STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LAUREN ALEXIS MITCHELL,

Petitioner,

vs. Case No. 22-0016

AEROTEK,

Respondent.
_____/

RECOMMENDED ORDER

On March 8, 2022, Administrative Law Judge Lisa Shearer Nelson of the Florida Division of Administrative Hearings (DOAH) conducted a hearing pursuant to section 120.57(1), Florida Statutes, by Zoom technology.

APPEARANCES

For Petitioner: Lauren Alexis Mitchell
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495 Mercury Avenue Southeast
Palm Bay, Florida 32909

For Respondent: Mary C. Biscoe-Hall, Esquire
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Suite 1600
100 South Charles Street
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STATEMENT OF THE ISSUE

The issue to be resolved in this proceeding is whether Respondent, Aerotek, Inc. (Aerotek), discriminated against Petitioner, Lauren Mitchell, with respect to her employment in violation of Florida's Civil Rights Act.

PRELIMINARY STATEMENT

On June 14, 2021, Petitioner filed a complaint of discrimination with the Florida Commission on Human Relations (Commission), alleging that Respondent discriminated against her based on a disability, and retaliated against her, in violation of section 760.10, Florida Statutes. Her complaint specifically alleged that she was fired because she unknowingly came to work with COVID-19 before she tested positive for the illness.

On December 6, 2021, the Commission filed a Determination of No Reasonable Cause, and provided to Petitioner an explanation of her rights should she disagree with the Commission's decision. On January 3, 2022, Petitioner filed a Petition for Relief, which the Commission forwarded to DOAH for the assignment of an administrative law judge.

The hearing was scheduled for March 8, 2022, to be conducted using Zoom technology. Petitioner was not represented by counsel, so a telephone pre-hearing conference was conducted in order to explain to Petitioner how the hearing would be conducted and to give her the opportunity to ask questions regarding the process. During the prehearing conference, the undersigned asked Petitioner to specify the nature of her disability, because COVID-19, without more, might not be considered a disability. Petitioner indicated that her disability dealt with her mental processing ability, because she suffers from Attention Deficit Hyperactivity Disorder (ADHD).

The hearing commenced as scheduled on March 8, 2022. At that time, Petitioner indicated that her disability was COVID-19 with complications related to diabetes.

At hearing, Petitioner testified on her own behalf and presented Petitioner's Exhibits numbered 1 through 4. Rhiannon Boyce testified for

Respondent, and Respondent's Exhibits numbered 1 through 6 were admitted into evidence.

The proceedings were recorded but no transcript was ordered or filed. The parties were advised that the deadline for filing proposed recommended orders would be ten days following the hearing, i.e., March 18, 2022.

Respondent filed its Proposed Recommended Order on March 16, 2022, and Petitioner filed her Proposed Recommended Order on March 18, 2022. Both have been carefully considered in the preparation of this Recommended Order. All references to the Florida Statutes are to the 2020 codification, and all emphasis is supplied unless otherwise indicated.

FINDINGS OF FACT

1. Lauren Mitchell is an African-American female. She asserts that she belongs to a protected class because she is disabled. Among other medical issues not relevant to these proceedings, Ms. Mitchell suffers from Type II diabetes.

2. Aerotek is a recruiting and staffing company that recruits and places workers with client companies who need temporary employees. Workers placed by Aerotek with client companies are paid and provided benefits by Aerotek, and are considered to be Aerotek's employees.

3. On or about April 13, 2021, Rhiannon Boyce, a recruiter for Aerotek, contacted Petitioner about a job opportunity as an administrative assistant with one of its client companies, Holiday Builders. After interviewing for the position, Petitioner was offered a job on April 16, 2021.

4. During the interview process, applicants are advised that the employment is on an "at-will" basis. The Aerotek client companies provide all supervision to employees recruited and supplied by Aerotek, and make the decisions to accept, reject, retain, or terminate an employee provided to them.

5. As a recruiting and staffing company, Aerotek handles the "onboarding" process for new workers provided to its clients. New workers are provided onboarding forms in two to three emails. The new worker is provided a link to an employment portal where documents requiring his or her electronic signature can be accessed. In order to enter the portal, the new worker must provide specific information, and no one else can sign in for the new worker.

6. Part of the process involves review and acknowledgment of a person's employment agreement with Aerotek; Aerotek's Safety Agreement; and Aerotek's Employee Handbook. These documents are acknowledged by electronic signature and must be completed before the new worker can begin employment.

