STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RUBEN RIVERO,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 02-2311
	)	
MIAMI-DADE COUNTY,	)	
	)	
Respondent.	)	
_____	)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on August 14, 2002, by video teleconference, with the parties appearing in Miami, Florida, before Patricia Hart Malono, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, who presided in Tallahassee, Florida.

APPEARANCES

For Petitioner: Ruben Rivero, pro se
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For Respondent: William X. Candela, Esquire
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STATEMENT OF THE ISSUE

Whether the Respondent discriminated against the Petitioner on the basis of disability, in violation of the Florida

Civil Rights Act of 1992, Section 760.10 et seq., Florida Statutes.

PRELIMINARY STATEMENT

On June 7, 2002, Ruben Rivero filed a Petition for Relief with the Florida Commission on Human Relations ("FCHR") in which he claimed that Miami-Dade County had discriminated against him for the following reasons:

> During the conformation of a supervisory position becoming available, a younger inexperienced individual was hire[d] and began training for said position. I was hired for (39) hours a week, during the availability of the supervisory position my hours were reduced to roughly (16) hours a week. As a result my health benefits were canceled, followed by my medical care. Between May 22, 1999 and July 18, 1999 I was on Call-out status. On July 22, 1999 I collected a letter for my local post office stating that I requested FMLA, which I did not nor was I made aware of any Florida Act. I had (15) days to supply medical certification to qualify for FMLA, return to work or resign. On August 10, 1999 I was terminated for abandonment of position.

The relief sought by Mr. Rivero is credit for his "retirement membership for the entire term, enrollment in the retiree medical, dental and/or life insurance program, and an honorable discharge."[1]

The FCHR transmitted the Petition for Relief with the Division of Administrative Hearings on June 12, 2002, before receiving an answer from Miami-Dade County; it was, however,

noted on the Transmittal of Petition sent to the Division of Administrative Hearings with the Petition for Relief that, among other documents, a copy of the notice and Petition for Relief had been sent to William X. Candela, an Assistant County Attorney for Miami-Dade County. An Initial Order was also sent to Mr. Candela, but Miami-Dade County did not file either an answer to the Petition for Relief or a response to the Initial Order. On the basis of information provided by Mr. Rivero, the final hearing in this matter was scheduled for August 14 through 16, 2002. The hearing was subsequently re-scheduled for August 14, 2002, by video teleconference.

At the hearing, Mr. Rivero testified in his own behalf, and Petitioner's Exhibits 1 through 14 were offered and received into evidence.[2] Petitioner's Exhibit 15 was offered into evidence, but was rejected as irrelevant; Mr. Rivero proffered the exhibit. Miami-Dade County presented the testimony of Diane M. Congdon, the Personnel Manager for the Metropolitan Dade County Park and Recreation Department, and Cindy J. Falcon, a security supervisor with the Metropolitan Dade County Park and Recreation Department. Respondent's Exhibits 1 and 2 were offered and received into evidence.

Counsel for Miami-Dade County stated at the hearing that a transcript of the proceedings would be ordered and filed in this case, and proposed recommended orders were to be filed 10 days

after the transcript was filed with the Division of Administrative Hearings. No transcript has been filed to date, and neither party has filed proposed findings of fact and conclusions of law. In the absence of a transcript, the findings of fact in this Recommended Order have been derived from the parties' exhibits and from the undersigned's fairly extensive notes of the testimony taken during the hearing.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing and on the entire record of this proceeding, the following findings of fact are made:

1. Mr. Rivero was first employed by Miami-Dade County in November 1984, apparently as a security guard with the Metropolitan Dade County Park and Recreation Department. He took a physical examination and informed the doctor conducting the examination that he suffered from cluster migraine headaches and that they occurred about six to eight times each month.

2. Mr. Rivero subsequently left his employment with Miami-Dade County, but was re-hired in September 1986. At the time he was re-hired, he advised the recruiting officer that he suffered from migraine headaches.

3. Mr. Rivero was employed by the Metropolitan Dade County Park and Recreation Department from September 1986 until August 10, 1999.

4. From January 1996 through May 1999, Mr. Rivero was employed as a park ranger by the Metropolitan Dade County Park and Recreation Department, and he worked at the Metrozoo. His job responsibilities included patrolling areas of the zoo, assisting in emergencies, providing information to patrons, and providing for the safety of patrons and security for Miami-Dade County property.

5. Because of his migraine headaches, Mr. Rivero often was absent from work, and he was advised several times by his supervisors, in documents entitled Record of Counseling, that the frequency of his absences was unacceptable. The most recent Record of Counseling submitted at the hearing by Mr. Rivero was dated November 24, 1997.

6. On January 10, 1995, Mr. Rivero consulted with Ray Lopez, M.D., a neurologist, about his recurring migraine headaches, which had become more intense and frequent after Mr. Rivero was involved in an automobile accident in November 1994. Dr. Lopez diagnosed Mr. Rivero with migraine headaches, with post-traumatic, likely cervicogenic, intensification.

