STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BERGITA EVANS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 04-2033
	)	
COUNTY OF ALACHUA,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Upon due notice, a disputed-fact hearing was conducted in this case on January 11-12, 2005, in Gainesville, Florida, before Ella Jane P. Davis, a duly-assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Bill Salmon, Esquire
410 Southeast 4th Avenue, Suite A
Gainesville, Florida 32601

For Respondent: Linda G. Bond, Esquire
Allen, Norton, and Blue, P.A.
906 North Monroe Street
Tallahassee, Florida 32303

STATEMENT OF THE ISSUE

Whether Respondent Employer is guilty of an unlawful employment practice, to wit: termination of Petitioner on the basis of handicap discrimination without reasonable accommodation.

PRELIMINARY STATEMENT

On or about September 4, 2003, Petitioner filed a Charge of Discrimination, on the basis of handicap, with the Florida Commission on Human Relations. On May 4, 2004, the Commission entered its Determination: No Cause. Petitioner timely filed a Petition for Relief. On or about June 9, 2004, this case was referred to the Division of Administrative Hearings.

This case was initially consolidated with Washington v. Alachua County Sheriff's Office, DOAH Case No. 04-2022. That case was bifurcated-out on the date of hearing. It subsequently settled, and that file of the Division was closed.

At the disputed-fact hearing herein, Petitioner Evans testified on her own behalf. Her Exhibits P-1 through P-9 were admitted in evidence. Petitioner's Exhibit P-7 was the deposition of Lt. Mike Donovan. Petitioner's Exhibit P-8 was Sheriff Stephen Oelrich's deposition. Respondent presented the testimony of Sheriff Stephen Oelrich, Robert Chapman, James Lybarger, and Sherry Larson. Respondent's Exhibits R-1 through R-23 were admitted in evidence. Certain items were officially recognized.

A Transcript was filed on January 24, 2005. Petitioner filed a Proposed Recommended Order on February 23, 2005, and Respondent filed its Proposed Recommended Order on February 24,

2005. Both proposals have been considered in preparation of this Recommended Order.

FINDINGS OF FACT

1. Respondent has been the elected Sheriff of Alachua County, Florida, for 12 years. As such, he was, and is, a constitutional officer of the State of Florida and the chief law enforcement officer for Alachua County. Since January 1998, he has administered the Alachua County Jail. In his capacity as administrator of the jail he qualifies, strictly in his official capacity, as an "employer," pursuant to Chapter 760, Florida Statutes. Respondent Employer also may be referred to as "the Alachua County Sheriff's Office" (ACSO).

2. Petitioner is an African-American female. At all times material, she was an employee of Respondent Employer, and "an aggrieved person," pursuant to Chapter 760, Florida Statutes.

3. Respondent began administration of the jail in January 1998. Prior to that time, the Alachua County Board of County Commissioners operated the jail. Respondent assumed administration of the jail through a governmental interlocal agreement, subject to existing collective bargaining agreements and various other parameters encouraging continued employment of existing jail personnel.

4. In January 1998, all current jail employees were required to complete new applications, subject to review to ensure compliance with the ACSO's employment standards.

5. On her 1998 job application form, Petitioner answered questions concerning her physical limitations as follows:

* * *

> 6. Are you able to participate with or without accommodation in defensive tactics, firearms, or physical training, operation of a motor vehicle, or otherwise perform the duties set forth in the job description or task analysis related to the position for which you applied? - NO.
>
> 7. This position may require a physical ability test. If such a test or examination is required, would you be able to take this test or examination with or without accommodation? - NO.
>
> 8. Explain what accommodation(s) you would need to perform these tasks or take the test or examination. - LEFT BLANK.

* * *

6. The majority of former Alachua County Jail employees were hired by ACSO. Some employees who did not meet ACSO's requirements were not hired/transferred to the new employer. These were mostly employees with criminal records.

7. It was Respondent's intent to try to retain jail employees, even if they were temporarily unable to perform their essential job functions, for up to 12 months.

8. Petitioner, who had served as a detention officer at the jail from 1981 to 1998, was one of the employees who successfully made the transition and was hired by Respondent in January 1998.

9. At all times material, Petitioner was a Certified Correctional Officer. Her certification only indicates that she had met minimum training requirements and the mandatory continuing professional training requirements, pursuant to Florida law.

10. At the time of her hire/transfer in January 1998, Petitioner weighed 350 pounds and suffered from osteoarthritis and hypertension. Obesity, osteoarthritis, and hypertension have plagued Petitioner since before her hire/transfer.

