

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CONSTANCE K. GATEWOOD,

Petitioner,

vs.

Case No. 16-5762

THE UNLIMITED PATH, INC.,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on April 17 and May 4, 2017, in Panama City, Florida, before Garnett W. Chisenhall, a duly-designated Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner: Constance K. Gatewood, pro se
Post Office Box 262
Campbellton, Florida 32426

For Respondent: William G. Warner, Esquire
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STATEMENT OF THE ISSUE

The issue is whether The Unlimited Path, Inc. ("The Unlimited Path") committed an unlawful employment practice against Constance K. Gatewood by denying her a reasonable accommodation and/or by demoting her from her position as Program Director at Jackson Correctional Institution.

PRELIMINARY STATEMENT

Ms. Gatewood filed a Charge of Discrimination with the Florida Commission on Human Relations ("the Commission") on January 25, 2016, alleging that The Unlimited Path did not provide a reasonable accommodation and retaliated against her by demoting her from a Program Director to a Clinical Supervisor.

The Commission conducted an investigation and issued a Determination on August 25, 2016, concluding that there was no reasonable cause to believe that an unlawful employment practice had occurred:

[Ms. Gatewood] filed a charge of discrimination against [The Unlimited Path] alleging that she was denied reasonable accommodations, harassed, denied wages, retaliated against and demoted based on her disability and age. The facts and evidence as set forth in the Investigative Memorandum do not support [Ms. Gatewood]'s allegation. The evidence in this matter does not reveal that [The Unlimited Path] considered [Ms. Gatewood] to be disabled. The evidence in this matter reveals that [The Unlimited Path] accommodated [Ms. Gatewood]'s requests regarding her allergies. The evidence in this matter reveals that [Ms. Gatewood] failed to provide any competent substantial evidence to prove otherwise. The evidence in this matter reveals that [Ms. Gatewood] is still employed by [The Unlimited Path] and has failed to provide any competent substantial evidence to prove that [The Unlimited Path] denied her wages.

Ms. Gatewood responded by filing a Petition for Relief with the Commission on September 27, 2016.

On September 27, 2016, the Commission referred this matter to DOAH for a formal administrative hearing.

On October 24, 2016, the undersigned issued a Notice scheduling the final hearing to occur on December 9, 2016.

After granting multiple requests for continuances, the final hearing commenced on April 17, 2017. Because the final hearing was not concluded on April 17, 2017, the undersigned reconvened the final hearing on May 4, 2017, and it concluded that day.

In addition to her own testimony, Ms. Gatewood presented the testimony of Michael Van Bebber and Sheila Randolph.

Ms. Gatewood's Exhibits 1, 2, 5A, 5B, 7, 9 through 11, 15, 18, 28, and 29 were accepted into evidence.

The Unlimited Path presented the testimony of Michael Dozier, Amie Bishop, Calvin Bell, Margaret Agerton, May-Li Clark, and Bertrand Randolph.

During the final hearing, The Unlimited Path asked the undersigned to accept Exhibits 1 through 73 into evidence. While the undersigned reserved ruling on the admissibility of Exhibits 61, 62, and 64, the undersigned accepted all of The Unlimited Path's other exhibits into evidence. As for Exhibits 61, 62, and 64, the undersigned does not accept them into evidence because they are unduly repetitious. See § 120.569(2)(g), Fla. Stat.,^{1/} (providing that "[i]rrelevant,

immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible, whether or not such evidence would be admissible in a trial in the courts of Florida.”).

Transcripts from the final hearing were filed with DOAH on May 25, 2017.

Ms. Gatewood and The Unlimited Path filed timely Proposed Recommended Orders that were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

The Parties

1. The Unlimited Path contracts with the Florida Department of Corrections (“DOC”) to provide residential substance abuse counseling and re-entry services to inmates on prison grounds.

2. The Unlimited Path has been operating since 1994 when it had 30 to 50 employees. Today, The Unlimited Path has 280 employees and operates at 20 to 24 institutions within Florida.

3. DOC is The Unlimited Path’s primary source of revenue. If The Unlimited Path is not satisfying its contractual obligations, then DOC can terminate the contract. Therefore, it

is imperative that The Unlimited Path satisfy its contractual obligations.

