STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ERNEST E. WHITEHURST,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 02-3574
	)	
DUVAL COUNTY SCHOOL BOARD	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

A hearing was held, pursuant to notice, on February 17 and 18, 2003, in Jacksonville, Florida, before the Division of Administrative Hearings by its designated Administrative Law Judge, Barbara J. Staros.

APPEARANCES

For Petitioner: Arthur G. Santorius, Esquire
1919 Atlantic Boulevard
Jacksonville, Florida 32207

For Respondent: Ernst D. Mueller, Esquire
Office of the General Counsel
117 West Duval Street, Suite 480
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STATEMENT OF THE ISSUE

Whether Respondent violated the Florida Civil Rights Act of 1992, as alleged in the Charge of Discrimination filed by Petitioner on August 10, 2002.

PRELIMINARY STATEMENT

On August 10, 2002, Petitioner, Ernest E. Whitehurst, filed a Charge of Discrimination with the Florida Commission on Human Relations (FCHR) which alleged that the Duval County School Board violated Section 760.10, Florida Statutes, by discriminating against him on the basis of disability.

The allegations were investigated and on August 7, 2002, FCHR issued its determination of "no cause" and Notice of Determination: No Cause.

A Petition for Relief was filed by Petitioner on September 1, 2002. FCHR transmitted the case to the Division of Administrative Hearings (Division) on or about September 13, 2002. A Notice of Hearing was issued setting the case for formal hearing on November 26, 2002. On November 19, 2002, Petitioner filed a Motion for Continuance which was granted. The hearing was rescheduled for January 16, 2003.

On December 23, 2002, Respondent filed a Motion for Summary Judgment. On January 7, 2003, Respondent filed an unopposed Motion to Continue Hearing. The motion was granted and the hearing was rescheduled for February 17 and 18, 2003. Respondent's Motion for Summary Judgment was withdrawn on January 21, 2003.

At hearing, Petitioner presented the testimony of Vicki Rideout Reynolds, Lisa Jones Moore, Lawrence R. McDonald, and

Dr. Polly Wietzke Peterson, and testified on his own behalf. Petitioner offered Exhibits numbered 1(a) through 1(n), 2(a) through 2(g), 3(a) through 3(s), 4(a) through 4(u), and 5(a) through 5(c), which were admitted into evidence. Respondent presented the testimony of Vicki Rideout Reynolds, Ethel E. Tarrant, Dale Lee Taylor, Daryl Leroy Williams, Michael Allen Myers, Daniel J. Bushnell, Colleen K. Taylor, Conni Vandenabeele, Rufus Albert Harmon and the deposition testimony of Emanuel Martinez, M.D. Respondent offered Exhibits numbered 1(a) through 1(i), 2, 3(a) and (b), 4 and 4(a), 5(a) through 5(g), 6, 7, 8, 9(a) through 9(f), 10, 11(a) and (b), 12(a) and (b) and Composite 13, which were admitted into evidence.

A Transcript consisting of two volumes was filed on March 25, 2003. On March 27, 2003, the parties filed a Joint Motion to Extend Time for filing Proposed Recommended Orders. The motion was granted. On May 12, 2003 and May 1, 2003, respectively, Petitioner and Respondent filed Unopposed Motions for Enlargement of Time for Filing Proposed Recommended Orders. The motions were granted. The parties timely filed Proposed Recommended Orders which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Stipulated Facts

1. Petitioner, Ernest E. Whitehurst, was employed by the Duval County School District (school district) beginning November 26, 1984.

2. Petitioner was discharged from employment effective August 25, 2000.

3. Petitioner was informed of his discharge by a letter signed by Lisa Moore, an employee of the school district, a copy of which was hand-delivered by management.

4. Petitioner suffered an on-the-job injury in September of 1991.

5. After recovering from the on-the-job injury, Petitioner had a permanent injury in that he was restricted in lifting objects.