11. Also, at least since June 29, 1998, Petitioner has been unable to walk long distances. On that date, a podiatrist diagnosed her with "bone spurs" in both feet. She submitted a Health and Work Status Report to the Employer stating Petitioner should only sit 50 percent, stand 50 percent, walk 50 percent, and climb stairs 10 percent. These figures add up to more than 100 percent, and the undersigned interprets the report, in the light of Petitioner's testimony, to mean that the physician was restricting her to no more than the respective percentages of each listed activity.

12. The June 29, 1998, report went on to say that Petitioner should not use her feet for extended periods, perform physical force restraints/combat, or stressful work.

13. As a result, ACSO placed Petitioner on temporary restricted duty (TRD). Petitioner's testimony suggested that, at some point, she recovered from the foregoing "temporary" restrictions, and a subsequent November 26, 2002, memorandum from the Employer (see Finding of Fact 45) suggests that sometime prior to March 6, 2002, Petitioner was returned to regular duty, minus the June 29, 1998, physical restrictions. (See Findings of Fact 35-37). However, it is not clear for what period of time between June 29, 1998, and March 6, 2002, Petitioner remained on TRD.

14. There was no requirement of a Physical Agility Test (PAT) during Petitioner's 18 years of service at the jail prior to ACSO taking over jail management, and Petitioner was not required to take and pass a PAT in order to be hired/transferred to the ACSO regime in 1998.

15. The jail employed more than 300 detention officers. Detention officers were subject to being assigned to any area within the jail.

16. The written Job Description for Detention Officer has, at all times material, required ". . . maintaining physical custody and control of inmates . . ." and ". . . receiving and

processing inmates, enforcing disciplinary procedures for the control of inmate behavior."

17. Nowhere does Petitioner's written job description use the word, "running," but it specifies the following "physical requirements," with or without, a PAT in place:

> E. PHYSICAL REQUIREMENTS
> Sit, stand or walk for moderate periods.
> Have good close, distant, color, peripheral, depth and adjusted vision.
> Hear at normal range or with accommodation.
> Speak, read, write, and understand English fluently.
> Lift/carry 100+ pounds.
> Climb, balance and reach with arms.
> Bend, stoop, kneel, crouch and crawl.
> Taste and smell.
> Manual dexterity.
> Drive a vehicle. (Emphasis supplied)

18. The primary duties for all jail detention officers were the care, custody, and control of jail inmates and operation of the facility. These duties might, on occasion, include running or walking briskly to come to the aid of fellow officers who were "down" or to respond to inmate fights. Detention officers were also responsible for the security of the entire 300,000 square feet of jail space and the 10-acre parcel of land surrounding it.

19. A jail detention officer's regular duties also included inspecting inmate housing areas and looking under bunks, some of which were only 16 inches off the floor, for

contraband, including drugs and weapons. Detention officers had to go up and down stairs to make these inspections.

20. During Petitioner's employment with Respondent, detention officers on TRD were often placed in the personnel office, lobby of the jail, or in central control. The lobby now only utilizes civilian personnel. (See Finding of Fact 50.)

21. The Sheriff has a law enforcement background and mindset. When he took over the jail, he imposed additional employment standards on jail detention officers above and beyond the minimum standards established by the State of Florida. As part of his initiative to professionalize the jail, and in an effort to obtain national accreditation for the jail from the American Correctional Association, the Sheriff established minimum physical requirements for all detention officers.

22. Over time, ACSO's training staff created a job-related physical review and designed the PAT.

23. The PAT evolved over a period from approximately November 1999 to March 2000. It ultimately consisted of a timed course of nine tasks.

24. The timed PAT began with Task 1: a 455-foot (reduced by July 1, 2003, to 300-foot) sprint, to the first obstacle. The "first obstacle" was the step obstacle (stepping over 17 seven-inch rope steps in sequence), then continuing on 50 feet to the next task. It is clear from her testimony that

Petitioner incorrectly saw this first part (Tasks 1 and 2) as the only part of the PAT which required running.

25. However, Task 3 of the PAT was the "Serpentine," which involved snaking around a series of cones without knocking them down. Then, the detention officer would have to "sprint approximately 85-feet to the next obstacle." Task 4 was a low crawl, followed by a sprint of approximately 155 feet to the weapon fire area and the next obstacle. Task 5 was rapid and accurate weapon fire testing, followed by a sprint approximately 40-feet to the next obstacle. Task 6 for detention officers involved climbing a set of stairs, followed by a sprint of approximately 60 feet to the next obstacle. Task 7 was another serpentine, followed by a sprint of approximately 160 feet to the next obstacle. Task 8 was a test involving dragging a 150-pound dummy and a 123-foot sprint to Task 9, which involved handcuffing.

26. It is clear that by "sprint" the PAT intended quick, short runs at high speeds and that the PAT required many sprints.

