STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TERRA FRANKLIN-SHAW,

Petitioner,

vs. Case No. 13-0025

JACKSONVILLE HOUSING AUTHORITY,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, this case was heard on October 18, 2013 and November 22, 2013, by video teleconference at sites in Tallahassee, Florida and Jacksonville, Florida, before E. Gary Early, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Jamison Jessup, Qualified Representative
557 Noremac Avenue
Deltona, Florida 32738

For Respondent: Wendy L. Mummaw, Esquire
Katy A. Harris, Esquire
Office of General Counsel
117 West Duval Street, Suite 480
Jacksonville, Florida 32202

STATEMENT OF THE ISSUE

Whether the Petitioner was subject to an unlawful employment practice by Respondent, Jacksonville Housing

Authority, on account of her disability, in violation of section 760.10, Florida Statutes.

PRELIMINARY STATEMENT

On or about June 5, 2012, Petitioner, Terra Franklin-Shaw (Petitioner), filed a complaint of discrimination with the Florida Commission on Human Relations (FCHR) which alleged that Respondent, Jacksonville Housing Authority (JHA or Respondent), violated section 760.10, Florida Statutes, by discriminating against her on the basis of her disability.

On December 5, 2012, the FCHR issued a Determination: No Cause and a Notice of Determination: No Cause, by which the FCHR determined that reasonable cause did not exist to believe that an unlawful employment practice occurred. On December 26, 2012, Petitioner filed a Petition for Relief with the FCHR. The Petition was transmitted to the Division of Administrative Hearings to conduct a final hearing.

The final hearing was initially set for March 7, 2013. On February 28, 2013, a motion to continue the final hearing was filed by Petitioner. The motion was granted, and the hearing was rescheduled for July 11-12, 2013. On April 19, 2013, Respondent moved to continue the rescheduled hearing based on the unavailability of a critical witness. The motion was granted, and the hearing was rescheduled for August 8-9, 2013. On July 29, 2013, Petitioner moved to continue the rescheduled

hearing based on a family medical matter. The motion was granted, and upon the filing of a status report by the parties, the hearing was rescheduled for October 18, 2013. On October 7, 2013, this matter was transferred to the undersigned for further proceedings.

A prehearing stipulation was filed by the parties on October 14, 2013. Those facts admitted by both parties are hereby accepted and adopted without restatement herein.

On October 15, 2013, Respondent filed a motion in limine to limit evidence of the condition of the JHA office building to which Petitioner was assigned as it may have existed more than one year prior to the filing of the complaint with the FHRC, and to limit evidence of any claim based on retaliation for Petitioner's previous claim of discrimination filed with the federal Equal Employment Opportunities Commission. The motion was taken up at the hearing, and discussion of the basis for the rulings on the issues may be found in the transcript of the hearing. To summarize, the motion in limine regarding the condition of the building was denied, with the admissibility of evidence of building conditions to be determined on a case-by-case basis. The motion in limine regarding the claim of retaliation was granted, since retaliation was not identified as a basis for Petitioner's claim in the initial charge of discrimination.

The hearing commenced as scheduled on October 18, 2013. The hearing was not completed in the time allotted, and was thence scheduled for completion on November 22, 2013. The hearing was reconvened and concluded as scheduled.

At the final hearing, Petitioner testified on her own behalf, and presented the testimony of Anthony Whitted, a former inspector and maintenance mechanic with the JHA; Michael Sapp, a former truck driver for the JHA, who was terminated from employment on February 27, 2012; and Ora Middleton, a former co-worker of Petitioner in the JHA's office of Resident Services, who was discharged from employment with the JHA in March 2012. Petitioner's Exhibit A.1, A.10 through A.32, and A.34; Exhibit B.1 through B.6; Exhibit D.1, D.2, and D.3; Exhibit E.1 through E.3; Exhibit F.1 through F.4, and F.7; Exhibit G, pages 1 through 30; Exhibit H, pages 1 through 4; and Exhibit I, pages 1 through 16 were received into evidence.

At the final hearing, Respondent presented the testimony of Mark Mongon, a licensed mold assessor and mold remediator employed by TCB Envirocorp; and Joyce Quaintance Couch, the JHA vice-president of Resident Services. Respondent's Exhibit 1; Exhibit 2; Exhibits 4 through 6; Exhibit 7.1 through 7.9; Exhibit 8.1 through 8.17; Exhibit 9; Exhibit 10.1 through 10.82; Exhibit 11.1 through 11.21; and Exhibits 12 through 16 were received into evidence.