6. Petitioner filed a charge of discrimination in relation to his termination on or about August 6, 2001.

7. Petitioner is presently suffering from a serious mental disorder.

Facts Established by the Evidence of Record

8. The letter of termination stated in pertinent part:

> Under Civil Service Rule 9.05(1), an employee can be dismissed for inability to perform assigned duties. You were hired as a school [sic] clerk II, after a fitness for duty assessment, job skills inventory and

> job search, the district has determined that you are unable to perform your assigned duties and that there are no other positions available.[1]

9. Petitioner was hired and worked as a Stock Clerk II. The position description for Stock Clerk II includes the following:

> KNOWLEDGES, SKILLS AND ABILITIES: Ability to establish and maintain effective working relationships with others. Requires alertness and manual dexterity. Ability to understand and carry out oral and written instructions. Ability to maintain manual and computerized records. Ability to lift 60 pounds. Ability to operate computer. Knowledge of computers regarding maintenance of records and inventories. Knowledge of storeroom methods and procedures.

10. The job description also includes the following as examples of work to be performed: supervising and/or participating in the ordering, receiving, storing, and issuing of a variety of equipment and supplies; assembling, parking, and arranging for transport of stored materials; preparing and maintaining an inventory system using computerized and manual records; and may be required to drive a truck up to 26,000 GUV, as well as to operate a forklift, stock-picker, and other material-handling equipment.

Physical Injuries

11. During his first years as a district employee, Petitioner apparently performed his job without serious problem

or difficulty. On September 9, 1988, however, he strained and pulled his right arm and shoulder while lifting a gate to open it, which limited his ability to raise his arm over his head and in reaching. Medical records reflect that a long period of limited duty ensued during which Petitioner was medically restricted to lifting no more than 30 pounds and doing no overhead lifting with his right arm.

12. On September 6, 1991, Petitioner was injured on the job again. The description of the accident furnished by the school district, is as follows:

> Employee was moving storage bins in Warehouse and they fell over on him, hurting his head, nose, back, both shoulders and both knees.

13. Petitioner's treating physician at the time of the 1991 injury, Dr. Lenger, a neurologist, placed work restrictions on Petitioner. The primary work restriction limited Petitioner to lifting not more than 30 pounds. The physical sequela from this accident remained with Petitioner through the time he was dismissed.

14. On August 30, 1995, Dr. Lenger, determined that Petitioner's injury was permanent in nature and irreversible. Petitioner's work restrictions at this point included the following: sitting no more than one hour; driving no more than one hour; standing no more than one hour; no prolonged walking;

no repetitive bending; and no carrying or lifting in excess of 30 pounds. These same work limitations were reiterated by Dr. Lenger on March 8, 1996, with the exception of the walking limitation. The last medical report reiterating the physical restrictions was dated April 27, 2000. The restrictions described by Dr. Langer remained in effect when Petitioner was dismissed.

15. In 1999, Petitioner developed carpal tunnel syndrome. On September 17, 1999, Dr. Lenger reported that Petitioner had "worsening CTS [carpal tunnel syndrome] bilat." This finding was reported by Dr. Lenger again on September 27, 1999, along with the notation "requires wrist splints for CTS." Dr. Lenger's January 14, 2000, report indicates "Rt. Carpal tunnel syndrome."[2] This condition also continued to affect Petitioner through the end of his employment with the school district. It hindered his ability to do repetitive work.

16. The school district accommodated Petitioner for his physical disabilities for many years by permitting him to remain on light-duty status. He received generally satisfactory job evaluations. However, his supervisors based these evaluations on the limited amount of work he was able to do, not on the entire scope of the job.

Mental Illness[3]

17. Petitioner also developed manifestations of mental illness during the time frame he was employed with the district. On or about March 8, 1996, Dr. Lenger reported that Petitioner was so upset he couldn't stop crying. Dr. Lenger's progress notes reflect that Petitioner's regular physician put him on an anti-depressant. Petitioner continued to take the anti-depressant through the time he was dismissed from employment by the district.

