STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DELORES BOATWRIGHT,

Petitioner,

vs. Case No. 13-2262

PALM BEACH HEALTH DEPARTMENT,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was conducted by video teleconference on May 14 and 15, 2014, at sites in West Palm Beach and Tallahassee, Florida, before Administrative Law Judge Claude B. Arrington of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: DeLores Boatwright, pro se
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Palm Beach Gardens, Florida 33418

For Respondent: Victoria Coleman-Miller, Esquire
Palm Beach County Health Department
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STATEMENT OF THE ISSUES

Whether the Palm Beach Health Department (Respondent) committed an unlawful employment practice by failing to

reasonably accommodate the alleged disabilities of DeLores Boatwright (Petitioner).

Whether Respondent committed an unlawful employment practice by discriminating against Petitioner based on Petitioner's age.

PRELIMINARY STATEMENT

On September 5, 2012, Petitioner filed a Complaint of Discrimination (Complaint) with the Florida Commission on Human Relations (FCHR) against Respondent, her former employer. The Complaint alleged that Respondent committed an unlawful employment practice against her by failing to provide a reasonable accommodation for her disabilities and by discriminating against her based on her age. Following its investigation, by documents dated May 21, 2013, the FCHR issued a "Notice of Determination: No Cause" and a "Determination: No Cause." Thereafter, Petitioner filed a Petition for Relief that was dated June 12, 2013, and date-stamped by the FCHR as being received on June 17. The Petition for Relief framed the issues set forth in the Statement of the Issues section of this Recommended Order. On June 17, the FCHR referred the matter to DOAH, and this proceeding followed.

At the final hearing, Respondent presented its case first to expedite the proceeding. Respondent presented the testimony of Robert Scott (Petitioner's former supervisor), Andy Walker (Respondent's director of general services), Erica Lacker

(Respondent's supervisor of human resources), Jean Lansiquot (a health services representative employed by Respondent), Donna Maffeo (Respondent's acting risk manager), Yanick Gribkoff (a nursing consultant employed by Respondent), Jackie Lester (the Florida Department of Health's equal opportunity manager), and Delores Taylor-Williams (Respondent's human resources manager). Respondent offered pre-marked Exhibits 1 through 13 and 15 through 16, each of which was admitted into evidence.

Petitioner testified on her own behalf and presented the additional testimony of Mitchell Durant (Respondent's HIV AIDS program coordinator), Shelia Finkley (a clerical employee employed by Respondent), Jesse Anderson (a clerical employee employed by Respondent), Kesha Brown (a registered nurse employed by Respondent), Lynn Todd (a human services program specialist employed by Respondent), and Juletha Bradley (a friend of Petitioner). Petitioner's Exhibits 1 through 9 and 13 through 16 were admitted into evidence.

Unless otherwise noted, all statutory references are to Florida Statutes (2012). The relevant statutes have not changed since the date of the events at issue.

A Transcript of the proceedings, consisting of three volumes, was filed on June 5, 2014. The undersigned extended the deadline for the filing of proposed orders pursuant to an agreed motion filed by Respondent. Thereafter, each party timely filed

a Proposed Recommended Order, which has been duly-considered by the undersigned in the preparation of this Recommended Order.

FINDINGS OF FACT

1. At all times pertinent to this proceeding, Respondent has been an agency of the State of Florida pursuant to section 20.43, Florida Statutes, and an employer within the meaning of section 760.02(7), Florida Statutes (2012).

2. Petitioner was employed by Respondent between January 3, 2002, and January 31, 2013. On January 31, 2013, Respondent terminated Petitioner's employment for cause.

3. Petitioner worked as an HIV counselor, which required her to provide both pre-test and post-test counseling to clients interested in HIV testing. Counseling performed by Petitioner involved her sitting in an office setting with the door closed to discuss with clients risks for contracting HIV and methods to reduce those risks. HIV counseling sessions are typically conducted face to face. There was a dispute in the record as to how much computer input is necessary while conducting a counseling session. The greater weight of the credible evidence established that any notes would typically be taken by hand and that any computer input would typically be made after the counseling session had been completed. Counseling sessions typically lasted approximately 15 to 20 minutes.

