STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

KAREN HOWE, PERSONAL REPRESENTATIVE OF THE ESTATE OF STEPHEN HOWE,	)	
Petitioner,	)	
vs.	)	Case No. 04-3236
WESTERN AND SOUTHERN FINANCIAL GROUP,	)	
Respondent.	)	

RECOMMENDED ORDER

Administrative Law Judge Don W. Davis of the Division of Administrative Hearings (DOAH) held a formal hearing in this cause in Pensacola, Florida, on August 23, 2005. The following appearances were entered:

APPEARANCES

For Petitioner: Daniel Stewart, Esquire
4519 Highway 90
Pace, Florida 32571

For Respondent: Linda Bond, Esquire
Allen, Norton and Blue, P.A.
906 North Monroe Street, Suite 100
Tallahassee, Florida 32303

Alice Fitzgerald, Esquire
Western and Southern Financial Group
400 Broadway
Cincinnati, Ohio 45202-3341

STATEMENT OF THE ISSUE

The issue for determination is whether the Western and Southern Financial Group (Respondent), violated the Florida Civil Rights Act of 1992 (FCRA) in terminating employment of Stephen Howe (Petitioner) without reasonable accommodation. § 760.10, Fla. Stat.

PRELIMINARY STATEMENT

Petitioner filed a Charge of Discrimination against Respondent with the Florida Commission on Human Relations (FCHR) on or about May 1, 2003, alleging his termination by Respondent was the result of discrimination on the basis of disability.

On or about August 11, 2004, the FCHR issued its determination: No Cause.

During the investigation period, Petitioner died. Petitioner's widow, Karen Howe, then continued with the claim on decedent Petitioner's behalf as his personal representative.

On or about September 10, 2004, Petitioner's widow filed a Petition for Relief with the FCHR. Initially, the undersigned determined that a jurisdictional basis to hear the matter did not exist and recommended the dismissal of the case by FCHR on that basis. FCHR remanded the matter for a full factual hearing and this proceeding followed. (See the Conclusions of Law below for further discussion of these legal issues.)

During the final hearing, Petitioner's widow, Karen Howe, testified. Further, five depositions, with attachments, were presented by Ms. Howe's counsel and accepted into evidence with the exception of the reserved ruling pertaining to admission of the deposition of Charles Messik. Upon review of these matters, that ruling is receded from and the deposition of Charles Messik is admitted. Additionally, Ms. Howe's counsel presented four other exhibits, which were admitted into evidence.

Respondent presented testimony of four witnesses and eight exhibits.

A transcript of the final hearing was filed on September 15, 2005. The parties requested and were granted leave to file any proposed recommended orders no later than October 26, 2005. Both parties availed themselves of the opportunity, and the Proposed Recommended Order of each party has been reviewed and considered in the preparation of this Recommended Order.

References to Florida Statutes are to the 2005 edition, unless otherwise noted.

FINDINGS OF FACT

1. Respondent is the Western and Southern Life Insurance Company, a subsidiary of Cincinnati-based Western & Southern Financial Group Inc. Respondent is a home service company that requires sales representatives to call on policy holders on a regular basis for sales and service. The district sales office in

Pensacola, Florida, is one of 181 sales offices headed by a district sales manager. Jim Swaim served as the district sales manager for Respondent's Pensacola Office from August 5, 2002 until November 3, 2003.

2. Petitioner Stephen Howe became a Western and Southern sales representative on January 25, 1993, compensated pursuant to a Sales Representative Agreement of that same date, inclusive of the incorporated Sales Representative Schedule of Commissions, setting forth his compensation schedule and job duties. He intermittently served as a sales manager, but voluntarily became a sales representative pursuant to a Sales Representative Agreement dated June 28, 1999. He remained a sales representative until his termination on February 3, 2003.

3. Petitioner was admitted to the hospital and therefore absent from work beginning August 28, 2002, due to an unrelenting headache and elevated blood pressure. The conditions cited by Petitioner's physician were sleep apnea and pheochromocytoma (pheo), which is a tumor on the adrenal gland that causes excess adrenaline production. Treatment for pheo usually takes four to five weeks, and is conducted on an outpatient basis.

4. Petitioner's disability was documented in September 2002, by Dr. Shawbilz, a neurologist, who reported at that time to Respondent personnel and described Petitioner's dizziness, syncope

and headaches. It was noted that Petitioner could not drive at that time due to obstructive sleep apnea, syncope and headache.