18. On July 13, 1998, a Monday, Petitioner told his supervisor and another co-worker that he had contemplated suicide during the prior weekend. He also told them that he had hit himself in the head numerous times. Larry McDonald, Director, Consolidated Services Property Manager, told Petitioner to go to the district's Wellness Clinic for counseling, but Petitioner refused.

19. Petitioner admitted to barking from time to time in the workplace. According to Petitioner, he did this to startle people. Petitioner's barking was observed and heard by many district employees, including Larry McDonald, Lee Taylor, Leroy Williams, Michael Myers, Colleen Taylor, and Rufus Harmon. These people found Petitioner's barking disturbing, frightening, strange, or annoying. It occurred frequently, was very loud,

and could be heard 300 to 400 feet away, half the length of the warehouse, and while visitors were present in the warehouse.

20. During the course of his employment, Petitioner made threatening remarks concerning management and specifically concerning Larry McDonald, Petitioner's superior through the reporting chain. On one occasion in 1999, Petitioner remarked to a co-worker that he would line management up and shoot them. Petitioner stated that if he lost his job, he would get even, a comment made in a conversation concerning other persons on "light" duty who had been dismissed.

21. Petitioner had a psychiatric examination on August 24, 2000, after he had received his letter of dismissal, but prior to the last day of his employment, August 25, 2000. According to Petitioner's psychiatrist, Dr. Martinez, Petitioner was having intense thoughts of killing himself and his supervisor because of being dismissed. Dr. Martinez hospitalized Petitioner due to suicidal and homicidal ideation on an emergency basis at Ten Broeck Hospital, and recommended long-term psychiatric treatment. It was Dr. Martinez's opinion that Petitioner was not employable at that point.

22. Petitioner acknowledged that when he visited Dr. Martinez on August 24, 2000, he had been homicidal and that he expressed at that point that he wanted to kill Mr. McDonald.

23. Dr. Martinez has continued to see Petitioner on a very regular basis. Petitioner's diagnosis is intermittent explosive disorder, clinical depression, and personality disorder. Dr. Martinez testified that Petitioner functions on a chronic level of paranoia and distrust, which is psychotic. Dr. Martinez stated that Petitioner continues to be permanently mentally disabled as a result of his industrial accident and the psychiatric sequelae following the accident.[4]

24. It is Dr. Martinez's opinion that Petitioner "has always been severely mentally disturbed," that he is very distrusting on a chronic basis, probably since he was a small boy, and that he is suspicious, hypervigilant and explosive. "I think he's been that way for quite a while." According to Dr. Martinez, behavior such as barking in the workplace is indicative of severe mental disturbance.

Employability at Time of Dismissal

25. Mr. McDonald estimated that Petitioner was doing only 35 percent of his job and was not carrying out its essential functions at the time of his dismissal. A supervisor estimated that Petitioner did 40 percent of his job. Another supervisor estimated that Petitioner could do between 15 percent to 25 percent of the job. One co-worker stated that Petitioner did very little work. No one testified that Petitioner was able to do all functions of his job.

26. In the opinion of Dr. Martinez, Petitioner was not able to do his work:

> Q: If he hadn't been terminated, I mean, is there any reason you would suspect he couldn't continue working unless there was another triggering event?
>
> A: If he had not been terminated?
>
> Q: Yes.
>
> A: I think that he needed to be out of this work situation. He couldn't do it.
>
> Q: Because there were triggering events other than the termination?
>
> A: He's fully disabled. You know, he couldn't do his job. But it's how it was handled that I have the issue with. It was--minimize the damage control. It should have been--human resources screen them before they work with children, you know.

27. In 1998, the district had 65 employees in "light" duty positions who could not perform and who had reached maximum medical improvement ("MMI"). The purpose of "light" duty was to allow employees a reasonable period of time to heal if they were injured. The school district hired a new "Safety Director" who was instrumental in the implementation of a process directed toward this large number of individuals who were not performing the full scope of their jobs. A review of their status commenced to either find jobs for them or separate those individuals who had reached MMI. Petitioner was one of the employees who became a subject of this process.