4. Due to privacy and HIPPA considerations, counseling sessions were conducted in a private office with the door closed.

5. Petitioner was directly supervised by Robert Scott from 2005 until December 2011.

6. In October 2009, Petitioner was rear-ended in a car accident while working. This accident prompted a workers' compensation claim. Petitioner advised Mr. Scott that she had hurt her neck, upper back, and right shoulder. Initially, Petitioner had work restrictions of no lifting, no driving for the job, and no bending. As of October 27, 2009, Petitioner's work restrictions were lifted, and no other work restrictions were placed on Petitioner. On January 28, 2010, Petitioner was referred to Dr. Edward Chung, an orthopedic specialist. Dr. Chung placed no work restrictions on Petitioner. On February 3, 2010, Dr. Chung determined Petitioner had reached maximum medical improvement and gave her an impairment rating of zero percent. During the remainder of her employment, Petitioner had no on-going impairment rating or work restrictions as a result of her automobile accident.

7. Petitioner worked at the West Palm Beach Health Center, which is Respondent's primary care medical clinic. This clinic, located on 45th Street in West Palm Beach, is generally known as the 45th Street Clinic.

8. The majority of the rooms in the 45th Street Clinic are examination rooms with an examination table, a small sink, and a small desk for use by the nurse or doctor. The 45th Street Clinic has a limited number of consultation rooms, which are typically small interior offices with a desk that separates the counselor and client with counter space behind or to the side of the counselor for computer work.

9. For a year and a half between 2004 and 2005, Petitioner conducted her counseling sessions in Room 104 of the 45th Street Clinic. Room 104 is a relatively small office with no windows.

10. At the end of 2005, Petitioner's office assignment changed to Room 102, which is also an interior office with no windows. This move was at Petitioner's request when the room became available due to the retirement of a colleague. Room 102 is slightly larger than Room 104. Petitioner remained in Room 102 until the beginning of 2010.

11. While she was assigned Room 102 and Room 104, Petitioner kept her door closed, even when she was not seeing clients. This practice was problematic because other staff members were unable to determine when Petitioner was available to counsel patients.

12. Mr. Scott discussed with Petitioner on numerous occasions the need for her to keep her office door open when she was not with a client. Petitioner informed Mr. Scott that she

kept the door closed because of a sinus problem that felt better when the door was closed. Petitioner never provided medical documentation of her alleged sinus problem, and there was no credible explanation why keeping her office door closed would improve a sinus condition.

13. In early 2010, Petitioner's room assignment was changed from Room 102 to Room 107. This reassignment was necessary because Respondent needed to make Room 102 available for another, legitimate business use.

14. Room 107 was an exterior office with a window. Its furniture was in an "L" shape attached to a wall. The office contained a desk and a counter for a computer. During counseling sessions, the counselor and client would sit face-to-face on opposite sides of the desk. The computer was to the counselor's side, which required the counselor to turn or swivel her chair away from the client to access the computer.

15. In December 2010, Petitioner complained to Mr. Scott that the furniture arrangement in her office was causing her neck and back pain. Petitioner attributed that pain to turning to access her computer or turning to talk to a client while on the computer.

16. In response to Petitioner's complaint of pain, Mr. Scott requested that Michial Swank, Respondent's risk manager, perform an ergonomic evaluation of the furniture in

Room 107. Such an evaluation is a service that requires no medical documentation and is offered by Risk Management to any employee.

17. Mr. Swank determined that if the furniture could be reconfigured, it should be so that Petitioner did not have to twist to look from a client to the computer or vice versa.

18. Mr. Swank provided his assessment to Respondent's General Services Department to determine whether the furniture could be reconfigured. Respondent's General Services Department determined the furniture could not be reconfigured because it was modular furniture custom-made for the office and bolted together.