27. It is not clear whether the PAT intended that a stopwatch be running non-stop through the nine tasks, but it is clear that all or part of the PAT was timed and that a specific overall time had to be met by each detention officer in order to pass the PAT.

28. Petitioner knew when she was hired/transferred in January 1998 that Respondent Employer had, or soon would have, additional and different employment standards than she had experienced for the last 18 years at the jail and that those new standards might constitute a mandatory threshold for her continued employment.

29. As of November 2000, all detention officers, including Petitioner, were advised that they would be required to participate in the PAT and that they were being given an 18-month phase-in period before the test became a mandatory job requirement for detention officers. Petitioner was advised that she would be required to take/pass the PAT by July 1, 2003.

30. Among other purposes, the PAT was designed to mirror some of Petitioner's daily job activities or job description requirements, such as going up and down stairs, running, and searching under bunks. Parts of the PAT addressed the readiness necessity of confronting and controlling inmates. It also included the less-likely emergency activities of crawling and shooting.

31. At least by July 1, 2003, (and possibly earlier), Petitioner's job description was amended to reflect that the PAT was part of the essential functions of her job:

IV. QUALIFICATIONS:

* * *

B. Experience and Training:

* * *

Must meet or exceed all applicable physical agility standards required by ACSO.

32. As part of the continued departmental upgrading and phasing-in of PAT, detention officers, including Petitioner, also were required to participate in 40 hours of in-service training, which included training to successfully pass the PAT.

33. ACSO provided University of Florida fitness and nutrition interns and an onsite exercise room to assist jail employees in reaching physical fitness levels sufficient to timely pass the PAT.

34. Petitioner did not avail herself of these PAT training opportunities, due, in part, to health reasons.

35. On March 6, 2002, Petitioner provided to Respondent a letter from her general practitioner, Dr. Thompson, stating:

> [Petitioner] suffers from morbid obesity and has severe osteoarthritis of both knees and also suffers from hypertension. These ongoing medical problems preclude her from being able to participate in the physical agility test that is a requirement of her position as a correctional officer. . . .

36. Petitioner could not physically train for, or perform, the PAT as of March 6, 2002. From that date on, she relied on Dr. Thompson's letter, so that her superiors would not require her to take/train for the PAT.

37. Petitioner submitted no later reports to change Dr. Thompson's March 6, 2002, opinion, but claimed that the Employer had not placed her on TRD as a result of it.

38. In April of 2002, Petitioner's knee was injured in a motor vehicle accident.

39. Petitioner testified that from the April 2002 accident until she was terminated in August 2003, she was unable to stand for long periods of time; run; cook regular meals for her family; clean her house without assistance; or do any gardening or yard work. She also related that knee pain limited or ended marital intimacy. To some degree, at least, these limitations continued after her August 2003 termination. She also claimed to have been unable to attempt the PAT from April 2002 until her termination in August 2003. See infra.

40. Petitioner testified that she could not workout at the jail gym or otherwise prepare for the PAT after her April 2002 automobile accident.

41. Over time, in part due to her inactivity, Petitioner reached a weight in excess of 400 pounds.

42. Petitioner continued to rely on Dr. Thompson's March 6, 2002, pre-accident letter to avoid training for, or taking, the PAT. Dr. Thompson never supplemented this letter.

43. Respondent's published policy concerning the PAT permitted employees who were unable to do PAT for medical reasons to delay taking it, as follows:

> 1. Sworn employees unable to participate in a semi-annual proficiency because of a medical condition must have their physician complete the Medical/Physician's Recommendation Form, ACSO 94-24 and the Health and Work Status Report, ACSO 96-178 and return them to the Human Resources Bureau.
> 2. Sworn employees who fail to participate or demonstrate semi-annual proficiency because of a medical condition will be placed on Temporary Restricted Duty (TRD) for a period of up to twelve (12) months to rectify the deficiency. The TRD shall not exceed twelve (12) consecutive months, or a total of eighteen (18) months within a twenty-four month period. At the end of the extension period, the sworn employee will be required to complete and successfully pass any missed test(s).
> 3. Sworn employees who fail to demonstrate proficiency at the end of the TRD period will be relieved . . . of sworn duty if not done so when the employee is placed on TRD. . . . [sworn employees] suspended from sworn duty shall be reassigned to non-sworn status pending administrative action. Administrative action may range from permanent non-sworn assignment with all employee pay and benefits adjusted accordingly, if a position is available, up to and including termination. (Bracketed material added for clarity.)

44. On or about November 25, 2002, Petitioner submitted a Health and Work Status Report from Dr. Bensen, her chiropractor, which said she was:

> Unable to run and is to be excused from that portion of the physical agility test until further notice.

