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**IN THE DISTRICT COURT OF APPEALS OF FLORIDA
SECOND DISTRICT
Case No. 2D06-2194**

CHERYL LENARD,

Appellant,

v.

A.L.P.H.A. "A BEGINNING" INC.,

Appellee.

FILED
06 JUL 24 AM 9:03
DIVISION OF
ADMINISTRATIVE
HEARINGS

**APPEAL FROM THE FLORIDA COMMISSION ON HUMAN
RELATIONS**

FCHR No. 2005-00868

FCHR Order No. 06-034

AND THE DIVISION OF ADMINISTRATIVE HEARINGS

DOAH No. 05-2976

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Statement of the Case and of the Facts

Nature of the Case

This is an appeal from a “No Cause” determination by the Florida Commission on Human Relations, on a discrimination charge filed by the Appellant Cheryl Lenard (“Lenard”) alleging violations of the Florida Civil Rights Act, Fla. Stat. § 760.01 *et seq.* (“the FCRA”) which prohibits disability discrimination in employment. It is Appellant’s contention that her former employer, Appellee A.L.P.H.A. “A Beginning” Inc., failed to provide a reasonable accommodation for her disability and wrongfully terminated her employment under the FCRA.

Course of the Proceedings

Lenard commenced the original proceeding by timely filing a Charge of Discrimination with the FCHR, alleging violations of FCRA based upon: (1) failure to provide a reasonable accommodation for her disability; and (2) termination of employment based on her disability. See Charge of Discrimination (R1:1)¹

¹ R1:1 refers to Record Vol. 1, page 1. Documents in the second volume are cited as R2:(page number). Volume 3 which contains only the transcript of the final evidentiary hearing before the DOAH, is cited simply as Tr. (page number).

On June 29, 2005, the FCHR Investigator rendered a Determination of No Cause. (R1:2,3)

On August 3, 2005, Lenard timely filed a Petition for Relief from an Unlawful Employment Practice and the Determination of No Cause dated June 29, 2005 (R1:4-6). Specifically, Lenard disputed the conclusions of the Investigator that: (1) “there is no reasonable cause to believe that Respondent discriminated against Complainant based on her disability;” (2) “that the Complainant did not have a disability as defined under the ADA” and that it was necessary for a doctor to request a reasonable accommodation in order for Petitioner to be afforded one under the ADA; and (3) that “Complainant was disciplined fairly and equally to all similarly situated employees in accordance with Respondent’s rules and regulations, and she was terminated for a legitimate non-discriminatory reason, more specifically, for her inability to attend work on a regular basis in violation of the Corrective Action Plan.”

The case came before the Division of Administrative Hearings (“the DOAH”) for Final Hearing on December 6, 2005. Following that evidentiary hearing, Administrative Law Judge (“ALJ”) Daniel Manry issued his Recommended Order of Dismissal, dated January 31, 2006 (“the Recommended Order”). (R1:61-73) In the Recommended Order, Judge Manry made specific findings of fact regarding Lenard’s physical impairment, which he found was both

permanent and was the cause for what were deemed “excessive absences” from work. (Recommended Order ¶¶10-13, R1:65) He found that her requests for certain reasonable accommodations (a special chair, therapeutic cushion and relocation of certain files so she could reach them without bending) were unnecessary, based on the fact that when these requests were denied she continued to perform satisfactory work for her employer. (Recommended Order ¶¶12, 29, R1:65,71) Judge Manry found attendance was an essential function of the job,² that Lenard was “a qualified employee able to perform the essential functions of her job, including attendance, with or without reasonable accommodations,”³ but that she is not disabled,⁴ and that the evidence did not support Lenard’s claim that she had requested a reasonable accommodation in the form of a scheduling change that would have enabled her to meet the attendance requirement of her job. (Recommended Order ¶¶15, 28, R1:66, 70)

On February 15, 2006, Lenard timely filed her Exceptions to Recommended Order. (R1:74-94) Deliberations were held before a panel of Commissioners for the FCHR on April 6, 2006 and, on April 13, 2006, the panel entered its Final Order Dismissing Petition for Relief from an Unlawful Employment Action (R1:102-07), from which the instant appeal is taken.

² (Recommended Order ¶27, R1:70)

³ (Recommended Order ¶23, R1:69)

This action was commenced by Lenard by filing a timely Notice of Appeal with the FCHR and DOAH on May 12, 2006.

