STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ELAINE WILLIAMS,

Petitioner,

vs. Case No. 20-1764

TALLAHASSEE MEMORIAL
HEALTHCARE, INC.

Respondent.
_____/

RECOMMENDED ORDER

A duly-noticed final hearing was held in this case via Zoom conference on August 18, 2020, before Administrative Law Judge Suzanne Van Wyk of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Elaine Williams, pro se
411 Earline Hobbs Road
Quincy, Florida 32351

For Respondent: Gerald D. Bryant, Esquire
Stephanie Clark, Esquire
Pennington, P.A.
215 South Monroe Street, Suite 200
Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

Whether Respondent discriminated against Petitioner in employment in violation of the Florida Civil Rights Act of 1992.

PRELIMINARY STATEMENT

Petitioner filed a Complaint of Discrimination ("Complaint") with the Florida Commission on Human Relations ("the Commission") on March 29, 2019, alleging Respondent discriminated against her on the basis of her age, sex, race, disability, and in retaliation for engaging in a protected activity, when Respondent discharged her from employment.

Following an investigation of her Complaint, the Commission issued a Determination of No Reasonable Cause on March 4, 2020. Petitioner timely filed a Petition for Relief with the Commission on April 7, 2020, to contest the determination. In her Petition, Petitioner alleges that Respondent failed to make a reasonable accommodation for Petitioner's injury sustained on the job. The Petition makes no reference to discrimination on the basis of her age, sex, race, or in retaliation for engaging in a protected activity.[1] The Commission forwarded the Petition to the Division of Administrative Hearings ("Division") on April 9, 2020, to conduct a formal fact-finding hearing.

The final hearing was originally scheduled for June 10, 2020, as an in-person hearing in Tallahassee according to the parties' request. The final hearing was subsequently rescheduled to a Zoom conference on August 18, 2020.

The final hearing commenced as rescheduled. Petitioner testified on her own behalf and called her grandmother, Clara Pride, as a witness. Petitioner introduced no exhibits into the record.

[1] Petitioner, who is unrepresented, also mistakenly includes a claim against Respondent under the Florida Fair Housing Act, which is clearly inapplicable to Petitioner's claim.

Respondent presented the testimony of Lora Vitali, Director of the Colleague Health Department ("Colleague Health"), and Elissa Long, Director of Colleague Relations. Respondent's Exhibits 2 and 3 were admitted into evidence.

The final hearing proceedings were recorded, but the parties did not request the transcript. The parties timely filed Proposed Recommended Orders ("PROs") which have been considered by the undersigned in preparing this Recommended Order.

Except as otherwise noted, all references herein to the Florida Statute are to the 2018 version, which was in effect when Petitioner was discharged.

FINDINGS OF FACT

1. At all times relevant hereto, Petitioner was employed by Respondent as a patient transporter.

2. On December 27, 2018, Petitioner sustained a back injury while on the job. Petitioner reported the injury to Lora Vitali, Director of Colleague Health, Respondent's employee healthcare department. Ms. Vitali instructed Petitioner to take the rest of the day off work and treat the injury with ice and ibuprofen.

3. On December 28, 2018, Petitioner returned to Colleague Health and reported that she was still in pain. Colleague Health nurse, Monica Hubmann, arranged massage therapy and pain medication for Petitioner and instructed her to report back to Colleague Health on Monday, December 31, 2018, for further evaluation.

4. Petitioner presented to Colleague Health on December 31, 2018, and reported that she was still in pain. Nurse Hubmann referred Petitioner to Dr. Spencer Stoetzel, who evaluates and treats Respondent's employees who

are injured on the job. Dr. Stoetzel is employed by North Florida Sports Medicine & Orthopaedic Center, not Respondent.

5. At Dr. Stoetzel's direction, Petitioner received regular treatment, including both physical and occupational therapy, until March 25, 2019. Petitioner was on workers' compensation leave from work during her treatment.