19. Around March 2011, Dr. Cook, the director of the 45th Street Clinic, proposed that Petitioner change rooms with another HIV counselor located in Room 104.

20. Mr. Swank performed an ergonomic assessment on Room 104 and determined the furniture and computer location to be ergonomically correct for counseling a patient while on the computer.

21. Respondent offered Petitioner the option of moving from Room 107 into Room 104, but she refused that offer and opted to remain in Room 107. Petitioner cited her sinus problems as the reason she did not want to move back to Room 104.

22. Despite her decision to remain in Room 107, Petitioner attempted to persuade Helen Bonner, a nurse, to switch offices

with her. This attempt was without the knowledge or permission of Mr. Scott or any other administrator. Ms. Bonner's room was set up for clinical use for patients with seizure disorders. When Yankick Gribikoff, the nursing supervisor, heard of Petitioner's effort to have Ms. Bonner swap offices, Ms. Gribicoff immediately squelched the idea. Ms. Bonner's office had specialized equipment, including specialized telephone equipment and refrigerators. Ms. Gribicoff had valid reasons to end Petitioner's efforts to swap rooms with Ms. Bonner.

23. In the fall of 2011, two of Respondent's clinics were closed due to budgetary constraints. Certain personnel were moved from those closed clinics into the 45th Street Clinic.

24. At that time, Rooms 104 and 107 were the only two rooms in the 45th Street Clinic available for HIV counseling. It became necessary to use Room 107 for both HIV and STD (sexually transmitted disease) counseling. Because of its location and proximity to other services, Respondent had a valid reason to select Room 107 over Room 104 as the room for HIV and STD counseling.

25. While Petitioner had had some training in STD counseling, she had difficulty with that type of counseling. An expert in STD counseling was among the personnel being moved from one of the closed clinics to the 45th Street Clinic. Respondent had a valid reason to select the expert to occupy Room 107.

26. Respondent reassigned Petitioner to Room 104. Petitioner agreed to the reassignment and moved into Room 104 on October 3, 2011. Petitioner kept the door to her office closed even when she was not counseling clients.

27. In early November 2011, Mr. Scott received a complaint about the physical condition of Room 104 from someone who used that office while Petitioner was away. The complaint centered on the room's lack of cleanliness.

28. On November 18, 2011, Mr. Scott met with Petitioner to discuss certain concerns he had. It was during that meeting that Petitioner told Mr. Scott, for the first time, that she was claustrophobic in Room 104. Petitioner referred to Room 104 as being a "closet" and stated that she could not stay in that room.

29. Petitioner brought to Mr. Scott a doctor's note dated November 23, 2011, that reflected that Petitioner was experiencing claustrophobic symptoms and could not stay in a small, closed space for 15 to 20 minutes.

30. Upon receiving the doctor's note, Mr. Scott notified Human Resources of the doctor's note. Arrangements were made to provide Petitioner a larger room in another clinic. Due to the merger of the two closed clinics with the 45th Street Clinic, no room at the 45th Street Clinic, other than Room 104, was available for Petitioner's use as an HIV counselor.

31. A larger office was found in the Lantana Clinic. The targeted Lantana office was being used by another HIV counselor. To accommodate Petitioner, Respondent arranged to have the Lantana counselor transferred to the 45th Street Clinic and Petitioner transferred to the Lantana Clinic.

32. Petitioner was advised of this change in location and agreed to move around December 18, 2011. She never advised or stated she could not drive to the Lantana Clinic.

33. Petitioner called in sick on December 18, the day she was scheduled to move to the Lantana Clinic.

34. On December 19, 2011, Petitioner reported for work at the 45th Street Clinic instead of the Lantana Clinic. Petitioner stayed at work at the 45th Street Clinic for a few hours, but left because she was not feeling well.

35. On December 19, 2011, Petitioner suffered a stroke[1/] and went on medical leave.

36. In May 2012, Petitioner told Mr. Scott that she was ready to return to work. For legitimate business reasons, the Lantana Clinic office was no longer available.