Statement of the Facts

ALPHA is a residential facility for pregnant women and new mothers and their babies. In August 2002, Lenard was hired by ALPHA as a residential staff assistant, or RSA. (Tr. 34) Lenard testified that the essential functions of her job were “assisting with the residents with care for their babies, assisting them with babysitting, helping them with meal planning, budgeting, doing any kind of staff notes for each client and their child as required by laundering [sic] each shift. Again, on the 4:00 to 12:00 shift, we would also transport residents as necessary to and from appointments to hospitals and just generally be there to assist the mothers and the newborns in any way.” (Tr. 34-35).

Lenard testified that during her employment at ALPHA, she suffered a fall while horseback riding, and was ultimately diagnosed with a herniated disc at the L-4, L-5 vertebrae. (Tr. 36-3). She underwent spine surgery, specifically, a laminectomy, which was not effective in curing her condition. (Tr. 37). Lenard testified that after the surgery, she continued to have (and still has) “ongoing episodic chronic pain of the neuropathy down the right leg which was caused by the compression on the spine that the laminectomy could not totally repair.” (Tr.

⁴ (Recommended Order ¶24, R1:69)

37) Medical records documenting Lenard's medical diagnosis and her surgery were admitted into evidence. Petitioner's Exhibit No.2. (R2:4-6) This evidence was uncontroverted by Respondent, which offered no medical evidence or opinions to refute the evidence regarding Lenard's physical impairment.

Lenard testified that she has difficulties sitting for extending periods of time, walking for extended periods of time, driving and, during chronic episodes, providing her own personal care. (Tr. 37-38). Her fiancé Alexander Kennedy, with whom she resides,⁵ confirmed that based on his personal observations, Lenard "has limitations of sitting in one spot for a specific period of time. And she's unable to do certain things." (Tr. 84). He testified that he has had to serve like a nurse's aide to her, "helping her walk, . . . help getting her food for her, helping her with the car so that she could go get her physical therapy and do certain other things that we take for granted."

He testified that the level of assistance he must provide to Lenard is markedly higher after her physical therapy appointments, when he needs to help her get into the car, help her walk into the house, and assist her with personal care matters such as bathing and using the restroom. (Tr. 84-85) He testified that he drives her to and from her physical therapy appointments on an ongoing basis. (Tr. 89) He also testified that it was his observation that Lenard complained more

⁵ Tr. 83-84.

about being in pain the evenings after she received her physical therapy, as compared to the following day. (Tr. 85) He testified that he was present on occasions when Lenard had physical therapy during the day, then later decided she needed to call off work that evening. (Tr. 85) Co-worker Rhonda Barman testified that on numerous occasions she saw Lenard working when she appeared to be in pain. (Tr. 103)

Joyce Lenard (Lenard's mother and former co-worker at ALPHA) testified to the dramatic change in Lenard's physical abilities after her injury, confirming that her daughter suffers from intense pain (particularly after physical therapy) and has difficulty sitting and bending. (Tr. 107-08) She testified to Lenard's use of a special chair and therapeutic cushion, and the removal of these by ALPHA's administration. (Tr. 108-09) *See also* Petitioner's Exhibit No. 3. (R2:17)

Lenard testified in detail as to the physical pain caused by the aggressive program of physical therapy, and explained that there were occasions on days she had physical therapy appointments when she was not able to call off work 6-8 hours before her shift began, because she could not determine that early whether she would be physically able to come to work that evening. (Tr. 63) She testified she sometime called 5 hours or 4 hours before her shift, but that she always followed ALPHA's policy in trying to find a replacement. Also, she testified that due to problems with ALPHA's "on call" phone, she was often unable despite

diligent effort to reach either Crowe or Gerber. (Tr. 62-64). Cherrita McBride, who worked at ALPHA as an RSA during the relevant time period, confirmed the difficulties with the phone system. (Tr. 93-95), and confirmed that she had received calls from Lenard asking if she could cover Lenard's shift due to Lenard's back problems. (Tr. 93) Rhonda Barkman, formerly employed as an RSA at ALPHA, confirmed the same phone problems, testifying that 3 out of 5 times she would not be able to reach either Crowe or Gerber, and that eventually the problem phones had to be replaced. (Tr. 104-05)

Lenard testified that, *with a reasonable accommodation*, she would be able to perform the duties of an RSA. (Tr. 40) She testified that she *requested* an accommodation on scheduling from Kelly Crowe, *who did not testify at trial*. (Tr. 54, 55, 60). Lenard testified:

Q: Ms. Lenard, you had physical therapy twice a week, is that correct?

A: Yes.

Q: And I'm assuming A.L.P.H.A. is a seven-day-a week program; is that correct?

