STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MATTHEW AVERY,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 04-2862
	)	
CITY OF PENSACOLA, FLORIDA,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to notice this cause came on for final proceeding and hearing before P. Michael Ruff, duly-designated Administrative Law Judge of the Division of Administrative Hearings. The formal hearing was conducted in Pensacola, Florida, on April 18, 2005. The appearances were as follows:

APPEARANCES

For Petitioner: Debra Dawn Cooper, Esquire
1008 West Garden Street
Pensacola, Florida 32501

For Respondent: Millard L. Fretland, Esquire
Conroy, Simberg, Ganon, Krevans,
& Apel, P.A.
125 West Romana Street, Suite 150
Pensacola, Florida 32521

STATEMENT OF THE ISSUES

The issues to be resolved in this proceeding concern whether the Petitioner was subjected to an act of employment discrimination based upon his termination from employment rather

than allegedly having his disability (blindness) accommodated by the Respondent employer in such a way as to allow his continued employment.

PRELIMINARY STATEMENT

This cause began by the Petitioner's filing of a charge of discrimination with the Florida Commission on Human Relations (Commission). In that charge he alleged that he had been discriminated against because of a handicap while working for Energy Services of Pensacola (ESP), a division of the City of Pensacola. The charge of discrimination was investigated by the Commission, which ultimately entered a Determination of "No Cause." Thereafter, the Petitioner filed a Petition for Relief, which was transmitted to the Division of Administrative Hearings and the undersigned administrative law judge. The Respondent is an agency of local government which assigns employees to work in various divisions. The Petitioner worked for ESP as a "field technician," until he was terminated early in the year 2002. He had held that position since sometime in 1998.

The cause came on for hearing as noticed. The Petitioner presented his own testimony and one other witness, Robert Lupton. The Respondent cross-examined the Petitioner's witnesses and presented documentary evidence. Upon the conclusion of the hearing the parties elected to order a transcript thereof and to avail themselves of the opportunity to

submit proposed recommended orders. The Proposed Recommended Orders were timely submitted after the stipulated grant of one extension, and have been considered in the rendition of this Recommended Order.

FINDINGS OF FACT

1. The Petitioner, at times pertinent hereto, was an employee of the Respondent, City of Pensacola, (ESP). He had been employed by the Respondent since 1993. He was promoted to the position of field service technician in 1998. The Petitioner was assigned to ESP and had been working in that capacity sometime in 1998.

2. When the Petitioner was promoted to the position of field service technician in 1998 he was required to obtain a commercial driver's license. Part of the qualifications for his position was that the holder have a commercial driver's license.

3. In order to obtain a commercial driver's license, Mr. Avery was required to pass a visual acuity test and was required to have good vision in order to keep the license to drive. The requirement for having a commercial driver's license remained in force for the position of field service technician through the dates of Mr. Avery's employment in that position until his termination. There is no evidence that there was any field service technician employed by ESP who did not possess a commercial driver's license while working there.

4. The Petitioner was assigned to work in the ESP gas meter shop, calibrating and repairing city gas meters. From time to time, however, he was required to work in the field in various capacities. Indeed, all field service technicians such as Mr. Avery, were always subject to being told to perform various duties at ESP, including duty in the field, depending upon where or the city needed the worker most at the time. When field service technicians were required to work outside the shop, the majority of time they worked alone and were therefore required to be able to and be licensed to operate various kinds of motor vehicles. They were required to operate trucks and other motor vehicles, as well as backhoes, ditching machines, and other equipment. Mr. Avery's job description as a field service technician required him to be able to safely operate backhoes and ditching machines.

5. Because of his vision difficulty, Mr. Avery admitted that he could only operate a backhoe safely if no other persons were around. He also admitted that he was unable to perform any of the job duties required of a field service technician outside the meter shop because they all involved driving or operating vehicles which he became unable to do because of his vision problem.

6. Mr. Avery was diagnosed with diabetes many years preceding his employment with ESP. Sometime in the year 2000 he

sustained an injury, and when released to return to work full-time, in June of 2000, ESP allowed him to do so. In April 2001, he told his supervisor, Ms. Nickerson, that he was having trouble with his vision and thought it might be attributable to some medication that he was taking. In fact, the evidence indicates that it may have been attributable to his long-term diabetes condition.

