

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

JOSEPH C. BENNETT, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 05-2404  
 )  
 DEPARTMENT OF AGRICULTURE AND )  
 CONSUMER SERVICES, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

This cause came on for formal hearing before Harry L. Hooper, Administrative Law Judge with the Division of Administrative Hearings, on October 6 and 10, 2005, in Tallahassee, Florida.

APPEARANCES

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For Respondent: Stephen M. Donelan, Esquire  
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STATEMENT OF THE ISSUE

The issue is whether Respondent engaged in an unlawful employment practice with regard to Petitioner.

PRELIMINARY STATEMENT

On December 21, 2004, Petitioner Bennett (Mr. Bennett), signed a Charge of Discrimination against the Department of Agriculture and Consumer Services (Department). On April 18, 2005, the Florida Commission on Human Relations (FCHR) filed its Notice of Determination: No Cause. On May 19, 2005, Mr. Bennett filed a Petition for Relief that was refused by FCHR as untimely. Thereafter FCHR reversed their position and granted a hearing.

The matter was filed with the Division of Administrative Hearings on July 5, 2005, and was scheduled for August 9, 2005. Petitioner filed a continuance, and with the consent of Respondent it was continued to October 6 and 10, 2005, and was heard as re-scheduled.

Mr. Bennett called four witnesses and offered Exhibits numbered 1 through 23 into evidence, which were admitted. The Department called seven witnesses and offered Exhibits numbered 1 through 3, which were admitted. A Transcript was filed on October 24, 2005. Ten days were allowed for the parties to file a proposed recommended order (PRO). This meant that the parties were required to file PROs no later than November 3, 2005. The Department timely filed its PRO on November 2, 2005.

Mr. Bennett, on November 5, 2005, requested an enlargement of time in which to file his PRO. Over the objection of the Department, Mr. Bennett was given until November 11, 2005, to file a PRO. November 11, 2005, was a national and state holiday and thus it was impossible to file on that day. The next available day for filing was November 14, 2005, which is when Mr. Bennett's PRO was filed, and therefore, Mr. Bennett's PRO was timely filed.

Both PROs were considered in the preparation of this Recommended Order.

#### FINDINGS OF FACT

1. Mr. Bennett was employed as a forester by the Department from May 30, 2003, until his termination on December 10, 2004. During times pertinent he was 30 years of age.

2. The Department is headed by the Commissioner of Agriculture. The Division of Forestry (Division) is an organic element of the Department. Among the duties of the Division are the protection of state forest lands and the provision of forest environmental education and forest recreation.

3. Mr. Bennett had eight to ten years of experience as a forester when he was hired by the Division. His initial assignment was as a forester stationed in the Bear Creek Educational Forest (Bear Creek).

4. Mr. Bennett was diagnosed as having bipolar disorder when he was 19 years of age. He has been medicated since that time with Lithium and Zyprexa. Lithium must be taken on a regular basis. Zyprexa is taken only when the lithium fails to accomplish the desired result. Zyprexa was needed when Mr. Bennett became stressed. Zyprexa taken in a very small dose would not affect Mr. Bennett's ability to work. Larger doses of five or ten milligrams resulted in Mr. Bennett having to be absent from work.

5. Mr. Bennett refrained from revealing his bipolar disorder to his employer. If the effect of the Zyprexa was such that he could not work, he would ask for leave and it would be given to him with no question, at least until August 9, 2004.

6. In performance evaluation periods ending May 2003 and May 2004, Mr. Bennett received acceptable evaluations. These evaluations were mid-range and not remarkable. They did indicate that he consistently achieved Division expectations.

7. At work, Mr. Bennett was teased by co-workers about his excessive weight from time to time and remarks were made to him by fire fighters which indicated that being a forester was not as important as being a fire fighter. This bothered Mr. Bennett.

8. August 9, 2004, was not a good day for Mr. Bennett. His mother was ill and he was feeling stress because of this.

He completed a physical examination as a precursor to becoming qualified as a forest fire fighter and then went to Bear Creek despite feeling unwell.

9. When he arrived at Bear Creek he was greeted by Shawn Duggar. Mr. Duggar laughed at him and this upset Mr. Bennett. Mr. Bennett became irate and cursed. It is clear that Mr. Bennett did not physically harm Mr. Duggar, but Mr. Bennett's display of emotion unnerved Mr. Duggar. Mr. Bennett's manner was sufficiently menacing that the physically smaller Mr. Duggar believed that he had reason to fear for his personal safety. As a result of this encounter Mr. Duggar departed the area and drove to the district office.