A: Yes. It was a 24-hour residential facility.

Q: Is there any reason you can think of why your employer couldn't have scheduled you to work the five days a week that you did not have physical therapy and had you off the days you did?

A: No.

Q: Did you ever request that?

A: Yes.

(Tr. At 79).

Accordingly, although Gerber denied she ever received a request from Lenard, that testimony regarding the request for a reasonable accommodation from Lenard's direct supervisor Kelly Crowe was uncontroverted. Again, Crowe did not even testify at trial on the employer's behalf.

Further, Gerber acknowledged at trial that there was *no reason* why Lenard's schedule could not have been changed to have her days off on the days of her physical therapy, simply denying that Lenard ever requested this accommodation *from her*. (Tr. 138) Gerber confirmed that such accommodation would not have caused an undue hardship on ALPHA's business, (Tr. 138-39), and admitted she had no personal knowledge of any conversations on this subject which may have occurred between Lenard and her direct supervisor, Crowe.

Further, as set forth above, Gerber testified that during Lenard's employment Gerber was "aware that [Lenard] continued to suffer from complications and pain from her back," (Tr. 136), and was "aware that the complications and back pain were the reasons that [Lenard] called off for what [Gerber] viewed as an excessive number of PTO days." (Tr. 137) Gerber

acknowledged that Lenard “explained to [Gerber] that she [Lenard] did not always know six hours or eight hours in advance whether her pain would be too severe for her to come into work.” (Tr. 137).

Lenard testified that she continues to receive treatment for her condition, including biweekly doctor visits, MRI’s and pain medication. She testified that she is currently prescribed Percocet, which she takes every four to six hours as needed for pain. (Tr. 38) She provided the following additional details as to the affect the impairment has on her ability to perform everyday tasks:

I’m unable to bend over at the waist and retrieve items from a lower level or even to get things out of the refrigerator at a lower level. I do require assistance with having things at waist higher or above. I’m unable to sit without a special cushion for more than 30 minutes at a time without causing pain. I’m unable to walk for extended periods of time. It causes me problems sleeping when I’m in an acute or chronic episode. I can’t sleep. I have leg spasms that go down the right side of my leg which cause severe pain. I have problems bathing and even getting food and driving when I’m in a chronic condition.

(Tr. 45)

Lenard further testified that as a result of her medication and lack of mobility she has gained more than one hundred pounds since her injury and subsequent surgery. (Tr. 45) She testified that she has applied to the Social Security Administration for disability benefits, and has received a determination

that she has a physical impairment which affects her ability to work. (Tr. 39) *See also* Petitioner's Exhibit No. 1. (R2:1-3)

Lenard testified that she requested a reasonable accommodation from her employer to cope with her difficulties with sitting and her inability to bend. Specifically, she requested a special chair and the use of a therapeutic lumbar support cushion. (Tr. 46). When the office was remodeled and new furniture purchased, however, her chair was removed and Kelly Crowe told her she was required to use one of the new existing chairs and not "clutter it [the office] up and move in any additional furniture." (Tr. 47-48) Lenard testified that from that point she was not allowed to bring her own chair in. (Tr. 48) Co-worker Phyllis Weems (who worked the same shift as Lenard) also testified that Lenard had a special chair and cushion that she used for her back, and that ALPHA "got rid of it." (Tr. 98) This testimony was further confirmed by Cherrita McBride, who testified that Lenard had a special chair and cushion she used, that it was removed, and that there was a memo from ALPHA telling employees not to bring in extra chairs. (Tr. 92) The removal of the chair was also confirmed by the testimony of Rhonda Barkman. (Tr. 105) *See also* ALPHA's note to employees, Exhibit 3 (R2:17).

Lenard testified that she told both Kelly Crowe and Diane Gerber that her neurosurgeon, Dr. Casey Gaines, had restricted her from pulling, but that she was nonetheless required by Crowe to pull a heavy gate shut on November 10, and

threatened with disciplinary action if she did not comply. (Tr. 49-50). Her testimony regarding this incident was supported by the testimony of co-worker Phyllis Weems, who testified that Crowe ordered her and Lenard to pull the gate shut, that she [Weems] was physically unable to do so due to arthritis in her right knee, that she heard Lenard tell Crowe that she [Lenard] physically could not pull the gate shut because of her back, and that Crowe nonetheless insisted that Weems and Lenard pull the gate shut. (Tr. 99-100) Lenard testified that pulling the gate shut caused her “significant and immediate pain,” for which she required additional treatment, and that, in fact, she “suffered a four to six-week setback according to the neurosurgeon.” (Tr. 50) Crowe did not testify at trial, and Gerber testified that she had no knowledge as to whether Crowe ordered them to pull the gate shut or not. (Tr. 142)