28. The evidence is unclear as to whether every step of this process was undertaken regarding Petitioner. The first step was a fitness for duty evaluation. This step was unnecessary regarding Petitioner because the school district already had Dr. Lenger's opinion that Petitioner's physical injuries were permanent. The termination letter indicated that prior to Petitioner's dismissal, a job skills inventory and search for other possible jobs for him within the district had been conducted, although no business records relating to this search was produced.

29. Vicki Reynolds is the current Assistant Superintendent of Human Resources. While she was not in that position at the time of Petitioner's dismissal, she reviewed school district business records relating to available vacancies which the district had in the months immediately prior to Petitioner's dismissal. She also reviewed business records relating to individuals who had been surplused because their positions had been cut for budgetary reasons. Those persons have rights to positions under the collective bargaining agreement and, in the case of teachers, under the applicable teacher tenure law. Ms. Reynolds' review indicated that the school district had no vacant position in which Petitioner could have been placed at the time of dismissal, taking into consideration Petitioner's limitations.

30. At the time of Petitioner's dismissal, there were some persons occupying Stock Clerk II positions who did not regularly do lifting, e.g., persons assigned to the purchasing office. However, according to Mr. McDonald, all Stock Clerk II's "are required to have the ability to lift." Regarding those positions, Mr. McDonald stated:

> Q: He [Petitioner's attorney] mentioned three things, whether stock clerks do computerized work, telephone, typing. Is that all part of a Stock Clerk II's job that goes along with lifting? Do they all do some of that?
>
> A: Yeah. The stock clerks that work in the office, their duties are typical clerical duties. They--they're expected to be able to work on a computer, on a computer networking system. They're expected to work on the telephone with both vendors and school board customers and meet personally with the vendors.
>
> Q: Do they go into the warehouse ever?
>
> A: Yes, they do.
>
> Q: What do they do out there?
>
> A: The ones on the warehouse side, they are in charge of certain commodities. We have--in the warehouse, we have 6,000 items, different items. And we break it up by about a third of those for each one. And their duties are to make sure that we are carrying and maintaining our certain inventory levels.
>
> This may require them to go out and physically count, physically inspect, move around items, help with the incoming of the inventory when it comes in as an inspector.

Q: And . . . but why could Whitehurst not have been placed in one of those jobs, which is the implication, in August of 2000?

A: Well, we didn't have any openings. And you cannot bump a person out of a job. It's illegal under the civil service rules and regulations.

Q: And any other reason that you can--

A: Well, his physical impairment. Mr. Whitehurst was limited to sitting, standing, walking. He had carpel tunnel on his wrist. He had several reasons that he wouldn't be a candidate for one of those jobs, if I had an opening at the time.

31. Petitioner did not identify a specific vacant position which the district had at the time he was dismissed for which he was qualified.

32. Petitioner had been issued a statement of eligibility for a teaching certificate. However, Petitioner had been evaluated by the school district and found not to be suitable for teaching positions. Dr. Martinez concurred that it would not have been appropriate for Petitioner to work at a school either before or after he was dismissed.

33. Petitioner was dismissed on August 11, 2000, effective August 25, 2000, for inability to perform his assigned duties and because no other position for him was available pursuant to Civil Service Rule 9.05(1). Civil Service Rule 9.05(1) provides that employees may be dismissed for cause. A determination of

cause may be predicated on "inability to perform assigned duties."[5]

CONCLUSIONS OF LAW

34. The Division of Administrative Hearings has jurisdiction over the parties and subject matter in this case. Sections 120.569 and 120.57, Florida Statutes.

35. The Florida Civil Rights Act (the Act) states that it is an unlawful employment practice for an employer to discharge or otherwise discriminate against an individual on the basis of handicap. Section 760.10(1), Florida Statutes.

