STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BEULAH M. JOHNSON,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 04-4315
	)	
ALACHUA COUNTY SHERIFF'S OFFICE	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

A hearing was held, pursuant to notice, on June 7, 2005, in Gainesville, Florida, before the Division of Administrative Hearings by its designated Administrative Law Judge, Barbara J. Staros.

APPEARANCES

For Petitioner: Beulah M. Johnson, pro se
Post Office Box 1372
Bunnell, Florida 32110

For Respondent: Linda G. Bond, Esquire
Allen, Norton & Blue, P.A.
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STATEMENT OF THE ISSUE

Whether Respondent violated the Florida Civil Rights Act of 1992, as alleged in the Charge of Discrimination filed by Petitioner on March 18, 2004.[1/]

PRELIMINARY STATEMENT

On March 18, 2004, Petitioner, Beulah M. Johnson, filed a Charge of Discrimination with the Florida Commission on Human Relations (FCHR), which alleged that the Alachua County Sheriff's Office violated Section 760.10, Florida Statutes, by discriminating against her on the basis of race, disability, and religion.

The allegations were investigated and on October 28, 2004, FCHR issued its determination of "no cause" and Notice of Determination: No Cause.

A Petition for Relief was filed by Petitioner on November 29, 2004. The Petition for Relief does not reference race or religion, but only references allegations of discrimination on the basis of disability. FCHR transmitted the case to the Division of Administrative Hearings (Division) on or about December 1, 2004. A Notice of Hearing was issued setting the case for formal hearing on April 7, 2005. On March 14, 2005, Petitioner filed an unopposed request for continuance, which was granted. The hearing was rescheduled for June 7, 2005. The hearing took place as scheduled.

At hearing, Petitioner presented the testimony of Laurie Brink, Carmen Belcher, Patricia Brannon, Doris Legree, Michael Thomas, and testified on her own behalf. Petitioner did not offer any exhibits into evidence. Respondent presented the

testimony of Louise Grimm, Sheriff Stephen Oelrich, and the deposition testimony of Sherry Larson. Respondent offered Exhibits numbered 1, 2, 4 through 7, and 10 through 13, which were admitted into evidence.

A Transcript consisting of one volume was filed on June 23, 2005. On July 20, 2005, Respondent filed a Motion to Extend Time for filing Proposed Recommended Orders. The motion was granted. On August 28, 2005, Petitioner filed a request for an extension of time in which to file proposed recommended orders, which was granted. The parties timely filed Proposed Recommended Orders which have been considered in the preparation of this Recommended Order.[2/]

FINDINGS OF FACT

1. Petitioner is an African-American female who began employment with the Alachua County Sheriff's Office (ACSO) on January 2, 2001.

2. Respondent is an employer as contemplated by Chapter 760, Florida Statutes.

3. Petitioner was hired and worked during her employment with Respondent as a Clerical Technician I in the county jail. The position description for Clerical Technician I includes the following:

WORK CONDITIONS:

Normal office environment. Shift work, including weekends and holidays. Work entails sitting for long periods, bending, light to moderate lifting, pushing, pulling, lifting and carrying.

PHYSICAL REQUIREMENTS:

Sit for long periods
Stand for moderate periods
See at a normal range or with accommodation
Hear at a normal range or with accommodation
Speak, read, and write English understandably
Ambulate independently
Bend, squat, kneel and crawl
Lift/carry 25+ pounds
Manual dexterity

4. The job description also includes the following under the heading, Special Requirements: "Ability to work shift work. May be required to work weekends or holidays."

Allegations Related to Disability

5. On September 4, 2003, Petitioner sustained a back injury while on the job from carrying a large coffee pot full of water. She completed an incident form regarding her injury.

6. At the instruction of her immediate supervisor, Pamela Cuffie, Petitioner was seen by a doctor, who completed a health and work status report dated September 9, 2003. This report placed temporary work restrictions on Petitioner. Initially, the work restrictions were: that she should not perform physical force restraints/combat; should not run, crawl, swim, climb a

ladder; drag or push heavy objects; and limited Petitioner to lifting not more than 10 pounds. The diagnosis was "lumbar sprain."