A three-volume Transcript of the hearing was filed on November 22, 2013 (volumes I and II) and December 12, 2013 (volume III). At the request of the parties, proposed recommended orders were to be filed on January 21, 2014. The date was twice extended, with proposed orders finally due on February 10, 2014. The parties timely filed their post-hearing Proposed Recommended Orders, which have been considered in the preparation of this Recommended Order. References to statutes are to Florida Statutes (2012) unless otherwise noted.

FINDINGS OF FACT

1. Petitioner, Terra Franklin-Shaw was, at all times relevant to this matter, an employee of JHA.

2. JHA is a municipal-housing authority with the authority to, among other duties, administer public housing and affordable housing programs in the City of Jacksonville. Respondent employs more than 15 full-time employees at any given time.

3. Among the properties owned or managed by JHA is an administrative office and maintenance building located at 1085 Golfair Boulevard, Jacksonville, Florida (1085 Golfair). Among the offices at 1085 Golfair were those of Resident Services.

4. Petitioner had been employed by JHA since September 6, 2000.

5. Petitioner was a senior service coordinator in Resident Services. The position of senior service coordinator requires supervision of three other employees as an essential element of the position.

6. The senior service coordinator is responsible for managing a caseload of participants in various JHA programs, and is required to meet with and provide counseling for program participants at the Resident Services offices as an essential element of the position.

7. Program-participant files are kept at the Resident Services offices at 1085 Golfair. Files maintained by JHA contain confidential information regarding program participants.

8. In June, 2010, Petitioner became ill. She had difficulty breathing, and experienced skin irritation. Over the next months, she was seen by several different doctors.

9. The parties stipulated that Petitioner "meets the definition for being disabled pursuant to the Americans with Disabilities Act (ADA) regarding her allergies, asthma, and pulmonary issues." There is, however, no credible, non-hearsay evidence to support a finding that Petitioner's allergies, asthma, and pulmonary issues were caused by conditions at 1085 Golfair.

10. On May 26, 2011, Petitioner received a note from her physician indicating that she should avoid mold due to mold

allergies. Petitioner testified that she provided the note to Ms. Couch and to the JHA human relations director.

11. On May 27, 2011, JHA commissioned a licensed mold assessment and remediation company, TCB Envirocorp (TCB) to perform air sampling at 1085 Golfair. TCB performed a visual inspection of the Resident Services suite of offices in which Petitioner worked, and performed air sampling in those areas.

12. Visual inspection of horizontal and vertical surfaces in Resident Services revealed no visible mold.

13. The results of the air quality sampling showed levels of mold outside of the building were roughly five times higher than levels of mold in Resident Services. Applying standard industrial hygiene practices, the Resident Services offices had no known hazard condition, and were safe for occupancy.

14. The results of the May 27, 2011, sampling were memorialized in a June 5, 2011 report.

15. On June 10, 2011, Petitioner received a doctor's note again indicating that Petitioner should be excused from exposure to mold.

16. On June 20, 2011, JHA called TCB back to 1085 Golfair to perform a more comprehensive mold inspection of the entire building.

17. TCB performed another visual inspection of Resident Services, and again observed no visible evidence of mold in that office suite.

18. TCB did note some visible mold behind the wallpaper in one front-facing office in a different area of the building that had resulted from a leaking window seal, and in the drywall ceiling above the HVAC room that had resulted from condensation from the above-ceiling ducting. Mr. Mongon described the visible mold as "very minor in nature." Both areas were well removed from Petitioner's office. TCB recommended that those areas be cleaned, and that a HEPA vacuum and HEPA filter be used.

19. The June 20, 2011, inspection and air sampling again showed levels of mold outside of the building to be substantially higher than levels of mold inside of the building. Thus, the building in general -- and the Resident Services offices specifically -- was safe for occupancy.

20. On July 7, 2011, Petitioner went on medical leave pursuant to the Family Medical Leave Act (FMLA).

21. On September 13, 2011, Petitioner was cleared to return to work, with the instruction that she should avoid construction dust or mold areas.