45. On November 26, 2002, Respondent Sheriff issued a memo to Petitioner that provided, in pertinent part:

> RE: TEMPORARY RESTRICTED DUTY
> the very nature of corrections requires instantaneous response to potentially hazardous or stressful situations. This response often involves extreme physical exertion. You have provided medical information from your physician indicating that you are temporarily unable to fulfill the essential functions of your appointment as a Detention Officer.
>
> Therefore, effective immediately, you are hereby placed on Temporary Restricted Duty and directed to report to the Human Resources Bureau for assignment. You must provide the Human Resources Bureau with an updated Health and Work Status Report every 30 days, commencing with the effective date of this assignment.
>
> While on Temporary Restricted Duty, the following conditions shall apply:
>
> 1. You shall avoid physical confrontations, except when necessary to protect yourself or another person from imminent death or serious injury.
>
> * * *
>
> 5. You will not participate in any training that would involve activities contrary to the restriction indicated by your physician.

* * *

> An assignment to Temporary Restricted Duty cannot exceed twelve months. If you are unable to return to full, unrestricted duties as a Detention Officer at that time, you will be subject to reclassification to a position within your capabilities or to termination.

46. Petitioner concedes that Instruction 5, of the Sheriff's November 26, 2002, memo, placing her on TRD, amounted to Respondent telling her that he was following her doctor's orders and expected her to follow them, too.

47. From November 2002, through July 2003, Petitioner submitted appropriate Health and Work Status Reports from Dr. Bensen and received approval of TRD from the Employer.

48. The way the foregoing system worked was that at some point between the 19th and 30th of each month, Petitioner would visit Dr. Bensen and he would make out a Health and Work Status Report, certifying that she was "unable to run and is excused from that portion of the Physical Ability Test until further notice." (R-12) A few days later, Petitioner would present the foregoing Report to a superior officer, who would note on a Return to Duty Form, the date of his or her conference with Petitioner concerning Petitioner's restrictions; the date Petitioner's next Health and Work Status Report was due; and the date of Petitioner's next scheduled physician's appointment.

This Return to Duty Form authorized Petitioner to be placed in TRD. (R-11) Thereafter, a Human Resources Risk Manager signed-off on the same form to approve the TRD assignment.

49. Although the Health and Work Status Report Forms and Return to Duty Forms in evidence do not cover every month between November 26, 2002, and August 2003, or precisely dove-tail by date, the tangible items in evidence, together with the credible testimony and evidence as a whole, support findings that Petitioner's last counseling by a superior officer occurred on August 1, 2003; that her next physician's appointment was expected to be August 26, 2003; and that Petitioner was ordered to remain on TRD, effective July 30, 2003. (See Findings of Fact 56-58)

50. While on TRD from November 2002 to August 2003, Petitioner was primarily assigned to the jail's lobby. Occasionally she was assigned to the command center. Petitioner was assigned to the lobby, partly due to her good communication skills. At the time, both locations were full duty detention officer postings. Neither location has stairs in it. Trustee inmates are not handcuffed in the lobby. Transferee-inmates may be handcuffed in the lobby. The lobby is mostly a public information outlet and an entrance and exit point for the jail facility. Currently, ACSO utilizes only civilian personnel in those areas, instead of physically restricted detention

officers, because all sworn detention officers are expected to be in a state of operational readiness and to be able to respond as full-service officers.

51. On June 10, 2003, the Employer requested an independent medical evaluation of Petitioner. Dr. Newcomer, a medical physician, evaluated Petitioner and provided the Employer with the following information on June 24, 2003:

> DIAGNOSIS: Morbid obesity, bilateral knee arthritis with more recent knee trauma resulting in chronic pain, hypertension in fair control.
>
> TREATMENT PLAN: Functional capacity evaluation is requested and will be set up at Rehab Solutions. When that information is available, further assessment of her specific functional abilities to compare the physical requirements of job description including physical agility test, can be more specifically addressed. Her extreme obesity and advanced degenerative arthritis in the knee will definitely limit her long term ability for weight bearing exercise and physical stress. (Emphasis supplied)

52. On June 27, 2003, Rehab Solutions, Inc., wrote Petitioner in an attempt to schedule, for July 7, 2003, the physician-ordered functional capacity evaluation.

