STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MILAINE MARRERRO,

Petitioner,

vs. Case No. 22-0480

AMAZON.COM SERVICES LLC,[1]

Respondent.
_____/

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham, Division of Administrative Hearings ("DOAH"), for final hearing by Zoom teleconference on August 29, 2022.

APPEARANCES

For Petitioner: Nathaly Saavedra, Esquire
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For Respondent: Catherine Hope Molloy, Esquire
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[1] In her Petition for Relief, Petitioner named Amazon.com Services LLC as Respondent. In its Transmittal of Petition, however, the Florida Commission on Human Relations ("FCHR") identified Respondent as "Amazon Warehouse," which is how the case was docketed. Because it is undisputed that Amazon.com Services LLC was Petitioner's former employer, the undersigned has now amended the case style to conform to this reality.

STATEMENT OF THE ISSUES

The issues in this case are whether, in violation of the Florida Civil Rights Act, Respondent: (i) subjected Petitioner to unlawful disability discrimination by terminating her employment after she had undergone dental surgery to extract several teeth that had caused her gums to become infected; or (ii) retaliated against Petitioner for engaging in protected activity.

PRELIMINARY STATEMENT

On October 20, 2021, Petitioner Milaine Marrero ("Marrero") filed a Complaint with FCHR alleging that Respondent Amazon.com Services LLC ("Amazon") had committed unlawful acts of employment discrimination, in violation of the Florida Civil Rights Act ("FCRA"), by failing provide a reasonable accommodation for her disability and by terminating her employment.

FCHR investigated Marrero's claims and, on January 24, 2022, issued a Determination stating that no reasonable cause existed to believe that an unlawful practice had occurred. Thereafter, Marrero filed a Petition for Relief, which FCHR transmitted to DOAH on February 14, 2022. On February 22, 2022, the undersigned entered an Order setting the final hearing for April 21 and 22, 2022. The undersigned later granted four requests to reschedule the hearing. On July 29, 2022, the undersigned entered an Order setting the final hearing for August 29, 2022, via Zoom conference.

At the final hearing, Marrero testified on her own behalf and called three additional witnesses, namely: Jaymee Wise, Naike Gabriel, and Vershanda Williams. Petitioner's Exhibits 13, 20, 21, 26, 27, 29, and 30 were received into evidence. Amazon presented no witnesses but offered Respondent's

Exhibits 1, 2, 9 through 11, 14, 17, 18, 20 through 23, 25, 29, and 31 through 35, which were admitted.

The one-volume final hearing transcript was filed on September 16, 2022. The parties timely filed proposed recommended orders, which were considered in the preparation of this Recommended Order.

Unless otherwise indicated, citations to the official statute law of the state of Florida refer to Florida Statutes 2022.

FINDINGS OF FACT

1. Amazon hired Marrero as a "fulfillment associate" in January 2020. She worked at Amazon's facility in Opa Locka, Florida, where her duties included locating merchandise in the warehouse and packing items for shipment.

2. Around 16 months into her Amazon employment, Marrero developed an infection in her upper gum (periodontitis), which formed an abscess and caused facial cellulitis. This condition was diagnosed in mid-April 2021, and thereafter Marrero arranged to have dental surgery, which was scheduled for the following month.

3. On April 30, 2021, Marrero requested a leave of absence for the upcoming surgery. Her request was handled, per company policy, by Amazon's Disability and Leave Services team ("DLS"). That same day, DLS opened a DLS "case" for Marrero, which was routine practice.

4. On May 3, 2021, DLS notified Marrero in writing that she had been approved conditionally for Family and Medical Leave Act ("FMLA") leave from April 30, 2021, through June 5, 2021. Marrero was instructed to "read all of the material in this packet, which describes your rights and responsibilities" and to "return the enclosed Certification Form" because "Certification is needed to approve leave."