22. Petitioner returned to work on September 21, 2011.

23. Upon her return to work, Petitioner was assigned to the JHA's 1085 Golfair Boulevard offices.

24. The day after her return from FMLA leave, September 22, 2011, Petitioner visited the hospital. She was discharged before noon with instruction to engage in no strenuous activity, to rest, and to not work for the remainder of the day or the following day. The activity-restriction note offered no suggestion of the reason for the visit or the restriction.

25. Over the course of the next six months, after some -- but not all -- of her absences, Petitioner presented JHA with notes from various physicians establishing that she had been seen by the physician and authorizing her return to work.[1/] Several notes stated that Petitioner should avoid construction dust, mold, and "fumes." Most, however, either authorized Petitioner's return to work without restriction, or were silent as to any respiratory restrictions.

26. After Petitioner's return from FMLA leave, whenever there were activities at 1085 Golfair that Petitioner believed might aggravate her breathing conditions, e.g. painting, JHA allowed Petitioner to temporarily work from offices in other buildings until the activity was completed.

27. On or about October 31, 2011, painting was scheduled to be performed at one of the alternate office buildings to

which Petitioner was assigned while painting was being performed at 1085 Golfair. JHA was preparing for its annual HUD inspection, and was "sprucing up all the properties." Petitioner did not ask to work from another location, but rather called Ms. Couch to advise her that she was going to stay home for the day.

28. Whenever there was construction at 1085 Golfair, Petitioner was able to use the front door for ingress and egress, and was able to access the bathrooms and break room without having to go through the areas undergoing construction.

29. Petitioner never requested that she be allowed to work from her home. Given the nature of her essential job duties, such a request, if made, would not have been feasible.

30. For the two-week period from September 26, 2011 through October 9, 2011, Petitioner was at work for 49.5 hours, and took 30.5 hours of leave without pay.

31. For the two-week period from October 10, 2011 through October 23, 2011, Petitioner was at work for 61.0 hours, took 3.0 hours of leave without pay, and took 16.0 hours of workers' compensation leave for days on which painting was being performed at 1085 Golfair.

32. For the two-week period from October 24, 2011 through November 6, 2011, Petitioner was at work for 42.0 hours, took

22.0 hours of leave without pay, took 8.0 hours of annual leave, and took 8.0 hours of personal holiday leave.

33. For the two-week period from November 7, 2011 through November 20, 2011, Petitioner was at work for 37.75 hours, took 32.75 hours of leave without pay, and took 1.5 hours of annual leave. One day was a holiday.

34. For the two-week period from November 21, 2011 through December 4, 2011, Petitioner was at work for 43.0 hours, took 11.55 hours of leave without pay, and took 9.45 hours of annual sick leave. Two days were holidays.

35. The record reflects that many of Petitioner's absences were requested without complying with the notice requirements established in JHA's employee handbook. Petitioner would often call in sick on the day she was going to take off, or would occasionally not call in but would present a doctor's note after-the-fact. Thus, her staff and program participants were often confused and uncertain as to when and whether Petitioner might be in the office.

36. During Petitioner's frequent absences from work, or when she was working at locations other than 1085 Golfair, she was not able to perform her supervisory duties on a regular, consistent basis. Her supervisory duties were performed by Ms. Couch during those periods.

37. During Petitioner's frequent absences from work, or when she was working at locations other than 1085 Golfair, she was not able to meet with program participants on a regular, consistent basis when they visited Resident Services. In Petitioner's absences, her staff had to take on her workload. In addition to handling clients, they were responsible for educational programs that were being organized and planned for the participants. Ms. Couch received complaints from program participants that they could not reach Petitioner and were being neglected.

38. Petitioner testified that she could adequately perform her duties as senior service coordinator from locations other than 1085 Golfair as long as she had access to participant files. The files contain confidential information regarding program participants. The Resident Services offices have secured filing cabinets that may not be readily available at other locations. Ms. Couch testified convincingly that the security of the files is at risk when they are taken from the 1085 Golfair offices.

39. There are times when files must be available to other staff members of Resident Services, as when a caseworker is absent or unavailable when a participant appears at the office.