36. The Act is to be construed in conformity with federal law. Specifically, courts have looked to the Rehabilitation Act, 29 U.S.C., et seq., and the Americans With Disabilities Act (ADA), 42 U.S.C. Section 12101, et seq., as well as related regulations and judicial decisions, in construing claims relating to handicap or disability. Chanda v. Engelhard/ICC, 234 F.3d 1219 (11th Cir. 2000); Brand v. Florida Power Corporation, 633 So. 2d 504 (Fla. 1st DCA 1994).

37. In construing the Act in accordance with federal law, the method of proving discrimination is normally analyzed by a tribunal based upon an approach set forth in the United States Supreme Court cases of McDonnell Douglas v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed.2d 668 (1973); and Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089,

67 L.Ed.2d 207 (1981). In this method of analysis, the employee has the burden of establishing by a preponderance of the evidence a prima facie case of unlawful discrimination. If the employee succeeds, a presumption of discrimination arises and the burden shifts to the employer to produce evidence articulating a legitimate, nondiscriminatory reason for its action. If the employer produces such evidence, the employee must prove that the employer's proffered reason was not the true reason for the employment decision, but was, in fact, a pretext for discrimination. See Department of Corrections v. Chandler, 582 So. 2d 1183 (Fla. 1st DCA 1991) (court discusses shifting burdens of proof in discrimination cases).

38. However, the McDonald Dougless/Burdine approach is frequently modified in handicap or discrimination cases in situations in which the employer admits that the plaintiff's handicap or disability was the reason for the adverse employment action. Brand, supra at 508, citing Barth v. Gelb, 2 F.3d 1180, 1183-1187 (D.C. Cir. 1993). Discriminatory intent is not necessarily the issue in such cases, such as this one, because the employer has admitted taking the action complained of because of the employee's handicap or disability. Brand, supra. Thus, the McDonald Douglas/Burdine burden shifting analyses is inapplicable here. Brand, supra at 509.

39. Accordingly, in this case, Petitioner's burden is to establish a prima facie case of employment discrimination by proving (1) that he is a handicapped or disabled individual under the Act; (2) that he was a qualified individual at the relevant time, i.e., that he could perform the essential functions of the job in question with or without reasonable accommodations; and (3) that he was discriminated against because of his handicap or disability. Lucas v. Grainger, supra at 1255; Reed v. Heil, supra at 1061; Brand, supra at 510. If Petitioner is unable to establish a prima facie case, the burden of producing rebuttal evidence does not shift to the employer and judgment should be entered for the employer. Brand, 633 So. 2d at 510-511.

40. In the event that Petitioner does meet his burden of proof, the employer then has the burden of showing that the Petitioner's handicap is such that it cannot be accommodated or that the proposed accommodation is unreasonable because it results in an undue hardship on defendant's activities. Brand, supra at 511-512.

41. Once the employer places in evidence valid reasons for the challenged action, Petitioner cannot remain silent, but must rebut the employer's position, if he can. Brand, supra at 612. In this connection, the ultimate burden of persuasion in the case remains with the employee (Petitioner). Id. at 615.

42. The ADA defines a disability as a physical or mental impairment that substantially limits one or more of the major life activities of an individual. Chanda, supra at 1221.

43. There is a split of opinion as to whether a restriction to avoid heavy lifting and manual labor constitutes a disability within the meaning of the ADA. While not reaching a determination in the case in which this issue was addressed, the Eleventh Circuit discussed this issue at length in Reed v. Heil, supra at 1061:

> This court has never faced the question of whether a restriction to avoid heavy and extra heavy manual labor, or more specifically, whether a restriction to lift no more than forty-five or fifty pounds and avoid frequent bending, stretching, and twisting, fails as a matter of law to establish a disability within the meaning of the ADA. The magistrate and district courts concluded that these restrictions did not exclude Reed from a broad range of jobs. A number of circuits have reached similar conclusions, holding as a matter of law that lifting restrictions comparable to Reed's do not constitute a disability. See Thompson v. Holy Family Hosp., 121 F.3d 537, 539-40 (9th Cir. 1997)(restriction from lifting more than fifty pounds twice per day and one hundred pounds once per day not a disability); Williams v. Channel Master Satellite Sys., Inc., 101 F.3d 346, 349 (4th Cir. 1996)(twenty-five pound lifting restriction not a disability); Aucutt v. Six Flags Over Mid-America, Inc., 85 F.3d 1311, 1319 (8th Cir. 1996)(twenty-five pound lifting restriction not a disability); Ray v. Glidden Co., 85 F.3d 227, 228-29 (5th Cir. 1996)(restriction allowing limited