7. In any event, in July 2001, Mr. Avery was asked to take a company truck and go alone to spot the location of some city gas lines. During this assignment Mr. Avery ran a red light in a company truck. He received a traffic ticket for running the red light and told his supervisor afterward that he was not able to drive responsibly any longer until he found out what was occurring with his vision difficulty.

8. Subsequent to this conversation with Ms. Nickerson, in July of 2001, Mr. Avery returned to work in the meter shop. A few days later he was required to go out on a "crew truck" for several days. While working on the crew truck, Mr. Avery sustained and orthopedic injury to his clavicle and was restricted from working, beginning sometime in late July of 2001. After the injury, in late July 2001, he never actually returned to work for ESP until the date of his termination.

9. The Petitioner was not released to return to full duty at work from his orthopedic injury by his physician until

December 2001. At that point the Respondent required that he pass a vision screening test in order to return to his position as a field service technician, because of his past driving difficulty related to his vision.

10. The vision screening test was performed by Dr. Herron. Dr. Herron opined in December 2001, that Mr. Avery was legally blind and could not drive an automobile. The doctor measured the Petitioner's visual acuity as 20/200, the standard for legal blindness, and stated that his condition was not likely to improve.

11. The Petitioner was terminated from his position on March 22, 2002, because he was unable to perform his job because he could not maintain the required driver's license due to his visual difficulty. The Petitioner maintains that he should have been "accommodated" regarding his inability to drive a vehicle, due to his visual handicap, by permanent assignment to the meter shop and thus never having to drive a motor vehicle or motor equipment. He contends that he would not need a commercial driver's license with such an assignment. However, the requirement to have a commercial driver's license and to operate various vehicles and equipment is a significant part of the requirements of the field service technician's position. Indeed, Mr. Lupton in his testimony, established that work outside the meter shop was a routine, regularly-requested job

duty, for field service technicians such as the Petitioner. Field service technicians have to be able to drive vehicles and motor equipment in order to go out, pick-up, and deliver meter parts, spot gas lines, do excavations and other functions requiring the ability and the license to operate and drive equipment or vehicles. Indeed, Mr. Lupton's testimony establishes that no one would be able to perform most of the many tasks of a field service technician at ESP if he permanently lost the ability to drive a vehicle. A non-driving employee could work in the meter shop only; however, a substantial portion of the duties of field service technicians do not involve work in the meter shop but rather in field duties.

12. After his termination in 2002 Mr. Avery applied for and received Social Security Disability entitlement and benefits due to his blindness. In order to establish one's claim for Social Security Disability Benefits, one must prove to the Social Security Administration that the applicant is not able to perform in any employment.

13. The Petitioner can perform most of the activities of daily living satisfactorily except those which depend upon his eyesight. His eyesight is sufficiently impaired to constitute a significant impairment to an activity of daily living (i.e. seeing). This is especially critical as to his inability to

drive a vehicle, although his does have some vision. In fact, when his eyes are examined currently, he is able to read the first line of an eye chart, the second line and then a letter or two of the third line. The Petitioner admits that he is unable to obtain a driver's license because his eye sight is insufficient. He is not able to perform any job with the Respondent that requires a driver's license. If his employment with ESP were so protected as to be confined to the meter shop duties only he may be able to perform those functions. However, a major portion of the duties of the field service technician involve the requirement that he be able to drive and operate motor vehicles and equipment. This the Petitioner is unable to do.

14. The Petitioner contends that his termination was actually due to reasons of personal dislike of him by his supervisors. He has applied for many other jobs unsuccessfully in the Pensacola area since his termination. He contends that this is due to an "unspoken law" in Pensacola that effectively "blacklists" former employees of the city, county or state governments who have been terminated from those positions. Other than his own opinion testimony, he offered no documentary evidence or testimony of other witnesses to corroborate this belief on his part.

15. The Petitioner attempted to assert that another ESP employee, Mr. Myers, was a similarly-situated, exemplar employee who had not been terminated when he suffered a disability or handicap during his employment, but was rather retained in ESP's employment as a field service technician. However, as established by the testimony of Mr. Lupton, Mr. Myers suffered severe burns in an accident and was medically restricted from contact with direct sunlight. Mr. Myers, however, continued to be able to drive a car, a tractor, a dump truck, and other equipment to, from, and around work sites. He continued to qualify for and retain his commercial driver's license. His employer was able to accommodate his disability or medical restriction involving reduced contact with direct sunlight because even with that restriction he was still able to perform the duties of his job. Therefore, Mr. Myers was not terminated and was continued in his employment with the accommodation concerning the restriction from contact with direct sunlight. Thus, because of the differences in Mr. Myers situation and condition, particularly the fact that he could remain licensed to and could physically operate vehicles and equipment, he is not truly a similarly-situated employee who was disparately and more favorably treated than was the Petitioner.