4. In order to ensure that The Unlimited Path is satisfying those obligations, DOC and the Department of Children and Families ("DCF") conduct periodic reviews of The Unlimited Path's substance abuse programs.

5. The contract between DOC and The Unlimited Path is comprehensive. For example, one provision requires that The Unlimited Path comply with the Americans with Disabilities Act ("the ADA"). Another provision empowers DOC to prohibit The Unlimited Path from employing a particular person at a DOC facility.

6. Bertrand Randolph is the President of The Unlimited Path and performs all of the functions typically associated with a chief executive officer of a corporation.

7. Mr. Randolph's wife, Sheila Randolph, is the Executive Director of The Unlimited Path, and her duties include overseeing the operations and policies of the entire corporation. Ms. Randolph also writes The Unlimited Path's bids.

8. Ms. Gatewood has worked in prison-based substance abuse treatment programs since 2005. She is a master's level certified addiction professional or a "CAP". As a CAP, Ms. Gatewood is qualified to operate a substance abuse program.

9. The Unlimited Path hired Ms. Gatewood on September 20, 2011, to work as a clinical supervisor at the Walton Correctional Institution ("Walton CI").

10. One piece of documentation associated with Ms. Gatewood's hiring asked her to disclose whether she suffers from various medical conditions such as epilepsy, diabetes, or heart disease. With regard to a category on that document entitled "other," Ms. Gatewood noted that she experiences "[a]llergies to certain foods, chemicals, perfumes, other odors plus dyes." However, she responded negatively to a question asking if she had ever "received a disability rating or had one assigned . . . by an insurance company or state/federal agency."

11. On an "Emergency Contact Information Sheet," Ms. Gatewood disclosed that she is allergic to several foods and substances such as aspirin, sulfides, chemicals, perfumes, colognes, seafood, pork, strawberries, nuts, chocolate, red dye, and yellow dye.

12. Ms. Gatewood also noted on the aforementioned form that she has asthma and is sensitive to extreme hot or cold conditions.

13. However, the disclosures described above did not present a complete picture regarding the severity of Ms. Gatewood's allergies. Specifically, those disclosures did

not indicate that Ms. Gatewood's allergies could be life-threatening.

14. A letter dated October 7, 2003, from Dr. Mark H. Kalenian of Alabama Asthma & Allergy, P.C. presented a comprehensive description of Ms. Gatewood's allergies and described how they could be life-threatening:

The above referenced patient is a 52 year old black female initially seen on 9/13/2001 and last seen on 4/1/2003. Her diagnoses include allergic rhinitis, asthma, dermographic Urticaria, Urticaria/angioedema, and multiple drug allergies. She breaks out in hives and can get facial swelling when ingesting MSG, scupper dines, vanilla ice cream, red #40 and yellow #5 dyes, shellfish, and Advil-related anti-inflammatory drugs. Her main problems that may affect her work are smoke, chemicals and/or perfumes which trigger sinus allergy type symptoms, lip swelling, dizziness, shortness of breath, and anaphylaxis (a potentially life-threatening reaction). These potential exposures to smoke, cologne, perfume, scents or chemicals, extreme hot/cold air, polluted air at work whether in the air or on co-workers could potentially trigger a severe allergic, asthmatic or anaphylactic reaction, which could send her to the emergency room, close off her airway and drop her blood pressure and be potentially life threatening.

She should work in a clean air environment, away from co-workers who smoke or wear scented lotions or perfumes, away from polluted air and away from extremes of hot or cold. Avoidance is the best treatment for her, although she needs to continue on all asthma and allergy medications. Please consider implementing a policy of no

perfume/cologne or strong scents worn on trainees, and people should smoke outside.

15. As discussed in more detail below, Ms. Gatewood did not share the above-referenced letter with The Unlimited Path until April of 2015.^{2/}

Ms. Gatewood's Tenure at The Unlimited Path Prior to July 2015

16. During her tenure with The Unlimited Path, Ms. Gatewood has worked as the Program Director of substance abuse rehabilitation programs at three different DOC facilities: Lowell CI, Jackson CI, and the Northwest Florida Regional Annex.