7. On September 12, 2003, Sheriff Stephen Oelrich sent a memorandum to Petitioner placing her on Temporary Restricted Duty. The memorandum set forth conditions of her restricted duty:

> You have provided a Health and Work Status Report signed by your physician indicating that as of September 10, 2003, you may return to work but will be unable to fulfill one or more of the essential functions of your appointment as a Clerical Technician I.
>
> Therefore, effective September 10, 2003, you are hereby placed on Temporary Restricted Duty....
>
> While on Temporary Restricted Duty, the following conditions shall apply:
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> 1. You shall abide by those physical restrictions as noted by your physician on the Health and Work Status Report dated 09/09/03.
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> 2. Your Temporary Restricted Duty dress will be at the discretion of the assigned Division Commander.
>
> 3. You must obtain the approval of your certifying physician, the Human Resources Bureau and your Division Commander prior to engaging or continuing in Secondary Employment.
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> 4. You shall not work overtime.
>
> 5. You will not be eligible for transfer, special assignment, or promotion.

> An assignment to Temporary Restricted Duty cannot exceed twelve months. If you are unable to return to full, unrestricted duties as a Clerical Technician I at that time, you will be subject to reclassification to a position within your capabilities, and to which you are qualified, or to termination.

8. On September 16, 2003, Petitioner's physician completed a second health and work status report, continuing her initial temporary work restrictions and adding that Petitioner should not operate duty weapons or vibrating tools and should not perform stressful work. The report also reflected that Petitioner will start physical therapy.

9. On October 13, 2003, Petitioner's physician completed a third health and work status report and continuing her previous restrictions and noted that Petitioner would continue physical therapy and schedule a lumbar MRI. Unlike the two previous reports, the diagnosis was "lumbar disc disease."

10. On October 22, 2003, Petitioner's physician completed a fourth health and work status report which continued the previous restrictions adding that Petitioner should not walk 50 percent of the time; that Petitioner should not do work requiring the use of both feet; that work shifts should be limited to eight-hour shifts; and that Petitioner should get work boots. The diagnosis was described as "lumbar sprain/lumbar disc disease."

11. Following the October 22, 2003, health and work status report, Sherry Larson, Human Resources Bureau Chief for Respondent, called the doctor who completed the health and work status reports, Dr. Urban, and inquired as to the need of work boots, especially in light of his recommendation about not using both feet. Ms. Larson informed Dr. Urban that Petitioner performed clerical duties, not law enforcements duties. Following this telephone conversation, Ms. Larson wrote a note on the bottom of the October 22, 2003, report, "Per Dr. Urban, Ms. Johnson can do office work. No use of both feet is limited to no cycling. Work shift 8 hours. No need for work boots."

12. The next two health and work status reports were completed on November 6, and December 2, 2003, which generally referenced the same restrictions but no longer referenced the need for work boots, removed the restriction that she should not use both feet, and added a restriction that Petitioner should not climb stairs 80 percent of the time.

13. Dr. Urban referred Petitioner to Dr. DePaz. Dr. DePaz examined Petitioner on February 24, 2004. He completed a health and work status report on which he wrote, "Light activities-no repetitious motion of the back." He noted that Petitioner should not lift over 25 pounds and included the notation, "Ability to make position changes as needed." The word

"repetitive" is written on the report, but the placement of the word "repetitive" is ambiguous as to what it modifies.

14. All of the health and work status reports signed by Dr. Urban noted the date of injury to be September 4, 2003. For reasons that are not clear from the record, Dr. DePaz referenced a 1985 injury. All of the health and work status reports, including Dr. DePaz's, reflect that Petitioner's injury was work related.

15. Of most significance to the allegations herein, Dr. DePaz noted that Petitioner's restrictions were permanent.

16. Upon receiving Dr. DePaz's health and status report, Ms. Larson informed her supervisor, Mr. Tudeen, and Cindy Weigant, the attorney for ACSO, that Petitioner's restrictions were changed from temporary to permanent.

17. Following receipt of Dr. DePaz's report, an analysis was made of Petitioner's job description and her permanent job restrictions. Of particular concern were the job requirements for light-to-moderate lifting, pushing, pulling, carrying, and bending. A determination was made that Petitioner would not be able to perform the essential requirements of her job on a permanent basis.

18. On March 2, 2004, Sheriff Oelrich wrote a memorandum to Petitioner which reads as follows:

> The Human Resources Bureau is in receipt of medical documentation which places permanent physical restrictions on your ability to lift more than 25 pounds with the additional restrictions of "light activities-no repetitive motion of the back." The job description for your position of Clerical Technician I specifically states that individuals assigned to this classification will be required to "lift/carry 25+ pounds, sit for long periods, light to moderate pushing, pulling and carrying." These tasks are considered essential functions of the job of Clerical Technician I.
>
> Because of these permanent restrictions, your assignment as Clerical Technician I is ended effective immediately. You are requested to contact Human Resources Bureau Chief Sherry Larson at 367-4039 to discuss your interest in other vacant positions for which you may qualify.