> lifting of forty-four to fifty-six pounds not a disability).
>
> One district court in this circuit has rejected the reasoning of those cases, finding that restrictions slightly more onerous than Reed's do constitute a disability. See Frix v. Florida Tile Indus., Inc., 970 F.Supp. 1027, 1034 (N.D. Ga. 1997)(restricted to lifting no more than twenty-five pounds with limited bending and stooping). The Seventh Circuit has held that shoulder injury restrictions of no heavy lifting, overhead work, pulling, or pushing presented a genuine issue of material fact as to whether the plaintiff was disabled. See Cochrum v. Old Ben Coal Co., 102 F.3d 908, 911 (7th Cir. 1996). The Interpretive Guidelines for the ADA support this view, providing the following example: "[A]n individual who has a back condition that prevents the individual from performing any heavy labor job would be substantially limited in the major life activity of working because the individual's impairment eliminates his or her ability to perform a class of jobs."

44. In the instant case, the school district does not dispute that that Petitioner is a handicapped individual under applicable law. Accordingly, the first prong of the prima facie case has been met by Petitioner.

45. Petitioner next must establish that he could perform the essential functions of the job to satisfy the second prong of the test.

46. The Eleventh Circuit addressed the issue of determining what functions of a particular job are deemed to be essential:

> The ADA provides that in determining what functions of a given job are deemed to be essential, "consideration shall be given to the employer's judgment . . . and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job." 42 U.S.C. § 12111(8). Regulations promulgated under the ADA further identify three factors that can be considered pursuant to an inquiry regarding whether a particular task is an essential part of a job: (1) the reason the position exists 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 highly specialized so that the incumbent in the position was hired for his or her expertise or ability to perform the particular function. 29 C.F.R. § 1630.2(n)(2)(i)-(iii)(1996).

Holbrook v. City of Alpharetta, Georgia, 112 F.3d 1522, 1526 (11th Cir. 1997).

47. Reasonable accommodation is defined in 29 C.F.R. Section 1630.2(o), which provides in pertinent part:

> (o) Reasonable accommodation.
>
> (1) The term reasonable accommodation means:
>
> * * *
>
> (ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position;

* * *

(2) Reasonable accommodation may include but is not limited to:

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

(ii) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications 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.

(3) To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations. . . . (Emphasis supplied)

48. Petitioner asserts that modifications or adjustments e.g., using a forklift, using tools for reaching, and sliding heavier boxes on strong paper, taken to assist him in performing his duties, enabled him to perform the essential functions of the job. However, the weight of the evidence established that he could not perform the essential functions of the job with or without reasonable accommodations. The testimony that Petitioner was able to do at most less than half of his job was

consistent and unrebutted. Moreover, the job evaluations that indicated he was performing satisfactorily were made based upon the limited job that he was doing and do not prove that he was able to perform the essential functions of the job.

49. The fact that an employer accommodates an employee, even though the employer is not or may not be legally required to do so, does not necessarily give rise to any legal liability for failure to reasonably accommodate when such a practice is discontinued. As discussed by the Eleventh Circuit,

> Significantly, what is reasonable for each individual employer is a highly fact-specific inquiry that will vary depending on the circumstances and necessities of each employment situation. Federal regulations promulgated pursuant to the ADA expressly note that
>
> > [a]n employer or other covered entity may restructure a job by reallocating or redistributing non-essential, marginal job functions . . . . An employer or other covered entity is not required to reallocate essential functions. The essential functions are by definition those that the individual who holds the job would have to perform, with or without accommodation, in order to be considered qualified for the position.
>
> 29 C.F.R. Part 1630, Appendix at 344. See also Milton v. Scrivner, Inc., 53 F.3d 1118, 1124 (10th Cir. 1995)("An employer is not required by the ADA to reallocate job duties in order to change the essential functions of a job."); Larkins v. CIBA Vision Corp.,