17. At The Unlimited Path, a program director is responsible for all aspects of a treatment program at a DOC facility.

18. Ms. Gatewood's allergies became well-known to those who worked around her. Any sort of strong scent presented a problem. For example, Ms. Gatewood's co-workers could not heat fish in a microwave because of the resulting aroma, and they could not use hand soap.

19. There is no dispute that The Unlimited Path's management (prior to November of 2014) properly addressed any complaints made by Ms. Gatewood. According to Ms. Randolph, "any time there was a concern, we would address it with the employee or the site by holding a staff [meeting], requesting that people refrain from heavily scented products. I mean,

we - we even allowed for there to be some cleaning schedule changes at sites to accommodate her allergies. So we tried very hard to respect the fact that she was sensitive."

20. The Unlimited Path also allowed Ms. Gatewood to set the standard for soap in the bathrooms.

21. Nevertheless, Ms. Gatewood's allergies were an issue throughout her tenure at The Unlimited Path.

22. As explained below, Ms. Gatewood cites three instances in which The Unlimited Path allegedly ignored requests from her for a reasonable accommodation within the meaning of the ADA. In other words, Ms. Gatewood alleges that The Unlimited Path began ignoring her requests for a reasonable accommodation in November of 2014.

23. The Unlimited Path began operating a substance abuse rehabilitation program at Jackson CI in January of 2014, with Ms. Gatewood as the Program Director.

24. In approximately November of 2014, counselors under Ms. Gatewood's supervision were wearing scented products, and the aromas from those scented products were being transferred to documents that Ms. Gatewood had to review in her capacity as Program Director. As a result, Ms. Gatewood experienced allergic reactions and began leaving documents in filing cabinets overnight in order for the scent to dissipate.

25. On November 5, 2014, Ms. Gatewood addressed the following e-mail to Sheila Randolph:

This message is to seek advice regarding employees that continue to wear scented products in the workplace which is creating complications because the paperwork is extremely saturated with perfume/cologne/aftershave/lotion scents so strong that I am experiencing allergic reactions signing the paperwork.

I have addressed this issue in staff meeting[s], however, it seems not to matter with certain staff.

Ms. Russell's entire caseload charts were so strongly scented today, I asked Ms. Dandridge to place them in the file cabinet because my system could not tolerate the smell nor could I continue signing off on the individual sessions. I became very ill and had to go outside to get fresh air in order to breathe.

Also, I know you want me to provide leadership training to Mr. Bell, however, the scented aftershave and hand product he wears makes it extremely difficult for me to interact in close proximity with him, and sign his paperwork. Today, I mentioned to him that I was experiencing an allergic reaction and my eyes were stinging so badly I could not sign his chart. Later I overheard him say "if someone is that sensitive this is not the environment to work in."

At this point, I am unable to perform the duties of my job due to these strong scents that I am affected by smelling and touch. There is a DOC policy that addresses strong scents in the workplace. I don't want the closed charts to arrive in Tallahassee smelling like a perfume factory, and lastly

these scents are very attractive to the inmates.

26. On April 9, 2015, Ms. Gatewood addressed the following e-mail to her immediate supervisor, Amie Bishop:

At your earliest convenience I need to speak with you regarding two issues that involve Counselor Karlicia Rogers.

1. Scented products in the workplace that has been address[ed] in the past. She is now wearing heavily scented hand products when completing documentation.

2. Documentation deficiencies regarding three charts that were not countersigned when the client was enrolled into the program, and correcting my documentation in the chart.

27. Later that day, Ms. Gatewood transmitted another e-mail to Ms. Bishop and copied Sheila Randolph. Within the e-mail, Ms. Gatewood expressed an issue regarding Mr. Bell. However, she also referred to the ADA:

Yesterday, after Staff Meeting, I considered Mr. Bell's behavior inappropriate. In front of staff members, he made a comment regarding Ms. Chavers who was not present in the room at the time. He said, "If you are that sensitive you don't need to be working here." This was regarding an incident earlier during staff meeting when Ms. Rogers reported information she overheard from Ms. Chavers' group and (Ms. Rogers) said she wanted clarification. Ms. Chavers thought Ms. Rogers was targeting her and told her so during the meeting. Ms. Rogers explained that she was not targeting her, and after numerous attempts to convince her she was not being targeted, Ms. Chavers excused herself and left the meeting.

