STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

NORMAN K. WRIGHT,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 04-3126
	)	
UNIVERSAL CITY DEVELOPMENT PARTNERS, d/b/a UNIVERSAL ORLANDO,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the administrative hearing in this proceeding on behalf of the Division of Administrative Hearings (DOAH) on October 27, 2004, in Orlando, Florida.

APPEARANCES

For Petitioner: Norman K. Wright, pro se
826 Grand Cayman Court
Orlando, Florida 32835

For Respondent: J. Lester Kaney, Esquire
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STATEMENT OF THE ISSUES

The issues for determination in this proceeding are whether Respondent discriminated against Petitioner on the basis of a handicap, within the meaning of Section 760.10, Florida Statutes

(2002), and whether the same alleged discrimination violated Section 448.045, Florida Statutes (2002).

PRELIMINARY STATEMENT

On August 11, 2003, Petitioner filed a complaint of discrimination with the Florida Commission on Human Relations (Commission). On July 23, 2004, the Commission issued a "no cause" determination. Petitioner requested an administrative hearing, and the Commission referred the matter to DOAH to conduct the hearing.

At the hearing, Petitioner testified, called six other witnesses, and submitted six exhibits for admission into evidence. Respondent called no witnesses and submitted two exhibits for admission into evidence. The ALJ took direct testimony from Petitioner and admitted ALJ exhibit into evidence.

The identity of the witnesses and exhibits, and any rulings regarding each, are reported in the record of the hearing. The one-volume Transcript of the hearing was filed on December 6, 2004. The parties timely filed their respective proposed recommended orders on December 16, 2004.

FINDINGS OF FACT

1. Petitioner is a handicapped person. Petitioner is bipolar and has episodes of psychosis and occasional ideations of suicide and homicide.

2. On January 14, 2003, Petitioner returned to work after an extended vacation, during which he suffered a psychotic episode and was diagnosed with his handicap. Respondent scheduled an in-office hearing, identified in the record as a "fit-for-duty hearing," because Respondent was concerned for the safety of Petitioner and other employees. Respondent denied Petitioner's request to postpone the hearing for one day to allow Petitioner to get back into "the swing of work routine."

3. Petitioner requested 30 days of accrued personal leave. Respondent granted the request, and Petitioner was due back on the job on February 18, 2003.

4. At the conclusion of the 30-day leave, Respondent granted Petitioner's request for medical leave. The medical leave began on February 18, 2003, and Petitioner was scheduled to return to work on July 3, 2004.

5. Respondent's policy requires every employee that is on medical leave, including Petitioner, to be certified by a physician that the employee is fit to return to work, with or without reasonable accommodation. A physician's certification is a prerequisite for any employee on medical leave to return to his or her job after medical leave.

6. During Petitioner's medical leave, Petitioner sought treatment from several physicians. As of the date of the administrative hearing, no doctor had certified Petitioner as

fit to return to work because Petitioner consistently refused to take medication prescribed for his handicap.

7. After going on medical leave, Petitioner received short-term disability benefits and, at the time of the administrative hearing, was receiving long-term disability benefits. The long-term benefits were scheduled to expire in August 2005. Petitioner is not contractually entitled to long-term disability benefits unless Petitioner is unable to perform all of the material and substantial duties of his regular occupation.

8. When Petitioner's medical leave ended on July 3, 2004, Petitioner was not medically certified as fit to return to work. Petitioner refused to take medication prescribed for his condition and continued to receive long-term disability benefits.

9. Respondent refused to accommodate Petitioner any further with additional leave. Respondent terminated Petitioner's employment on July 3, 2004.

CONCLUSIONS OF LAW

10. DOAH has no jurisdiction over Petitioner's claim for relief under Section 448.045, Florida Statutes (2002). § 448.103, Fla. Stat. (2002). However, DOAH has jurisdiction over the parties and the subject matter of Petitioner's claim for relief under Chapter 760, Florida Statutes (2002).

§§ 120.569 and 120.57(1), Fla. Stat. (2004). The parties received adequate notice of the administrative hearing.

11. Federal discrimination law may be used for guidance in evaluating the merits of claims arising under Chapter 760, Florida Statutes (2002). Florida courts construe disability discrimination actions under the Florida Civil Rights Act in conformity with the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. Section 12111(8), as interpreted by federal courts. Wimberly v. Securities Technology Group, Inc., 866 So. 2d 146 (Fla. 4th DCA 2004); Tourville v. Securex, Inc., 769 So. 2d 491 n.1 (Fla. 4th DCA 2000); Greene v. Seminole Electric Co-op., Inc., 701 So. 2d 646 (Fla. 5th DCA 1997).

12. The general rule describing the burden of proof in discrimination cases involving circumstantial evidence was first enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-803 (1973). However, the charge of discrimination in McDonnell Douglas involved an alleged violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sections 2000e through 2000e-17, (Title VII), rather than an alleged violation of the ADA.

13. Unlike Title VII discrimination cases in which race or sex are rarely admitted as motives for adverse employment actions, employers, including Respondent, generally admit that they take adverse employment actions against handicapped persons

such as Petitioner solely as a result of the handicap. Brand v. Florida Power Corp., 633 So. 2d 504, 508 (Fla. 1st DCA 1994). Although the Title VII criteria utilized by the court in McDonnell Douglas are, as a practical matter, inapplicable to handicap discrimination cases under the ADA, the shifting burden of proof utilized in McDonnell Douglas is applicable to handicap discrimination cases such as this proceeding. Brand, 633 So. 2d at 509-510.

