

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DENA WEVER,)
)
 Petitioner,)
)
 vs.) Case No. 02-0234
)
 TEL-PART, INC.,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly-designated Administrative Law Judge, William R. Pfeiffer, held a formal hearing in the above-styled case on April 12, 2002, in St. Petersburg, Florida.

APPEARANCES

For Petitioner: Dena Wever, pro se
2913 Englewood Drive
Largo, Florida 34701

For Respondent: Richard L. Bradford, Esquire
Thompson, Sizemore, & Gonzalez, P.A.
501 East Kennedy Boulevard
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STATEMENT OF THE ISSUE

Whether Respondent, Tel-Part, Inc., violated Chapter 70 of the Pinellas County Ordinance, as amended, and Title I of the Americans with Disabilities Act by denying Petitioner, Dena Wever, a reasonable accommodation for her disability.

PRELIMINARY STATEMENT

On May 26, 1998, Petitioner filed a Charge of Discrimination with the St. Petersburg Human Relations Division alleging that Respondent discriminated against her based on her disability by denying her a reasonable accommodation. A reasonable cause determination on the disability discrimination claim was entered on July 11, 2001.

The parties proceeded to a formal DOAH hearing on April 12, 2002, wherein Petitioner presented the testimony of Stephanie Crocker, Sandra Heap, Jon Weaver, and herself. Respondent presented the testimony of Christopher Laberio and Menahem Roth. Petitioner's Exhibits A through M were admitted into evidence. Respondent's Exhibit 4 was admitted into evidence.

FINDINGS OF FACT

1. Respondent, Tel-Part, Inc. ("Tel-Part"), supplies telecommunication products to consumers. Menahem Roth is the vice president and co-owner of Tel-Part and handles the daily operations. Mr. Roth's wife is the president of the company and also co-owner. Tel-Part is located at 9190 Ulmerton Road, in Largo, Florida.

2. Employees at Tel-Part's were assigned various responsibilities on a day-to-day basis that included the following: Tel-Part office staff received work orders from various customers and processed the paper work. Thereafter,

warehouse employees retrieved the requested item, packed it in a box, taped and weighed the box, marked it, and set the box on one of two shipping lines located on the floor of the warehouse. The officer manager prepared an invoice for the outgoing shipments and typically, the office clerk prepared a shipping label for the outgoing shipments and placed the labels on the boxes.

3. Petitioner, Dena Wever was employed at Tel-Part as the office manager from February 1992 until March 24, 1998. Her duties as the office manager included invoicing, accounts receivables, accounts payable, personnel matters, payroll, and monthly sales reports. She was also responsible for the administration of health insurance and retirement pay for Tel-Part employees. During her employment at Tel-Part, Ms. Wever was assigned an office clerk to assist her. The duties of the office clerk included answering the phones, filing, and performing general office duties. Again, the office clerk usually placed the labels on the boxes for outgoing shipments. During her tenure of employment between 1992 and 1998, 12 different office clerks were assigned to assist her. Ms. Wever admitted that the office clerk position was rarely unfilled.

4. On May 24, 1997, Ms. Wever was injured in an automobile accident unrelated to her employment with Tel-Part. The accident caused Ms. Wever to experience pain in her neck,

shoulders, and back. Ms. Wever's limitations included: the inability to lift more than ten pounds; no excessive reaching; and no repetitive bending or stooping. After her surgery in March 1988, Ms. Wever wore a back brace to provide support.

5. Although Ms. Wever suffered from physical and mental health problems, her limitations admittedly did not affect her ability to perform administrative office functions. Ms. Wever indicated that she could handle the responsibilities of office manager.

6. In December 1997, Ms. Wever requested Mr. Roth to provide her with a keyboard tray for her computer's keyboard because the keyboard was positioned too high and was uncomfortable. Mr. Roth accommodated her request and provided the keyboard tray.

7. On or about December 22, 1997, Ms. Wever's office clerk, Sandra Heap, resigned from Tel-Part. Consequently, Ms. Wever took the initiative to place the labels on the outgoing shipments. On or about January 9, 1998, Ms. Wever requested Mr. Roth to place an elevated table in the shipping line enabling her to place labels on the outgoing shipments without bending to the floor. In making this request, Ms. Wever provided a note to Mr. Roth, which in pertinent part read:

Due to medical reasons, I am not able to repetitively apply labels to the boxes.