5. Marrero underwent surgery on May 14, 2021. Her dentist recommended that, to facilitate healing, she should avoid dust, eat soft foods, and refrain from heavy lifting.

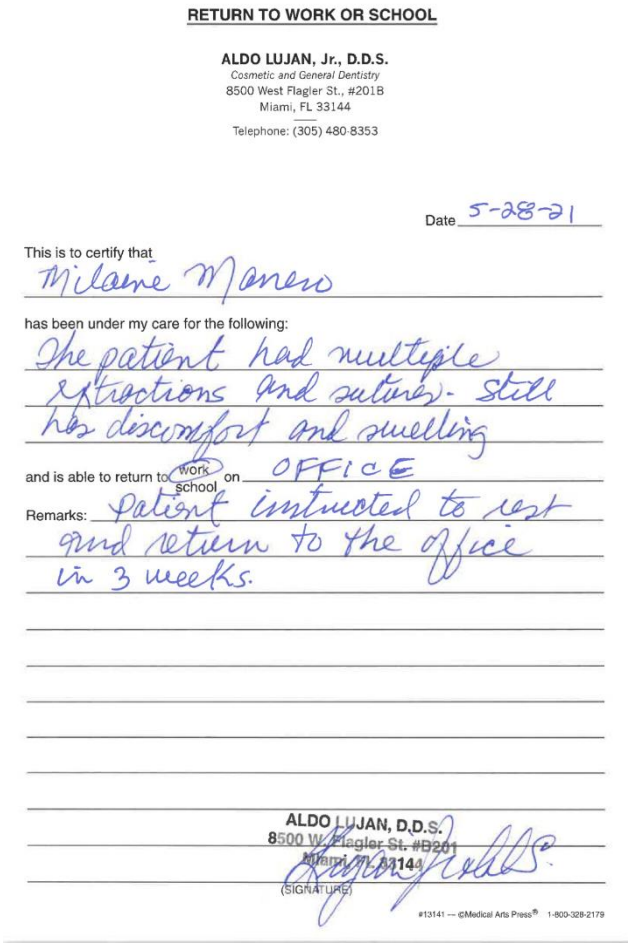
6. Marrero's dentist sent a note to Amazon documenting that she'd had multiple extractions requiring stitches and "need[ed] to rest and return in 2 weeks." With that, Amazon granted Marrero's request for FMLA leave, for two weeks, from May 14, 2021, through May 28, 2021. She would receive disability pay for this date range.

7. The "Decision Notification" letter informing Marrero of the approval of her claim for leave also highlighted the following instructions:

> You are expected to return to work on May 29, 2021, or your next scheduled shift. If this date changes, please contact us immediately to request an extension. If you do not return to work or request an extension, you will be held to Amazon's attendance policy and have UPT[,i.e., unpaid time,] deductions. We may request additional documentation in certain circumstances (for example, if you request additional time off.)

8. On May 25, 2021, Marrero called DLS to say that she could not return to work on May 29 because she continued to be in pain and to experience swelling. Her next dentist appointment was on May 28, Marrero stated, and she was waiting to be released by him to resume working. DLS advised Marrero that if she wanted to extend her leave, she would need to provide Amazon with appropriate supporting documentation, e.g., a doctor's note substantiating the medical necessity for additional time off and the date she could be expected to return to work.

9. On May 28, 2021, Marrero's dentist submitted the following "Return to Work or School" form:



RETURN TO WORK OR SCHOOL

ALDO LUJAN, Jr., D.D.S.
Cosmetic and General Dentistry
8500 West Flagler St., #201B
Miami, FL 33144
Telephone: (305) 480-8353

Date 5-28-21

This is to certify that
Milaine Marrero
has been under my care for the following:
The patient had multiple extractions and sutures - Still has discomfort and swelling
and is able to return to work school on OFFICE
Remarks: Patient instructed to rest and return to the office in 3 weeks.