7. Dr. Lopez treated Mr. Rivero for his headaches from January 1995 until at least December 1999. During this time, Mr. Rivero was seen by Dr. Lopez approximately twice a month.

8. Between 1995 and 1999, Mr. Rivero's migraine headaches continued to intensify in severity and frequency. By January 1999, Mr. Rivero found it increasingly more difficult to carry out his duties as a park ranger at Miami-Dade County's Metrozoo when he had a headache, and his headaches were occurring almost daily.

9. Between January 1999 and March 1, 1999, Dr. Lopez wrote several notes documenting Mr. Rivero's inability to work on specified days because of the headaches.

10. Effective March 29, 1999, Mr. Rivero's work schedule was cut from 39 hours per week to 16 hours per week. Mr. Rivero had previously worked Saturdays through Wednesdays, with Thursdays and Fridays off. As a result of the change, Mr. Rivero was assigned to work on Saturdays and Sundays from 10:00 a.m. to 6:30 p.m.

11. Mr. Rivero last reported for work at the Metrozoo on or about May 22, 1999. Mr. Rivero was unable to continue working because of the frequency and severity of his headaches. Nonetheless, Mr. Rivero called the Metrozoo office regularly between May 22, 1999, and July 18, 1999, to report that he was absent because of illness. He did not, however, have any intention of returning to work after May 1999 because he believed he could no longer perform the duties required of a park ranger.[3]

12. In July 1999, Diane Condon, the personnel manager for Metropolitan Dade County Park and Recreation Department, was told by Mr. Rivero's supervisor at the Metrozoo that Mr. Rivero had been absent for quite some time, that he had exhausted his paid leave time, and that the reason for his absences was medical. It was suggested to Ms. Congdon that Mr. Rivero be offered leave under the Family Medical Leave Act of 1993.

13. In a letter dated July 12, 1999, from John Aligood, Chief of the Human Resources Division of the Metropolitan Dade County Park and Recreation Department, Mr. Rivero was notified that he had been preliminarily granted family/medical leave but that he would have to present a certification from his doctor within 15 days of the date he received the letter in order for his eligibility for such leave to be finally determined.

14. Mr. Rivero was advised in the July 12, 1999, letter that continuation of the leave was contingent on receipt of medical certification from his doctor; that he must furnish the certification within 15 days after he received the letter; and that "[f]ailure to do so will result in relinquishing FMLA leave; you will then be required to return to the full duties of your job or resign, or you will be terminated for abandonment of position."

15. The July 12, 1999, letter was sent to Mr. Rivero via certified mail, and he picked it up on July 22, 1999.

16. Mr. Rivero contacted Ms. Congdon on July 22, 1999, and told her that Dr. Lopez was unavailable at that time to complete the medical certification. Ms. Congdon advised him that the medical certification was required for the family/medical leave to continue.[4]

17. In a letter dated August 10, 1999, which was prepared by Ms. Congdon, Mr. Rivero was advised that his employment had been terminated for abandonment of position because he had failed to provide the medical certification required for continuation of family/medical leave by July 26, 1999, which was 15 days after July 12, 1999.[5]

Summary

18. The evidence presented by Mr. Rivero is insufficient to establish with the requisite degree of certainty that his employment as a park ranger with the Metropolitan Dade County Park and Recreation Department was terminated because of his medical condition. Mr. Rivero himself testified that he believed he was unable to perform the duties required by his job as of May 1999 because of his migraine headaches and that he had no intention of returning to work subsequent to May 1999.

19. The evidence presented by Mr. Rivero is sufficient to support the inference that, prior to July 12, 1999, Mr. Rivero did not advise his supervisor at the Metrozoo or anyone else in the Metropolitan Dade County Park and Recreation Department that

he did not intend to return to work after the end of May 1999. His being placed preliminarily on family/medical leave as of July 12, 1999, did not harm Mr. Rivero but, rather, resulted in his health benefits being continued until his termination on August 10, 1999.

CONCLUSIONS OF LAW

20. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2002).

21. Sections 760.01 through .11 and 509.092, Florida Statutes, are known as the Florida Civil Rights Act of 1992, as amended.[6] Section 760.10, Florida Statutes (1999), the statute applicable in this case, provided 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 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, national origin, age, handicap, or marital status.

22. The FCHR has defined "handicap" in Rule 60Y-3.001(14), Florida Administrative Code, as follows:

> "Handicap" means a condition that prevents normal functioning in some way; a person with a handicap does not enjoy the full and

> normal use of his or her sensory, mental, or physical faculties.

23. It is the burden of the petitioner in an employment discrimination case to prove by a preponderance of the evidence that the challenged employment practice was discriminatory and violated the Florida Civil Rights Act of 1992. Kelly v. K.D. Construction of Florida, Inc., 866 F. Supp. 1406, 1411 (S.D. Fla. 1994).