It was [about] time to go, I went to look for Ms. Chavers, and did not feel the need to keep Mr. Bell overtime to address his behavior. However, this morning, I advised Mr. Bell that I overheard the remark and wanted to address it with him. I mentioned that in the past I overheard him make the same remark about me when he thought I was out of the room (re: scented products in the workplace, and allergic effect it causes me). I further mentioned that I was surprise[d] he would commit the very same act after having been talked to by the Corporate Office. He remembered the incident stating Ms. Clark had advised him not to wear scented products in the workplace, however, she agreed with him regarding his opinion that if I was that sensitive, I did not need to be working here. He further stated that she did not know that I was still upset by the incident, and he began to apologize profusely.

I emphasized to him that I was not still upset about that incident. However, my concern is the comment is totally inappropriate in the workplace because of the following reasons: (1) the forum in which he made the comment. The person he was talking about was not present, (2) the possibility of influencing staff members present to feel the same way he does which creates tension in the workplace, (3) in my situation, it is essential to recognize the Americans with Disabilities Act, (4) re: Ms. Chavers it was inappropriate for him to say where she can work, and (5) he continues to make this comment in total disregard of the effect.

Hopefully, Mr. Bell will not continue this behavior, however, I do want to keep you in the loop.

(emphasis added).

28. Ms. Randolph responded to Ms. Gatewood via e-mail on April 9, 2015, by stating that,

This is the first time I've heard you make mention of ADA for your condition. We have never gotten any medical documentation from you regarding special accommodations for your sensitivities and yet, we have continued to be supportive of your allergies and the needs you have regarding scents and strong odors. If you are stating that you have a condition covered under the ADA, we need documentation in support of that so that we can explore our responsibilities in that regard further.

29. Via an e-mail dated April 16, 2015, Ms. Gatewood responded to Ms. Randolph's request by attaching a note dated April 15, 2015, from Dr. Kalenian recommending that Ms. Gatewood have a fragrance free environment due to asthma and chemical sensitivity. Ms. Gatewood also attached Dr. Kalenian's October 7, 2003, letter that was quoted above in paragraph number 14.

30. In addition, Ms. Gatewood reiterated in her April 16, 2015, e-mail that "the current source of issues for me is when counselors use heavily scented hand products when handling inmates' charts that I am required to countersign as the Qualified Supervisor."

31. To the extent that Ms. Gatewood's November 5, 2014, e-mail amounts to a request for a reasonable accommodation within the meaning of the ADA, her subsequent e-mail on April 9,

2015, indicates that The Unlimited Path addressed her concerns regarding Mr. Bell's use of scented aftershave.

32. Moreover, The Unlimited Path conducted a staff meeting at some point between November 5, 2014, and December 25, 2014, at Jackson CI and trained the staff members on workplace grooming etiquette and being sensitive to co-workers' allergies.

33. To the extent that Ms. Gatewood's April 9, 2015, e-mails amount to requests for a reasonable accommodation within the meaning of the ADA, The Unlimited Path mandated in May of 2015, that female staff members at Jackson CI no longer wear scented lotions. In addition, The Unlimited Path prohibited liquid soap in the bathroom at Jackson CI.

34. To the extent that any of the e-mails discussed above amount to requests for a reasonable accommodation within the meaning of the ADA, the greater weight of the evidence demonstrates that The Unlimited Path took appropriate actions to satisfy those requests.

35. Aside from the issues regarding her allergies, Ms. Gatewood's tenure at The Unlimited Path has been marked by difficulties with DOC.

36. For example, Ms. Gatewood did not have a good working relationship with the assistant warden of programs at Lowell CI when she was the Program Director there.

37. As a result, Ms. Randolph encountered resistance when she sought permission from DOC to transfer Ms. Gatewood from Lowell CI to Jackson CI.