53. On July 1, 2003, the PAT became mandatory for all detention officers, including Petitioner.

54. Petitioner took Rehab Solutions a July 1, 2003, letter (Tr-142; R-10) from Dr. Bensen. As a result, Rehab Solutions elected not to perform the functional capacity evaluation of

Petitioner on July 7, 2003. Dr. Bensen's letter read, in pertinent part:

> [Petitioner] has been seen in this office for treatment of injuries sustained in an MVA [sic. "motor vehicle accident"] which occurred on April 12, 2002. These injuries include cervicobrachial syndrome, cervical sprain-strain, knee sprain-strain, and thoracic sprain-strain . . . she has recently been able to increase both the speed as well as the distance of her walking regimen. Soft tissue injuries typically take up to 18 months to heal and [Petitioner's] rehabilitation has been complicated by her weight. . . . any stressful assessment examination at this time is likely to re-injure that patient's knee and it is recommended that such assessment be postponed until October of this year to allow for more complete resolution of her symptoms.

55. Since the foregoing letter from Dr. Bensen was presented to Rehab Solutions, Inc., it would seem to be suggesting, not that Petitioner could attempt the PAT in October 2003, but that Rehab Solutions, Inc., ought not to perform a functional capacity evaluation of Petitioner for Dr. Newcomer and the Employer until October 2003. It is not clear when the Employer came into possession of this letter of Dr. Bensen.

56. On July 29, 2003, Dr. Bensen filled out a Health and Work Status Report to the effect that he had examined Petitioner on July 29, 2003; that she might return to work on July 30, 2003; and that she was "unable to run and is to be excused from

that portion of the physical agility test until dated [sic.] listed below - October 2003"; and that he expected Petitioner to return for her next appointment on August 26, 2003. (R-12) This was the last Health and Work Status Report submitted to the Employer before Petitioner's termination on August 7, 2003. (See Finding of Fact 49.)

57. The last Return to Duty Form before Petitioner's termination shows that Susan Wiley, on behalf of the Employer, discussed Petitioner's restrictions with her on August 1, 2003; continued Petitioner on temporary restricted duty, effective July 30, 2003; and expected Petitioner to supply a new Health and Work Status Report on September 1, 2003, from a next scheduled physician's appointment date of August 1, 2003. (R-1) (See Finding of Fact 49.)

58. From Findings of Fact 56 and 57, it is further found that despite some discrepancy in dates between Dr. Bensen's reports and the Employer's Return to Duty Forms, Petitioner's supervisors knew on August 1, 2003, that Petitioner might be able to attempt the PAT in October 2003.

59. However, Respondent Employer terminated Petitioner on August 7, 2003, by a memorandum of that date, stating:

> In July of 2000, the Alachua County Sheriff's Office established a Physical Agility Test for Detention Officers at the Department of the Jail. The test was developed to test a Detention Officer's

ability to meet essential minimum physical requirements of the job. The test, notification of requirements, and trial period were implemented over a 3 year time period. This test is specifically designed to assess one's ability to perform essential functions of your position which are physical in nature. Your medical information on file with the Human Resources Bureau indicates that you are unable to perform this test either now or in the foreseeable future.

Detention Officers must be able to carry out their duties in a manner which safeguards the safety and welfare of the inmate population as well as employees. I have allowed you to function in a restricted capacity with the hope that you would make some progress in your rehabilitation, however, I note that no improvement in your medical condition has been documented. Keeping in mind the safety needs of this agency as well as the requirements of the position, I must accordingly end your assignment as a Detention Officer with the Department of the Jail of the Alachua County Sheriff's Office effective as of 1700 August 7, 2003. I encourage you to contact Human Resources Bureau Chief Sherry Larson at 367-4039 to discuss your interest in other vacant positions for which you may qualify.

Please note your circumstances qualify you to take advantage of ACSO's Transition Period which allows you to use up to sixty (60) days of accumulated leave (sick, annual, compensatory, special event) to transition into retirement or other non-ACSO employment. In order to take advantage of this option you must contact Human Resources at 367-4040 immediately upon receipt of this memorandum. (Emphasis supplied.)

60. Petitioner was employed for 3.8 years between her hire/transition to ACSO in January 1998 and her termination in August 2003.

61. Petitioner contended that she never asked for an accommodation of her disability, but clearly, she accepted TRD for as often and as long as it was provided, at least from November 26, 2002 to August 7, 2003.

62. During her entire 22 years of service as a detention officer, Petitioner was never disciplined or evaluated as unsatisfactory for any reason.

63. After August 7, 2003, Petitioner contacted Ms. Larson concerning continued employment with ACSO and was informed that there were two ACSO positions available. Petitioner understood these positions to be "deputy" and "detention assistant."

64. Petitioner understood the "deputy" position to be one for "road deputy," a position which requires passing an even more rigorous PAT than the one Petitioner would have to have passed as a jail detention officer. (See Findings of Fact 24-27.)

65. Although the detention assistant position was not commensurate with the salary level and duties of a detention officer, Petitioner admitted to being qualified and capable of performing that job description in August 2003.