ALDO LUJAN, D.D.S.
8500 W. Flagler St. #B201
Miami, FL 33144
(SIGNATURE)

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10. The parties disagree as to the meaning of this note. Marrero contends that the dentist intended to tell Amazon that she could "return to the office," i.e., to Amazon's warehouse for work, "in 3 weeks," which would have supported a request for an extension of leave to June 18, 2021. Amazon maintains, however, that, by circling the word "work", without specifying *when* Marrero could do so, the dentist asserted that Marrero was "able to return to work" *period*, full stop. Thus, Amazon read the note as confirmation that Marrero could perform her job, at that moment. Accordingly, Amazon understood the remark about Marrero's "return[ing] to the office in 3 weeks" to mean that she had been instructed to be seen in the *dentist's* office within the next three weeks for a follow-up exam.

11. The dentist's note is ambiguous. Neither party's interpretation is unreasonable; a case can be made for either.[2] That Amazon's interpretation is not the only reasonable reading of the note affords an insufficient basis for the undersigned to infer discriminatory intent. Based upon its reasonable understanding of the dentist's note,[3] DLS determined that, because Marrero's doctor had released her to return to work as of May 28, 2021, which was the last day of the previously approved two-week FMLA leave, Marrero neither needed, nor was even requesting, an extension. Accordingly, DLS did not intentionally deny a request for additional leave; rather, it closed Marrero's case on the grounds that she was able to return to work.

12. Marrero did not report for duty on May 29, 2021 (or ever again). This was quickly detected because Amazon's system performs a sweep of time records twice daily to identify employees who might have used more than their allotted unpaid time off (and hence have "negative UPT" in Amazon jargon) or who might have abandoned their jobs. The system sends out an automatic email to any employee who appears to have violated the attendance policies. The email warns the employee that he or she might be dismissed for job abandonment. Then, the matter is assigned to the company's People Experience and Technology team ("PXT"), which decides cases of job abandonment.

13. On the morning of June 6, 2021, Marrero received an email from Amazon notifying her that she had missed two shifts. The email went on to state that "if you are eligible and require a leave of absence; received approval for covered absences due to your own personal medical condition; or

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[2] The undersigned believes that the dentist likely meant Marrero was ready to return to work immediately for "office" duties. Because she worked in a warehouse, however, not an office; and because the dentist presumably knew that when he wrote the note, it is unclear whether the word "office" was intended as a limitation on her activities.

[3] Amazon did not, in fact, regard the note as ambiguous. There is no evidence, therefore, that Amazon believed it was construing the note in its favor or against Marrero. To the contrary, Amazon made its decisions in the ordinary course of its regular business practices, unaware that the matter was anything other than a routine, noncontroversial transaction.

you believe your absences should be covered by a pre-approved leave – please contact the leave team." Marrero was warned that "failure to respond or take action may result in the separation of your employment for job abandonment."

14. Marrero did not respond to the a.m. email, nor did she show up for work. Consequently, that evening, Amazon sent Marrero a second email, which notified her that she had missed a third shift. Under Amazon policy, as the email explained, an employee who has missed three consecutive shifts without notice is assumed to have voluntarily resigned and will be separated for job abandonment. The p.m. email instructed Marrero to "please reply to this email or contact the Employee Resource Center." Marrero did not contact Amazon.

15. As a result, PXT opened a job abandonment case for the purpose of reviewing Marrero's employment records to determine whether she should be terminated. This case was closed on June 10, 2021, when, after she had missed eight shifts, Amazon fired Marrero for job abandonment. Marrero did not seek review of the decision under the company's appeal procedure.

16. Amazon's decision to terminate Marrero's employment was taken in compliance with company policy and was justified under the facts.

Ultimate Factual Determinations

17. There is no persuasive evidence that Amazon took any actions against Marrero motivated by discriminatory animus. Indeed, there is no competent, persuasive evidence in the record, direct or circumstantial, upon which a finding of unlawful disability discrimination could be made.