40. Having participant files at a location other than Resident Services is not a reasonable or practical accommodation.

41. During the period from September 21, 2011 until early December 2011, Petitioner's frequent absences from work created confusion and "chaos" in Resident Services. As a result of Petitioner's failure to perform her essential job functions, JHA decided to shift her duties from those involving supervising employees and meeting with program participants. Instead, Petitioner was to be assigned to correcting escrow accounts kept for program participants in the family self-sufficiency program.

42. The family self-sufficiency program is a program of the federal Department of Housing and Urban Development. Rents for subsidized housing are based on the income of the participant. Through the family self-sufficiency program, participants who find employment may place the monthly amount of their rent attributable to their increased income into an escrowed savings account. At the end of five years of employment, the participant may draw on the account for down payment assistance on a home, to pay for education, or to engage in other activities designed to improve their quality of life.

43. Due to errors over time in participant qualification information and the failure to apply changing HUD income limits, the amount held in many of the participants' accounts was

inaccurate. Correcting the escrow accounts was important because federal funding was, in part, dependent upon the local program being able to adequately manage and account for program funds.

44. It was determined that Petitioner had the skill and experience to review participant files and make manual calculations and corrections to their accounts. Ms. Couch testified that Petitioner was capable of manually correcting account files better than any other employee, herself included.

45. There were between 270 and 300 participants in the family self-sufficiency program. The time needed for correcting participant accounts varied based on the age of the account. For recently opened accounts, little correction would be necessary, and a file could be completed in as little as fifteen minutes. For an account that was nearing the five-year completion date, collecting the participant data and manually applying the correct HUD income limits could take as long as an hour-and-a-half per file. Ms. Couch testified that, on average, and without other duties to interfere, one could reasonably expect to review and correct six to eight files per day.

46. On December 1, 2011, JHA prepared a memorandum setting forth Petitioner's revised duties to review all participant escrow accounts for the family self-sufficiency program. The memorandum provided that Petitioner would complete the review of

an average of 20 files per week. The evidence demonstrates that 20 files per week was a reasonable and achievable expectation. The memorandum set March 31, 2012, as the date by which the review process would be complete.

47. On December 6, 2011, Petitioner signed the memorandum expressing her agreement with its terms.

48. After December 6, Petitioner never asked to be moved from 1085 Golfair.

49. For the two-week period from December 5, 2011 through December 18, 2011, Petitioner was at work for 44.5 hours, and took 35.5 hours of leave without pay.

50. For the two-week period from December 19, 2011 through January 1, 2012, Petitioner was at work for 36.0 hours, and took 28.0 hours of leave without pay. Two days were holidays.

51. For the two-week period from January 2, 2012 through January 15, 2012, Petitioner was at work for 48.5 hours, took 7.5 hours of leave without pay, and took 16.0 hours of annual sick leave. One day was a holiday.

52. For the two-week period from January 16, 2012 through January 29, 2012, Petitioner was at work for 46.75 hours, took 10.5 hours of leave without pay, took 11.5 hours of workers' compensation leave, and took 3.25 hours of annual leave. One day was a holiday.

53. Petitioner testified that when she was at work, she was capable of performing the duties assigned to her, and that the only reason she could not perform the escrow corrections was "because I was out sick."

54. Despite the extraordinary amount of time missed from work, Petitioner's time entries show that she was at work for a total of 175.75 hours between December 5, 2011 and January 27, 2012.

55. By January 27, 2012, Petitioner had completed the review of 20 files. Ms. Couch advised Petitioner of her concerns with the pace of completion.

56. For the two-week period from January 30, 2012 through February 12, 2012, Petitioner was at work for 51.5 hours, took 26.5 hours of leave without pay, and took 2.0 hours of annual leave.

57. For the two-week period from February 13, 2012 through February 26, 2012, Petitioner was at work for 56.0 hours, took 11.0 hours of leave without pay, and took 5.0 hours of annual leave. One day was a holiday.

58. On February 16, 2012, Ms. Couch advised Petitioner in writing of her concerns with the pace of the escrow review. Ms. Couch testified that Petitioner had provided her with 22 completed files, far fewer than the 20 files per week agreed

upon, and well under the pace that might be expected if a pace of one file per hour-and-a-half were met.

59. On February 27, 2012, Ms. Couch again expressed her concern with the pace of review, noting that, as of that date, a total of 30 files had been completed and submitted to the accounting department to be updated.