24. In a case such as the instant case, where there is no direct evidence of discriminatory intent with respect Mr. Rivero's termination, Mr. Rivero must first present a prima facie case establishing that the termination was discriminatory; once Mr. Rivero has done so, the burden shifts to Miami-Dade County to produce evidence of a legitimate, non-discriminatory reason for Mr. Rivero's termination; and, finally, if Miami-Dade County meets its burden of producing such evidence, the burden shifts back to Mr. Rivero, who must establish that the non-discriminatory reason put forward by Miami-Dade County was merely pretextual and that he was terminated for a discriminatory reason. See Vickers v. Federal Express Corp., 132 F. Supp. 3d (S.D. Fla. 2000), citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973) and Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 248 (1981).

25. The court in Smith v. Avatar Properties, Inc., 714 So. 2d 1103, 1106 (Fla. 5th DCA 1998), set forth the elements that must be proven to establish a prima facie case of discrimination on the basis of a disability:

> To present a prima facie case of employment discrimination based on disability under FCRA [Florida Civil Rights Act], a plaintiff must show 1) that he or she is a person with a disability; 2) that he or she is "qualified" for the position apart from his or her disability; and 3) that he or she was denied the position solely because of his or her disability.

26. Based on the findings of fact herein, Mr. Rivero has shown that he is a person with a disability, or "handicap," as that term is defined in Rule 60Y-3.001(14), Florida Administrative Code. Mr. Rivero has also shown that he was terminated from his employment, which was an adverse employment action. He has not, however, shown that he was qualified for the position of park ranger at the Metrozoo, either in May or August 1999, apart from his disability.

27. The court in Smith observed that the Florida Civil Rights Act is to "be construed in conformity with the American with Disabilities Act (ADA), and its predecessor, the Rehabilitation Act," and that "[t]he ADA provides that a 'qualified individual' is an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the job." 714 So. 2d at 1106-07.

28. As set forth in the findings of fact herein, Mr. Rivero admitted that when he stopped reporting for work after May 22, 1999, he believed he was not capable of continuing in his employment because of his frequent and intensely painful migraine headaches and that no accommodation would assist him in performing his job responsibilities. Mr. Rivero, furthermore, had no intention of returning to work with the Metropolitan Dade County Park and Recreation Department. For these reasons, Mr. Rivero has failed to establish a prima facie case of discrimination under the Florida Civil Rights Act of 1992, and he has, therefore, failed to prove by a preponderance of the evidence that the termination of his employment on August 10, 1999, was unlawful. See Tourville v. Securex, Inc., 769 So. 2d 491, 492 (Fla. 4th DCA 2000)("If appellee terminated Tourville's employment, such a discharge of Tourville was not unlawful under section 760.10(8)(a), Florida Statutes (1993) [Section 760.10(14), Florida Statutes(1999)], since his hospitalization and illness prevented him from performing the physical requirements of his job as an on-site security guard, even with reasonable accommodation.").

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 the Petition for Relief of Ruben Rivero.

DONE AND ENTERED this 12th day of November, 2002, in Tallahassee, Leon County, Florida.

PATRICIA HART MALONO
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of November, 2002.

ENDNOTES

[1/] Mr. Rivero clarified at the hearing that he did not contend that he was denied promotion to the supervisory position because of discrimination.

[2/] Many, if not most, of the exhibits introduced by Mr. Rivero consist of hearsay. Hearsay is admissible in proceedings conducted pursuant to Section 120.57(1), see Section 120.569(2)(g), Florida Statutes, although hearsay is not sufficient, of itself, to support a finding of fact. See Section 120.57(1)(c), Florida Statutes. Hearsay evidence may, however, be relied upon to supplement or explain other evidence. Id. To the extent that the findings of fact herein incorporate matters contained in hearsay evidence submitted by Mr. Rivero, it has been determined that the hearsay evidence supplements and explains evidence provided by Mr. Rivero in his testimony.

[3/] In a letter dated December 16, 1999, addressed to "To Whom It May Concern," Dr. Lopez stated his opinion that Mr. Rivero was unable to sustain gainful employment.

[4/] In a letter dated August 2, 1999, addressed to "To Whom It May Concern," a person identifying herself as an assistant office manager in Dr. Lopez's office stated, "Ruben Rivero has a U.S. Department of Labor form to be completed at this time. Dr. Lopez is has been [sic] out of town and will not return until next week. Due to the doctor being out we can not complete this form until he returns." See Petitioner's Exhibit 3. It is not clear whether Mr. Rivero furnished this letter to Ms. Congdon.

[5/] Because he did not receive the letter from Mr. Aligood until July 22, 1999, the 15-day deadline for Mr. Rivero to submit the medication certification was actually August 6, 1999. Notwithstanding Ms. Congdon's error in calculating the date on which Mr. Rivero's medical certification was due, Mr. Rivero was not terminated prior to the expiration of the 15-day time period, and the error was, therefore, harmless.

[6/] Section 509.092, Florida Statutes, applies to public accommodations and is not at issue in this case.

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.