18. There is no persuasive evidence that Amazon took any retaliatory action against Marrero for having opposed or sought redress for an unlawful employment practice.

19. Therefore, it is determined that Amazon did not discriminate unlawfully against Marrero on any basis.

CONCLUSIONS OF LAW

20. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes.

21. As stated in *City of Hollywood v. Hogan*, 986 So. 2d 634, 641 (Fla. 4th DCA 2008):

> The Florida Civil Rights Act of 1992 (FCRA) prohibits … discrimination in the workplace. *See* § 760.10(1)(a), Fla. Stat. (2007). … Federal case law interpreting Title VII … applies to cases arising under the FCRA. *Brown Distrib. Co. of W. Palm Beach v. Marcell,* 890 So. 2d 1227, 1230 n.1 (Fla. 4th DCA 2005).

22. Section 760.10(1)(a), Florida Statutes, provides that it is an unlawful employment practice for an employer:

> To discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status.

23. Section 760.10(7) provides as follows:

> 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.

24. When "a Florida statute [such as the FCRA] is modeled after a federal law on the same subject, the Florida statute will take on the same constructions as placed on its federal prototype." *Brand v. Fla. Power Corp.*, 633 So. 2d 504, 509 (Fla. 1st DCA 1994). Therefore, claims for handicap-

based employment discrimination brought under the FCRA are determined using the analytical framework designed for analogous claims arising under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, *et seq.,* as amended. *See, e.g., Greenberg v. BellSouth Telecomms., Inc.*, 498 F.3d 1258, 1263-64 (11th Cir. 2007). Accordingly, federal case law interpreting the ADA is applicable to cases arising under the FCRA.

25. The ADA prohibits employers from discriminating against a qualified individual with a disability because of that person's disability. 42 U.S.C. § 12112(a). A "qualified individual" is one "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). ADA claims are evaluated using the *McDonnell Douglas* burden-shifting analysis.

26. In *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 802-03 (1973), the U.S. Supreme Court articulated a scheme for analyzing employment discrimination claims where, as here, the complainant relies upon circumstantial evidence of discriminatory intent. Pursuant to this analysis, the complainant has the initial burden of establishing, by a preponderance of the evidence, a prima facie case of unlawful discrimination. Failure to establish a prima facie case of discrimination ends the inquiry. If, however, the complainant succeeds in making a prima facie case, then the burden shifts to the accused employer to articulate a legitimate, nondiscriminatory reason for its complained-of conduct. If the employer carries this burden, then the complainant must establish that the proffered reason was not the true reason but merely a pretext for discrimination. *Id.*; *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506-07 (1993).

27. To state a prima facie case of discrimination in violation of the ADA, a complainant "must prove that (1) she has a disability; (2) she is a qualified

individual; and (3) she was subjected to unlawful discrimination because of her disability." *See, e.g., Morisky v. Broward Cnty.*, 80 F.3d 445, 447 (11th Cir. 1996).

28. Marrero failed to prove that she had a disability. The ADA defines the statutory term "disability," with respect to an individual, to mean:

> (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 (as described in paragraph (3)).

42 U.S.C. § 12102(1).

29. "[M]ajor 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." 42 U.S.C. § 12102(2)(A).

30. There is no persuasive evidence that the gum infection from which Marrero suffered, and for which she underwent surgical treatment, substantially limited any major life activities. In fact, she continued to work at all times while she had the infection, right up until the date of surgery. After the surgery, Marrero had a few limitations, e.g., no heavy lifting, but these were garden-variety restrictions, common to most surgical procedures. To be clear, there is no persuasive evidence that Marrero was unduly harmed by the surgery or that she experienced any unexpected or unusual complications. Nor did the operation entail the sort of surgery that would likely cause a disability by its nature, such as the amputation of a limb. Rather, Marrero recovered within a brief period—less than six weeks at

most—from a procedure (the surgical extraction of teeth) that is, by any reasonable measure, a routine operation.[4]

31. The ADA's definition of "disability" is expansive, but it cannot be understood as including temporary post-surgical limitations of a routine nature to facilitate recovery where, as here, the underlying condition necessitating the surgery did not constitute a disability; the surgery itself did not entail the loss of a limb, removal of a major organ, or other inherently disabling outcome; there were no exceptional complications arising from the surgery; and the patient healed in the ordinary and expected course within a matter of weeks.

