STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LAWRENCE A. LOPENSKI,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 03-4708
	)	
DEPARTMENT OF CORRECTIONS,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Administrative Law Judge Don W. Davis of the Division of Administrative Hearings conducted a final hearing in this case on March 30, 2004, by video teleconference at sites in Daytona Beach and Tallahassee, Florida.

APPEARANCES

For Petitioner: Lawrence A. Lopenski, pro se
2482 Barbarossa Avenue
Deltona, Florida 32524

For Respondent: Ernest L. Reddick, Esquire
Department of Corrections
2601 Blair Stone Road
Tallahassee, Florida 32399-2500

STATEMENT OF THE ISSUES

The issue is whether Respondent has engaged in an unlawful employment practice against Petitioner in violation of Section 760.10, Florida Statutes, by discriminating against Petitioner based on his disability.

PRELIMINARY STATEMENT

On March 11, 2002, Petitioner Lawrence A. Lopenski (Petitioner) filed a Charge of Discrimination with the Florida Commission on Human Relations (FCHR). The charge alleged that Respondent Department of Corrections (Respondent) discriminated against Petitioner by failing to provide him reasonable accommodation for his disability, the effects of Non-Hodgkin's Lymphoma and treatment for that disability.

On September 24, 2003, FCHR issued a Notice of Determination finding no reasonable cause to believe that a discriminatory employment practice had occurred.

On October 28, 2003, Petitioner filed a Petition For Relief with FCHR.

On December 15, 2003, FCHR referred the case to the Division of Administrative Hearings.

During the final hearing, Petitioner testified on his own behalf and presented two exhibits. Respondent presented the testimony of two witnesses and 22 exhibits, which were accepted into evidence.

No transcript of the proceeding was provided. Both parties, however, filed Proposed Recommended Orders. Those post-hearing submissions have been reviewed and addressed to the extent possible in this Recommended Order.

FINDINGS OF FACT

1. Petitioner has been employed as a correctional officer by Respondent at all times pertinent to this proceeding at Tomoka Correctional Institution (TCI) in Volusia County, Florida. The prison houses adult male inmates. Staff at TCI has the primary mission of providing for the public safety through the care, custody and control of the inmates housed in that facility.

2. In early 1998, Petitioner was diagnosed with Non-Hodgkin's Lymphoma and began treatment for the disease. He was granted leave as needed for treatment and continued otherwise to work.

3. Petitioner requested and was eventually granted the privilege of working a double shift only in those situations where he could take the next day off. In December of 2000, he requested that he be assigned to a perimeter post half of the time, and that he not be assigned to the chow hall or to guard sick inmates. Since Petitioner did not provide sufficient medical information to support the requested accommodation, it was denied.

4. Respondent assigned Petitioner to be a "roving perimeter officer" on June 18, 2001. These officers observe the secure perimeter of the facility to ensure that no unauthorized entry into or out of the facility takes place. Each officer on

this assignment is issued a shotgun, revolver and a motor vehicle. Each officer has a specific part of the perimeter fence to guard. Petitioner, as a result of medication he takes for his condition, experienced an urgent need to defecate, and left his post after calling for a replacement. As a consequence, Petitioner was thereafter assigned duty only where he would have immediate access to bathroom facilities.

5. Petitioner provided documentation from his health care provider to Respondent indicating that Petitioner could work any post in the facility subject to certain qualifications. He should be given 16 hours' advance notice of the assignment to permit him to plan his medication schedule if he were assigned to the perimeter or other station where bathrooms were not readily available. Additionally, Petitioner was to be relieved within nine minutes of requesting a needed bathroom break. Petitioner also needed to have constant access to cold water and not be subjected to temperatures in excess of 90 degrees for more than an hour.

6. As a result of his special needs, Petitioner remained assigned mainly to inside posts. He meets all requirements to work in the TCI observation towers, which have bathroom facilities and are climate controlled. He is assigned to such a tower one day per week.

7. Respondent will not provide Petitioner 16 hours' notification of a future assignment so as to permit him to schedule his medication in such a way as to avoid urgent bathroom usage. Further, Respondent will not provide relief within nine minutes so that Petitioner can use the restrooms when necessary.

8. Petitioner is generally assigned by Respondent to dormitory duty with the exception of tower duty one day per week. The dormitory is air-conditioned, but such assignment is stressful, fatiguing, and could adversely affect Petitioner's physical condition of lymphoma which is presently in remission.

CONCLUSIONS OF LAW

9. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this case. §§ 120.569 and 120.57(1), Fla. Stat.