CONCLUSIONS OF LAW

16. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2004).

17. The burden of proof in this proceeding is on the Petitioner to establish by preponderant evidence that his termination from employment constituted unlawful discrimination because of disability or handicap, within the purview of Chapter 760, Florida Statutes. See Florida Department of Transportation v. J.W.C. Co., 396 So. 778, 788 (Fla. 1st DCA 1981); St. Mary's Honor Center v. Hicks, 509 US 502 (1993) (in a proceeding where the Petitioner asserts an unlawful employment practice, although the burden of going forward with evidence may shift, the ultimate burden of persuasion to establish proof of an unlawful employment practice remains with the Petitioner).

18. Because the Florida Civil Rights Act (FCRA), Chapter 760, Florida Statutes, is patterned after the Federal Civil Rights law, federal case law interrupting the federal civil rights statutes applies to interrupting the provisions of Chapter 760 Florida Statutes. See Green v. Burger King Corporation, 728 So. 2d 369, 370-71 (Fla. 3rd DCA 1999); School Board of Leon County v. Hargis, 400 So. 2d 103, 108 n. 2 (Fla. 1st DCA 1981). See also Green v. Seminole Electric Cooperative,

Inc., 701 So. 2d 646, 647 (Fla. 5th DCA 1997) (FCRA "should be construed in conformity with" the Federal Americans With Disabilities Act of 1990 [the "ADA"], 42 USC Section 12101 et seq., and related regulations).

19. Intentional discrimination can be proven in two ways, either by direct evidence of discriminatory intent or through circumstantial evidence. See McDonnell-Douglas Corporation v. Green, 411 U.S. 792, 804 (1973); Burrell v. Board of Trustees of Georgia Military College, 1205 F.3d 1390, 1393-94 (11th Cir. 1997) ("[d]irect evidence is 'evidence, which, if believed, proves existence of fact in issue without inference or presumption'"). (Citation omitted by the court).

20. In the absence of direct evidence, as is the situation at bar, the Petitioner must put forth a prima facie case, which consists of the following: (a) that he was handicapped by having a disability, physically or mentally, that substantially limits one or more major life activities; (b) that he is able to perform the assigned job duties satisfactorily with or without reasonable accommodation; (c) that there is a record of his having such handicap or disability, that the employer knew of it or that he was generally regarded as having such impairment; that despite his satisfactory performance he was terminated from his employment, when others, similarly situated, were given more favorable treatment. Clark v. Jackson County Hospital, 20 FALR

1182, 1184 (FCHR 1997). See also Brand v. Florida Power Corporation, 633 So. 2d 504, 509 (Fla. 1st DCA 1994).

21. There is no doubt that the first element of the Petitioner's prima facie case, that he has a "disability," has been established. The Petitioner has a substantial loss of vision, which vision impairment inhibits major life activities such as seeing itself, working, and in his particular case, driving. Although, the Petitioner has some eyesight remaining, it is clear from the evidence that he is unable to drive and to maintain a commercial driving license. It is also obvious that the Petitioner suffered an adverse employment event in that he was ultimately terminated. It has also been proven by the Petitioner that the employer was aware of his disability involving his visual difficulty because he informed his supervisor of it.

22. In order to make out a prima facie case the Petitioner is also required to establish that he is qualified and capable to perform the "essential functions" of the job in question, that of field service technician. He must be able to do so "with or without reasonable accommodation" by the employer. Sutton v. United Airlines, Inc., 527 U.S. 471-459 (1999). See also 42 USC 12111(8). The preponderant, persuasive evidence demonstrates that one of the "essential functions" of the job of field service technician is possession of a commercial driver's

license and the ability to drive a motor vehicle and other types of equipment. The record clearly demonstrates that a person who is permanently unable to hold a driver's license and to drive vehicles or other equipment cannot be employed at ESP in any capacity. This is because working inside the meter shop and adjusting, calibrating, or otherwise repairing meters is not the major portion of the job duties of field service technician. The duties of that position occurring outside the meter shop revolve, in large part, around the ability to drive motor vehicles, as well as other types of equipment such as backhoes, tractors, etc. If an employee as such as the Petitioner is unable to do those things, he cannot perform the essential functions of the job, absent some "reasonable accommodation."