19. Respondent has a directive given to all employees entitled Alachua County Sheriff's Office Employee Injury, Disability and Workers' Compensation. This directive outlines policies and procedures for reporting, processing, and treating job-related injuries under Florida's Workers' Compensation Law. This directive sets out a process that was followed in the instant case: the injured employee makes an initial injury report; health and work status reports are completed by the treating physician; and temporary restricted duty is a temporary benefit extended to full-time employees placing an employee into a temporary restricted work assignment. Regarding instances

when an employee cannot be returned to unrestricted duty, the policy states the following:

> An employee whose restriction has been deemed to be permanent by a licensed physician and who is therefore unable to perform the essential functions of his/her job or who is unable to return to unrestricted duty from temporary restricted duty within the allowable time frame, will be governed by the following:
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> * * *
>
> Employees who are not able to return to unrestricted duty, with or without accommodation, due to work related injury/illness shall be subject to reclassification to a position within their capabilities, and for which they are qualified, if available, or to termination in accordance with the provisions of F.S. 440.

20. Petitioner recalls calling Ms. Larson twice inquiring as to vacant positions, but did not learn of any as a result of these phone calls.

21. Ms. Larson does not recall whether Petitioner called her inquiring as to vacant positions, but outlined what she does in those circumstances. When an employee calls, she has a list of current vacancies in the ACSO that she reviews to determine whether there are any vacancies in positions that meet the person's permanent restrictions. When asked whether she would have gone though this process had Petitioner called, she responded, "Absolutely. Yes."

22. Petitioner did not identify a specific vacant position for which she was qualified which the district had at the time she received the Duty Status memorandum.

23. In addition to Petitioner, Respondent has terminated three other employees from the booking support unit who had permanent restrictions that did not allow him or her to perform certain positions with Respondent. Two of those employees are Caucasian females; one is a Caucasian male.

24. Other than the health and work status reports, there was no medical evidence presented that Petitioner is disabled.[3/]

Allegations regarding race and religion

25. Petitioner acknowledged at hearing that no action was taken against her because of her religion. When asked what happened that led her to believe that any action was taken against her on the basis of religion, Petitioner responded, "No action was taken because of my religion."

26. Further, Petitioner acknowledged at hearing that she was not terminated because of her race. When asked whether she believed that she was terminated because of her race, she answered "No."[4/]

CONCLUSIONS OF LAW

27. The Division of Administrative Hearings has jurisdiction over the parties and subject matter in this case. §§ 120.569 and 120.57, Fla. Stat.

28. The Florida Civil Rights Act (the Act) states that it is an unlawful employment practice for an employer to discharge or otherwise discriminate against an individual on the basis of handicap. § 760.10(1), Fla. Stat.

29. The Act is to be construed in conformity with federal law. Specifically, courts have looked to the Rehabilitation Act, 29 U.S.C., et seq., and the Americans With Disabilities Act (ADA), 42 U.S.C. Section 12101, et seq., as well as related regulations and judicial decisions, in construing claims relating to handicap or disability. Chanda v. Engelhard/ICC, 234 F.3d 1219 (11th Cir. 2000); Brand v. Florida Power Corporation, 633 So. 2d 504 (Fla. 1st DCA 1994).

30. In construing the Act in accordance with federal law, the method of proving discrimination is normally analyzed by a tribunal based upon an approach set forth in the United States Supreme Court cases of McDonnell Douglas v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); and Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). In this method of analysis, the employee has the burden of establishing by a preponderance of the evidence a prima facie case of unlawful discrimination. If the employee succeeds, a presumption of discrimination arises and the burden shifts to the employer to produce evidence articulating a legitimate, nondiscriminatory reason for its

action. If the employer produces such evidence, the employee must prove that the employer's proffered reason was not the true reason for the employment decision, but was, in fact, a pretext for discrimination. See Department of Corrections v. Chandler, 582 So. 2d 1183 (Fla. 1st DCA 1991) (court discusses shifting burdens of proof in discrimination cases).