10. Florida law prohibits employers from discriminating against employees on the basis of a handicap. § 760.10(1)(a), Fla. Stat. The Florida Civil Rights Act of 1992, Section 760.01, et seq., is modeled after Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000, et seq.; therefore, case law interpreting Title VII is also relevant to cases bought under the Florida Civil Rights Act. Florida Department of Community Affairs v. Bryant, 586 So. 2d 1205, 1209 (Fla. 1st DCA 1991). Additionally, the Florida Civil Rights Acts is construed

in accordance with the Americans with Disability Act (ADA), 42 U.S.C., Section 12101, et seq. Razner v. Wellington Regional Medical Center, Inc. 837 So. 2d 437, 440 (Fla. 4th DCA 2002).

11. A petitioner in a discrimination case has the initial burden of proving a prima facie case of discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed.2d 668 (1973).

12. If the petitioner proves a prima facie case, the burden shifts to the Respondent to proffer a legitimate non-discriminatory reason for the actions it took. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L.Ed.2d 207 (1981). The respondent's burden is one of production, not persuasion, as it always remains Petitioner's burden to persuade the fact finder that the proffered reason is a pretext and that the respondent intentionally discriminated against the Petitioner. Burdine, 450 U.S. at 252-256.

13. In the instant case, Petitioner alleges that Respondent discriminated against him based on his disability of remitted lymphoma and its subsequent affects on his physical health by not granting him reasonable accommodations in his employment. Petitioner’s testimony, coupled with medical correspondence presented at hearing, indicates that stress and fatigue in his current assignment has the potential to adversely

affect his status of remitted cancer. He has not, however, shown a prima facie case of discrimination.

14. A person is disabled when: (a) he or she has a physical or mental impairment that substantially limits one or more major life activities, i.e., an urgent need to defecate or eliminate waste from his body at exigent moments; (b) he or she has a record of having an impairment; or (c) he or she is regarded as having an impairment. 42 U.S.C. Section 12102(2); 29 C.F.R. Section 1630.2(g)(I). Petitioner has demonstrated (a) he is a disabled person within the meaning of the Florida Civil Rights Act and the ADA; and (b) he is "qualified" to perform the job apart from his disability.

15. Non-Hodgkin's Lymphoma results in lowered stamina and a lower fatigue threshold. Petitioner's cancer is, however, in remission at the present time. Respondent is presently assigning him to the observation tower and dormitory duty. Both assignments take full cognizance of Petitioner's needs. Employment stress simply cannot be considered a "disability."

16. Petitioner has proven that his disability does not, with the accommodation presently being made by Respondent, interfere with his ability to perform the job for which he was hired. A qualified individual with a disability is one who can perform the essential functions of the job with or without reasonable accommodation. 42 U.S.C. Section 12111(8). The term

"essential functions" means the fundamental job duties of the employment position. 29 C.F.R. Section 1630.2(n)(1). In this case, the evidence indicates that Petitioner, with the present accommodations made by Respondent, is qualified to work as a correctional officer for Respondent.

17. The ADA imposes a duty on employers to provide reasonable accommodations for known disabilities unless doing so would result in undue hardship. Hernandez v. Prudential Insurance Company, 877 F. Supp. 1160, 1165 (M.D. Fla. 1997). While Respondent knows Petitioner's disability, no evidence was presented that Respondent's assignments practice is conducive to the 16-hour notice requested by Petitioner. By virtue of the nature of Respondent's task of securing the facility and its inmates, a 16-hour notice of guard assignment, such as requested by Petitioner, would not be feasible.

18. Based on the evidence received, Petitioner has not been refused a reasonable accommodation for his disability, which is within Respondent's power to grant.

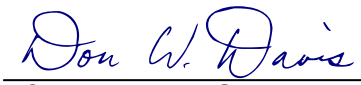
RECOMMENDATION

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

RECOMMENDED:

That FCHR enter a final order dismissing the Petition for Relief.

DONE AND ENTERED this 22nd day of April, 2004, in Tallahassee, Leon County, Florida.



DON W. DAVIS
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of April, 2004.

COPIES FURNISHED:

Denise Crawford, Agency Clerk
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

Ernest L. Reddick, Esquire
Department of Corrections
2601 Blair Stone Road
Tallahassee, Florida 32399-2500

Lawrence A. Lopenski
2482 Barbarossa Avenue
Deltona, Florida 32524

Cecil Howard, General Counsel
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

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.