66. Petitioner told Ms. Larson that Petitioner would get back with her, but because Petitioner did not contact Ms. Larson within two days, Ms. Larson assumed Petitioner would not be applying for either current ACSO job opening or for any future ACSO openings, so she did not continue to contact Petitioner thereafter.

67. Petitioner claims that approximately August 20, 2003, Dr. Thompson provided medical documentation indicating that she could attempt the PAT. However, Petitioner concedes that she never provided this information to Respondent. Dr. Thompson's alleged August 20, 2003, permission slip also was not offered in evidence. (TR-201-202.)

68. Petitioner's testimony is conflicted as to her physical limitations from July 2003 to the date of hearing. She testified that prior to her termination by Respondent, her medical condition did not prohibit her performing any of the "essential functions" of her job as a detention officer, except running. At one point, she testified that after October 2003, (the earliest date of possible PAT performance as predicted by Dr. Bensen), she was able again to perform all her household chores. She also testified that after her termination in August 2003, her medical condition, which at least until October 2003, included no prolonged walking or standing and no running, prevented her from seeking a range of jobs outside her field,

such as day care provider, cashier, mail deliverer, cook, grocery bagger, waitress, and nurse's aide.

69. Petitioner testified that she continued to be unable to do her housework, yard work and general life activities at least until the beginning of 2004. Petitioner also testified that she believed she could fulfill her detention officer job description as of the date of hearing. She testified that she could attempt the PAT (without running) as of the date of hearing, but she was not sure she could pass it. She asserted that the PAT is not a bona fide requirement of the job of detention officer.

70. Petitioner testified that from some time post-termination to May 2004, she suffered from depression and anxiety due to loss of her job, but she provided no medical corroboration of this part of her testimony. Nonetheless, at some point, she has been able to apply for a counselor position at Alachua County Work Release; a job at the Alachua County Library; and a job at the Court Services Office. For reasons unknown, she was not hired at any of them. She was not hired by the Bradford County Sheriff's Department in 2003 because it had no vacant positions at that time. She has intentionally not applied for any correctional officer jobs. She has a college degree in business administration, but apparently has not sought employment in that field.

71. Petitioner has lost no health benefits as a result of her termination by Respondent Employer, because she has always had health insurance through her husband's employment. She did lose salary, retirement benefits, dental plan coverage, and supplemental life insurance coverage as a result of her termination.

72. Petitioner has agreed to pay her attorney a reasonable fee in this case.

CONCLUSIONS OF LAW

73. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this cause, pursuant to Chapter 760, and Section 120.57(1), Florida Statutes.

74. Subsection 760.10(1)(a), Florida Statutes, provides:

> (1) It is an unlawful employment practice for an employer:
>
> (a) To discharge 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 an individual's race, color, religion, sex, national origin, age, handicap, or marital status. (Emphasis supplied.)

75. Although this process, in this forum, may not adjudicate any rights under federal law, it is appropriate to interpret Subsection 760.10(1)(a), Florida Statutes, by reference to federal case law under the Civil Rights Act (Title

VII), the Rehabilitation Act, and the Americans with Disabilities Act (ADA). School Board of Leon County v. Weaver, 556 So. 2d 443 (Fla. 1st DCA 1990); Hunter v. Winn-Dixie Stores, Inc., FCHR Case No. 82-0799 (February 23, 1983).

76. Accordingly, Petitioner must prove the following in order to establish a prima facie case of handicap discrimination:

> A. She is handicapped within the meaning of the Florida Civil Rights Act;
>
> B. She was otherwise qualified for her job, with or without reasonable accommodation; and
>
> C. She was terminated solely by reason of her handicap.

Hilburn v. Murata Electronics North America, Inc., 181 F.3d 1220 (11th Cir. 1999); Gordon v. E.L. Hanuin & Assoc., Inc., 100 F.3d 907 (11th Cir. 1999); and Brand v. Florida Power Corporation, 633 So. 2d 504 (Fla. 1st DCA 1994).

77. Florida has yet to adopt the more enlightened term, "disability," and Chapter 760, Florida Statutes, does not define "handicap." However, in Brand, supra, the court adopted the definition of handicap found in Section 504 of Title V of the Rehabilitation Act of 1973, and stated:

> Section 504 specifically refers to 29 U.S.C. Sec. 706(8)(B) for the definition thereof. The latter defines an "individual with handicaps," subject to certain exceptions not applicable to this case, as one "who (i)

> has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment." Examples of major life activities include caring for oneself, breathing, learning, and working. (Emphasis supplied).

Id. at 510, FN 10.