7. Petitioner accessed the portal and completed the paperwork required to begin employment. Among the documents bearing Petitioner's electronic signature is the employment agreement between Petitioner and Aerotek. The employment agreement states in pertinent part:

> Scope of Employment with Aerotek, Inc. – You understand that your employment with Aerotek, Inc. will be co-extensive with the Assignment. In other words, your employment with Aerotek, Inc. begins when you first work for the Client on the Assignment, and ends if and when the Assignment is ended by the Client or otherwise. Following the end of the Assignment, while you may remain eligible for future assignments with other Aerotek, Inc., clients, you will not be employed with Aerotek, Inc. unless and until you are re-hired and assigned to another client. You further understand that following the ending of the Assignment, while you may remain eligible for new assignments with Aerotek, Inc. clients, Aerotek, Inc. has no obligation to find you additional assignments and has no ability to compel any client to hire you.

8. The employment agreement indicates that Petitioner signed it electronically on April 16, 2021, and it was accepted by Aerotek, Inc., by Heather Brinkley, on April 23, 2021. Petitioner initially denied signing this

document, and does not remember the paragraph in the employment agreement quoted above. Petitioner suggested that there must be a "glitch" in the program, and that someone else could have signed into the system in her stead. However, Petitioner did not present any evidence to support this speculative theory.

9. Ms. Boyce testified that each employment file in the portal is audited for completeness, and that if documents remained unsigned, Aerotek's administrative section would notify the recruiter and the recruiter would be responsible for contacting the new employee to complete the paperwork. "Glitches" would most likely be discovered when the files are audited.

10. The more persuasive evidence indicates that Petitioner signed the employment agreement electronically, but did not read it closely. Had Petitioner not signed the employment agreement, she would not have been cleared to begin employment.

11. Petitioner testified that she advised Aerotek that she had diabetes during the onboarding process, in some of the paperwork she completed. However, she did not provide a copy of any paperwork submitted that indicated she suffered from diabetes. There is no credible evidence to support the claim that she notified Aerotek that she suffered from diabetes, either before or during her employment.

12. Petitioner began her employment on April 26, 2021, working as an administrative assistant for Holiday Builders. On her first day, she notified Ms. Boyce that she left work early for a doctor's appointment and had another appointment the next day. The appointments were related to an accident Petitioner experienced in which she hurt one of her fingers, and nothing related to diabetes was mentioned in Petitioner's email to Ms. Boyce. Ms. Boyce advised Petitioner that she needed to notify Ms. Boyce if she is going to need to take time out of the office.

13. Petitioner worked at Holiday Builders under the auspices of her employment with Aerotek, Inc., from April 26, 2021, through May 3, 2021, a

total of less than six business days. She testified that she was not given any type of training or orientation materials by Holiday Builders and could not identify any signs that might have been posted in the workplace about safety precautions to prevent the spread of disease. She stated at hearing that it was "not in her job description" to read all the signs that might be on the wall. She also testified that people did not seem to be observing any type of COVID-19 restrictions and were not wearing masks or social distancing.

14. Ms. Boyce testified credibly that Aerotek suggested to its new employees that they bring a mask and hand sanitizer to the workplace. Petitioner admitted that she did not wear a mask to the office, although her reasons for not doing so varied from not being able to afford masks, to having them, but not being able to locate them. Instead, she got a mask at the office, where it appears they were readily available for those who needed them.

15. On Monday, May 3, 2021, Petitioner woke up not feeling well, and described her symptoms as general symptoms of illness, with a cough. She blamed her symptoms on conditions from which she already suffered. She went to work, despite not feeling well. When asked why she did not call her supervisor, she stated that she could not remember her supervisor's name and did not have her number. Petitioner also did not call Ms. Boyce and tell her she was not well.

16. Petitioner did not wear a mask to the office on May 3, 2022, even though she did not feel well, but secured one after she got there. Once she arrived at work, Petitioner went to her supervisor and told her she had a cough and felt ill. She testified that her supervisor told her to remain in her cubicle. Petitioner returned to her cubicle and stayed for approximately an hour and a half, and then left because she felt worse.[1] After leaving the office, she got a rapid test for COVID-19, which was positive.

[1] Despite testifying that she left work during the morning and got a COVID-19 test, Petitioner also insisted that she did not take off any time on May 3, so there was no reason to contact Ms. Boyce.

17. Petitioner reported her positive COVID-19 test to her supervisor at Holiday Builders but did not advise anyone at Aerotek.

