that I have been discriminated and retaliated against, including my unlawful termination, based on my handicap and/or disability in violation of the Florida Civil Rights Act of 1992 and Title VII of the Civil Rights Act. Due to my unlawful termination, I have suffered and continue to suffer severe financial and emotional damages. I am seeking compensation for my lost earnings, my lost earnings capacity, my emotional distress, and for punitive damages because Orange County Clerk of Courts acted with malice and/or reckless disregard for my protected rights.

3. Following the "no cause" determination by FCHR, Petitioner requested an administrative hearing by filing a Petition for Relief. In her Petition for Relief, Petitioner, when directed to describe the "disputed issues of material fact," noted the following: "Respondent states Complainant abandoned her position. Complainant had vacation time not used on company's books - other employees have/were granted extension of time off - they had no time accrued on books."

4. Petitioner was employed by Respondent as a supervisor in the Division of Records Management. In her role as supervisor, Petitioner, among other duties, was responsible for supervising "a records tech one, two, and three" as well as the person that occupied the position designated as the team "lead."

Petitioner's job description lists the following as essential duties and responsibilities of her position:

Perform any or all of the duties described below depending upon the Division to which assigned. The omission of specific statements of duties does not exclude them from the position if the work is similar, related, or a logical assignment to the position.

Assign, schedule, review and evaluate the work of subordinates. Assist in various areas of personnel administration to include preparation of employee performance evaluation, conduct of employee action plans, and employee counseling/discipline.

Monitor customer assistance to include service counter/courtroom coverage, and provide assistance when appropriate.

Coordinate divisional orientation and oversee the training of new employees.

Provide ongoing divisional training program to include efficient use of a variety of court software, case tracking, and other computer systems.

Maintain time and attendance records and related reports for divisional personnel.

Review/approve employee leave requests.

Respond to complaints, difficult situations and non-routine inquiries from the public in a professional and timely manner.

Resolve problems and answers questions that subordinates are unable to solve.

Provide assistance to judicial assistants, judges, and other court personnel.

Verify that documents processed through the front counter are distributed properly and in a timely manner.

Assist in collecting/analyzing data and prepare associated reports.

Inform management of any problems or issues.

Establish/maintain effective intra-divisional working relationships where areas of responsibility are shared among divisions.

Close out and balance the register when required. Complete end of day audit per Clerk's Cash Control Policy as necessary.

Communicate with coworkers, management, staff, the general public, and others in a timely, courteous and professional manner.

Conform with and abide by all regulations, policies, work procedures and instructions.

Respond promptly when returning telephone calls and replying to correspondence including email and faxes/emails.

Act, dress, and behave in a professional manner to reflect a positive image of the Clerk's Office.

Fully support the Clerk's Quality Policy and standards of Performance Excellence by delivering exemplary services to both internal and external customers. Provide the utmost in customer service efficiently, effectively, and expeditiously.

Develop, implement, and provide tools necessary for staff to collect accurate and useable data for the Performance/Productivity Measurement System (MOS).

Utilize available tools to collect necessary information and report daily/weekly

Performance/Productivity Measurement System (MOS) data to the Assistant Manager.

Perform observations, calculations, and implementation of forms necessary for the Performance/Productivity Measurement System (MOS).

Monitor process changes in order to evaluate Performance/Productivity Measurement System (MOS) measurements accordingly. Report these findings to the management team and Special Projects Coordinator for appropriate action.

Assist in the preparation and update of the Performance/Productivity Measurement System (MOS) Area Books for the division.

Continuously strive to instill Performance Excellence in all functions within the Division through teamwork, customer feedback, and process based management.

5. Throughout her tenure as a supervisor, Petitioner generally received "acceptable" ratings (highest ratings possible) on her annual employee performance appraisals. On June 1, 2009, Petitioner's supervisor, Cindy Startz, noted that Petitioner was viewed as a "great asset" to the office of the Orange County Clerk of Courts.

6. In 1999, Petitioner sustained a work related injury to her back. In reviewing the record, it appears as though Petitioner, sometime in 2003, had surgical rods inserted in her back in order to stabilize her spine. The rods were surgically removed from Petitioner's back on or about December 9, 2010.

7. Prior to her December 2010 back surgery, Petitioner, from August 3, 2010, through August 17, 2010, used two weeks of Family Medical Leave Act (FMLA) leave to care for her child. Petitioner's FMLA leave year for the period in question commenced on August 3, 2010. Therefore, for the twelve month period beginning August 3, 2010, Petitioner had twelve weeks of FMLA leave or a maximum of 480 working hours available for use.