78. The same definition of disability is set out in the ADA. In Toyota Motor Manufacturing, Kentucky, Inc., v. Williams, 112 S. Ct. 681 (2002), the United States Supreme Court, in a unanimous decision provided guidance, for purposes of the ADA, as to how "handicap/disability" is to be proven:

* * *

> Merely having an impairment does not make one disabled for purposes of ADA. Claimants also need to demonstrate that the impairment [substantially] limits a major life activity. (Bracketed material added for clarity.)

* * *

> The word "substantial" thus clearly precludes impairments that interfere in only a minor way with the performance of manual tasks from qualifying as disabilities Cf. Albertson's, Inc. v. Kirkinburg, 527 U.S., at 565, 119 S. Ct. 2162 (explaining that a "mere difference" does not amount to a "significant restrict[tion]" and therefore does not satisfy the EEOC's interpretation of "substantially limits").

* * *

"Major life activities" thus refers to those activities that are of central importance to daily life. In order for performing manual tasks to fit into this category -- a category that includes such basic abilities as walking, seeing, and hearing, -- the manual tasks in question must be central to daily life. If each of the tasks included in the major life activity of performing manual tasks does not independently qualify as a major life activity, then together they must do so.

* * *

We therefore hold that to be substantially limited in 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. The impairment's impact must also be permanent or long-term. See 29 CFR §§ 1639.2(j)(2)(ii) -- (iii) (2001).

It is insufficient for individuals attempting to prove disability status under this test to merely submit evidence of a medical diagnosis of an impairment. Instead, the ADA requires those "claiming the Act's protection . . . to prove a disability by offering evidence that the extent of the limitation [caused by their impairment] in terms of their own experience . . . is substantial." Albertson's, Inc. v. Kirkinburg, supra, at 567, 119 S. Ct. 2162. . . .

* * *

. . . Congress intended the existence of a disability to be determined in such a case-by-case manner. See Sutton v. United Air Lines, Inc., supra, at 483, 119 S. Ct. 2139; Albertson's, Inc. v. Kirkinburg supra. at 556, 119 S. Ct. 2162. . . . The determination of whether an individual has a

disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual"); ibid. (The substantially limited in a major life activity must be made on a case-by-case basis.)

* * *

An individual assessment of the effect of an impairment is particularly necessary when the impairment is one whose symptoms vary widely from person to person.

* * *

When addressing the major life activity of performing manual tasks, the central inquiry must be whether the claimant is unable to perform the variety of tasks central to most people's daily lives, not whether the claimant is unable to perform the tasks associated with her specific job.

* * *

The definition is intended to cover individuals with disabling impairments regardless of whether the individuals have any connection to a workplace.

* * *

. . . the manual tasks unique to any particular job are not necessarily important parts of most people's lives. As a result, occupation-specific tasks may have only limited relevance to the manual task inquiry.

* * *

The Court, therefore, should not have considered respondent's inability to do such manual work in her specialized assembly line job as sufficient proof that she was

> substantially limited in performing manual tasks.
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> * * *
>
> Yet household chores, bathing, and brushing one's teeth are among the types of manual tasks of central importance to people's daily lives, and should have been part of the assessment of whether respondent was substantially limited in performing manual tasks.

79. Respondent's position is that the medical evidence and Petitioner's testimony herein do not meet the foregoing tests to establish a "handicap," because Petitioner can now manage her daily life. The undersigned concludes to the contrary.

80. Although Petitioner contends that she can now (and as of October 2003 could have) attempted the PAT, the bulk of her testimony as to why she has been unable to mitigate potential post-termination damages for "back pay" by obtaining other employment hinges upon her total inability to run or even to walk for more than a moderate distance. Apparently, Petitioner's other physical conditions that prohibit long-term standing also remain as a continuous physical limitation upon her major life activities.

81. Moreover, even if an employer merely views an employee as disabled, that is sufficient to meet the first prong of the tri-partite test. See Rossbach v. City of Miami, 371 F.3d 1354

(11th Cir. 2004). Respondent Employer viewed Petitioner as handicapped, and consequently as unfit for duty.

82. Regardless of how the parties' respective proposals have woven the "words of art," there is no factual dispute that both Petitioner and Respondent viewed Petitioner as disabled from November 2002 through August 7, 2003, the date of termination. Nor is it disputed that Petitioner considered her disabled condition unchanged at least until October 2003. It is equally clear and undisputed that even though she was not on TRD for the entire period, Petitioner was unable to perform at least two essential functions of her job as a detention officer (rapid response and confrontational control of inmates) from the date of her April 2002 motor vehicle accident until at least October 2003 (17 months).

83. Therefore, it is concluded that at all times material, Petitioner was "handicapped," pursuant to Chapter 760, and was unable, with or without accommodation, to perform the essential functions of her job. These conclusions together mean that she has not made a prima facie case of handicap discrimination.