> 858 F.Supp. 1572, 1583 (N.D. Ga. 1994) ("[R]easonable accommodation does not require an employer to eliminate essential functions of the position.").
>
> * * *
>
> We agree that the record unambiguously reveals that the police department made certain adjustments to accommodate Holbrook in the past.
>
> * * *
>
> However, we cannot say that the City's decision to cease making those accommodations that pertained to the essential functions of Holbrook's job was violative of the ADA.

Holbrook, supra at 1527-1528.

50. Petitioner argues that he should have been offered a vacant position, including teacher positions. However, he has failed to establish that there was another vacant position at the school district, which he could have held.

51. As to being reassigned to a teaching position, Petitioner had been evaluated by the school district and found to be not suitable for teaching positions. Intertwined is the district's knowledge that he had a history of mental illness, at least to some extent, evidenced by consistent testimony from numerous witnesses of Petitioner's peculiar, inappropriate behavior while on the job, e.g., barking in the workplace. The fact that Petitioner had a statement of eligibility for a

teaching certificate does not mean that the school district is obligated to place him in a teaching position.

52. Further, Petitioner argues that the school district should have engaged in an interactive process about reasonable accommodations prior to his dismissal. First, 29 C.F.R. Section 1630.2(o)(3), refers to any such interactive process as permissive, not mandatory. Finally, the school district's accommodation of Petitioner's limitations for years is evidence that an interactive process took place over time. Petitioner's handicap was and is such that it could not be reasonably accommodated by the school district.

53. Accordingly, as to the second prong of a prima facie case, Petitioner has failed to establish that he was qualified for the Stock Clerk II position from which he was removed.

54. As to the third prong of the prima facie test, while the school district acknowledges that they removed Petitioner because of his disability, the removal did not constitute unlawful discrimination.

55. Since Petitioner did not establish a prima facie case of unlawful discrimination on the basis of handicap, the burden does not shift to the employer.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law set forth herein, it is

RECOMMENDED:

That the Florida Commission on Human Relations enter a final order dismissing the Petition for Relief filed by Ernest E. Whitehurst.

DONE AND ENTERED this 20th day of June, 2003, in Tallahassee, Leon County, Florida.

BARBARA J. STAROS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of June, 2003.

ENDNOTES

1/ The word "school" was crossed out and the work "stock" was substituted in handwriting.

2/ While it is not entirely clear what is meant by "Rt", it does not likely mean "right" because Dr. Lenger's notes describe the condition as "bilat" and multiple wrist splints were prescribed. The record does not reflect whether the cause of the carpel tunnel syndrome was work-related. However, that is not an issue raised in this case.

3/ Petitioner contends that his dismissal was based solely on his physical limitations and not on any mental infirmities. The weight of the evidence is to the contrary. Both management and his co-workers were aware of certain behaviors discussed herein that related to Petitioner's mental condition during his

employment. It is impossible to totally isolate his mental condition from his physical condition in terms of others' perceptions and beliefs regarding Petitioner's ability to perform his job duties. Moreover, on May 22, 2001, Dr. Martinez wrote in a letter that he believed that Petitioner's psychiatric condition is causally related to his worker's compensation injury and the psychiatric sequelae following this injury, not to his dismissal.

4/ Dr. Martinez's deposition was taken on January 31, 2003, less than three weeks before the final hearing.

5/ In his Proposed Recommended Order, Petitioner argues that the school district did not follow its procedure under its Civil Service Rule 9.05 regarding furnishing the employee a detailed written statement supporting his dismissal and notifying him of his right to appeal the action. While these may be matters relevant to a civil service proceeding, they do not come into play regarding whether or not the school district illegally discriminated against Petitioner on the basis of disability.

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.