23. In the case at hand, the Petitioner has not demonstrated what that reasonable accommodation might be. He was only able to demonstrate that he could perform the job in the meter shop if he was absolved from having to perform the other duties of a field service technician involving use of a commercial driver's license and operation of vehicles and other motorized equipment. Such however, is not a "reasonable accommodation" since it really amounts to asking the employer to eliminate a substantial and essential function of the job itself. An employer is not legally required to "accommodate" an employee by eliminating an essential job function, rather, the

"accommodation" must consequently enable the employee to perform those job functions. The employer is not required to make substantial modifications in the functions of the job in the interest of accommodating the disability. See Sheets v. Florida East Coast Railway, Co., 132 F. Supp. 2nd 1031, 1035 (SD Fla. 2001). The accommodation sought by Mr. Avery involving not requiring him to drive any kind of vehicle would eliminate, and not merely accommodate, his performance of an undisputed essential job function. Therefore, he is not entitled to relief under the principles of the ADA, as applied to Section 760.10, Florida Statutes. See Hensley v. Punta Gorda, 686 So. 2d 724, 726 (Fla. 1st DCA 1997) (employee who could not perform an essential job function is not entitled to ADA protection).

24. Aside from the context of the Petitioner not proving all the elements of his prima facie case as delineated above, the Respondent also demonstrated that it had a legitimate, non-discriminatory reason for the Petitioner's termination. That is, because of the unfortunate event of the Petitioner's blindness, he was unable to obtain a commercial driver's license and to perform driving functions as an essential function of his position, involving all sorts of motor vehicles and motorized equipment. Because of this he was unable to perform the essential functions of the job and the employer was therefore, within its rights to terminate him. There was no proof that

there was some other reasonable accommodation, possibly even including placement in a different employment position, which would have accommodated the Petitioner's disability. Moreover, it is the Petitioner's responsibility to request one and identify an accommodation that will be reasonable. See Gaston v. Bellingrath Gardens and Home, Inc., 167 F.3d 1361, 1363-64 (11th Cir. 1999).

25. Finally, against this articulation of the employer's reason for the Petitioner's termination, the Petitioner did not prove that such reasons were pre-textual in nature. The Petitioner attempted to show that he was treated in a disparate way by demonstrating that Mr. Myers, disabled as referenced in the above Findings of Fact, had been retained in his employment position as a field service technician, whereas the Petitioner was terminated. The facts demonstrate, however, that they are not comparable employees. The Petitioner obviously had as his principal disability his lack of visual acuity; Mr. Myers on the other hand had been disabled due to severe burns. Mr. Myers differs from the Petitioner in his ability to perform the essential functions of the job, in that he can perform the essential functions of the job and the Petitioner could not. Even though Mr. Myer's disability requires that he avoid extensive contact with direct sunlight on his skin, was still able to fully function, driving all sorts of vehicles and

equipment for the Respondent employer and to continue to be able to lawfully possess and use a commercial driver's license. The Petitioner could not. Thus they are not comparable, similarly-situated in that Mr. Myers could perform the essential functions of the job Mr. Avery could not.

26. In summary, in view of the above Findings of Fact and Conclusions of Law, the Petitioner has not established a prima facie case of discrimination based upon a disability for the reasons delineated above. Moreover, even if that were the case, the Respondent has demonstrated a legitimate, non-discriminatory business reason for terminating the Petitioner. Consequently, the Petitioner has not established his burden of proof and the Petition must fail.

RECOMMENDATION

Having considered the foregoing findings of fact, conclusions of law, the evidence of record, the candor and demeanor of the witnesses and the pleadings and arguments of the parties, it is, therefore,

RECOMMENDED: That a final order be entered by the Florida Commission on Human Relations dismissing the Petition for Relief in its entirety.

DONE AND ENTERED this 11th day of August, 2005, in Tallahassee, Leon County, Florida.

P. MICHAEL RUFF
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 11th day of August, 2005.

COPIES FURNISHED:

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

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

Debra Dawn Cooper, Esquire
1008 West Garden Street
Pensacola, Florida 32501

Millard L. Fretland, Esquire
Conroy, Simberg, Ganon, Krevans,
& Apel, P.A.
125 West Romana Street, Suite 150
Pensacola, Florida 32521

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.