32. Accordingly, because the dental condition for which Marrero was treated did not constitute a disability under the ADA (Marrero herself does not contend otherwise), and because Marrero's recovery from the surgery was medically unremarkable, it is concluded that Marrero did not have a "disability" as defined in section 12102(1)(A).

33. There is no evidence that Marrero had a "record" of any kind of disability. Thus, section 12102(1)(B) is inapplicable.

34. As for section 12102(1)(C), there is no evidence that Amazon "regarded" Marrero as having a disability. Moreover, section 12102(1)(C) does "not apply to impairments that are transitory and minor." 42 U.S.C. § 12102(3)(B). "A transitory impairment is an impairment with an actual or expected duration of 6 months or less." *Id.* Routine restrictions following the extraction of teeth to treat a gum infection and abscess, such as the few limitations placed on Marrero's daily activities for a brief period, fall squarely within the definition of a "temporary impairment."

35. Marrero's failure to make out a prima facie case of disability discrimination ended the inquiry. Because the burden never shifted to

[4] This is not to discount Marrero's pain and suffering. Anyone who has had the experience of recovering from dental surgery, including the undersigned, can attest to the discomfort involved.

Amazon to articulate a legitimate, nondiscriminatory reason for its conduct, it was not necessary to make any findings of fact in this regard, but the undersigned has done so anyway based upon competent substantial evidence adduced at hearing, to avoid leaving the impression that Amazon lacked genuine business reasons for its actions.

36. Marrero asserts that Amazon retaliated against her, although the factual basis for this claim is unclear. Under the FCRA's opposition clause, Amazon would have been prohibited from retaliating against Marrero because she opposed an unlawful employment practice. § 760.10(7), Fla. Stat. Meanwhile, under the FCRA's participation clause, Amazon would have been prohibited from retaliating against Marrero for having "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [the FCRA]." *Id*.

37. To establish a prima facie case of retaliation, Marrero must demonstrate that: (i) she engaged in statutorily protected activity; (ii) she suffered a materially adverse action; and (iii) a causal relationship existed between her protected activity and the adverse action. *Goldsmith v. Bagby Elevator Co., Inc.*, 513 F.3d 1261, 1277 (11th Cir. 2008). If Marrero establishes a prima facie case, the burden shifts to Amazon to rebut the presumption by articulating a legitimate non-retaliatory reason for the materially adverse action. *Id.* Marrero then must demonstrate that the articulated reason is a pretext to mask an improper motive. *Id.* In other words, Marrero must show that her alleged protected activity was a "but for" cause of her termination. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013).

38. Assuming, for argument's sake, that Marrero engaged in statutorily protected activity, she failed to prove that she suffered a materially adverse action *because of* such activity. That is, there is no persuasive evidence to support a finding that *but for* Marrero's asserting her civil rights in some way, she would not have been fired. Rather, as found, Amazon terminated

Marrero's employment because she missed eight shifts in a row and failed to respond to clear, written warnings advising that she was in jeopardy of being separated for job abandonment. Marrero's failure to prove a causal connection is a sufficient reason to conclude that a prima facie case of retaliation was not shown.

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 finding Amazon not liable for unlawful disability discrimination or retaliation against Marrero.

DONE AND ENTERED this 17th day of October, 2022, in Tallahassee, Leon County, Florida.

JOHN G. VAN LANINGHAM
Administrative Law Judge
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Filed with the Clerk of the
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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.