8. On or about October 4, 2010, Petitioner submitted to Respondent another request for FMLA leave. This request from Petitioner was for the period September 27, 2010, through October 27, 2010. Petitioner's FMLA leave request for this period was approved by Respondent on November 2, 2010.

9. Petitioner did not return to work on October 28, 2010. She sought and was granted by Respondent a continuation of her FMLA leave through and including December 8, 2010. As of December 8, 2010, Petitioner had exhausted her 12 weeks of FMLA leave for the annual leave period that commenced on August 3, 2010.

10. Several days prior to exhausting her FMLA leave, Petitioner was informed by Respondent that her FMLA leave entitlement for the relevant period would expire on December 8, 2010. In anticipation of the expiration of her FMLA leave entitlement, Petitioner, on or about December 2, 2010, submitted to Respondent a request for leave of absence without pay for the

period December 9, 2010, through December 27, 2010. In support of her request for leave of absence, Petitioner provided to Respondent a statement from her orthopedist.

11. According to her orthopedist, Petitioner suffered from chronic low back pain and was "having surgery on 12/9/10 for hardware removal [from her back, and that] [s]he will be out of work from 12/9/10 - 12/27/10, and [these] dates may be adjusted as needed pending [patient] recovery." The orthopedist also noted that for the two to three month period following her surgery, it was anticipated that Petitioner would experience one or two "flare-ups" with her back that would require orthopedic intervention.

12. On December 8, 2010, Petitioner's supervisor, Marlene Muscatello, sent Petitioner an email message regarding Petitioner's request for a leave of absence without pay. The email message provides as follows:

Hello Sandra,

I received your leave of absence request for December 9 through December 27th.

Your request has been reviewed and considered. However, the Records Management division is unable to accommodate your leave of absence request due to the workload burden on the division.

Thank you,
Marlene

13. On September 6, 2010, Marlene Muscatello became Petitioner's supervisor and division manager for Respondent's Records Management Division. Ms. Muscatello, when considering Petitioner's request for leave of absence, was familiar with the needs of the Records Management Division. In explaining why Petitioner's request for leave of absence was denied, Ms. Muscatello credibly testified that as a result of Petitioner's absence, it was necessary to reassign Petitioner's responsibilities to other employees in the Records Management Division. The employees that were tasked with Petitioner's work functions were required to perform Petitioner's job functions as well as their own. According to Ms. Muscatello, this working arrangement created a hardship on the employees in the Records Management Division.

14. Petitioner disputes that her absence from the office during her FMLA leave period created a hardship on her fellow employees. According to Petitioner, her absence from the office allowed the person serving in the position of tech-three, "to jump in and learn more." Ms. Muscatello generally agrees that Petitioner's absence provided learning opportunities for other employees. However, Ms. Muscatello also notes that while the other employees in the division were taking on new responsibilities associated with Petitioner's absence, the

employees were still responsible for performing their regular duties.

15. In addition to the hardship placed on other employees resulting from Petitioner's absence, Ms. Muscatello was also concerned about the uncertainty surrounding when Petitioner would be released by her physician to return to work. Specifically, Ms. Muscatello was concerned about that portion of the physician's statement indicating that December 27, 2010, was only an anticipated release to return to work date and that Petitioner's actual return to work date "may be adjusted as needed pending [patient] recovery." Petitioner contends that because the doctor's statement is "open ended," it was possible that Petitioner could have been released to return to work prior to December 27, 2010. It is precisely the "open ended" nature of the doctor's statement that factored into Ms. Muscatello's decision to deny Petitioner's request for leave without pay. It is clear from the doctor's statement that Petitioner was unable to perform her job duties upon exhaustion of her FMLA leave.

16. In addition to the previously referenced email, Respondent also sent on December 8, 2010, correspondence to Petitioner wherein she was advised of the following:

This is to advise you that as of December 8, 2010, your 12 weeks of leave under the federal Family and Medical Leave Act is exhausted. The State of Florida does not mandate any additional leave rights beyond

the federally mandated FMLA and all of your accrued sick and vacation leave has been exhausted.

In accordance with our FMLA policy and as is permitted by FMLA regulations, we require all employees on leave to provide notice of their intent to return to work and if returning, a note from their medical provider returning them to their job.