60. For the two-week period from February 27, 2012 through March 11, 2012, Petitioner was at work for 54.75 hours, took 19.75 hours of leave without pay, and took 5.5 hours of annual leave.

61. For the two-week period from March 12, 2012 through March 25, 2012, Petitioner was at work for 66.0 hours, took 13.5 hours of leave without pay, and took 0.5 hours of annual leave.

62. By March 21, 2012, roughly 15 weeks after Petitioner's agreement to review 20 files per week, Petitioner had completed the review of 87 files.

63. Petitioner did not go to work on March 26 or 27, 2012. On March 28, 2012, Petitioner visited her physician, who indicated Petitioner was under her care for asthma and severe reactive airway disease, and recommended that Petitioner refrain from working for the next 30 days. Thereafter, Petitioner did not work through April 29, 2012, and took annual leave or leave without pay for that period.

64. By April 19, 2012, Ms. Couch had come to the conclusion that Petitioner was incapable of performing the duties of a senior service coordinator in Resident Services. She prepared a recommendation of termination and submitted it to the President and CEO of JHA. The basis of her recommendation was Petitioner's excessive absenteeism, the hardship that her absences posed for program participants and for the staff that she supervised, and Petitioner's failure to perform the assigned task of performing escrow account review.

65. Petitioner returned to work on April 30, 2012, and worked on that day and the following day, May 1, 2012.

66. Petitioner took leave without pay from May 2, 2012 through May 4, 2012 for an unspecified issue regarding her sister's "condition" that required her to travel to Virginia. The request to be off on those days was sent by e-mail on May 2, 2012 at 12:56 p.m. It is not known when the request was received by Ms. Couch.

67. Petitioner was terminated from employment on May 7, 2012.

Reasonable Accommodation

68. When Petitioner returned to work from her FMLA leave in September 2011, with a recommendation that she avoid exposure to mold, JHA immediately contracted with a qualified environmental firm to assess whether 1085 Golfair had problems

with mold. The initial assessment and subsequent more-detailed assessment revealed that indoor air-mold levels were at concentrations much lower than the ambient outside air. The assessment revealed two areas in the building with minor mold problems, neither of which were in proximity to Resident Services or Petitioner's office.

69. Petitioner admitted that JHA allowed her to work from other locations when painting was scheduled, except for a single occasion when all of the alternative locations were undergoing maintenance in preparation for its annual HUD inspection. In such instances, the central maintenance director would advise Ms. Couch when painting was scheduled, and Ms. Couch would then temporarily assign Petitioner to an alternative worksite while the painting was ongoing.

70. When Petitioner was working at locations other than 1085 Golfair, JHA provided her with a laptop computer to facilitate her temporary off-site work.

71. On or about January 19, 2012, Petitioner's physician recommended that she wear a mask at work. Upon being presented with the doctor's recommendation, Ms. Couch provided Petitioner with a catalog from Office Depot, the company with which JHA contracts for office supplies. Petitioner was asked to select the type of mask she wanted. JHA did not want to purchase a

mask without Petitioner's input so as to avoid buying something that would not accommodate her need.

72. Upon going through the normal procurement process, JHA ordered and provided Petitioner with masks for her use by the beginning of the following week, which is found to be a reasonable period of time. Although Ms. Couch was prepared to procure a mask in the 50 to 60 dollar range, the masks determined by Petitioner to be acceptable were simple "ninety-nine cent" masks.[2/]

73. In addition to the masks recommended by Petitioner's physician, JHA also provided Petitioner with a HEPA air filter for her office. The unit was provided to Petitioner without her having to ask or having to provide a doctor's request.

74. Petitioner suggested that JHA should have allowed her to permanently work from other JHA locations as a reasonable accommodation for her respiratory disability. In this case, working from 1085 Golfair was an essential function of Petitioner's job as a supervisor. It is not a reasonable accommodation to have confidential files moved to and secured at another location, away from other employees who may need to access the files to meet the needs of program participants. Furthermore, it is not a reasonable accommodation to require program participants go to different locations depending on who their caseworker might be.

Ultimate Findings of Fact

75. The evidence in this case demonstrates that JHA made reasonable accommodations to meet any known physical limitations asserted by Petitioner.

