STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

OSWALD NORTON,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 04-3068
	)	
JOHN G'S RESTAURANT, INC.,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

This cause came on for formal hearing before Robert S. Cohen, Administrative Law Judge with the Division of Administrative Hearings, on November 22, 2004, in West Palm Beach, Florida.

APPEARANCES

For Petitioner: Stewart Lee Karlin, Esquire
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For Respondent: F. Dean Hewitt, Esquire
Rissman, Weisberg, Barrett,
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STATEMENT OF THE ISSUE

The issue is whether Respondent discriminated against Petitioner on the basis of his alleged disability.

PRELIMINARY STATEMENT

On January 26, 2004, Petitioner filed a Charge of Discrimination with the Florida Commission on Human Relations ("FCHR"), alleging that Respondent terminated his employment after 12 years on the basis of his disability and perceived disability. On July 27, 2004, the FCHR issued a Determination: No Cause in which it found that no unlawful employment practice had occurred in Petitioner's termination. On July 30, 2004, Petitioner filed a Petition for Relief with the FCHR in which he alleged that his termination by Respondent for willful misconduct was a pretext for the true reason for his firing, namely, that he suffered from diabetes. The matter was referred to the Division of Administrative Hearings on August 31, 2004, and was assigned to the undersigned Administrative Law Judge. Following a brief continuance, this matter proceeded to hearing in West Palm Beach, Florida, on November 22, 2004.

At the hearing, Petitioner presented the testimony of Susan Barish, M.D., testified himself, and offered Exhibit numbered 1, into evidence. Respondent presented the testimony of John Giragos, Jr., Keith Giragos, and Wendy Yarbrough, and offered Exhibits numbered 1 through 3, into evidence.

A Transcript was filed on December 15, 2004. After the hearing, Respondent filed its Proposed Findings of Fact and

Conclusions of Law on December 3, 2004. Petitioner filed his Proposed Findings of Fact and Conclusions of Law on December 29, 2004.

References to statutes are to Florida Statutes (2004) unless otherwise noted.

FINDINGS OF FACT

1. Respondent, John G's Restaurant, Inc., has operated a restaurant located at 10 South Ocean Boulevard, Lake Worth, Florida, since 1973.

2. Respondent began as a small business owned by John Giragos, Sr., and was essentially operated by his family including his children, Wendy Giragos Yarbrough; John "Jay" Giragos, Jr.; and Keith Giragos.

3. In 1993, John Giragos, Sr., transferred ownership of John G's to Wendy Giragos Yarbrough, Jay Giragos, and Keith Giragos, and the restaurant has grown to the point where it now employs approximately 40 employees, a significant percentage of whom are minorities.

4. Petitioner, Oswald Norton, worked as a cook at John G's for 12 years from October 1991 through March 20, 2003. His typical day included working the grill in the morning and the broiler in the afternoon.

5. Petitioner was known as a hard-worker at John G's.

6. Petitioner was known to have a strong temper on the job. On several occasions over the years Petitioner had outbursts directed at his fellow employees.

7. Keith Giragos stepped in on many occasions to calm Petitioner down when he was having an emotional outburst in the kitchen.

8. On March 20, 2003, Petitioner cooked breakfast, but was not feeling well in the afternoon. Petitioner sat on a stool in the kitchen because he felt dizzy and lightheaded.

9. Petitioner believes he had told John "Jay" Giragos, Jr., that he had not been feeling well for two weeks, had blurred vision, was dizzy from time to time, and was on a restricted diet.

10. Jay Giragos did not like his employees sitting down on the job and commented on this to Petitioner.

11. Petitioner either threw or dropped forcefully a large bag of frozen french fries on a table in the kitchen and yelled at several employees who were working in the kitchen at the time. French fries spilled out of the bag and were on the table and the floor.

12. Jay Giragos told Petitioner that he should "get the [expletive] out of the kitchen and go drive a truck." Petitioner clocked out of the restaurant and went home.

13. In telling Petitioner to leave and go drive a truck, Jay Giragos meant he should go home and calm down. Mr. Giragos never told Petitioner explicitly that he was fired from his job.