Lenard testified that she also requested a reasonable accommodation regarding her retrieval of resident files, so that she could avoid bending. Specifically, she requested that the binders containing the files be moved to a higher shelf area so that she would not need to bend to reach them. ALPHA refused to move the binders. (Tr. 50-51)

Lenard further requested a reasonable accommodation with respect to ALPHA’s policy regarding advance notice to report off from work. (Tr. 54; *see also* Tr. 51-53)

Weems testified that Crowe and Gerber told her that “they couldn’t have two disabled people on the shift,” referring to Weems and Lenard. (Tr. 101)

Lenard testified that during her employment she kept her supervisors, Kelly Crowe and Diane Gerber, apprised of her medical condition at all times, and that she provided her employer with the medical documentation which was entered into evidence as Petitioner’s Exhibit No. 2. (R2:4-16) (Tr. 40-41) She testified that she provided every medical document her employer requested. (Tr. 43) Gerber testified that “we knew [Lenard] had a back problem,” but that “we did not look at it as a long-term disability.” Nonetheless, Gerber testified that during Lenard’s employment Gerber was “aware that [Lenard] continued to suffer from complications and pain from her back,” (Tr. 136), and was “aware that the complications and back pain were the reasons that [Lenard] called off for what [Gerber] viewed as an excessive number of PTO days.” (Tr. 137) Gerber acknowledged that Lenard “explained to [Gerber] that she [Lenard] did not always know six hours or eight hours in advance whether her pain would be too severe for her to come into work.” (Tr. 137)

Lenard testified that, with a reasonable accommodation, she would be able to perform the duties of an RSA. (Tr. 40) She testified that she requested an accommodation on scheduling. Gerber acknowledged that there was no reason why Lenard’s schedule could not have been changed to have her days off on the days of

her physical therapy, but denied that Lenard ever requested this accommodation. (Tr. 138) Gerber confirmed that such accommodation would not have caused an undue hardship on ALPHA's business. (Tr. 138-39)

Joyce Lenard testified that on at least one occasion (not involving Lenard) there was only one staff member on shift at night, and that Gerber told her that was not a problem because she was "only 5 minutes away," and would "come right in" if there was any problem. (Tr. 113)

Gerber testified that Petitioner's Exhibit No. 4 (R. 2:18-26) was a copy of ALHPA'S American's with Disabilities Act policy. (Tr. 139) Gerber confirmed that, in order to comply with that policy's provision regarding existing employees (beginning on page 3), ALPHA would need to have an employee who returned from major surgery sit down with his/her supervisor and complete a Task Limitation Worksheet. (Tr. 139-40) Gerber stated that, in Lenard's case, it would have been the responsibility of Lenard's supervisor Kelly Crowe to do that, and that Gerber did not know whether or not that was done for Lenard. (Tr. 139). Crowe did not testify, nor did ALPHA present any evidence to refute Lenard's testimony that this policy was not followed by ALPHA. Specifically, Lenard testified that ALPHA failed to follow its own policy (Tr. 56), and that she was never asked to complete a Task Limitation Worksheet. (Tr. 57) She further testified that no one at ALPHA ever told her that any of the reasonable

accommodations she requested would cause an undue hardship to ALPHA, or suggest an alternative reasonable accommodation. (Tr. 58) Rather, Crowe and Gerber told Lenard that because she worked the night shift which was lighter duty, “no accommodation was necessary.” (Tr. 59) Gerber testified that Crowe, as Lenard’s direct supervisor, would have been responsible for handling any discussions regarding any request for a reasonable accommodation and any scheduling issues by Lenard. (Tr. 142)

Under ALPHA’s own PTO guidelines (Petitioner’s Exhibit No. 5, R2:27), Lenard should have been exempt from the PTO restrictions based on her disability because, as Lenard testified, she fell into “the category of having a documented, prolonged illness or injury.” (Tr. 60)

Lenard was issued a Corrective Action Plan (Petitioner’s Exhibit 6, R2:28) based on her inability to call off work 6 hours or more in advance of her shift and, on January 27, 2004, her employment was terminated ostensibly for that reason. (Tr. 61)

At all times relevant hereto Lenard competently performed her job responsibilities, and was never criticized based on performance. (Tr. 62). Indeed, Gerber testified that Lenard “was a very responsible employee that we depended upon.” (Tr. 125)