38. Margaret Agerton, the Assistant Bureau Chief in DOC's Bureau of Programs, felt as if The Unlimited Path was transferring a problem from one place to another. Nevertheless, Ms. Agerton approved the transfer with the caveat that this would be the last one.

Events Leading to Ms. Gatewood's Demotion

39. On June 2, 2015, Ms. Gatewood requested leave from Thursday, July 16, 2015, through Friday, July 24, 2015, and her request was approved the next day.

40. Because DCF is responsible for licensing and regulating substance abuse and mental health facilities throughout Florida, Michael Van Bebber of DCF arrived on July 23, 2015, at Jackson CI in order to conduct an audit. The Unlimited Path had received advance notice approximately two weeks beforehand.

41. At the time of the audit, Jackson CI was treating 68 inmates.

42. Even though Mr. Van Bebber considers The Unlimited Path to be one of the highest performing substance abuse providers that he reviews, he was disturbed by the state of the treatment program at Jackson CI.

43. Three counselors employed by The Unlimited Path at Jackson CI had resigned within the previous week, and there were not enough counselors for the 68 people receiving treatment.

44. In addition, Mr. Van Bebber considered the treatment facility to be too small for the number of people in the program. In his opinion, the facility was overcrowded, and the overcrowding caused the inmates to be extremely agitated. Mr. Van Bebber felt unsafe and locked himself in an on-site office.

45. With regard to the overall functioning of the program at Jackson CI, Mr. Van Bebber concluded that The Unlimited Path was not performing at the level he would expect from an established provider of residential treatment programs.

46. In fact, The Unlimited Path almost got a warning that could have resulted in the loss of its license at Jackson CI. Because Mr. Van Bebber considered DOC to be equally responsible for the problems at Jackson CI, the warning was not issued.^{3/}

47. At the time of the audit, Michael Dozier worked for The Unlimited Path, and he substituted as the Program Director at Jackson CI during Ms. Gatewood's vacation.

48. Mr. Dozier has over 25 years of experience with prison residential treatment communities. He is recognized as an authority on residential treatment programs/communities.

49. Upon arriving at Jackson CI, Mr. Dozier spoke to The Unlimited Path's staff members and estimated that 50 percent of those to whom he spoke were looking for another job.

50. As Mr. Dozier examined the physical area housing the substance abuse treatment program, he noticed that the facility was unclean and that many of the inmates were disheveled in appearance. This indicated to Mr. Dozier that there was a lack of structure and accountability.

51. On July 23, 2015, Mr. Dozier wrote a memo to the "Executive Leadership" of The Unlimited Path recommending the "immediate removal" of Ms. Gatewood as the Program Director of Jackson CI:

First, let me start by saying I have spent the past week evaluating the strengths and weaknesses of our Jackson CI RTC with hopes of identifying the direct cause of high staff turnover, staff resignations without notice, high staff dissatisfaction, and high levels of inmate frustration. During my review, I was very discouraged by what I found. The program space was very dirty with trash cans overflowing, negative graffiti on the walls, chairs disorganized in group space, and counseling offices discombobulated. I also noticed heavy layers of dust and spider webs in the windows [along with] hanging poster paper with inappropriate writing on them.

As I focused my attention on the program, I quickly realized that there was no structure in the program. There appeared to be no accountability when it came to community expectations. [R]esidents were walking around with their shirts out, failing to

wear their ID, using abusive language and consistently giv[ing] the staff negative feedback when being directed. After speaking to several structure members, I received the following feedback: the last structure meeting was held over three months ago, staff is not assigned to departments, there are no department meetings, no visual display of assigned structure positions and no systems for behavior management/behavior shaping. It was very disappointing to witness the disarray in Morning Meeting and Wrap-up. [T]hose meetings had no structure or desired outcome and residents expressed no trust of the environment.

It was clear that staff had been receiving little to no direction from the program director when it came to managing the community and creating program expectations. During my interviews with staff, it was apparent that the director spent most of the time being punitive towards staff focusing on issues such as the way they wore their hair, what they [were] wearing, what lotion they were using and what deodorant they had on. It was also reported that the director would always make negative comments about the corporate office, negative comments about other employees, and a clear dissatisfaction with the contract manager. [S]taff also stated that if they complained about anything the director would defiantly retaliate against them using their request[s] for time off, [the] dress code, clinical files, or [by assigning that staff member to] the difficult clients that week.