76. JHA took timely and reasonable steps to demonstrate that 1085 Golfair was not infested with mold as alleged by Petitioner. The evidence in that regard was convincing.

77. JHA allowed Petitioner to work from alternate locations when activities, most notably painting, were to be conducted at 1085 Golfair, and provided her with a laptop computer to facilitate her off-site work.

78. Petitioner had means of ingress and egress, and access to break rooms and restrooms, that allowed her to avoid areas of construction at 1085 Golfair when such were occurring.

79. JHA provided Petitioner with breathing masks of her choice when asked. JHA further provided Petitioner with a HEPA air filter for her office.

80. JHA allowed Petitioner to perform duties that were within her level of skill and experience, but that would not require that she be continually available to supervise employees and meet with participants. There was no suggestion by any party to this proceeding that Petitioner's salary or benefits were altered as a result of the transfer of duties.

81. There were no accommodations related to conditions at 1085 Golfair requested by Petitioner that were not met by JHA.

82. Petitioner suggested that she could have been accommodated by being allowed to work at a location other than 1085 Golfair. Given her position as a supervisory senior service coordinator, the accommodation suggested would impose an undue hardship on the operation of the JHA. There was no credible, competent, substantial evidence adduced at the hearing to suggest otherwise.

CONCLUSIONS OF LAW

83. Sections 120.569 and 120.57(1), Florida Statutes, grant the Division of Administrative Hearings jurisdiction over the subject matter of this proceeding and of the parties.

Discrimination

84. Section 760.10 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.

85. Petitioner maintains that the JHA discriminated against her by failing to provide an alternate work environment as a reasonable accommodation for her disability.

86. Section 760.11(1) provides that "[a]ny person aggrieved by a violation of ss. 760.01-760.10 may file a complaint with the [FCHR] within 365 days of the alleged violation . . . ." Petitioner timely filed her complaint.

87. Section 760.11(7) provides that upon a determination by the FCHR that there is no probable cause to believe that a violation of the Florida Civil Rights Act of 1992 has occurred, "[t]he aggrieved person may request an administrative hearing under ss. 120.569 and 120.57, but any such request must be made within 35 days of the date of determination of reasonable cause . . . ." Following the FCHR determination of no cause, Petitioner timely filed her Petition for Relief requesting this hearing.

88. Chapter 760, Part I, is patterned after Title VII of the Civil Rights Act of 1964, as amended. When "a Florida statute is modeled after a federal law on the same subject, the Florida statute will take on the same constructions as placed on its federal prototype." Brand v. Fla. Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994); see also Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17 (Fla. 3rd DCA 2009); Byrd v. BT Foods, Inc., 948 So. 2d 921, 925 (Fla. 4th DCA 2007); Fla. State Univ. v. Sondel, 685 So. 2d 923 (Fla. 1st DCA 1996); Fla. Dep't of Cmty. Aff. v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991).

89. In addition, "because FCRA is patterned after Title VII and related federal statutes and regulations, courts construe FCRA in conformity with Title VII and the Americans with Disabilities Act (ADA)." Byrd v. BT Foods, Inc., 26 So. 3d 600, 605 (Fla. 4th DCA 2009); see also Byrd v. BT Foods, Inc., 948 So. 2d 921, 925 (Fla. 4th DCA 2007); Lenard v. A.L.P.H.A. "A Beginning", Inc., 945 So. 2d 618, 621 (Fla. 2d DCA 2006); Ross v. Jim Adams Ford, Inc., 871 So. 2d 312, 314 (Fla. 2d DCA 2004).

90. Chapter 760, Part I does not contain an explicit provision establishing an employer's duty to provide reasonable accommodations for an employee's handicap, but by application of the principles of the ADA, such a duty is reasonably implied. Brand v. Fla. Power Corp., 633 So. 2d at 511, n.12.

91. In applying the ADA, Florida courts recognize that:

> The ADA provides that a "qualified individual" is an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the job. 42 U.S.C.A. § 12111(8). If a qualified individual with a disability can perform the essential functions of the job with reasonable accommodation, then the employer is required to provide the accommodation unless doing so would constitute an undue hardship for the employer. 42 U.S.C.A. § 12112(b)(5)(A). Reasonable accommodations to the employee may include, but are not limited to, additional unpaid leave, job restructuring, a modified work schedule, or reassignment. 42 U.S.C.A. § 12111(9)(B).