Lenard testified that she has been unemployed since her termination from ALPHA, and that she has attempted to find another position but has been unsuccessful. (Tr. 40) She testified as to diligent efforts looking for a job, including sending out her resume, searching on the Internet and newspapers, visiting job fairs, and performing job searches. She testified that she continues to contact various other social services organizations looking for work, and is also looking into re-training as a job option. (Tr. 64)

Disposition in the Lower Tribunal

The April 13, 2006 Final Order Dismissing Petition for Relief from an Unlawful Employment Action (“the Final Order”) found the ALJ’s findings of fact to be supported by competent substantial evidence, and adopted them. The Final Order found a “harmless error” in the ALJ’s conclusions of law, but upheld the substantive determination that Lenard was not disabled/handicapped as defined by the FCRA. (R1:102-07)

Standard of Review

The standard of review for factual determinations of the FCHR (and the underlying Recommended Order adopted by the FCHR) is whether there is competent substantial evidence in the record to support those factual findings. *Arnold v. Burger Queen Systems, Inc.*, 509 So.2d 958 (Fla.2d DCA 1987); *Greer v. Burger Queen Systems, Inc.*, 509 So.2d 959 (Fla. 2d DCA 1987). The standard of review for pure questions of law, however, is *de novo*. *E.g. Engle v. Liggett Group, Inc.*, No. SC03-1856 (Fla. July 6, 2006, slip op.)

Summary of Argument

The Administrative Law Judge erred as a matter of law in determining in the Recommended Order (adopted by the FCHR in its Final Order) that Lenard is not disabled. Judge Manry made a factual finding that Lenard has a permanent physical impairment which limits her ability to work, sit, pull, lift, bend to retrieve files from lower drawers, and drive. He made a finding of fact that the impairment caused Lenard to be absent from work excessively, and that that was the only basis for her termination by ALPHA. Judge Manry erred as a matter of law when he concluded that, despite the foregoing factual findings, Lenard was not in fact disabled and therefore entitled to protection under the FCRA because: (1) she requested reasonable accommodations in the form of a special chair, use of a therapeutic cushion and relocation of certain files so she would not have to bend to

retrieve them, but continued to perform her job satisfactorily to her employer when those requests for accommodation were denied; and (2) the Social Security Administration found her to have an impairment which affected her ability to work but denied her application of SSI disability benefits.

As discussed herein, the fact that an employee struggles to perform their job without the requested accommodation does not mean the accommodation wasn't needed or that the employee is not disabled. Further, it is well-established that the standards for receipt of SSI disability benefits are different from the standards for a disability under the FCRA/ADA and denial of one is not an automatic bar to the other.

In the instant case, the Administrative Law Judge also made factual findings which are not supported by competent substantial evidence. Lenard testified that she was unable to comply with ALPHA's policy of calling off work for a shift 6-8 hours in advance because, on the days she received physical therapy, she would come home in acute pain and would not know until closer to the start of her shift time that evening whether, in fact, she would be physically able to report to work. She testified that she asked her supervisor, Kelly Crowe, for either of two accommodations: (1) to be permitted to call in closer to the start of her shift; or (2) to have her schedule adjusted so that her two days off per week could be the same two days that she had physical therapy appointments. This testimony was

unrefuted. Kelly Crowe did not testify at trial, and Crowe's supervisor, Diane Gerber, admitted that Crowe would have been the proper person for Lenard to discuss such a request with and that Gerber had no personal knowledge as to whether such a conversation between Lenard and Crowe had ever taken place. Gerber further testified that, had the scheduling accommodation been requested by Lenard, it would not have posed an undue hardship on ALPHA to grant it. She simply stated that, to the best of *her* knowledge, there had never been such a request. Based on the foregoing, there was no competent substantial evidence upon which Judge Manry could have based his factual determination that Lenard failed to request a reasonable accommodation with respect to scheduling.

Given the factual finding in the Recommended Order that the sole basis for Lenard's termination was her excessive number of absences from work on the evening shifts of the days when she had physical therapy, had Judge Manry ruled consistent with the evidence that Lenard did in fact request an accommodation, then her termination would as a matter of law have been a direct result of her employer's refusal to grant that accommodation, and a violation of the FCRA.

Accordingly, Lenard requests this Court reverse the following determinations in the Recommended Order, adopted by the FCHR in its Final Order:

(1)that Lenard is not a qualified individual with a disability under the FCRA:

(2)that Lenard was not denied a reasonable accommodation with respect to the special chair, therapeutic cushion and relocation of files;

(3)that Lenard was not denied a reasonable accommodation with respect to scheduling;

(4)and that Lenard was not terminated from her job in violation of the FCRA.

