STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HORACE BROWN, JR.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 04-4028
	)	
DEPARTMENT OF CORRECTIONS,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Upon due notice, a disputed-fact hearing was conducted in this case on March 29, 2005, in Tallahassee, Florida, before Ella Jane P. Davis, a duly-assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Horace Brown, Jr., pro se
2012 Bradley Avenue
Valdosta, Georgia 31602

For Respondent: Mark Simpson, Esquire
Department of Corrections
2601 Blair Stone Road
Tallahassee, Florida 32399

STATEMENT OF THE ISSUE

Whether Respondent employer is guilty of an unlawful employment practice, to wit: failure to accommodate Petitioner's handicap and termination of Petitioner, on the basis of handicap discrimination.

PRELIMINARY STATEMENT

On or about May 24, 2004, Petitioner filed a Charge of Discrimination with the Florida Commission on Human Relations (FCHR), alleging that Respondent, Department of Corrections, discriminated against him on the basis of handicap. On October 5, 2004, FCHR entered a Determination: No Cause.

Petitioner timely-filed a Petition for Relief with FCHR on November 1, 2004. On or about November 5, 2004, the cause was referred to the Division of Administrative Hearings. Petitioner included an Americans With Disabilities Act (ADA) claim within his Petition. Although cases decided under ADA may be instructive in Federal Title VII and State Chapter 760, Florida Statutes cases, the Division is without jurisdiction to entertain an ADA claim, or any other claim outside Chapter 760, Florida Statutes, and Petitioner was orally informed of this.

At the hearing on March 29, 2005, Petitioner presented the oral testimony of Brenda Brown and testified on his own behalf. Petitioner's Exhibits one, three, five, six, and eight were admitted in evidence. Respondent presented the oral testimony of Martie Taylor. Respondent's Exhibits one and two were admitted in evidence.

Official recognition was taken of two reported cases, one of which included the entire reported history of Brown v. Department of Corrections, PERC Case CS-2003-351 at 19 FCSR 9,

in which Petitioner and Respondent were both involved, and in which they litigated some of the same issues as they have litigated in this case.

No transcript was provided.

Both parties filed Proposed Recommended Orders, which have been considered in preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is an adult African-American male. After retiring from the United States Army with an excellent reputation, Petitioner was hired by Respondent Department of Corrections. When Respondent hired Petitioner it was aware he had a 10 percent physical impairment, as assigned by the Veterans' Administration (VA).

2. Petitioner completed 512 hours of training and was certified as a Correctional Officer, pursuant to the Florida Statutes. At all times material, he was a "vested" State career service employee.

3. Petitioner sustained an on-the-job injury on February 11, 2003, while employed by Respondent. Apparently, Petitioner was adequately performing his job duties up through the date of his injury. Respondent Employer provided workers' compensation and medical benefits as required by Chapter 440, Florida Statutes. These benefits were monitored by the State Risk Management Office within the Department of Insurance.

4. The Employer instructed Petitioner not to return to work until he was medically released to return to work.

5. Petitioner's injury was a torn medial meniscus (knee joint injury). He underwent collagen injections and lengthy physical therapy, but no surgery. His treating physician was Dr. Aguero.

6. On July 21, 2003, Petitioner underwent a Functional Capacity Evaluation by a physical therapist. The report of this evaluation was typed up two days later and showed, in pertinent part, that:

> Mr. Brown demonstrated the capacity to sustain work tasks in the light strength category of physical demands. His . . . previous job was corrections officer. That job is estimated to be in the medium strength category. Known job duties of concern or particular relevance include: ability to move rapidly and to perform take-down and restraint procedures.

7. Risk Management employees urged the treating physician to release Petitioner to return to work.

8. On July 30, 2003, Dr. Aguero released Petitioner to return to work on light duty, with restrictions on standing, walking, and lifting.

9. Presumably, Dr. Aguero believed Petitioner would be reassigned by the employer to appropriate light duty work until he reached maximum medical improvement from his knee injury.