Could you possibly place a table to make this task easier.

8. Due to the limited space and dysfunction that a large table would create in the warehouse, Mr. Roth denied her request but, instead, ordered other employees to assume the responsibility of placing labels on the outgoing shipments. Initially, Mr. Roth instructed Jon Wever, Ms. Wever's husband to place the labels on the boxes; however, on January 14, 1998, Ms. Wever informed Mr. Roth that Mr. Wever was unable to consistently assist. Immediately thereafter, Mr. Roth ordered Bob Zam and Chris Laberio to assume the task of placing labels on the boxes. Apparently Mr. Zam and Mr. Laberio were deficient with the assignment and Ms. Wever continued to affix the labels.

9. While Ms. Wever indicated that she did not receive sufficient help from Mr. Zam and Mr. Laberio, she admitted that Mr. Roth specifically instructed them, as well as others, to handle the responsibility of placing labels on the outgoing shipments. In addition, contrary to Ms. Wever's testimony, Mr. Laberio indicated that he fully assisted with the labeling while Ms. Wever was employed at Tel-Part and Mr. Wever stated that he assisted approximately 50 percent of the time.

10. Clearly, Mr. Roth relieved Ms. Wever of the task of applying the labels, ordered alternative employees to perform the task, and neither disciplined, threatened discipline nor

penalized Ms. Wever for failing to place the labels on the outgoing shipments.

11. On January 28, 1998, Ms. Wever requested a medical leave of absence which was approved by Mr. Roth. On February 4, 1998, Ms. Wever's doctor at the Florida Spine Institute provided Ms. Wever with a note indicating that she suffered a "total temporary disability" from January 22, 1998 thru February 22, 1998 and could not work.

12. Upon her return from medical leave on February 22, 1998, Ms. Wever requested to work part-time, approximately four hours a day. Although her part-time restriction was not imposed by her doctor, she believed that it was best for her to work in a reduced capacity. Mr. Roth accommodated her request. From the time of her return on February 22, 1998, until she failed to report to work and was deemed to have resigned on March 24, 1998, Ms. Wever did not place labels on outgoing shipments.

13. Following her resignation, Ms. Wever underwent surgery, was deemed "disabled" and began receiving Social Security benefits.

14. In July 2001, Ms. Wever accepted employment at Baycrest Industries.

CONCLUSIONS OF LAW

15. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of these proceedings. Section 120.57(1), Florida Statutes.

16. Petitioner, Dena Wever, brought this action against Respondent, Tel-Part, Inc., pursuant to Chapter 70 of the Pinellas County Ordinance, and Title I of the Americans with Disabilities Act ("ADA"). Specifically, Ms. Wever claims that Tel-Part failed to provide her with a reasonable accommodation for her disability, i.e., her back impairment.

17. The parties have stipulated that Ms. Wever's disability claim should be analyzed in accordance with the provisions of the ADA and case law, interpreting the same.

18. To satisfy her claim, Ms. Wever has the burden of establishing by preponderant evidence a prima facie case of unlawful discrimination. McDonnell Douglass Corporation v. Green, 411 U.S. 792 (1973). If the prima facie case is demonstrated, a presumption of discrimination arises and the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for its action. The burden of producing evidence is next placed on the petitioner to demonstrate that the proffered reason was pretextual. However, the ultimate burden of persuasion remains with the plaintiff or petitioner. St. Mary's Honor Center v. Hicks, 509 U.S. 502, (1993).

Disability under ADA

19. In order for Petitioner to demonstrate a prima facie case under the proof standard set forth above, Petitioner must demonstrate:

- (1) She is handicapped within the meaning of the ADA;
- (2) She is otherwise qualified for the position from which she was terminated; and
- (3) She suffered an adverse employment action under circumstances which give rise to an inference that the employment action was based solely upon her handicap.

20. Pursuant to 42 U.S.C. Section 12101 and the ADA, the term "disability" is defined 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 an impairment; or
- (C) being regarded as having such an impairment."