McCaw Cellular Commc'ns. v. Kwiatek, 763 So. 2d 1063, 1065-1066 (Fla. 4th DCA 1999).

92. Petitioner has the burden of proving by a preponderance of the evidence that the JHA committed an unlawful employment practice. See St. Louis v. Fla. Int'l Univ., 60 So. 3d 455 (Fla. 3rd DCA 2011); Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981).

93. One option for establishing that discrimination has occurred is by direct evidence. Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d at 22. Direct evidence is evidence that, if believed, would prove the existence of discriminatory intent without resort to inference or presumption. Denney v. City of Albany, 247 F.3d 1172, 1182 (11th Cir. 2001); Holifield v. Reno, 115 F.3d 1555, 1561 (11th Cir. 1997). Courts have held that "'only the most blatant remarks, whose intent could be nothing other than to discriminate . . .' will constitute direct evidence of discrimination." Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d 1354, 1358-59 (11th Cir. 1999)(citations omitted).

94. The record of this proceeding contains no direct evidence of any bias on the part of the JHA related to Petitioner's disability.

95. In a typical case of alleged discrimination, in the absence of direct evidence of discrimination, the focus of the

prima facie case would shift to the test for determining whether there was circumstantial evidence of an employer's intent to discriminate first established by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and as refined in Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) and St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993). However, Petitioner's claim of discrimination is not based on disparate treatment or other circumstantial evidence of discrimination, but on the JHA's failure to provide reasonable accommodation for her disability.

96. While discrimination based on disparate treatment requires a showing of some discriminatory intent, disability discrimination based upon an employer's failure to provide an employee with a reasonable accommodation does not. In that regard:

> Unlike other types of discrimination claims, however, a "failure to accommodate" claim under the ADA does not require a showing of discriminatory intent. . . . "Rather, the failure to provide reasonable accommodations is a per se violation of the ADA, regardless of intentions." . . . "In other words, a claim that an employer failed to . . . provide reasonable accommodations to qualified employees, does not involve a determination of whether that employer acted, or failed to act, with discriminatory intent." . . . Such claims require only a showing that the employer failed "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.'" Accordingly, . . . the McDonnell Douglas burden-shifting framework, "while appropriate for determining the existence of disability discrimination in disparate treatment cases, is not necessary or useful in determining whether a defendant has discriminated by failing to provide a reasonable accommodation." (citations omitted).

Wright v. Hosp. Auth. of Houston Cnty., 2009 U.S. Dist. LEXIS 7504 *18-19 (M.D. Ga. Feb. 2, 2009); accord Nadler v. Harvey, No. 06-12692, 2007 U.S. App. LEXIS 20272 **10-11 (11th Cir. August 24, 2007); Jones v. Ga. Dep't of Corr., No. 1:07-CV-1228-RLV, 2008 U.S. Dist. LEXIS 22142 **14-15 (N.D. Ga. March 18, 2008).

Reasonable Accommodation

97. Related to the more fundamental issue of whether Petitioner was a "qualified individual" to whom reasonable accommodation was owed, an analysis of the extent to which an employer must tolerate excessive absenteeism is appropriate.

98. A detailed discussion of the role of absenteeism in employment decisions was undertaken by the Second Circuit Court of Appeals in EEOC v. Yellow Freight System, Inc., 253 F.3d 943 (7th Cir. 2001). In that case, the court determined "that in most instances the ADA does not protect persons who have erratic, unexplained absences, even when those absences are a

result of a disability" because "no business is 'obligated to tolerate erratic, unreliable attendance.'" Id. at 948 (quoting Waggoner v. Olin Corp., 169 F.3d 481, 485 (7th Cir. 1999)). The court further held that:

> Indeed, the absence of employees is disruptive to any work environment. However, it is not the absence itself but rather the excessive frequency of an employee's absences in relation to that employee's job responsibilities that may lead to a finding that an employee is unable to perform the duties of his job.

Id. at 949. The undersigned is in agreement with the comprehensive analysis of the issue provided by EEOC v. Yellow Freight System, Inc. and the cases cited therein.