I was clearly concerned about the staff morale, lack of leadership and the poor client satisfaction I heard over the past four days. As you know, the program director has to be seen as the ultimate role model in the Therapeutic Community.

Based on my findings, I am recommending the immediate removal of the Program Director.

52. On July 27, 2015, The Unlimited Path removed Ms. Gatewood from her position as Program Director at Jackson CI and reassigned her to a counselor position at the Northwest Florida Regional Annex.

53. A memorandum signed by May-Li Clark, Ms. Gatewood's immediate supervisor at the time, explained why Ms. Gatewood was demoted:

During the dates of 7/21/15 - 7/23/15, while Mr. Dozier, State Director, was onsite at Jackson CI's RTC, several issues were noted that clearly reflect lack of leadership within the program. The following issues were noted: No structure within the program; last structure meeting was held over three (3) months ago, no staff assigned to the departments within the community; department meetings with the community were not being held, no visual display of assigned structure position; and no system for behavior management/behavior shaping within the program. Morning Meetings and Wrap-Up Meetings were unorganized with no desired outcome. There was no accountability in regards to community expectations as the inmate/clients were not in Class A uniform, did not have ID's, were allowed to use profane language and did not follow staff directives. It was apparent that the inmate/clients were experiencing a high level of frustration. Additionally, the inmate/clients expressed no trust within the treatment environment.

54. The memorandum also held Ms. Gatewood responsible for a high amount of turnover among counselors at Jackson CI:

Between the dates of 7/17/15 - 7/22/15, two staff members quit without notice and one staff member was escorted off the compound

by Jackson CI Administration. In addition to the immediate staff turnover concerns, it has been noted that the program at Jackson CI has experienced a high level of staff turnover since The Unlimited Path took over operations of the program. Issues that were noted which have been the main contributing factors to staff turnover include: 1) program space (staff work space) was unsanitary with trashcans overflowing, layers of dust and spider webs in the windows, disorganization of program and office space, negative graffiti on the walls and hanging poster paper with inappropriate writing on them; (2) staff receiving little to no direction from the program director regarding program structure, creating and managing program expectations and minimal training regarding clinical file documentation; and 3) fear of retaliation when speaking of concerns or seeking assistance.

55. Ms. Gatewood signed the memorandum but noted that she did not agree with its contents and would challenge the decision.^{4/}

56. Since the end of July 2015, Ms. Gatewood has been working as a Counselor at the Northwest Florida Regional Annex.

57. As a Counselor, Ms. Gatewood does not have to handle the paperwork of other counselors.

58. The greater weight of the evidence does not demonstrate that Ms. Gatewood's demotion was retaliation for her repeated complaints about co-workers being insensitive about her allergies. In other words, The Unlimited Path had valid reasons for demoting Ms. Gatewood.

CONCLUSIONS OF LAW

59. DOAH has jurisdiction over the parties and the subject matter of this proceeding pursuant to sections 120.569 and 120.57, Florida Statutes, and Florida Administrative Code Rule 60Y-4.016(1).

60. The State of Florida, under the legislative scheme contained in sections 760.01-760.11, Florida Statutes, known as the Florida Civil Rights Act of 1992 ("the FCRA"), incorporates and adopts the legal principles and precedents established in the federal anti-discrimination laws specifically set forth under Title VII of the Civil Rights Act of 1964, as amended. 42 U.S.C. § 2000e, et. seq.

61. Section 760.10 prohibits discrimination "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." § 760.10(1)(a), Fla. Stat.

62. FCHR and Florida courts have determined that federal discrimination law should be used as guidance when construing the FCRA. 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).