6. On March 25, 2019, Dr. Stoetzel cleared Petitioner to return to work with no restrictions and a 0% impairment rating. Based on Dr. Stoetzel's conclusion, Ms. Vitali released Petitioner to return to work effective March 26, 2019. Ms. Vitali informed Petitioner of her release to work on March 25, 2019.

7. Petitioner's supervisor placed Petitioner on the work schedule after she was released to return to work, but Petitioner did not return to work as scheduled, and did not return any one of several telephone calls from her supervisor. Therefore, Respondent discharged Petitioner for job abandonment.

8. Petitioner disputes her dismissal for job abandonment because she maintains that she was unable to work due to continuing pain.

9. Petitioner disputes Dr. Stoetzel's conclusion that she could return to work beginning March 26, 2019. Petitioner testified that Dr. Stoetzel told her that, based on the results of magnetic resonance imaging ("MRI"), she had a lumbar tear in the L4-L5 region, yet the discharge summary excluded the results of the MRI. The discharge summary refers only to a "[l]umbar sprain or strain with discrepant pain as well as radicular symptoms [pain radiating down the leg]." In the discharge summary, Dr. Stoetzel concludes, "There is really nothing further I have to offer."

10. Petitioner testified that her pain is continuous, has increased in severity, and prevents her from wearing shoes, driving, doing household chores, and caring for her children. Ms. Pride testified that her daughter is in

constant pain and that Ms. Pride has assumed care of her grandchildren during the day when Petitioner's husband is at work.

11. Petitioner maintains that she has been unable to work due to her injury from December 27, 2018, through the date of the final hearing.

12. Petitioner did not introduce any evidence of discrimination on the basis of her race, sex, or in retaliation for engaging in a protected activity. With regard to age discrimination, Petitioner testified that Dr. Stoetzel once commented that her back pain was due to her age.

13. Petitioner's PRO includes no references to discrimination based on her age, sex, race, or in retaliation for engaging in a protected activity.

CONCLUSIONS OF LAW

14. The Division has jurisdiction over the parties to, and the subject matter of, this case, pursuant to sections 120.569(2), 120.57(1) and 760.11(7), Florida Statutes (2020).

15. The Florida Civil Rights Act ("the Act") prohibits employers from discriminating against employees on the basis of race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status. *See* § 760.10(1)(a), Fla. Stat. The Act also prohibits employers from retaliating against employees for engaging in activity protected under the Act. *See* § 760.10(7), Fla. Stat.

16. The Act is patterned after federal anti-discrimination laws; therefore, federal case law construing these laws is applicable to claims under the Act. *See Dep't of Cmty. Aff. v. Bryant*, 586 So. 2d 1205, 1209 (Fla. 1st DCA 1991); *Albra v. Advan, Inc.*, 490 F.3d 826, 834 (11th Cir. 2007).

17. In her Complaint, Petitioner alleged Respondent intentionally discriminated against her by discharging her from employment on the basis of her age, sex, race, disability, and in retaliation for engaging in a protected activity. However, in her Petition, Petitioner alleges discrimination based

solely on her disability. Specifically, Petitioner alleges that Respondent failed to make a reasonable accommodation for her disability.

18. Petitioner introduced no evidence relating to discrimination on the basis of age, sex, race, or in retaliation for engaging in a protected activity. Furthermore, Petitioner did not address any of those issues in her PRO. Petitioner has abandoned those allegations, which will not be addressed further herein. *See Wickham v. State*, 124 So. 3d 841, 860 (Fla. 2013) (Failure to pursue a claim amounts to abandonment of the issue); *Built Right Constr. Inc., v. Palm Beach Cty. Sch. Bd.*, Case No. 11-5316 (Fla. DOAH Dec. 16, 2013; Fla. Palm Beach Cty. Sch. Bd. Apr. 2, 2014); *Hammonds v. Fish & Wildlife Conser. Comm'n*, Case No. 19-6307 (Fla. DOAH June 23, 2020).