5. Petitioner's family doctor, Dr. Mayeaux, prepared a report to Respondent on October, 2002, defining Petitioner's condition as serious and “requiring a period of incapacity from work and subsequent treatment”. Petitioner’s condition included high blood pressure, syncope, tremor, diaphoresis and palpitations.

6. On October 2 and 8, 2002, Dr. Mayeaux sent a letter to Lori Mitchell, a registered nurse and the head of the Benefits Department of Respondent, outlining Petitioner's severe uncontrolled hypertension and a rare debilitating adrenal tumor. The doctor did not feel Petitioner should be working at that time. Later, in further correspondence dated October 28, 2002, Dr. Mayeaux opined Petitioner should not operate a motor vehicle at that time.

7. On November 18, 2002, Dr. Mayeaux forwarded another letter to Respondent's benefit department outlining additional concerns about Petitioner’s syncope, chest pain, palpitations, diaphoresis, and disability to perform meaningful work or drive.

8. On December 19, 2002, Dr. Mayeaux forwarded another letter to Respondent noting the now determined severe sleep apnea of Petitioner as a basis for daytime somnolence and drop attack/syncope. He again opined that Petitioner needed surgical relief from ear, nose and throat (ENT) issues to address sleep apnea prior to return to work. Respondent initially denied insurance for the surgery to

address these issues while also denying Petitioner’s disability insurance claim.

9. On December 30, 2002, Dr. Mayeaux again wrote to Lori Mitchell and noted Petitioner’s additional adrenal gland tumor. He opined, "[Petitioner] may not work until these problems have been satisfactorily resolved."

10. On January 23, 2003, Mayeaux again wrote to Respondent’s Benefits Department continuing his disability opinions and noting, "aggressive surgical evaluation and intervention is underway at this time."

11. Petitioner’s blood pressure continued to be labile and uncontrollable, but Mayeaux hoped to control this with surgery for Petitioner’s tumor.

12. Sleep apnea, another of Petitioner’s disabilities, exists when a sleeping person experiences episodes where the individual is without breath. Petitioner did not respond well to the non-surgical treatment for this disorder, in which a machine is used to force air into the sleeping person’s breathing passages. The machine is called a “C-PAP”. Such treatment was prescribed for Petitioner without the best of success. Mayeaux hoped future surgery for the sleep apnea would help Petitioner’s severe case of this disorder by enlarging Petitioner’s breathing airway. The sleep apnea symptoms would have prevented him from driving in the course of his work. Petitioner’s wife observed Petitioner’s condition worsening beginning around

August 2, 2002, when Petitioner would come home once or twice a day while working to take a nap.

13. The tumor on Petitioner’s adrenal glands substantially limited major life-sustaining activities. As established by deposition testimony of Dr. Mayeaux, hormones secreted by Petitioner’s adrenal glands were affected by the tumor on his adrenal glands. There was evidence in Petitioner’s blood of over-production of adrenaline, with a by-product being excessive production of epinephrine. That he considered this to be a substantially limiting factor is one reason Mayeaux opined that Petitioner should not be working in his then-existing condition.

14. Deposition testimony of Lori Mitchell establishes that she wrote a letter to Petitioner on September 9, 2002, requesting disability information for short-term disability. Subsequently, she sent a letter to Petitioner approving disability beginning September 13, 2002 Per Petitioner’s medical release provided to her, she had the ability to consult with Dr. Mayeaux. Mitchell was aware of all information received from Dr. Mayeaux.

15. Mitchell was aware that Respondent's Family Medical Leave Act (FMLA) Department sent Petitioner a letter telling him that his absence of August 28, 2002, through October 8, 2002, was recorded as a "serious health condition." She also knew short-term disability was authorized for Petitioner through her department for

the period ending October 8, 2002, following a review of his medical records.

16. Short Term Disability is defined under Respondent's plan for associates "who are regularly unable to per form normal duties of their regular occupation due to sickness or injury."

17. Mitchell was also aware of the "pheo" tumor, which can develop on an individual’s adrenal glands. She understood Dr. Mayeaux’s letter to her describing the tumor in Petitioner’s case as "debilitating" to mean "impairing him." She understood Dr. Mayeaux's letter of October 10, 2002, to her to mean Petitioner was prevented "from performing his daily activities" by his symptoms.