63. Ms. Gatewood alleges that The Unlimited Path failed to intervene after November of 2014, when staff members would wear

scented products and transfer those scents to documents she had to review. In other words, Ms. Gatewood alleges that The Unlimited Path denied her a reasonable accommodation after November of 2014, and retaliated against her by demoting her from the program director position at Jackson CI.^{5/}

64. Ms. Gatewood has the burden of proving by a preponderance of the evidence that The Unlimited Path committed an unlawful employment practice. See EEOC v. Joe's Stone Crabs, Inc., 296 F.3d 1265, 1273 (11th Cir. 2002) (noting that a claimant bears the ultimate burden of persuading the trier of fact that the employer intentionally discriminated against the employees); § 120.57(1)(j), Fla. Stat.

65. Each of Ms. Gatewood's claims will be addressed separately below.

The Greater Weight of the Evidence Indicates that The Unlimited Path Did Not Deny Ms. Gatewood a Reasonable Accommodation

66. 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 504, 511 n.12 (Fla. 1st DCA 1994).

67. 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).

68. 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. Aug. 24, 2007); Frazier-White v. Gee, No. 8:13-cv-1854-T-36TBM, 2015 U.S. Dist. LEXIS 48923 *18 (M.D. Fla. 2015); Jones v. Ga. Dep't of Corr., No. 1:07-CV-1228-RLV, 2008 U.S. Dist. LEXIS 22142 *14-15 (N.D. Ga. Mar. 18, 2008).

69. Accepting that she was a "qualified individual" within the meaning of the ADA, she has failed to demonstrate by a preponderance of the evidence that The Unlimited Path denied her a reasonable accommodation.

70. Instead, the greater weight of the evidence indicates that The Unlimited Path responded to Ms. Gatewood's complaints and took measures to address them during her entire tenure with The Unlimited Path.

The Greater Weight of the Evidence Does Not Demonstrate that The Unlimited Path Retaliated Against Ms. Gatewood

71. Ms. Gatewood also alleges that The Unlimited Path retaliated against her by demoting her from her position as Program Director at Jackson CI.

72. Section 760.10(7) provides, in pertinent part that

[i]t is an unlawful employment practice for an employer, an employment agency, a joint labor-management committee, or a labor organization to discriminate against any person because that person has opposed any practice which is an unlawful employment practice under this section, or because that person has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section.

73. An employee can establish that she suffered retaliation under the FCRA by proving that: (1) she engaged in an activity protected by the FCRA; (2) she suffered an adverse employment action; and that (3) there was a causal connection between the protected activity and the adverse employment action. Pennington v. City of Huntsville, 261 F.3d 1262, 1266 (11th Cir. 2001); Russell v. KSL Hotel Corp., 887 So. 2d 372, 379 (Fla. 3d DCA 2004).

74. With regard to the first criterion, a protected activity includes requesting a reasonable accommodation provided that the employee was actually handicapped or had a good faith, objectively reasonable belief that she was handicapped.

See Tabatchnik v. Cont'l Airlines, 262 Fed. Appx. 674, 677 (5th Cir. 2008) (stating that "[b]ecause Tabatchnik has not shown that he had a good faith belief that he was disabled or perceived as disabled, his request for an accommodation cannot be considered protected by the ADA."); Williams v. Philadelphia Hous. Auth. Police Dep't, 380 F.3d 751, 759 (3d Cir. 2004) (stating that "[u]nlike a claim for discrimination under the ADA, an ADA retaliation claim based upon an employee having requested an accommodation does not require that a plaintiff show that he or she is 'disabled' within the meaning of the ADA . . . Thus, as opposed to showing disability, a plaintiff need only show that she had a reasonable, good faith belief that she was entitled to request the reasonable accommodation she requested.") (citation omitted).

75. In the instant case, even if Ms. Gatewood did not have a disability within the meaning of the ADA, she had an objectively reasonable belief that she was disabled within the meaning of the ADA.

76. As for the second criterion of a retaliation claim, there can be no reasonable dispute that Ms. Gatewood's involuntary demotion from the Program Director at Jackson CI to a Clinical Supervisor at the Northwest Florida Regional Annex was an adverse employment action.

77. Therefore, the only remaining question regarding Ms. Gatewood's retaliation claim is whether there was a causal connection between her requests for a reasonable accommodation and her demotion.