37. Jacqueline Lester is the equal opportunity manager for the Florida Department of Health. Ms. Lester reviews requests for reasonable accommodations with the authority to approve or reject a request.

38. Ms. Lester first became aware of Petitioner as a result of Petitioner's accommodation request dated December 15, 2011. Petitioner asked to stay at the 45th Street Clinic in a larger office with a furniture arrangement not requiring her to turn her neck. That request was not processed because Petitioner soon thereafter went on medical leave for an extended period.

39. On June 19, 2012, a second request for accommodation was received from Petitioner. In this request, Petitioner asked for a reasonably-sized office, which Petitioner described as being at least 10' x 10', with a window. She also asked that the office be within close distance to her home in Palm Beach Gardens due to her inability to drive or sit for "any great length of time." Petitioner also requested that she start back to work on a part-time basis. Petitioner's request included notes from two doctors. This medical documentation did not state that Petitioner could not drive due to a neck and back disability.

40. After reviewing the request and medical documentation, Ms. Lester, whose office is in Tallahassee, talked with Respondent's personnel in Palm Beach County. Ms. Lester decided to accommodate Petitioner's request.

41. The accommodation was an office located in Respondent's clinic in Delray Beach. The office was 10' x 10' with a window. Although the Delray Beach Clinic was a substantial commute from Petitioner's home in Palm Beach Gardens, the accommodation

included permission for Petitioner to stop as needed while traveling to work without being penalized for late arrival at work.[2/] The accommodation also provided that Petitioner could return to full-time schedule at the Delray Beach Clinic "upon release from her medical providers."

42. Petitioner refused the offer of the office at the Delray Beach Clinic.

43. On January 31, 2013, Respondent terminated Petitioner's employment for cause based on Petitioner's refusal to return to work. Petitioner presented no meaningful evidence that Respondent discriminated against her based on age or because of her perceived disabilities.

44. Petitioner filed her Complaint of Discrimination with the FCHR on September 5, 2012.

45. FCHR issued its "Notice of Determination: No Cause" and "Determination: No Cause" on May 21, 2013. Petitioner filed her Petition for Relief on June 12, 2013.

CONCLUSIONS OF LAW

46. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this case pursuant to sections 760.11(7), 120.569, and 120.57(1), Florida Statutes (2013).

47. The Florida Civil Rights Act of 1992 (FCRA) is codified in sections 760.01 through 760.11.

48. Petitioner filed her Complaint of Discrimination against Respondent on September 5, 2012. 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 . . . ." All claimed discriminatory acts occurring more than 365 days before September 5, 2012, are time-barred.

49. 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 FCRA 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.

50. Respondent is an employer as that term is defined in section 760.02(7).

51. Petitioner asserted in her Petition for Relief that Respondent discriminated against her based on her age and by failing to provide a reasonable accommodation of her disability.

52. Petitioner has the burden of proving by a preponderance of the evidence that Respondent committed an unlawful employment practice as alleged in her Petition for Relief. 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).

53. Petitioner failed to present any meaningful evidence that Respondent discriminated against her on the basis of her age. Consequently, no further discussion as to the elements needed to prove age discrimination is necessary.

54. 42 U.S.C. § 12102 provides, in relevant part, as follows:

> (1) Disability. The term "disability" means, with respect to an individual—
> (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
> (B) a record of such an impairment; or
> (C) being regarded as having such an impairment . . . .
> (2) Major life activities.
> (A) In general. For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

55. 42 U.S.C. § 12102(4) sets forth the following rules of construction:

> (4) Rules of construction regarding the definition of disability. The definition of "disability" in paragraph (1) shall be construed in accordance with the following:
> (A) The definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.
> (B) The term "substantially limits" shall be

> interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.
> (C) An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.
> (D) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

56. It is not necessary to determine whether Petitioner has a disability within the meaning of 42 U.S.C. § 12102(1)(A) because Respondent regarded her as having a disability within the meaning of 42 U.S.C. § 12102(1)(C).[3/]

57. When Mr. Scott received the note pertaining to claustrophobia, he contacted Human Resources, and efforts were made to move Petitioner to a larger room in another clinic. Those acts constitute evidence that Respondent regarded Petitioner as having an impairment within the meaning of 42 U.S.C. § 12102(1)(C). Consequently, it is appropriate to complete the "failure to accommodate" analysis.