21. The regulations interpreting the ADA define "substantially limits" as follows:

The term substantially limits means [u]nable to perform a major life activity that the average person in the general population can perform; or [s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the average person in the general population can perform that same major life activity . . . The following factors should be considered in determining whether an individual is substantially limited in a major life activity; (i) the nature and severity of the impairment; (ii) the duration or expected duration of the impairment; and (iii) the permanent or long term impact, or the

expected permanent or long term impact of or resulting from the impairment.

Maynard v. Pneumatic Products Corp., 233 F.3d 1344, 1347 (11th Cir. 2000) (quoting 29 C.F.R. Subsection 1630.2(j)(1), (2)).

22. "Substantially" in the phrase "substantially limits" suggests "considerable" or "to a large degree," and thus clearly precludes impairments that interfere in only a minor way with performing manual tasks. Toyota Motor Manufacturing, Kentucky v. Williams, 122 S. Ct 681 (2002). Moreover, because "major" means important, "major life activities" refers to those activities that are of central importance to daily life. Id. To be substantially limited in the specific major life activity of performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives.

23. In addition, the impairment's impact must be permanent or long-term. See 29 C.F.R. Section 1630.2(j)(2)(ii-iii). Merely proving the existence of a physical impairment, without addressing any limitation on major life activities, is not sufficient to prove disability under the Act. Rather, the ADA plaintiff must show that the impairment substantially limits a major life activity.

24. In the case at hand, Petitioner has not demonstrated that she is disabled as defined by the ADA. She has not shown that she is substantially limited in any major life activity. While Ms. Wever indicated that she has experienced pain in her neck, shoulders, and back, caused by an automobile accident and noted that she cannot lift more than ten pounds, engage in excessive reaching, or repetitive bending, she did not present any evidence showing that she is substantially limited in any major life activity.

25. In addition, Ms. Wever's note from her physician dated February 4, 1998, does not support her claim that she was permanently or long-term disabled. The note merely indicates that Ms. Wever had a "total temporary disability" from January 22, 1998 through February 22, 1998. Moreover, Ms. Wever indicated that her physician did not change her status during the time that she remained employed at Tel-Part. The temporal restrictions set forth in the doctor's note suggest that Ms. Wever's alleged disability was temporary. The ADA protects employees with permanent or long term disabilities, not temporary disabilities. See 29 C.F.R. Section 1630.2(j).

26. To the extent that Ms. Wever contends that she is substantially limited in the major life activity of working, she must show that she is significantly restricted from performing

in a class of jobs or broad range of jobs. The ADA regulations provide that "substantially limits" means:

[S]ignificantly restricted from performing in a class of jobs or broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities. The inability to perform a single particular job does not constitute a substantial limitation in the major life activity of working.

20 C.F.R. Section 1630.2(j)(3)(i).

27. Ms. Wever provided no evidence that she was substantially limited in the major life activity of working, admitted that she can still perform the tasks of an office manager, and is currently working full-time in an office setting. While she was limited from lifting and bending, and may currently have the same restrictions, she has not shown that her limitations significantly restrict her from performing in a class of jobs or broad range of jobs. See Stein v. Ashcroft, 284 F.3d 721 (9th Cir. 2002) (finding that inability to lift heavy boxes related to plaintiff's outreach work does not rise to the level of a substantial impairment with respect to the major life activity of working); see also Bolton v. Scrivner, Inc., 36 F.3d 939, 944 (10th Cir. 1994) (inability to stand on concrete floor all day because of permanent partial disability to feet insufficient alone to show disability under ADA); McKay v. Toyota Motor Manufacturing USA, 110 F.3d 369, 373 (6th Cir.

1997) (denied disability status to plaintiff who could not lift more than 20 pounds, use vibrating equipment, or make repetitive use of his right hand); Wooten v. Farmland Foods, 58 F.3d 382, 386 (8th Cir. 1995) (denied disability status to a plaintiff who could not lift more than 20 pounds or work in cold environment, or work with meat products); and Ray v. Glidden Company, 85 F.3d 227 (5th Cir. 1996) (holding that an employee who was unable to lift 44-56 pounds continuously throughout the day but able to do so for one to three and a half hours in one day was not disabled).