14. Petitioner was scheduled to work the following day, Friday, March 21, 2003, as well as Saturday, March 22, 2003, and Sunday, March 23, 2003. He then had Monday, March 24, 2003, and Tuesday, March 25, 2003, off.

15. Petitioner failed to report to work on Friday, Saturday, or Sunday, as scheduled, and failed to call John G's to advise he would not be reporting to work. Accordingly, he was a "no-show, no-call" for three consecutive days following the March 20, 2003, incident.

16. In the past, when he was ill, Petitioner either told his employer he would not be coming in the next day or he called from home to say he was ill. Jay Giragos knew that Petitioner usually suffered from one cold every year since he had been working at the restaurant.

17. On March 25, 2003, Petitioner visited his physician, Susan Barish, M.D. At that visit, Petitioner was diagnosed for the first time as a diabetic.

18. The parties stipulated that prior to March 25, 2003, neither Petitioner nor anyone at John G's had any knowledge of

Petitioner's diabetes. The owners of John G's first learned of Petitioner's diabetes when he arrived at the restaurant on March 26, 2003.

19. Respondent has a long history of accommodating its employees who suffer either from a disease or disability, or who require accommodation due to pregnancy.

20. On March 26, 2003, rather than reporting to work at 6:00 a.m. as scheduled, Petitioner arrived mid-morning with his bundle of uniforms and asked for his paycheck. At this time, Petitioner informed everyone that he was suffering from diabetes.

21. Petitioner claims that he asked for his job back, but none of Petitioner's owners recall his asking to be re-hired.

22. After his absence on March 21-23, 2003, Jay Giragos was not interested in retaining Petitioner, even though he had not yet hired a replacement cook.

23. According to Dr. Barish, Petitioner has obtained good control of his diabetes with oral medication and diet. Dr. Barish believes that Petitioner is not restricted from working as a cook or in any other occupation.

24. Petitioner remained unemployed until October 2003, at which time he opened his own restaurant, which remained in business for eight months.

25. During the time that he was unemployed, Petitioner lost about $13,000 in pay based upon his salary at John G's.

26. Petitioner is currently employed as a cook at Flix Restaurant working 39.5 hours per week cooking breakfast and lunch, and performing essentially the same duties as he had performed at John G's.

CONCLUSIONS OF LAW

27. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. §§ 120.569, 120.57(1), and 760.01 et seq., Fla. Stat.

28. Petitioner is an “aggrieved person” and Respondent an "employer" within the meaning of Subsections 760.02(10) and (7), Florida Statutes, respectively. Section 760.10, Florida Statutes, makes it unlawful for Respondent to discharge or otherwise discriminate against Petitioner based on an employee’s disability.

29. In a disability discrimination case alleging discriminatory discharge, in order to establish a prima facie case of discrimination, a petitioner must demonstrate that (1) he is physically disabled; (2) he is a “qualified individual,” meaning he can perform the essential functions of the job in question with or without reasonable accommodation; and (3) he was discriminated against because of his disability.

Lucas v. W.W. Granger, Inc., 257 F.3d 1249, 1255 (11th Cir. 2001); Reed v. Heil Co., 206 F.3d 1055, 1061 (11th Cir. 2000).

30. No direct evidence of discrimination exists in this case. A finding, if any, must be based on circumstantial evidence.

31. The burden of proof in discrimination cases involving circumstantial evidence is set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973). Federal discrimination law may be used for guidance in evaluating the merits of claims arising under Chapter 760. Tourville v. Securex, Inc., 769 So. 2d 491 (Fla. 4th DCA 2000); Greene v. Seminole Electric Co-op., Inc., 701 So. 2d 646 (Fla. 5th DCA 1997); Brand v. Florida Power Corp., 633 So. 2d 504 (Fla. 1st DCA 1994).

32. Florida courts have recognized that actions for discrimination on the basis of disability are analyzed under the same framework as Americans with Disabilities Act (ADA) claims. Chanda v. Englehard/ICC, 234 F.3d 1219 (11th Cir. 2000). 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, Id. at 1221. In this matter, at no time has Petitioner alleged that he is restricted in the manner in which he can perform any major life activity.