58. The FCRA 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 Americans with Disabilities Act, such a duty is reasonably implied. Brand v. Fla. Power Corp., 633 So. 2d 504, 511, n.12 (Fla. 1st DCA 1994).

59. In McCaw Cellular Communications v. Kwiatek, 763 So. 2d 1063, 1065-1066 (Fla. 4th DCA 1999), the court observed 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. § 12112(b)(5)(A). (footnote omitted).

60. Disability discrimination based upon an employer's failure to provide an employee with a disability a reasonable accommodation for that disability does not require the employee to prove that the employer acted with a discriminatory intent. The court made the following observation in Wright v. Hospital Authority of Houston County, 2009 U.S. Dist. LEXIS 7504 *18-19 (M.D. Da. Feb. 2, 2009):

> Unlike other types of discrimination claims, however, a "failure to accommodate" claim under the ADA does not require a showing of discriminatory intent. . . . "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 the disability'

> without demonstrating that 'the accommodation would impose an undue hardship on the operation of the business.'" Accordingly, . . . the McDonnell Douglas[4/] 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).

61. As reflected by the Findings of Fact, Respondent repeatedly made efforts to accommodate Petitioner by switching room assignments and offering Petitioner various options. The conclusion is inescapable that Respondent not only took reasonable measures to try to accommodate Petitioner's needs, it took extraordinary measures.

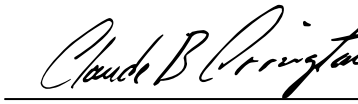
62. The final office offered to her in the Delray Beach clinic was the size Petitioner requested and had a window. While the Delray Beach location involved a substantial commute for Petitioner, Respondent made a reasonable accommodation for that commute by authorizing Petitioner to stop as needed while traveling to work without being penalized for late arrival at work. Respondent also granted Petitioner's request that she start back to work on a part-time basis.

63. Respondent made an offer of a reasonable accommodation to Petitioner. Petitioner declined that offer and quit coming to work. Respondent was justified in terminating Petitioner's employment.

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 adopting the Findings of Fact and Conclusions of Law contained in this Recommended Order. It is further RECOMMENDED that the final order dismiss the Petition for Relief with prejudice.

DONE AND ENTERED this 1st day of August, 2014, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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this 1st day of August, 2014.

ENDNOTES

[1/] One of Petitioner's doctors later referred to the stroke as being a TIA (transient ischemic attack).

[2/] Additionally, the Delray Beach Clinic was very close to a Tri-Rail stop, so Petitioner could have taken that transportation to and from work.

[3/] If required to do so, the undersigned would conclude that Petitioner failed to prove that the pain she suffers when she

turns from computer to client, and vice versa, and her symptoms of claustrophobia constitute "a physical or mental impairment that substantially limits one or more major life activities" within the meaning of 42 U.S.C. § 1210(1)(A). Respondent established that there was no need for Petitioner to turn from client to computer, and vice versa, in doing the sedentary counseling work she was required to do. All she had to do was swivel her office chair to face either the client or the computer. Petitioner's alleged symptoms of claustrophobia were not of sufficient strength to keep Petitioner from closing her office door when she was not counseling a client. As the court observed in Wimberly v. Securities Technology Group, Inc., 866 So. 2d 146, 147 (Fla. 4th DCA 2004):

> For there to be a disability within the meaning of the ADA, there must be a substantial limitation on a major life activity; a "disabled" person must be completely unable to perform the activity, or significantly restricted in performing the activity as compared to an average person. . . . Factors to consider when determining whether an individual is "substantially limited" include: 1) "the nature and severity of the impairment"; 2) "the duration of the impairment"; and 3) "the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment." (citations omitted).

[4/] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

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.