31. In examining handicap discrimination cases, the McDonnell Douglas/Burdine approach is frequently modified in handicap or disability cases, particularly in situations in which the employer admits that the plaintiff's handicap or disability was the reason for the adverse employment action. Brand, supra, at 508. Discriminatory intent is not necessarily the issue in such cases, because the employer has admitted taking the action complained of because of the employee's handicap or disability. Brand, supra.

32. While Respondent in this case recognizes that Petitioner's back condition is a physical impairment which formed the basis for the employment action taken regarding Petitioner, it does not concede that the physical impairment constitutes a disability under the ADA. See, Chanda, supra at 1222. The process employed by Respondent in response to Petitioner's injury is the process outlined in its directive regarding injuries for purposes of workers' compensation. Whether Petitioner's physical impairment constitutes a

disability under the law governing disability discrimination is a threshold matter for consideration.

33. In this case, Petitioner's burden is to establish a prima facie case of employment discrimination by proving by a preponderance of the evidence (1) that she is a handicapped or disabled individual under the ADA; (2) that she was a qualified individual at the relevant time, i.e., that she could perform the essential functions of the job in question with or without reasonable accommodations; and (3) that she was discriminated against because of her handicap or disability. Lucas v. Grainger, 257 F.3d 1249, 1255 (11th Cir. 2001), citing Reed v. Heil, 206 F.3d 1055, 1061 (11th Cir. 2000). If Petitioner is unable to establish a prima facie case, the burden of producing rebuttal evidence does not shift to the employer, and judgment should be entered for the employer. Brand, 633 So. 2d at 510-511.

34. In the event that Petitioner does meet her burden of proof, the employer then has the burden of showing that the Petitioner's handicap is such that it cannot be accommodated or that the proposed accommodation is unreasonable because it results in an undue hardship on defendant's activities. Brand, supra, at 511-512. The plaintiff bears the burden of identifying an accommodation and demonstrating that the

accommodation allows her to perform the essential functions of the job. Lucas v. Grainger, supra, at 1255-1256.

35. Once the employer places in evidence valid reasons for the challenged action, Petitioner cannot remain silent, but must rebut the employer's position, if she can. Brand, supra, at 512. In this connection, the ultimate burden of persuasion in the case remains with the employee (Petitioner). Id.

36. 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, a record of such impairment or being regarded as having such an impairment. 42 U.S.C. § 12102(2); Rossbach v. City of Miami, 371 F.3d 1354, 1357 (11th Cir. 2004)

37. Major life activities are defined as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." Hilburn v. Murata Electronics North America, Inc., 181 F.3d 1220, 1227. The inability to perform one particular type of job does not constitute a substantial limitation on one's ability to work. Rossbach v. City of Miami, supra, at 1359; Aucutt V. Six Flags over Mid-America, 85 F.3d 1311 (8th Cir. 1996).

38. At least two federal circuit courts have held that a lifting restriction of no more than 25 pounds is not a disability within the meaning of the ADA. Williams v. Channel

Master Satellite Systems, Inc., 101 F.3d 346, 349 (4th Cir. 1996); Aucutt v. Six Flags Over Mid-America, supra.

39. Applying the above analysis to the instant case, the undersigned is not persuaded that Petitioner's physical impairment constitutes a disability under the law. Petitioner's treating physician(s) did not testify. The only medical documentation regarding her injury are the health and work status reports. This is simply insufficient to establish that Petitioner is disabled as contemplated by the ADA. Further, Petitioner has not presented any evidence indicating that her back condition poses a significant restriction on her ability to carry out either a class of jobs or a broad range of jobs or that her physical impairment poses a significant restriction on her ability to carry out other major life activities. "In short, [Petitioner] has failed to present sufficient evidence to establish that the nature, duration, and long-term impact of [her] medical problems caused [her] to be substantially limited in a major life activity." Aucutt, supra, at 1319. Accordingly, the first prong of the prima facie case has not been met by Petitioner.

40. Nor has Petitioner established that Respondent regarded her as disabled as contemplated by the ADA. Knowledge alone of an employee's physical impairment by an employer does not show that the employer regards the employee as having a

substantially limiting impairment. Id. Following a physician's work restrictions for purposes of compliance with workers' compensation laws does not establish that Respondent perceived Petitioner to have a disability that substantially limited a major life activity. See Rossbach v. City of Miami, supra, at 1360-1361. Further, the March 2, 2004, memorandum from Sheriff Oelrich offered an opportunity to, at least, discuss other employment options.

41. As to the second prong of the prima facie case, Petitioner must establish that she is a qualified individual, who could perform the essential functions of the job with or without an accommodation.