78. In her new position as a Counselor at the Northwest Florida Regional Annex, Ms. Gatewood's allergies are a lesser issue because she does not have to frequently handle the paperwork of others. Nevertheless, the greater weight of the evidence does not demonstrate that The Unlimited Path demoted Ms. Gatewood so that it would no longer have to take measures to cope with her allergies. The Unlimited Path had valid grounds for demoting her.

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 dismissing Constance K. Gatewood's Petition for Relief from an unlawful employment practice.

DONE AND ENTERED this 22nd day of June, 2017, in
Tallahassee, Leon County, Florida.

Garnett Chisenhall

G. W. CHISENHALL
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of June, 2017.

ENDNOTES

^{1/} Unless indicated otherwise, all statutory references will be to the 2016 version of the Florida Statutes.

^{2/} When asked on cross-examination why she did not disclose the full nature of her allergies upon being hired by The Unlimited Path, Ms. Gatewood testified that she disclosed the information during her initial interview with The Unlimited Path. According to Ms. Gatewood, the interviewer responded by stating there would be no problem because strong scents are not allowed in a prison.

^{3/} During the final hearing, Ms. Gatewood fairly questioned why she should be held responsible for events that occurred when she was on leave. In response, May-Li Clark, The Unlimited Path's Regional Director, testified that:

Well, Ms. Gatewood, when an - when an employee is serving as a program director, the program should be in a shape in such a manner that, when the program director is not there, the program is still running as it should according to the model.

So even though you had not been there for seven days, the program should still have been operating if it was up to par. If it was operating as a therapeutic community according to the model and it was functioning as it should be, then you being away for seven days would not have affected the program. It would not have [resulted in] Mr. Dozier having those findings.

^{4/} Prior to being demoted, Ms. Gatewood received a performance evaluation in 2015 indicating that The Unlimited Path was pleased with her performance. When questioned why Ms. Gatewood was demoted in light of the positive performance evaluation, Ms. Randolph testified as follows:

Because it was - it doesn't reflect the other sites that she had been at. At Walton CI, A.W. Whitehurst at the time, who's now warden, got so upset with her that he almost, in her words came across the table at her, relating to just her interaction with that institution and with the correctional staff.

At Lowell Annex, she had such an adversarial relationship with the administration at Lowell Annex, that we had to have the clinical supervisor go to all the department head meetings, because Ms. Gatewood had gotten into a little bit of a disagreement with the colonel at the site, the Department of Corrections' representative.

And in order to make nice and make peace with that local institution, we let Mr. Roberts be the front of the program and just had her be the program director within the site, you know, where she didn't really interface with the Department of Corrections' local administration.

And about that time, not soon thereafter, she asked to be moved back up to this area. And we had the program director position at Jackson, so we moved her up there.

So it felt like we were - we have constantly been trying to find the right spot and fit for Ms. Gatewood without it being a - I don't know, utilizing her credentials and her clinical files skills set. And we just were kind of like at our wits' end, at that point, that Jackson CI was in the shape that it was in and the personnel problems were so pronounced there.

^{5/} Ms. Gatewood also alleged that she was the victim of age discrimination because one of her subordinates under the age of 40 at Jackson CI referred to her as "old." As the grounds for her age discrimination claim, Ms. Gatewood alleges that: (a) she should have been told of the corrective measures implemented by The Unlimited Path; and that (b) The Unlimited Path held her responsible for the subordinate's resignation. However, Ms. Gatewood's allegations do not amount to a prima facie case of age discrimination. See City of Hollywood v. Hogan, 986 So. 2d 634, 641 (Fla. 4th DCA 2008) (stating that in order to make a prima facie showing of age discrimination, a plaintiff must prove that: (a) she is at least 40 years of age; (b) she is otherwise qualified for the position sought; (c) she was rejected for the position; and (d) the position was filled by a worker substantially younger than the plaintiff). McRae v. Kash N' Karry d/b/a Sweetbay Supermarket, Case No. 09-6222 (Fla. DOAH Oct. 29, 2010; FCHR Jan. 14, 2011) (defining the elements of a prima facie age discrimination case as (1) was the petitioner qualified for the position; (2) did the petitioner suffer an adverse employment action; and (3) did the respondent treat similarly-situated employees outside the protected class more favorably).

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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.