33. If Petitioner succeeds in making a prima facie case, the burden shifts to Respondent to articulate some legitimate,

nondiscriminatory reason for its conduct. If Respondent carries this burden of rebutting Petitioner's prima facie case, Petitioner must demonstrate that the proffered reason was not the true reason, but merely a pretext for discrimination. McDonnell Douglas, supra at 802-03.

34. Mere proof of a physical impairment is not proof of a disability under the ADA. 29 C.F.R. Part 1630, App. § 1630.2(j); Gordon v. E.L. Hamm & Assoc., Inc., 100 F.3d 907, 911 (11th Cir. 1996); Hamm v. Runyon, 51 F.3d 721, 726 (7th Cir. 1995). Furthermore, when assessing whether a physical impairment constitutes a disability under the ADA, the mitigating effects of the body's own accommodating measures must be considered. Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 566 (1999); Sutton v. United Airlines, Inc., 527 U.S. 471, 482 (1999) ("[w]e see no principled basis for distinguishing between measures taken with artificial aids, like medications and devices, and measures undertaken, whether consciously or not, with the body's own systems.")

35. Applying the Supreme Court's analysis in Sutton, controlled diabetes has been found not to constitute a disability under the ADA. See, e.g., Orr v. Wal-Mart Stores, Inc., 297 F.3d 720, 724 (8th Cir. 2002). Additionally, under the model of proof set forth above, Petitioner must demonstrate by competent substantial evidence that the employer in question

actually knew of Petitioner's claimed disability. See, e.g., Jovanovic v. In-Sink-erator Division of Emerson Electric Co., 201 F.3d 894, 898-899 (7th Cir. 2000); Jones v. United Parcel Service, 214 F.3d 402, 408 (3d Cir. 2000).

36. Applying the required standard of proof, Petitioner has failed to establish any claim of unlawful discrimination. First, the Petitioner has failed to establish that he is a qualified individual with a disability recognized by the ADA. Petitioner's and his physician's testimony at hearing clearly establishes that, despite his diabetes, he is able to control his medical condition through medication and diet. Further, Petitioner has been able to work full-time as soon as he was able to secure employment after his termination from Respondent. Petitioner wholly failed to present any evidence of any substantial limitations on any major life activity. Under the rationale of Sutton and Orr cited above, Petitioner's claim must fail since he did not have a disability recognized under the ADA at the time of his employment with John G's.

37. Additionally, Petitioner failed to present any competent substantial evidence that any of his supervisors or the owners of John G's were aware of Petitioner's alleged disability, his diabetes. Although Petitioner testified that he asked for his job back on March 26, 2003, after he told his employers that he suffers from diabetes, no evidence was

presented that Petitioner's co-workers or supervisors had any knowledge of his illness prior to his termination whether, as he claims, that was on March 20, 2003, the date of the french fry incident, or after he was a no-show, no-call for three days, March 21-23, 2003.

38. Finally, Petitioner failed to produce any competent substantial evidence to support his contention that his employment was terminated by his claimed disability. Petitioner had a history of emotional outbursts directed toward his fellow employees and employers. Respondent terminated his employment after another of his outbursts followed by three days of not appearing for work and not calling to say he was ill. Respondent's termination of Petitioner was wholly unrelated to his diabetes.

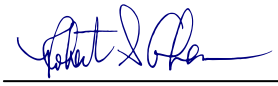
39. In conclusion, Petitioner presented no credible and persuasive evidence that Respondent's articulated reasons for its actions were a pretext for discrimination. There is no evidence to support a finding that Respondent violated Chapter 760, Florida Statutes, or the ADA.

RECOMMENDATION

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

RECOMMENDED that the Commission enter a Final Order finding that the Respondent did not discriminate against Petitioner and dismissing the Petition for Relief.

DONE AND ENTERED this 26th day of January, 2005, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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this 26th day of January, 2005.

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.