The documentation you provided on December 2, 2010, from your physician states that you need to be out of work from December 9th through December 27th. As outlined in the Clerk of Courts Employee Handbook, Section 408, you submitted a request to your division management for a Leave of Absence beyond your FMLA eligibility. Unfortunately your division is unable to approve your request at this time. Clerk of Courts policy states that if you do not return to work following the exhaustion of your FMLA, you will be considered to have voluntarily resigned.

When you are released by your physician to return to work, you may apply for available employment opportunities with the Clerk of Courts. We appreciate your service to the Orange County Clerk of Courts and certainly wish you well in the future. If you have any questions you may reach me at 407-836-2302.

Information regarding your rights to continue your employee benefits under COBRA will be sent to you separately. Please contact our office to arrange the return of any property belonging to the Clerk of Courts still in your possession (employee ID badge, parking card, keys, etc.)

Sincerely,

Jacquelyn Clarke, SPHR
Sr. Human Resource Generalist

17. In her Charge of Discrimination, Petitioner alleges that "[m]any of her colleagues that were unable to report to work were provided the opportunity to work from home, however I was not." The evidence is undisputed that Petitioner never requested of Respondent that she be allowed to work from home. It is illogical to suggest that Respondent discriminated against Petitioner by not allowing her to work from home when Petitioner never asked for such an accommodation. There was no evidence presented that other employees were allowed to work from home under circumstances where this option was unilaterally presented to the employees as a proposed accommodation.

18. As previously noted, Petitioner, in her Petition for Relief, alleges that Respondent discriminated against her by not allowing her to use her accrued vacation leave upon exhaustion of her FMLA leave. In comparing the Petition for Relief with the Charge of Discrimination filed by Petitioner, it is the case that Petitioner did not make any reference, express or implied, to unused vacation time in the Charge of Discrimination that was investigated by FCHR. The undersigned has only considered those issues raised in the Charge of Discrimination.

19. During Petitioner's employment with Respondent, the position that she occupied was covered by the Orange County Clerk of Courts Employee Handbook (Handbook). Section 409(E) of the Handbook provides, in part, that "[i]f the employee does not

return to work following the conclusion of a family or medical leave, the employee will be considered to have voluntarily resigned." Petitioner signed for and received a copy of the Handbook on February 22, 2000.

20. Section 408 of the Handbook governs requests for leave of absence without pay. This section provides in part that "[l]eave of absence without pay may be granted with manager's approval to eligible employees in instances where unusual or unavoidable circumstances require prolonged absence."

CONCLUSIONS OF LAW

21. The Division of Administrative Hearings has jurisdiction over the parties and subject matter in this case. §§ 120.569 and 120.57, Fla. Stat. (2012).

22. FCHR and Florida courts have determined that federal discrimination law should be used as guidance when construing provisions of section 760.10. See Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17, 21 (Fla. 3d DCA 2009); Brand v. Fla. Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994).

23. Section 760.10(1)(a), Florida Statutes, states that it is an unlawful employment practice for an employer to discharge or otherwise discriminate against an individual on the basis of disability. Section 760.10(7), provides that it is an unlawful employment practice for an employer to retaliate against an employee for engaging in statutorily protected expression.

24. 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 (ADA), 42 U.S.C. §§ 12101, et seq. 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 one or more major life activities. Major life activities are functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. Chanda at 1222. On December 9, 2010, Petitioner met the definition of being a disabled individual. However, Petitioner, on December 9, 2010, was not qualified to perform the functions of her job.

25. Discriminatory intent can be established through direct or circumstantial evidence. Schoenfeld v. Babbitt, 168 F.3d 1257, 1266 (11th Cir. 1999). Direct evidence of discrimination is evidence that, if believed, establishes the existence of discriminatory intent behind an employment decision without inference or presumption. Maynard v. Bd. of Regents, 342 F.3d 1281, 1289 (11th Cir. 2003).

26. "Direct evidence is composed of 'only the most blatant remarks, whose intent could be nothing other than to discriminate'

on the basis of some impermissible factor." Schoenfeld v. Babbitt, supra. Petitioner presented no direct evidence that her request for leave without pay was denied because of her disability.

27. "[D]irect evidence of intent is often unavailable." Shealy v. City of Albany, 89 F.3d 804, 806 (11th Cir. 1996). For this reason, those who claim to be victims of intentional discrimination "are permitted to establish their cases through inferential and circumstantial proof." Kline v. Tennessee Valley Auth., 128 F.3d 337, 348 (6th Cir. 1997).