99. Petitioner did not demonstrate that JHA failed to make reasonable accommodation to meet her disability based on exposures to dust, mold, fumes, or other indoor air quality issues. As in the case of Buckles v. First Data Resources, Inc., 176 F.3d 1098 (8th Cir. 1999), this case is one in which "there is only so much avoidance that can be done before an employer would essentially be providing a bubble for an employee to work in . . . . An employer is not required by the ADA to create a wholly isolated work space for an employee that is free from numerous possible irritants, and to provide an unlimited absentee policy." Id. at 1101.

100. The evidence in this case clearly demonstrated that JHA took reasonable measures as requested by Petitioner to allow her to perform her duties at 1085 Golfair, and provided accommodations that went beyond those requested. Thus, JHA provided the reasonable accommodations required of it under the Florida Civil Rights Act, as construed under the principles of the ADA.

Undue Hardship on JHA's Operations

101. Assuming that Petitioner made a prima facie showing that JHA had failed to provide reasonable accommodation to Petitioner for her disability -- which she did not -- the burden would shift to JHA to demonstrate that accommodation as requested by Petitioner would impose an undue hardship on the JHA's operations.

102. The evidence demonstrates that it was a necessary element of Petitioner's job that she be located in the same physical location as the employees she was expected to supervise, and that program participants would be expected to appear for counseling and assistance. In that regard:

> Often, "an essential function of any government job is an ability to appear for work (whether in the workplace or, in the unusual case, at home) and to complete assigned tasks within a reasonable period of time." [Carr v. Reno, 23 F.3d 525, 530 (D.C. Cir. 1994)] "'Team work under supervision generally cannot be performed at home without a substantial reduction in the

> quality of the employee's performance.'" Amsel v. Tex. Water Dev. Bd., 464 Fed. Appx. 395, 400 (5th Cir. 2012) (quoting Hypes v. First Commerce Corp., 134 F.3d 721, 727 (5th Cir. 1998)). Training co-workers and providing guidance to co-workers are tasks that ordinarily must be performed at an employer's worksite. See Kiburz v. England, 361 Fed. Appx. 326, 334 (3d Cir. 2010) (stating that the district court properly held that "training, scheduling [and attending meetings], and [providing] guidance [to other staff and managers]" could not be performed from home).

Morris v. Jackson, 2013 U.S. Dist. LEXIS 155513 (D.D.C. 2013).

103. JHA demonstrated that allowing program participant files to be removed from the Resident Services offices would jeopardize the security of the confidential information contained therein, and would risk making the files inaccessible when program participants appeared at Resident Services for counseling and assistance.

104. For the reasons set forth herein, the accommodation of working from a remote location as proposed by Petitioner would impose an undue hardship on the JHA's operations.

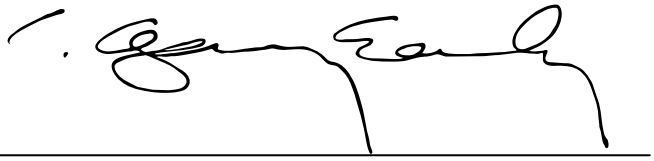
Conclusion

105. Petitioner did not prove by a preponderance of the evidence that JHA discriminated against her by failing to provide reasonable accommodation for her disability in violation of the Florida Civil Rights Act, section 760.10, Florida Statutes.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations issue a final order finding that Respondent, Jacksonville Housing Authority, did not commit an unlawful employment practice in its actions towards Petitioner, Terra Franklin-Shaw, and dismissing the Petition for Relief filed in FCHR No. 2012-02291.

DONE AND ENTERED this 3rd day of March, 2014, in Tallahassee, Leon County, Florida.



E. GARY EARLY
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Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of March, 2014.

ENDNOTES

[1/] It must be noted that none of the notes, reports, or other documents from Petitioner's medical service providers, which are hearsay, were corroborated by competent, substantial evidence that would be admissible over objection in a civil trial, and no provider appeared at the hearing to substantiate any diagnosis. To the extent the documents demonstrate notice of a request for

reasonable accommodation, they have been accepted. They have not been accepted as proof of the truth of any matter asserted therein.

[2/] Petitioner was critical of the length of time -- roughly one week -- that it took for the JHA to procure the masks. However, Petitioner failed to explain why she could not have obtained a "ninety-nine cent" mask on her own, the cost of which could have then been easily reimbursed from petty cash.

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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.