10. The Employer Department of Corrections, in fact, did assign Petitioner to "alternate duty" work when he returned to the correctional institution on or about July 30, 2003. Petitioner worked in the mail room for approximately three weeks thereafter.

11. As of July 30, 2003, in addition to his 10 percent rating of permanent partial disability from the VA, Petitioner had gained a great deal of weight due to inactivity during the post-knee injury period. He also suffered from arthritis.

12. On or about August 18, 2003, Dr. Aguero filled out a Workers' Compensation Maximum Medical Improvement (MMI) Form, designating that Petitioner had improved from his on-the-job injury as much as could be reasonably medically expected. As of that date, Dr. Aguero assigned him an additional two percent permanent partial disability rating, due to his on-the-job accident. The two percent rating carried continued work restrictions.

13. Dr. Aguero provided the results of Petitioner's July 21, 2003, Functional Capacity Test score to the Employer (see Finding of Fact 6) attached to his MMI rating.

14. Dr. Aguero's employment restrictions for Petitioner, post-MMI, as stated on the official MMI Form, say "See FCE," meaning that Dr. Aguero had adopted, as his restrictions on Petitioner, the functional abilities described in the July 21,

2003, Functional Capacity Evaluation Report. This meant that Petitioner was found by the physical therapist testing him to be unable to do these tasks on July 21, 2003, and the medical physician was saying for July 30, 2003, that Petitioner had achieved all the improvement he was going to achieve from the knee injury and he should not be required to do these activities on the job because he could not do them and trying to do them could be harmful to him. These restrictions included no extended periods of standing/walking, no balancing, and no significant lifting. Also, Petitioner was listed as being unable to lift 50 pounds, routinely.

15. Essential Function A-4 of the Essential Functions of a Correctional Officer, which the Department of Corrections has adopted as its minimum standards for employment as a Correctional Officer, requires that a Correctional Officer be able to:

> Sit, walk, and stand for prolonged periods of time; stoop, squat, kneel, bend, run, and lift approximately 50 pounds on a routine basis.

16. Within a day of receiving the MMI package, Petitioner's highest superior, the Warden, sent Petitioner home. Petitioner was subsequently provided a Predetermination Conference and a dismissal letter.

17. Petitioner claimed to have begged to stay on in alternate duty positions, but neither he nor any of his local supervisors reported these requests for light duty or other accommodation of his permanent condition to the Employer's Americans With Disabilities Act Coordinator, Martie Taylor. It was not necessary under Chapter 760, Florida Statutes, for Petitioner to do more than ask his supervisors for an accommodation, but Ms. Taylor testified that even if Petitioner's supervisors had properly relayed his requests for accommodation to her, she knew of no way the Employer could have accommodated Petitioner's lifting restrictions.

18. Petitioner related that supervisors made comments to him that they needed a fully functional "soldier in the field" and that his obesity and inability to run and subdue prisoners rendered him not fully functional as a correctional officer.

19. Petitioner believes that his large size is an asset in commanding and subduing inmates but that Respondent is prejudiced against his size.

20. Petitioner testified that he knew of insulin-dependent diabetics and of other obese correctional officers who did very well at regular employment with the Employer and that he knew of other correctional officers whom the Employer had permitted to stay employed at light duty longer than he had been allowed to stay on light duty. However, Petitioner had no knowledge of

whether these employees had reached MMI or of which essential requirements of the job of Correctional Officer they were able, or unable, to perform while they were on light duty.

21. In fact, the Department of Correction's Procedure 208.10, covering "Career service employee's right to alternate duty assignments," reads, in pertinent part:

> SPECIFIC PROCEDURES
> (1) COORDINATION OF ALTERNATE DUTY: . . .
>
> * * *
>
> (c) The department does not have specific alternate duty positions. The employee will remain in her/his current position while performing alternate duties.
>
> * * *
>
> (i) Certified Officers:
> 1. Individuals employed in a certified officer's position must be prepared and able at all times to perform the essential functions of his/her position.
> 2. If approved for alternate duty, an employee in a certified officer's position will be temporarily assigned to non-certified officer duties for the period of time during which the employee is determined by the Division of Risk Management to have a temporary partial disability.
>
> * * *
>
> (8) MAXIMUM MEDICAL IMPROVEMENT
>
> (c) When maximum medical improvement has been determined by the treating physical and information has been provided to the Division of Risk Management, the employee will be reassigned the duties and responsibilities of her/his regular position