18. Mitchell’s supervisor, Noreen Hayes, explained that the approval of the extension of short-term disability benefits through November 30, 2002, was based on "all doctor's notes associated with [Petitioner’s] condition."

19. Mitchell was familiar with Dr Mayeaux's December 5, 2002 letter concerning the sleep apnea and breathing issues of Petitioner, as well as other letters from Mayeaux on December 30, 2002, and January 23, 2003. She identified a Respondent Medical Leave of Absence form executed on December 12, 2002, where his doctor opined Petitioner had "a serious health condition that makes you unable to perform the essential functions of your job" and that the condition would continue until rectified.

20. Dr. Terrell Clark is Respondent's Vice President and Medical Director. He recalled information received regarding high blood pressure and sleep apnea to "evaluate what time might be appropriate for [Petitioner's] disability." He was also aware of a concern for brain problems due to Petitioner's head CT scan. He was aware of the "pheo" tumor diagnosis on Petitioner's adrenal gland and resultant production of abnormal hormones. He also agreed that the condition was very treatable. He also was acquainted with the correspondence of Dr. Mayeaux on Petitioner's behalf.

21. Dr. Mayeaux opined it would be possible for Petitioner to have performed an office-type job that did not require driving. His ability to provide service to his clients was otherwise unimpaired. During August, 2002 to February, 2003, Petitioner was in constant contact with Respondent personnel and his clients by phone. In the words of Karen Howe, "he was always on the phone" until the end of his employment. The phone was part of his normal job activity.

22. During this same time, Petitioner filled out all his clients' paperwork and paperwork for their families in regard to financial matters. He was also able to give advice to clients as he always had.

23. There are clerical positions in the field offices of Respondent. In Cincinnati, Ohio, Respondent has hundreds of clerical positions that do not require driving as an essential

function of the job. The company has 1,900 clerical sedentary positions. Most of these do not require driving.

24. Dr Mayeaux sent a letter to Respondent dated January 30, 2003, stating that Petitioner could return to work so long as he did not drive. He also told Petitioner earlier that he could work if someone else drove.

25. No direct credible evidence was presented that having Petitioner's wife drive him would not result in a reasonable accommodation for Petitioner. The company does not insure the vehicle Petitioner drove as part of his work. There is also no direct credible evidence that Respondent required Petitioner to be covered with insurance over and above what he and his wife ordinarily carried on their vehicle. No evidence was presented assailing the driving abilities of Petitioner's wife.

26. Petitioner's job did not require that he drive at any certain time. His wife often rode with her husband while he was meeting with his clients or Respondent personnel during the years of his employment. She routinely went by the local office, saw his manager, and no one ever objected to her riding with Petitioner.

27. Petitioner's wife asked his district manager, on her husband's behalf, three or four times if she could drive her husband after he was told by his doctor not to drive. Her requests were denied. She was willing to do this without pay, with the vehicle he customarily used, that they both owned, and kept well insured. She

drove him to his last day at work where, when informed that he was fired, he cried.

28. Thomas Johnson is the company vice president responsible for administering Respondent's leave-of-absence policy. Respondent personnel monitor when an employee "can return to work." Johnson initially received a form noting Petitioner began his leave *of* absence as a result of illness on August 28, 2002. Johnson receives information from a Respondent committee that meets to discuss whether to allow accommodations for injured employees. Pursuant to the committee's action, Johnson notified Petitioner that Short Term Disability was approved through November 30, 2002.

29. Johnson wrote a letter on January 23, 2003, to Petitioner to return to work on full-duty status on February 2, 2003, or be terminated. This letter was based on a meeting of his department's medical and legal personnel.

30. At the meeting, which resulted in Johnson's letter to Petitioner, all of those in attendance decided not to accommodate Petitioner. At that meeting they never discussed restructuring or modifying Petitioner's position or reassigning him, even though the only restriction Johnson was aware of was the restriction on Petitioner's driving.

31. At that meeting, they did discuss time for Petitioner to provide medical information in regard to Petitioner's fitness to return to work. As a result of the denial by the committee of further

Short Term Disability Leave, Petitioner's right to a further leave of absence ended, absent a "fitness for duty" report.