Lenard further requests that this case be remanded for entry of an Order consistent with reversing those determinations, and an award of back pay, reinstatement/front pay, attorney's fees and costs under the FCRA.

Argument

I. Lenard has a Disability as Defined by the FCRA and the ADA and was therefore Entitled to a Reasonable Accommodation

Claims under the Florida Civil Rights Act, Fla. Stat. § 760.01 *et seq.* (“the FCRA”), are interpreted consistent with caselaw under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.* (“the ADA). *E.g. Ross v. Jim Adams Ford, Inc.*, 871 So.2d 312 (Fla. 2nd DCA 2004); *Wimberly v. Securities Technology Group, Inc.*, 866 So.2d 146 (Fla. 4th DCA 2004) and cases cited.

To state a *prima facie* case for disability discrimination under the ADA or the FCRA, Lenard must establish: (1) that she has a statutorily covered disability; (2) that she is a qualified individual; and (3) that she was discriminated against by ALPHA because of her disability. *Pritchard v. Southern Company Services*, 92 F.3d 1130, 1132 (11th Cir. 1996).

As noted by the court in *Wimberly*, “[t]he ADA defines a disability as ‘(A) A physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment.’ 42 U.S.C. § 12101(2).” 866 So.2d at 147. Whether a particular condition qualifies as a disability is a case-by-case factual determination. *See Ross v. Jim Adams Ford, Inc.*, 871 So.2d 312 (Fla. 2nd

DCA 2004)(discussing circumstances where a slow-healing injury could be deemed a disability); *Norton v. Leon County School Board*, 2003 WL 21467095 at *6-7 (June 5, 2003) (slip op); *Wimberly*, *supra* (comparing minor, temporary physical limitations from disabilities).

In the Recommended Order which ultimately was adopted by the FCHR, Judge Manry made factual findings that “Petitioner’s resulting impairment has limited her ability to work by impairing her ability to sit for long periods, pull, lift, bend to retrieve files from lower file drawers, and drive.” See Recommended Order, ¶ 10. (R1:65) Judge Manry also found that the impairment is permanent.” See Recommended Order, ¶ 11. (R1:65)

The ADA specifically lists the following as major life activities, noting that the list is not exhaustive: “functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.” 29 C.F.R. § 1630.2(I).

In determining whether a major life activity is substantially limited by an impairment, courts consider the following factors: 1) “the nature and severity of the impairment;” 2) “the duration or expected duration of the impairment;” and 3) “the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.” *Wimberly*, 866 So.2d at 147, *quoting* 29 C.F.S. § 1630.2(j)(1) (2000). In the instant case, Lenard identified the

following as major life activities which are substantially limited for her: sitting, working, pulling, lifting, bending, self-care and driving.

At the evidentiary hearing, she provided ample evidence of her disability – evidence which was unrefuted by ALPHA. Based on the testimony presented and the medical records entered into evidence, there could be no reasonable dispute that Lenard does suffer a physical impairment. In addition, the finding of an impairment is supported by evidence of the Social Security Administration determination. Specifically, the significance of the Social Security determination is its finding, based on all medical records submitted, that Lenard in fact does have a physical impairment which affects her ability to work. Taking into account the testimony of the witnesses, and the lack of any medical evidence or testimony offered by ALPHA, there was no competent substantial evidence upon which to base the ALJ's finding that Lenard's physical impairment does substantially limit a major life activity as defined by the ADA. Accordingly, she should have been granted her request for the use of a special chair, therapeutic cushion (which she provided and ALPHA removed), and the relocation of files for accessibility without bending. No evidence was presented by ALPHA at all indicating that any of these requests would have caused an undue hardship or indeed *any* hardship on the employer.

The administrative law judge, however, relied on two bases for his conclusion that Lenard was *not* entitled to *any* reasonable accommodation because she is *not disabled* as a matter of law. He held that although Lenard is “permanently impaired” and although this impairment “has limited her ability to work by impairing her ability to sit for long periods, pull, lift, bend to retrieve files from lower file drawers, and drive,” (Recommended Order ¶10, R1:65), she is not disabled. These are: (1) the determination that she is not eligible for Social Security disability benefits; and (2) her work record of good performance (discussed *infra* in Section II). This reasoning, because it is based on conclusions of law, is subject to *de novo* review on appeal.