84. Petitioner relied on medical excuses to avoid training for the PAT as well as to avoid taking the PAT from March 6, 2002 until August 7, 2003 (17 months).

85. August 7, 2003, the date of termination, was only about 9 and 1/2 months after November 26, 2002, the date

Petitioner was most recently placed on TRD. By Respondent's policy, she was entitled to up to 12 consecutive months of TRD. (See Findings of Fact 43 and 45). Two reasons given by the Employer for Petitioner's termination, that her medical information on file indicated that she was unable to perform the PAT in the foreseeable future and that no improvement in her medical condition had been documented (See Finding of Fact 59), were not articulated well. It was shown that Dr. Bensen, the chiropractor treating only Petitioner's knee, had written the Employer that Petitioner might attempt the PAT on October 2003. (See Finding of Fact 56). However, the Employer also had the report of the independent medical physician Dr. Newcomer, which stated that Petitioner's combined medical conditions would "definitely limit her long term ability for weight bearing exercise and physical stress," (see Finding of Fact 51), plus the fact that for all or most of the 3.2 years Petitioner had worked for ACSO, she had been unable to perform essential functions of her job description. (See Findings of Fact 5, 10-13, 16-20, and 35-39). By her own admission, Petitioner could not have performed the PAT or all her job description duties in October 2003, even if the Employer had continued to employ her until October 2003. It is clear Petitioner could not fulfill the job requirements.

86. This case is only complicated by the effect that Respondent's PAT requirement may have. It is undisputed that the PAT did not become a mandatory portion of Petitioner's job description until July 1, 2003. The PAT requirement permitted a detention officer to delay taking it for 12 months, due to a medical condition, and further permitted that officer to stay on TRD for up to 18 months within a 24-month period.

87. Respondent gave as its reason for terminating Petitioner, that she could not perform the PAT. The reason is not clearly pretextual. That was the prime reason Respondent chose to terminate Petitioner, but the termination letter also stated, "This test is specifically designed to assess one's ability to perform essential functions of your position which are physical in nature," and "detention officers must be able to carry out their duties in a manner which safeguards the safety and welfare of the inmate population as well as employees." Respondent was justified in terminating Petitioner for the permissible, non-discriminatory, reason that it appeared that she was permanently (not temporarily) disabled from performing at least two of the essential functions of her job duties which the PAT was designed to test: rapid responses and controlling prisoners. Moreover, at best, it was only possible she could attempt the PAT as of October 2003, and at worst, that she could only be re-evaluated or begin training for the PAT in

October 2003. (See Findings of Fact 43, 55, and 58.) Petitioner concedes that even in 2005, she is unsure that she can pass the PAT.

88. Employers are required to make reasonable accommodations for their employees' handicaps, See Kelly v. Bechtel Power Corporation, 633 F. Supp. 927 (S.D. Fla. 1986), but they are not required to create work that the employee can do. An employer has the right to determine particular job requirements as well as the right to change the requirements as necessary in a manner that serves the legitimate business interest of the employer. Fussell v. Georgia Port Authority, 906 F. Supp. 1651 (11th Cir. 1995), citing Wilson v. AAA Plumbing and Pottery Corp., 34 F.3d 1024, 1030 (11th Cir. 1994).

89. The PAT simulates the actual job duties of detention officers. Despite Petitioner's current belief she can do all parts of the PAT except running, running is such an integral part of the PAT that it is clear Petitioner is, even now, asking to be excused from more than 50 percent of the test, plus she has lifting, standing, and crouching problems. (See Findings of Fact 24-27.)

90. Petitioner's view is that she should be assigned to the lobby or elsewhere within the jail so that she will not have to look under bunks, run, climb stairs, or control prisoners, but this proposed "accommodation" would require that Respondent

schedule all its able-bodied detention officers around Petitioner's needs, instead of around Respondent's legitimate business interests. Accommodating Petitioner this way would eliminate essential functions of the job of a detention officer for a single individual. Employers are not required to eliminate essential functions of the job. Rio v. Runyon, 972 F. Supp. 1445 (S.D. Fla. 1997), or to wait an indefinite period for an accommodation to achieve its intended effect. Myers v. Hose, 50 F.3d 278, 283 (4th Cir. 1995) decided under the ADA.

91. Petitioner has failed to state a prima facie case, but even if she had, Respondent has stated a non-discriminatory reason (that Petitioner cannot do the job), which has not been shown to be pretextual.

RECOMMENDATION

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

RECOMMENDED: that the Florida Commission on Human Relations enter final order dismissing the Petition for Relief and Charge of Discrimination herein.

DONE AND ENTERED this 7th day of June, 2005, in Tallahassee, Leon County, Florida.

S

ELLA JANE P. DAVIS
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Filed with the Clerk of the
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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.