32. Johnson informed Petitioner of the Respondent committee's action by another letter dated January 27, 2003, sent from Cincinnati, Ohio, to Petitioner in Pensacola, Florida, through regular post office mail to a numbered post office box. Per that letter, Johnson required that Petitioner have the requisite fitness for duty report by February 3, 2003, or be terminated. Petitioner was not provided the appropriate form for the report as part of this communication and he was not given any time to obtain the information, yet he was terminated for not having it.

33. Johnson instructed Petitioner's District Manager on February 3, 2003, that Petitioner could not work that day because of "unauthorized leave of absence".

34. Johnson sent a letter on February 3, 2003, terminating Petitioner. The clause Johnson used to terminate Petitioner was "absence for two days without notice."

35. Johnson received a letter from Dr. Mayeaux dated January 30, 2003, after he had sent his February 3, 2003 letter to Petitioner. Mayeaux's letter stated that Petitioner could work as long as he did not drive. Petitioner showed up for work on February 3, 2003, with only the letter of January 23, 2003.

36. The employment agreement provided by Respondent to Petitioner does not spell out what medical evidence is to be

provided to prevent application of the "unauthorized leave of absence" clause used to terminate Petitioner.

37. By company policy, there is no right for an unpaid leave of absence because of a disability claim.

38. Johnson was fully informed and received regular information from Lori Mitchell regarding Petitioner’s condition as reported by his doctors to her.

39. When an employee such as Petitioner is absent from the office, this fact is reported to Respondent’s home offices without notice to the affected employee.

40. Dean Vonderheide is the director of Respondent’s benefit department. His testimony establishes that the Summary Plan Description given to Respondent employees for Short Term Disability provides no information regarding where an employee can get the forms to file claims.

41. A terminated employee is not entitled to long-term disability benefits.

42. Neither Lori Mitchell, R.N.; vice president Dr. Clark; or vice president Johnson made any effort to contact Petitioner or his doctor to supplement or add to what was included by Dr. Mayeaux in his correspondence dated January 30, 2003.

43. Petitioner was wrongfully terminated by Respondent on the basis of Petitioner’s disability without fair consideration by Respondent of Petitioner’s request for accommodation, i.e. , that his

wife be permitted to chauffer Petitioner in the course of his continued employment or that alternative employment for Petitioner within Respondent's company be considered by Respondent. Such provision had been made for a former salesperson of Respondent.

44. Petitioner lost wages from his termination of employment with Respondent up and through his death on July 6, 2003. The income tax records in evidence show that Respondent paid Petitioner a total of $42,057.09 in the taxable year 2002.

CONCLUSIONS OF LAW

45. Whether jurisdiction exists in this forum to consider and award recompense to Petitioner's estate for wrongful termination by Respondent of Petitioner's employment on the basis of Petitioner's disability, without affording Petitioner a reasonable accommodation, is more fully discussed below in this Recommended Order.

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

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

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

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

49. In the instant case, Petitioner's widow alleges that Respondent discriminated against Petitioner based on his disability of sleep apnea, his adrenal gland tumor and subsequent effects on his physical health by not granting him reasonable accommodations in his employment. Testimony received at final hearing, coupled with medical correspondence presented at that hearing, indicates that Petitioner could have continued

in his employment with reasonable accommodation. Petitioner's widow has shown a prima facie case of discrimination on Petitioner's behalf, with the exceptions noted below in this Recommended Order.

50. A person is disabled when: (a) he or she has a physical or mental impairment that substantially limits one or more major life activities, i.e., the inability to breathe while sleeping or control body metabolism as the result of an adrenal gland tumor; (b) he or she has a record of having an impairment; or (c) he or she is regarded as having an impairment. 42 U.S.C. § 12102(2); 29 C.F.R. § 1630.2(g)(I). Petitioner's widow has demonstrated (a) that Petitioner was a disabled person within the meaning of the Florida Civil Rights Act and the ADA; and (b) he was "qualified" to perform the job apart from his disability.

51. Respondent's assignment of duties to Petitioner, requiring that he, and he alone, drive his car in the course of his job, was without the reasonable accommodation of permitting Petitioner to use a chauffer at his own expense, and must be considered pretextual.

52. Petitioner's wife has proven that Petitioner's disability would not, with the reasonable accommodation previously sought by she and her late husband, interfere with his ability to perform the job for which he was hired. A qualified individual with a disability is one who can perform

the essential functions of the job. 42 U.S.C. § 12111(8). The term "essential functions" means the fundamental job duties of the employment position. 29 C.F.R. § 1630.2(n)(1). In this case, the evidence indicates that Petitioner, with the accommodations previously denied by Respondent, was qualified to continue to work as an insurance salesman for Respondent.