The Administrative Law Judge’s reliance on the Social Security Administration’s finding that Lenard suffers an impairment but is not disabled *for purposes of SSI benefits* as a basis for finding that she is not disabled under the ADA and FCRA, is misplaced. It is well established that disability determinations for SSI purposes do not take into account the existence or possibility of reasonable accommodations, and are therefore not determinative of whether or not an individual is disabled under the ADA and FCRA. Specifically, courts have held that an individual who is totally disabled under the standards for receipt of Social Security disability benefits, may nonetheless be able to perform the essential functions of their job under the ADA given a reasonable accommodation.

Likewise, a person who is not entitled to disability benefits under the ADA because they can perform some type of work, may nonetheless be disabled under the ADA if they are substantially limited in one or more major life activities. *Talavera v. School Board of Palm Beach County*, 129 F.3d 1214 (11th Cir. 1997).

Accordingly, although the Social Security Administration's findings were relevant as to the existence of a physical impairment, they were not legally conclusive as to whether that impairment constitutes a disability under the ADA or the FCRA. The ALJ therefore erred as a matter of law in reaching this conclusion in the Recommended Order.

II. Performing the Job to One's Detriment does Not Eliminate the Disability or Negate the Need for a Reasonable Accommodation

In the Recommended Order adopted by the FCHR, Judge Manry found that there were "[d]isputed requests for accommodations in the form of a particular chair that was comfortable for Petitioner and in the form of location of files in higher drawers for easier access by Petitioner." See Recommended Order, ¶ 12. (R1:65) However, Judge Manry then concluded that because Lenard "satisfactorily performed her job" without the accommodation, her request didn't fall under the ADA." See Recommended Order, ¶ 12, 17 and 29. (R1:65,67,71). "[Lenard's] impairment is neither a 'disability' nor a 'handicap,'" Judge Manry

held, because the impairment “did not prevent her from satisfactorily performing her job duties other than attendance.” See Recommended Order, ¶17 (R1:63).

This legal conclusion is incorrect and, frankly, illogical. The mere fact that Petitioner managed to satisfactorily perform *part of her job for a period of time*, despite the pain she suffered from her attempts to retrieve files from lower drawers and despite having her chair and therapeutic cushion removed, does not mean that the Respondent was legally relieved of its obligation to provide these reasonable accommodations under the ADA. This would be analogous to ruling that if an individual otherwise restricted to a wheelchair for mobility manages to crawl up the steps to access a work area through sheer force of will, that individual is therefore not disabled and has no right to request that a wheelchair ramp be provided. Likewise, Lenard’s struggle to continue to perform her job by enduring totally unnecessary additional pain occasioned by reaching lower files and sitting without the assistance of a properly contoured chair and therapeutic cushion, should not be equated to an admission that she is not disabled. She should be commended, not penalized, for her efforts to maintain her job in the face of her employer’s unjustifiable refusal to provide a reasonable accommodation for her extreme difficulties both sitting and bending.

And as Judge Manry acknowledged in the Recommended Order, Lenard's impairment *did* prevent her from fulfilling the *attendance* requirements of the job⁶ – requirements which, as set forth below, the uncontroverted evidence established could easily have been met by Lenard if only ALPHA had provided the reasonable accommodation she requested with respect to scheduling.

Accordingly, the conclusion by the ALJ -- which was adopted by the FCHR – that Lenard, as a matter of law, cannot be deemed *not* disabled under the FCRA *because* she “satisfactorily performed her job duties without those accommodations,”⁷ is legally incorrect. As a pure question of law, it is entitled to *de novo* review by this Court.

III. No Competent Substantial Evidence Supports Judge Manry's Conclusion that Lenard Failed to Request a Reasonable Accommodation with Respect to Scheduling, and ALPHA'S Own Testimony Showed that a Reasonable Accommodation Could have been Provided

As discussed *supra*, the ADA (and therefore by analogy the FCRA) defines a “qualified individual with a disability” as “an individual with a disability 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. §

⁶ Recommended Order ¶12-13, R1:5-6)

⁷ Recommended Order ¶12, R1:5-6)

12112(a). Based upon the evidence presented and discussed *supra*, the proof at trial was overwhelming that had Lenard been provided flexibility either in the scheduling of her days off to coincide with her physical therapy treatments, or provided the ability to call off work with less than 6-8 hours lead time, she would not have been in violation of any company policy regarding PTO. The testimony of the employer was clear that there were no other performance issues, and the Lenard's testimony, her medical records and that testimony of her co-workers and family members were uncontroverted.