Essential Functions of Office Manager Position

28. Ms. Wever alleges that she was denied an accommodation because Tel-Part did not provide her with a table to assist her in the job of placing labels on boxes or outgoing shipments.

29. The term "essential functions" is defined by the EEOC regulations as "the fundamental job duties of the employment position the individual with the disability holds" and "does not include the marginal functions of the position." 29 C.F.R. Section 1630.2(n)(1); LaChance v. Duffy's Draft House, Inc., 146 F.3d 832, 835 (11th Cir. 1998). The employee must actually perform the function the employer asserts is essential. LaChance, 146 F.3d at 835.

30. The ADA provides that in determining what functions of a given job are deemed essential, "consideration should be given

to the employer's judgment . . . and if an employer has prepared a written job description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential job functions of the job." 42 U.S.C. Section 12111(8); Holbrook City of Alpharetta, Ga., 112 F.3d 1522, 1526 (11th Cir. 1997).

31. Regulations promulgated under the ADA further identify three factors that can be considered to determine whether a particular task is an essential part of a job. They include:

- (1) the reason the position exist is to perform the function;
 - (2) there are a limited number of employees available among whom the performance of the job function can be distributed; and
 - (3) the function is so highly specialized that the incumbent in the position was hired for his or her expertise or ability to perform the particular function.
- See Holbrook, 112 F.3d at 1526.

32. In the case at hand, placing labels on boxes in the warehouse was not an essential function of Ms. Wever's position as office manager. She was responsible for handling insurance, retirement plans, accounts receivables, accounts payable, personnel matters, payroll, accounting, and monthly sales reports. In addition, throughout her employment at Tel-Part, she usually had an office clerk. In fact, Ms. Wever testified that the position of office clerk was rarely unfilled and that

it was the office clerk, not the office manager who handled the task of placing labels on outgoing shipments.

33. Ms. Wever also presented the testimony of Stephanie Crocker and Sandra Heap, former office clerks, who admitted that placing labels on boxes was primarily handled by the office clerk. And although, Tel-Part does not have written job descriptions for the office manager position, consideration is given to the employer's determination of the essential functions of the office manager position. There is no indication that the office manager's position exists to perform the function of placing labels on boxes or outgoing shipments. In fact, there were a number of lower level employees available for that function. Moreover, the task did not require any highly specialized skill. As Ms. Heap noted, the task simply required the ability to peel a sticker and be able to lift the box and move it.

34. Ms. Wever failed to satisfy her burden of showing that placing labels on outgoing shipments was an essential function of her position as officer manager.

Reasonable Accommodation

35. Ms. Wever alleges that Tel-Part denied her a reasonable accommodation by failing to provide her with a table to help her place labels on outgoing shipments. Tel-Part, however, alleges that they provided Ms. Wever with a reasonable

accommodation for her alleged impairment by removing responsibility for applying labels from Ms. Wever and assigning the task to other employees, i.e., Jon Wever, Bob Zam, Christopher Laberio.

36. Pursuant to 42 U.S.C. Section 12111 (9), and the ADA, a "reasonable accommodation" may include:

(A) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

37. Tel-Part assigned the task of placing labels on boxes to Mr. Laberio, Mr. Zam, and Mr. Wever, Ms. Wever's husband. Notwithstanding their ineffectiveness at the task, Ms. Wever, against Mr. Roth's direction, continued to affix the labels and failed to reasonably advise Mr. Roth of her activity.

38. By shifting Ms. Wever's temporary, and self-assigned task of placing labels on outgoing shipments to other employees, Tel-Part complied with the requirements of the ADA. Tel-Part restructured the organizational responsibilities which is clearly permitted under 42 U.S.C. Section 12111(9).

39. Petitioner failed to demonstrate that Respondent did not accommodate for her alleged disability. Furthermore, Petitioner failed to show that Tel-Part discriminated against her for any reason including her alleged disability.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the City of St. Petersburg Community Affairs Department enter a final order dismissing the Petitioner's Complaint.

DONE AND ENTERED this 25th day of July, 2002, in Tallahassee, Leon County, Florida.

WILLIAM R. PFEIFFER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of July, 2002.

COPIES FURNISHED:

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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.