> unless the employee cannot perform the essential functions of the position. In no way will the employee be allowed to continue to perform alternate duties once the maximum medical improvement has been determined by the Division of Risk Management. (Emphasis supplied)

22. Petitioner pursued his employment rights before the Public Employees Relations Commission (PERC). PERC's Final Order (January 8, 2004) on this matter determined as a factual finding that Petitioner could not perform the essential duties of a correctional officer and accepted the hearing officer's findings of fact. Brown v. Dept. of Corrections, 19 FCSR 9 (2004). More specifically, the PERC hearing officer found that "Brown received maximum medical improvement on July 30, 2003, with a two percent impairment," and that "the doctor indicated on the evaluation that Brown has work restrictions and he cannot perform the standing and walking requirements of a correctional officer." At hearing, Brown indicated that he cannot perform the duties of a correctional officer . . . . He also stated that he cannot run . . . . In sum, the Agency demonstrated that it is undisputed that Brown cannot perform the essential duties of a correctional officer." Since there were no appeals, the findings of fact of the PERC hearing officer between the same two parties are res judicata; are presumed correct, and are binding herein as a matter of law. Some findings also constituted admissions of Petitioner.

23. Loss of employment has been very hard on Petitioner and his family.

24. On September 11, 2003, Petitioner applied for a disabled person license plate, reciting that he was so ambulatory disabled that he could not walk 200 feet without stopping to rest, and that he is severely limited in his walk due to an arthritic, neurological, or orthopedic condition. His treating physician signed this application, attesting to Petitioner's listed conditions.

25. Petitioner's Answers to Respondent's Requests for Admission in the instant case concedes that he can perform jobs other than those of a correctional officer.

26. Petitioner's testimony at hearing was to the effect that he still cannot perform all the duties of a correctional officer.

CONCLUSIONS OF LAW

27. 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.

28. While PERC's findings of fact are binding here, the conclusions of law are not binding, because the legal issues and statutes under consideration are different.

29. In order to prove a prima facie case of employment discrimination on the basis of "handicap," pursuant to Chapter 760, Florida Statutes, Petitioner must establish (1) that he has a disability; (2) that he is a "qualified individual," which is to say, that he is able to perform the essential functions of the employment position he holds or seeks, with or without reasonable accommodation; and (3) that the employer unlawfully discriminated against him because of his disability. Hilburn v. Murata Electronics North America, Inc., 181 F.3d 1220 (11th Cir. 1999); Gordon v. E.L. Hannin & Assoc., Inc., 100 F.3d 907 (11th Cir. 1999).

30. Petitioner submits that he should be entitled to reasonable accommodation of his handicap, but each of the "accommodations" he has proposed results in his never having to perform the essential functions of a correctional officer. This is per se an unreasonable request. The difference between this case and many others is that Petitioner has reached MMI and employers are not required to eliminate essential functions of a job description indefinitely. See Rio v. Runyan, 972 F. Supp. 1446 (S.D. Fla. 1997).

31. Petitioner has not met the prima facie standard, and his case must be dismissed.

32. Respondent's Proposed Recommended Order contains unnecessarily harsh language against Petitioner, personally, and

against Petitioner's motives. It prays for attorney's fees upon grounds that the case lacked "foundation," from its inception, and claims that fees will deter similar suits. Such fees may only be awarded by the Commission, and the undersigned recommends against such an award.

RECOMMENDATION

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

RECOMMENDED: that the Florida Commission on Human Relations enter a final order dismissing the Petition for Relief and the Charge of Discrimination herein, and awarding no attorney's fees or costs to Respondent.

DONE AND ENTERED this 9th day of May, 2005, in Tallahassee, Leon County, Florida.

S

ELLA JANE P. DAVIS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 9th day of May, 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.