Lenard testified that, *with a reasonable accommodation*, she would be able to perform the duties of an RSA. (Tr. 40) She testified that she *requested* an accommodation on scheduling from Kelly Crowe, *who did not testify at trial*. (Tr. 54, 55, 60). Lenard testified:

Q: Ms. Lenard, you had physical therapy twice a week, is that correct?

A: Yes.

Q: And I'm assuming A.L.P.H.A. is a seven-day-a week program; is that correct?

A: Yes. It was a 24-hour residential facility.

Q: Is there any reason you can think of why your employer couldn't have scheduled you to work the five days a week that you did not have physical therapy and had you off the days you did?

A: No.

Q: Did you ever request that?

A: Yes.

(Tr. At 79).

Accordingly, although Gerber denied she ever received a request from Lenard, that testimony regarding the request for a reasonable accommodation from Lenard's direct supervisor Kelly Crowe was uncontroverted. Again, Crowe did not even testify at trial on the employer's behalf.

Further, Gerber acknowledged at trial that there was *no reason* why Lenard's schedule could not have been changed to have her days off on the days of her physical therapy, simply denying that Lenard ever requested this accommodation *from her*. (Tr. 138) Gerber confirmed that such accommodation would not have caused an undue hardship on ALPHA's business, (Tr. 138-39), and admitted she had no personal knowledge of any conversations on this subject which may have occurred between Lenard and her direct supervisor, Crowe.

Further, as set forth above, Gerber testified that during Lenard's employment Gerber was "aware that [Lenard] continued to suffer from complications and pain from her back," (Tr. 136), and was "aware that the complications and back pain were the reasons that [Lenard] called off for what [Gerber] viewed as an excessive number of PTO days." (Tr. 137) Gerber

acknowledged that Lenard “explained to [Gerber] that she [Lenard] did not always know six hours or eight hours in advance whether her pain would be too severe for her to come into work.” (Tr. 137).

This simply was no competent substantial evidence at trial upon which Judge Manry could have based his factual determination that Lenard was properly terminated for failing to satisfy an essential job function – attendance – because she failed to ask for an accommodation for scheduling. (See Recommended Order ¶28, R1:70). *All* of the evidence presented is directly contrary to that finding.

The denial of Lenard’s request for a reasonable accommodation with respect to scheduling directly resulted in the termination of her employment. As such, that termination was disability discrimination in violation of the FCRA.

Conclusion

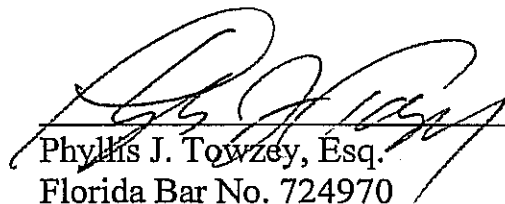
Lenard requests this Court reverse the following determinations in the Recommended Order, adopted by the FCHR in its Final Order:

- (1)that Lenard is not a qualified individual with a disability under the FCRA:
- (2)that Lenard was not denied a reasonable accommodation with respect to the special chair, therapeutic cushion and relocation of files;
- (3)that Lenard was not denied a reasonable accommodation with respect to scheduling;
- (4)and that Lenard was not terminated from her job in violation of the FCRA.

Lenard further requests that this case be remanded for entry of an Order consistent with reversing those determinations, and an award of back pay, reinstatement/front pay, attorney's fees and costs under the FCRA.

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Federal Express delivery to A.L.P.H.A. "A Beginning" Inc., c/o Ms. Theresa A. Deeb, Esq., Deeb Brainard, P.A., 5999 Central Avenue, Suite 202, St. Petersburg, FL 33710; Denise Crawford, Clerk of the Commission, Florida Commission on Human Relations, 2009 Apalachee Parkway, Suite 100, Tallahassee, FL 32301-4857; and Clerk of the Division of Administrative Hearing, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, FL 32399-3060, this 21st day of July, 2006.



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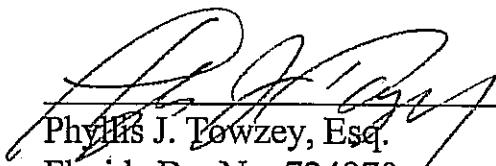
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Certificate of Compliance

I HEREBY CERTIFY that the foregoing Initial Brief complies with the font requirements of Rule 9.210, Florida Rules of Appellate Procedure.

A handwritten signature in black ink, appearing to read "Phyllis J. Towzey", is written over a horizontal line.

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