42. The Eleventh Circuit addressed the issue of determining what functions of a particular job are deemed to be essential:

> The ADA provides that in determining what functions of a given job are deemed to be essential, 'consideration shall be given to the employer's judgment . . . and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.' 42 U.S.C. § 12111(8).

Holbrook v. City of Alpharetta, Georgia, 112 F.3d 1522, 1526 (11th Cir. 1997).

43. Lifting more than 25 pounds is listed as an essential function of the job for a Clerical Technician I in the job description of that position. Employers are not required to transform a position into another one by eliminating functions that are essential to the job. Lucas v. Grainger, supra, at 1260.

44. Respondent placed Petitioner on temporary work duty after she reported her back injury. Once her physician classified her work restrictions as permanent, temporary work duty was no longer appropriate. An employer is not required to make fundamental alterations in its program or create a new job for the plaintiff. Brand, supra, citing Alexander v. Choate, 469 U.S. 287, 300 (1985); School Board of Nassau County v. Arline, 480 U.S. 273 (1987).

45. The fact that an employer accommodates an employee, even though the employer is not or may not be legally required to do so, does not necessarily give rise to any legal liability for failure to reasonably accommodate when such a practice is discontinued. As discussed by the Eleventh Circuit,

> Significantly, what is reasonable for each individual employer is a highly fact-specific inquiry that will vary depending on the circumstances and necessities of each employment situation. Federal regulations promulgated pursuant to the ADA expressly note that

> [a]n employer or other covered entity may restructure a job by reallocating or redistributing non-essential, marginal job functions . . . . An employer or other covered entity is not required to reallocate essential functions. The essential functions are by definition those that the individual who holds the job would have to perform, with or without accommodation, in order to be considered qualified for the position.
>
> 29 C.F.R. Part 1630, Appendix at 344. See also Milton v. Scrivner, Inc., 53 F.3d 1118, 1124 (10th Cir. 1995)("An employer is not required by the ADA to reallocate job duties in order to change the essential functions of a job."); Larkins v. CIBA Vision Corp., 858 F. Supp. 1572, 1583 (N.D. Ga. 1994) ("[R]easonable accommodation does not require an employer to eliminate essential functions of the position.").
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> * * *
>
> We agree that the record unambiguously reveals that the police department made certain adjustments to accommodate Holbrook in the past.
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> * * *
>
> However, we cannot say that the City's decision to cease making those accommodations that pertained to the essential functions of Holbrook's job was violative of the ADA.

Holbrook, supra, at 1527-1528.

46. Moreover, Petitioner complained about not receiving work boots as an accommodation specified by her doctor.

However, Ms. Larson clarified with the treating physician that work boots were not necessary for the duties of Clerical Technician I.

47. Petitioner argues that she should have been offered a vacant position. However, she has failed to establish that there was another vacant position at ACSO, for which she was qualified.

48. Accordingly, as to the second prong of a prima facie case, Petitioner has failed to establish that she was qualified for the Clerical Technician I position from which she was removed.

49. As to the third prong of the prima facie test, while the ACSO acknowledges that they removed Petitioner because of her physical impairment, the removal did not constitute unlawful discrimination as she is not disabled as contemplated by the ADA.

50. Since Petitioner did not establish a prima facie case of unlawful discrimination on the basis of handicap, the burden does not shift to the employer.

RECOMMENDATION

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

RECOMMENDED:

That the Florida Commission on Human Relations enter a final order dismissing the Petition for Relief filed by Petitioner, Beulah M. Johnson.

DONE AND ENTERED this 30th day of September, 2005, in Tallahassee, Leon County, Florida.

BARBARA J. STAROS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of September, 2005.

ENDNOTES

1/ In her Proposed Recommended Order, Petitioner argues that Respondent did not follow certain employment matters, primarily related to worker's compensation. The jurisdiction of FCHR and, therefore, of the undersigned, is limited to violations of Chapter 760, Florida Statutes. Therefore, other matters are outside the scope of this proceeding and will not be addressed.

2/ Petitioner attached several documents to her Proposed Recommended Order, which had not been offered into evidence at the final hearing. Accordingly, those documents are not part of the record and cannot be considered by the undersigned in writing this Recommended Order. § 120.57(1)(f), Fla. Stat.

3/ Neither Dr. Urban or Dr. DePaz testified.

4/ Accordingly, this Order will only address Petitioner's allegations of discrimination on the basis of disability.

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.