18. At 11:25 a.m. that day, Lee Palmer, the Vice President of Human Resources for Holiday Builders, emailed Ms. Boyce regarding Petitioner, stating: "Lauren showed up at work this morning not feeling well. I have been told she just tested positive for COVID. While I am sorry she is not well, I am concerned with her lack of judgment coming into the office. We would like to replace her please. Thank you."

19. Ms. Boyce did not know that Petitioner had tested positive for COVID-19 until she received Ms. Palmer's email. Once she received Ms. Palmer's email, Ms. Boyce called Petitioner to advise her that her employment was terminated. Consistent with the terms specified in the employment agreement, her employment with Aerotek ended simultaneously with Holiday Builder's decision to replace her. At that time, Ms. Boyce mentioned that there *might* be another opportunity for her, but nothing was finalized, and Aerotek had no obligation to find Petitioner other employment, and did not offer her a position.

20. Petitioner claimed that her employment continued after May 3, 2021, because Aerotek called her after that date regarding her time sheets. However, she did not work for Aerotek after May 3, 2021, and did not receive any pay for work after that date.

21. There were multiple telephone calls made to Petitioner from Aerotek staff during the week following her termination. Most calls were unanswered. Petitioner claimed, and Ms. Boyce acknowledged, that on May 4, 2021, she asked that all contacts be in writing because her throat remained sore. However, this request cannot constitute an accommodation of a disability in order to perform her job, as claimed by Petitioner, because at the time of the request, Petitioner was no longer employed. The last telephone call, on May 10, 2021, resulted in Petitioner hanging up on Ms. Boyce after screaming at her and accusing her of "ruining her life."

22. Petitioner acknowledged that she did not ask for an accommodation related to COVID-19 or her diabetes prior to her termination on May 3, 2021. In fact, she first advised Aerotek that she had diabetes and was going to the hospital with breathing issues at approximately 6:15 p.m. on May 3, 2021, several hours after her termination.

23. Petitioner acknowledged that Aerotek did not discriminate against her because of her diabetes or COVID-19 diagnosis before May 3, 2021.

24. Petitioner acknowledged that she did not complain to Aerotek regarding any type of discrimination before her termination on May 3, 2021.

25. Petitioner did not apply for any open positions at Aerotek after May 3, 2021, and stated at hearing that she did not want to work with the company. She did, in a telephone conversation with Ms. Boyce, mention the possibility of litigation related to her termination. However, the contents of that conversation are not clear. Conversely, Ms. Boyce testified that if Petitioner applied for a new position with Aerotek and met the qualifications, she would be considered for the position.

CONCLUSIONS OF LAW

26. DOAH has jurisdiction over the parties and the subject matter of this proceeding pursuant to sections 120.569 and 120.57(1).

27. The Florida Civil Rights Act of 1992 (the Act), codified in chapter 760, prohibits discrimination in the workplace and is modeled after Title VII of the Civil Rights Acts of 1964 and 1991, 42 U.S.C. § 2000 *et seq*. Federal case law regarding Title VII is applicable to construe the Act. *Castleberry v. Edward M. Chabourne, Inc.,* 810 So. 2d 1028, 1030 (Fla. 1st DCA 2002); *Dep't of Cmty. Aff. v. Bryant*, 586 So. 1205 (Fla. 1st DCA 1991).

28. 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 to discriminate against any

> individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status.
>
> * * *
>
> (7) It 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.

29. Neither party has disputed that Aerotek is an "employer" as that term is defined in section 760.02(7).

30. Under the shifting burden analysis articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), for employment discrimination claims, Petitioner has the burden of establishing, by a preponderance of the evidence, a prima facie case of unlawful discrimination. If Petitioner establishes a prima facie case, then the burden shifts to the employer to produce evidence that the adverse action was taken for some legitimate, non-discriminatory reason. If the employer produces such evidence, the burden shifts back to the Petitioner to prove that the employer's reasons were pretextual, and that the real reason is based on discrimination. *Texas Dep't of Cmty. Aff. v. Burdine*, 450 U.S. 248 (1981).

31. Petitioner claims that she was discriminated against because of her disability, and that Aerotek retaliated against her. In order to establish a claim based upon disability, Petitioner must show that 1) she is disabled; 2) she is qualified to perform her job; and 3) she was discriminated against based on her disability. *Moreira v. Am. Airlines, Inc.*, 157 F.Supp. 3d 1208,

1214 (S.D. Fla. 2016) (quoting *Goldsmith v. Jackson Mem'l Hosp. Pub. Health Trust,* 33 F.Supp. 2d 1336 (S.D. Fla. 1989), *aff'd*, 198 F.3d 263 (11th Cir. 1999)); *McKenzie v. EAP Mgmt. Corp.*, 40 F.Supp. 2d 1369, 1375 (S.D. Fla. 1999); *Desai v. Tire Kingdom, Inc.*, 944 F.Supp. 876, 879 (S.D. Fla. 1996).