53. The ADA imposes a duty on employers to provide reasonable accommodations for known disabilities unless doing so would result in undue hardship. Hernandez v. Prudential Insurance Company, 877 F. Supp. 1160, 1165 (M.D. Fla. 1997). Respondent knew Petitioner's disability. No credible evidence was presented, however, that Respondent's requirement that Petitioner drive his own automobile was conducive to the reasonable accommodation requested by Petitioner and his wife. Such accommodation was certainly feasible.

54. Based on the evidence received, Petitioner was refused a reasonable accommodation for his disability, which was within Respondent's power to grant.

55. Finally, we come to the possible remedies that would, but for Petitioner's death, have been available in this situation. Normally, were Petitioner still alive, a recommended order would issue to the FCHR, recommending the entry of a final order finding that Respondent had imposed an illegal employment practice on Petitioner, directing the imposition of penal remedies inclusive of the re-

employment of Petitioner, full award of back pay and benefits in an approximate amount calculated on the available evidence (in this instance, payments made to Petitioner in the taxable year prior to his employment termination). In that regard, such a recommended order would note that Petitioner lost wages from termination of employment on February 3, 2003, up and until his death on July 6, 2003. The income tax records in evidence show that Respondent paid Petitioner a total of $42,057.09 in the taxable year 2002. Accordingly, if his earnings for the 2003 tax year had been similar and his employment had continued until his death, an extrapolated figure (5/12 x $42,057.09) of $17,523.78 would approximate the amount of wages that Petitioner would have expected to have received from Respondent for the period February 3, 2003 through July 6, 2003.

56. Such a remedy is not possible in this case. Petitioner is deceased. He died before he could even perfect his request for a formal administrative hearing through FCHR's Petition for Relief process. The Petition for Relief was filed and pursued by Petitioner’s estate. It is axiomatic that an administrative agency may only do what it is statutorily empowered to do. Nowhere in the statutory authority contained in Part I, Chapter 760, Florida Statutes, has the undersigned been able to decipher any basis for FCHR to hear and dispose of cases where the complainant of a violation of personal employment rights is deceased. Remedies available for

consideration where there has been a violation of employment rights are penal in nature and are not available where the complainant has died. Caraballo v. South Stevedoring, Inc. ,932 F. Supp. 1462, (S.D.Fla,1996)

57. The wrongful treatment of Petitioner can only be considered a personal violation of his rights, visited upon him by Respondent. Based on the evidence presented, that violation could potentially be considered a tortuous action. As such, relief for Petitioner's estate may well lie within the jurisdiction of a forum equipped to provide the equitable relief suggested in this matter. See Knowles v. Beverly Enterprises-Florida, Inc., 898 So. 2d 1, at page 8, (Fla. 2004) issued on December 16, 2004. The statutory scheme set forth in Chapter 760, Florida Statutes, does not, however, make provision for such equitable relief to be provided in this forum when, as in this matter, the Petitioner is deceased.

58. Jurisdiction is obviously essential to fashioning a remedy in any forum. Despite a request made at the final hearing to the parties to provide the undersigned with a basis to presume jurisdiction, there has been no response to that request. Such equitable jurisdiction does not exist in the forum of the Division of Administrative Hearings for a matter like the case at bar.

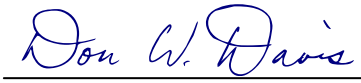
RECOMMENDATION

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

RECOMMENDED:

That a Final Order be entered dismissing the Petition for Relief for lack of jurisdiction.

DONE AND ENTERED this 16th day of November, 2005, in Tallahassee, Leon County, Florida.



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

Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of November, 2005.

COPIES FURNISHED:

Daniel Stewart, Esquire
4519 Highway 90
Pace, Florida 32571

Alice M. Fitzgerald, Esquire
Western & Southern Financial Group
400 Broadway
Cincinnati, Ohio 45202-3341

Linda G. Bond, Esquire
Allen, Norton & Blue, P.A.
906 North Monroe Street, Suite 100
Tallahassee, Florida 32303

Cecil Howard, General Counsel
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32303-4149

Denise Crawford, Agency Clerk
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32303-4149

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.