14. In order for Petitioner to make a prima facie case of disability discrimination under the ADA, Petitioner must show by a preponderance of the evidence that he is a handicapped person, he is a qualified employee, Respondent took an adverse employment action against Petitioner solely because of the handicap, and Respondent had knowledge of the disability or considered Petitioner to be disabled. Gordon v. E.L. Hamm & Associates, 100 F.3d 907, 910 (11th Cir. 1996). It is undisputed that Petitioner is a handicapped person, Respondent took adverse employment actions against Petitioner solely because of Petitioner's handicap, and Respondent had actual knowledge of Petitioner's handicap.

15. Petitioner did not show that he was a qualified employee. Petitioner did not show that, at the time of the adverse employment actions, Petitioner could perform the essential functions of his job, with or without reasonable

accommodations, within the meaning of 42 U.S.C. Section 12112(a). Compare Wood v. Green, 323 F.3d 1309, 1312 (11th Cir. 2003) and Cramer v. Florida, 117 F.3d 1258, 1264 (11th Cir. 1997) (each stating the cited definition of a qualified employee under the ADA) with Brand, 633 So. 2d at 510 (defining a qualified employee under Title V of the Rehabilitation Act of 1973, 29 U.S.C. Section 791, to be an individual that is qualified for a position "apart from his or her handicap").

16. Petitioner was not a qualified employee because there was a genuine, substantial risk that Petitioner could injure himself or others, and there was no evidence that Respondent could modify the job to eliminate the risk. See Brand, 633 So. 2d at 509 (citing Chiari v. City of League City, 920 F.2d 311, 317 (5th Cir. 1991) for the cited factual test of a qualified employee). Petitioner's diagnosis included episodes of psychosis and occasional ideations of suicide and homicide. The diagnosis created a reasonable basis for Respondent to conclude that Petitioner presented a genuine, substantial risk of injury to Petitioner or other workers.

17. Respondent attempted to verify Petitioner's fitness for employment to ensure the safety of Petitioner and other employees. An employer may inquire as to the ability of an employee to perform the essential functions of the job, including a medical examination of an employee that is job-

related and consistent with a business necessity. See 29 C.F.R. § 1630.14(c).

18. Petitioner elected to take personal leave followed by medical leave. Petitioner refused to take the medication needed to render him fit to perform his job. No physician would certify Petitioner as fit to perform his job in the absence of the requisite medication, and Petitioner applied for and received long-term disability benefits.

19. Petitioner's claim that he is a qualified employee presents an apparent contradiction with the claim of total disability that Petitioner made in order to receive disability benefits. See Cleveland v. Policy Management Systems Corporation, 526 U.S. 795, 805-806, 119 S. Ct. 1597, 143 L. Ed. 2d 966 (1999)(holding that a claim of total disability in an application for Social Security benefits presents an "apparent contradiction" with a claim that the applicant is a qualified employee under the ADA). Petitioner bears the burden of submitting evidence that explains the apparent contradiction. Cleveland, 526 U.S. at 806. Petitioner did not explain the apparent contradiction. Rather, Petitioner confirmed that he continued to refuse to take his medication and continued to receive long-term disability benefits based on an admission of total disability.

20. An employee that admits he is totally disabled is not a qualified employee. See Cramer, 117 F.3d at 1264 (holding that plaintiffs who admitted disability for purposes of the worker's compensation law in Florida were not qualified employees, within the meaning of the ADA, who were able to perform their job duties with or without accommodation). At the time of the hearing, Petitioner was totally disabled, received disability benefits, failed to explain the apparent conflict between the receipt of disability benefits and the claim that he was a qualified employee, and refused to take the medication necessary for medical certification that he was fit to perform his job duties.

21. Respondent provided reasonable accommodations to Petitioner to allow Petitioner to seek medical treatment and titrate his medication. Respondent granted personal and medical leave to Petitioner that exceeded 16 months. Petitioner consistently refused to take his medication through the date of the administrative hearing.

22. Nothing in the term "reasonable accommodation" requires Respondent to wait for an indefinite period for an accommodation to have its intended effect. Rather, the term must be construed to mean an accommodation that presently, or in the immediate future, enables Petitioner to perform the essential functions of his job. Wood, 323 F.3d at 1313-1314.

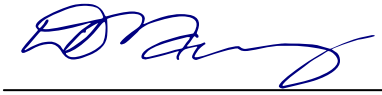
23. At the time of the hearing, Petitioner had refused medication for over two years. The concept of reasonable accommodation does not require Respondent to wait indefinitely until Petitioner titrates his medication. Nor does the definition of a qualified employee require Respondent to reinstate Petitioner in his former position at a time that Petitioner's diagnosis presents a genuine, significant threat of harm to himself or other employees.

RECOMMENDATION

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

RECOMMENDED that the Commission enter a final order finding that Respondent did not unlawfully discriminate against Petitioner by convening a "fit-for-duty hearing" or by subsequently terminating Petitioner's employment.

DONE AND ENTERED this 21st day of December, 2004, in Tallahassee, Leon County, Florida.



DANIEL MANRY
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Filed with the Clerk of the
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this 21st day of December, 2004.

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.