32. Disability is defined in section 760.22(a) as "a person [who] has a physical or mental impairment, which substantially limits one or more major life activities, or [who] has a record of having, or is regarded as having, such physical or mental impairment." While this definition expressly applies to cases involving housing discrimination, cases discussing employment discrimination have used it as a guideline for defining a handicap under section 760.10. *See, e.g., Desai v. Tire Kingdom*, 944 F.Supp. at 879. "Major life activities" include caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 29 C.F.R. § 1630.2(i).

33. A qualified individual is one who, with or without reasonable accommodation, can perform the essential functions of the employment position held or desired, and to discriminate in this context is the failure to make reasonable accommodations to the *known* physical or mental limitations of an otherwise qualified individual unless the employer can demonstrate that to do so would create an undue hardship on the employer. *McKenzie*, 40 F.Supp. 2d at 1376. Petitioner must show that the person making the adverse employment decision was aware of the disability. *Cordoba v. Dillards, Inc.*, 419 F.3d 1169, 1175 (11th Cir. 2005); *Moreira*, 157 F.Supp. 3d at 1215.

34. Petitioner has failed to demonstrate a prima facie case of discrimination. First, she has not established that she suffers from a disability that affects one or more life functions. While she testified that she suffers from diabetes, and that she had complications from diabetes related to her COVID-19 diagnosis, she did not explain how either condition affected her ability to perform life functions.

35. For the sake of discussion, it is assumed that Petitioner is qualified for the position that she held. She testified that she was performing well, and no one disputed this statement. However, the evidence presented at hearing reflects that, even assuming that diabetes is a disability affecting one or more of her life activities, she did not advise Aerotek of her diabetes or ask for any accommodation related to her diabetes, until after she was terminated.

36. Petitioner asserted in her Proposed Recommended Order that when Aerotek informed her of her termination by Holiday Builders, they immediately offered her a new job, and then withdrew the offer when she told them about her diabetes complications and hospital visit.

37. First, these assertions are not consistent with Petitioner's Petition for Relief and Petitioner did not assert this theory at hearing. Ms. Boyce testified that she mentioned the possibility of a new opportunity for Petitioner, but Petitioner did not apply for that position, and it was not offered to her. Ms. Boyce attempted contact with Petitioner multiple times, and Petitioner did not return the majority of her calls. Second, the evidence shows that Ms. Boyce stopped communicating with Petitioner after she screamed at Ms. Boyce, accused her of ruining her life, and hung up on her.

38. Petitioner also asserts that Aerotek retaliated against her because of her disability. In her Proposed Recommended Order, she claims that Aerotek retaliated against her because she threatened to file suit against them.

39. In order to demonstrate retaliation, Petitioner must show that 1) she engaged in an activity protected under Title VII; 2) that she suffered an adverse employment action; and 3) there was a causal connection between the protected activity and the adverse employment action. *Crawford v. Carroll*, 529 F.3d 961, 970 (11th Cir. 2008); *Jolibois v. Fla. Int'l Univ. Bd. of Trs.*, 92 F.Supp. 3d 1239, 1247 (S.D. Fla. 2015).

40. Here, Petitioner did not testify that she notified Aerotek that she intended to file a complaint regarding what she perceived to be discriminatory behavior. The only real evidence related to this issue was from

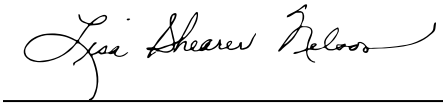
Ms. Boyce, who stated that in one of her conversations with Petitioner, there was some mention of litigation, and for that reason, issues related to Petitioner's employment were forwarded to Employee Relations, so that they could address her concerns. Neither the nature of her concerns nor any resolution that may have taken place were identified at hearing.

41. Assuming for the sake of discussion that Petitioner was engaging in a protected activity when she apparently threatened litigation, that activity occurred after her termination. By definition, retaliation cannot occur retroactively. Petitioner did not demonstrate a prima facie case for retaliation.

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 dismissing Petitioner's Petition for Relief.

DONE AND ENTERED this 5th day of April, 2022, in Tallahassee, Leon County, Florida.



LISA SHEARER NELSON
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Filed with the Clerk of the
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this 5th day of April, 2022.

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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.