19. Petitioner bears the burden to prove her allegation of discrimination on the basis of a disability. *See Dep't. of Banking and Fin. v. Osborne Stern and Co.*, 670 So. 2d 932, 934 (Fla. 1996) ("The general rule is that a party asserting the affirmative of an issue has the burden of presenting evidence as to that issue."); *Fla. Dep't of HRS v. Career Serv. Comm'n*, 289 So. 2d 412, 414 (Fla. 4th DCA 1974) ("[T]he burden of proof is on the party asserting the affirmative of an issue before an administrative tribunal.").

20. To prove a claim for failure to accommodate a disability, a claimant must show that: (1) she is disabled; (2) she is a qualified individual; and (3) she was discriminated against by way of respondent's failure to provide a reasonable accommodation. *See McKane v. UBS Fin. Servs., Inc.*, 363 Fed.Appx. 679, 681 (11th Cir. 2010) (citing *Lucas v. W.W. Grainger, Inc.*, 257 F.3d 1249, 1255 (11th Cir. 2001)). To establish herself as a qualified individual, Petitioner "must show either that [she] can perform the essential functions of [her] job without accommodation, or, failing that, show that [she] can perform the essential functions of [her] job with a reasonable accommodation." *Id.* (citing *Davis v. Fla. Power & Light Co.*, 205 F.3d 1301, 1305 (11th Cir. 2000)). Petitioner cannot prevail on a failure-to-accommodate

claim if she never requested an accommodation. *See Connelly v. Wellstar Health Sys., Inc.*, 758 Fed.Appx. 825, 831 (11th Cir. 2019).

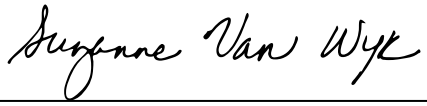
21. Setting aside whether Petitioner is disabled, Petitioner, by her own admission, was not qualified to perform the essential elements of her position as patient transporter without an accommodation. Petitioner did not identify—let alone present evidence of—any reasonable accommodation which would have allowed her to perform this position. Therefore, Petitioner cannot establish the second element of a failure-to-accommodate claim. *See McKane*, 363 Fed.Appx., at 681.

22. Petitioner also did not request an accommodation from Respondent. Petitioner did not believe she was capable of returning to work as of March 26, 2019, but there is no evidence that Petitioner sought or requested any form of accommodation from Respondent which would have allowed her to perform the essential functions of her position. Petitioner's failure to do this is fatal to her failure-to-accommodate claim. *See Connelly*, 758 Fed.Appx., at 831 (11th Cir. 2019).

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Commission issue a final order finding that Tallahassee Memorial HealthCare, Inc., did not discriminate or retaliate against Petitioner, and dismissing Petitioner's Petition for Relief in Case No. 2019-18837.

DONE AND ENTERED this 9th day of September, 2020, in Tallahassee, Leon County, Florida.



SUZANNE VAN WYK
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of September, 2020.

COPIES FURNISHED:

Tammy S. Barton, Agency Clerk
Florida Commission on Human Relations
Room 110
4075 Esplanade Way
Tallahassee, Florida 32399-7020
(eServed)

Elaine Williams
411 Earline Hobbs Road
Quincy, Florida 32351

Gerald D. Bryant, Esquire
Pennington, Moore, Wilkinson,
Bell & Dunbar, P.A.
2nd Floor
215 South Monroe Street
Tallahassee, Florida 32301
(eServed)

Stephanie Clark, Esquire
Pennington, P.A.
Suite 200
215 South Monroe Street
Tallahassee, Florida 32301
(eServed)

Cheyanne Costilla, General Counsel
Florida Commission on Human Relations
Room 110
4075 Esplanade Way
Tallahassee, Florida 32399-7020
(eServed)

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.