28. Where a complainant attempts to prove intentional discrimination using circumstantial evidence, the shifting burden analysis established by the U.S. Supreme Court in McDonnell Douglas v. Green, 411 U.S. 792 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), is applied. Under this well-established model of proof, the charging party bears the initial burden of establishing a prima facie case of discrimination. When the charging party, i.e., Petitioner, is able to establish a prima facie case, the burden to go forward shifts to the employer to articulate a legitimate, non-discriminatory explanation for the employment action. See Dep't of Corr. v. Chandler, 582 So. 2d 1183 (Fla. 1st DCA 1991) (court discusses shifting burdens of proof in discrimination cases). The employer has the burden of production,

not persuasion, and need only present evidence that the decision was non-discriminatory. Id.; Alexander v. Fulton Cnty., 207 F.3d 1303 (11th Cir. 2000). The employee must then come forward with specific evidence demonstrating that the reasons given by the employer are a pretext for discrimination. Schoenfeld v. Babbitt, supra, at 1267. The employee must satisfy this burden of demonstrating pretext by showing directly that a discriminatory reason more likely than not motivated the decision or indirectly by showing that the proffered reason for the employment decision is not worthy of belief. Dep't of Corr. v. Chandler, supra, at 1186; Alexander v. Fulton Cnty., supra.

29. "Although the intermediate burdens of production shift back and forth, the ultimate burden of persuading the trier of fact that the employer intentionally discriminated against the [Petitioner] remains at all times with the [Petitioner]." EEOC v. Joe's Stone Crabs, Inc., 296 F.3d 1265, 1273 (11th Cir. 2002); see also Byrd v. RT Foods, Inc., 948 So. 2d 921, 927 (Fla. 4th DCA 2007) ("The ultimate burden of proving intentional discrimination against the plaintiff remains with the plaintiff at all times."). Once the matter has, as in the instant case, been fully tried, "it is no longer relevant whether the plaintiff actually established a prima facie case [and] . . . the only relevant inquiry is the ultimate, factual issue of intentional discrimination." Green v. Sch. Bd. of Hillsborough Cnty., 25 F.3d 974, 978 (11th Cir.

1994) (citing U.S. Postal Serv. Bd. of Governors. v. Aikens, 460 U.S. 711, 714-15 (1983)).

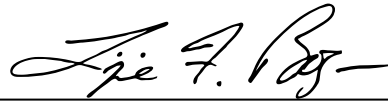
30. Petitioner has failed to establish that Respondent's decision denying her request for leave of absence without pay was motivated by impermissible discriminatory animus. Respondent denied Petitioner's request for leave without pay because of the hardship caused on the staff by Petitioner's absence and the uncertainty surrounding the date upon which Petitioner was scheduled to return to work. Petitioner failed to prove that the reasons offered by Respondent when denying her request were pretextual. Additionally, on December 9, 2010, Petitioner was not medically able to perform the tasks required by her job and she had exhausted her FMLA leave. Employers are not required to 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 not qualified to do the work on December 9, 2010.^{2/} Accordingly, Petitioner has failed to meet her burden of proving unlawful discrimination by Respondent.

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 finding that Respondent, Orange County Clerk of Courts, did not commit an unlawful employment

practice as alleged by Petitioner, Sandra A. Jones, and denying Petitioner's Charge of Discrimination.

DONE AND ENTERED this 27th day of June, 2013, in Tallahassee, Leon County, Florida.



LINZIE F. BOGAN
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of June, 2013.

ENDNOTES

^{1/} All subsequent references to Florida Statutes will be to 2010, unless otherwise indicated.

^{2/} Petitioner repeatedly asserts that Respondent retaliated against her because she used her FMLA leave. As an initial matter, it is important to note that the Division of Administrative Hearings (DOAH) does not have jurisdiction with regard to an alleged violation of the FMLA. However, Petitioner's retaliation claim seems to suggest that because a portion of her FMLA leave was due to her disability, that Respondent's action of not granting her leave of absence request was retaliatory action based on her disability. Presuming that DOAH has jurisdiction to consider this claim, Petitioner's argument fails for a number of reasons. Contrary to Petitioner's assertion, the credible evidence establishes that Respondent's decision to deny Petitioner's leave of absence request was due to Petitioner's inability to perform the requirements of her job resulting from her post-FMLA surgery that coincided with her

December 9, 2010, return to work date. Furthermore, Respondent's decision to deny Petitioner's leave of absence, as previously noted, was also based upon the uncertainty surrounding Petitioner's return to work following her surgery and the resulting hardship on Respondent's employees caused by Petitioner's absence. Petitioner has not proven any such retaliatory intent on the part of Respondent.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.