10. Mr. Bennett felt too upset to work on August 10, 2004. He called in early that day and left a message on Mr. Oswald's answering machine informing him that he would be unable to come in to work that day. Mr. Oswald was Mr. Bennett's supervisor at the time.

11. Both Mr. Oswald and Mr. Weber, the supervisor next up the line, called Mr. Bennett and wanted to have a meeting with him. Later the district manager, Charlie Marcus, called. Lastly, he got a call from John Webster, a bureau chief.

12. Mr. Bennett felt that because he was on sick leave, he did not have to meet with these supervisory personnel. Also to the best of his recollection, Mr. Bennett had taken Zyprexa that

morning and as a result, he felt it would be inappropriate to meet with his supervisors while under the influence of that drug.

13. John Webster was sufficiently concerned about Mr. Bennett's behavior that he asked him if he was, "going postal." The phrase "going postal" means engaging in violent acts in the workplace. Subsequently, at Mr. Webster's instigation, Gadsden County Sheriff's Deputy Jenkins came to his residence, which was located within the curtilage of the Bear Creek facility. Deputy Jenkins told Mr. Bennett that he wanted Mr. Bennett to enroll in the Employee Assistance Program (EAP).

14. About one hour later, Deputy Jenkins came back to Mr. Bennett's residence accompanied by Sergeant Wilder from the Gadsden County Sheriff's Office. Mr. Bennett was questioned with regard to his stability and medications, the EAP program was discussed yet again, and Sergeant Wilder observed that Mr. Bennett was "a bit shaky." The officers also talked to Mr. Bennett's girlfriend when she called Mr. Bennett. Thereafter, the officers departed.

15. After several days of suffering from the effects of his bipolar disorder, Mr. Bennett returned to work on August 19, 2005. On August 23, 2004, Mr. Bennett met with his supervisors. As a result of that meeting he was transferred from Bear Creek

to Wakulla County, and Ken Weber, the Forestry Operations Administrator for that district, referred him to EAP.

16. He was also required to get a note from his doctor indicating the cause of his absence. The physician's note that he brought the first time failed to specify the type of illness resulting in his absence. He was required to get a second note and he did. This second note also was nonspecific with regard to his illness. The doctors were of the opinion that it would violate Mr. Bennett's privacy if they revealed the nature of his illness.

17. Subsequently, on September 8, 2004, he received a memorandum of counseling. This was not punitive. It merely told him to avoid instances of behavior such as that demonstrated on August 9, 2004.

18. It is important to note at this point, that although Mr. Bennett, immediately after the incident of August 9, 2005, and at the hearing, attempted to minimize the incident with Shawn Duggar, it is found as a fact that Mr. Bennett's actions at that time were irrational and demonstrated a lack of emotional control. This was recognized by the Chief of Human Resources who said he was sent to EAP for "anger management problems."

19. Mr. Bennett successfully completed the requirements of EAP and evidence of this was provided in a letter from Jerry A.

Smith of the Allen Group, a provider of employee assistance, which stated, "Mr. Bennett has been compliant with, and has now successfully completed, all recommended treatment."

20. His supervisor at the Wakulla County job was Ken Weber. His work at that job for a few weeks was unremarkable.

21. On October 14, 2004, there was a Wakulla State Forest status meeting which Mr. Bennett attended. Mr. Weber, William Taylor, and others attended. Mr. Bennett suggested that they buy a digital camera for official use. He was informed that he should meet with Allen Griffith, who also used a camera in his work, fill out a necessary form, and then purchase the camera.

22. Mr. Bennett discussed the matter with Allen Griffith briefly, and purchased the camera with his state purchasing card. Mr. Bennett did not fill out the necessary forms due to his lack of understanding of the complexity of state purchasing rules. His purchase of the camera was somewhat precipitous, but there was no malicious intent on his part nor did he personally benefit from the purchase of the camera. He was eventually asked to return the camera to the seller, and he did as asked.

23. Subsequent to Hurricane Ivan, Mr. Bennett was ordered on temporary duty in the Blackwater River State Forest (Blackwater) which had been damaged by hurricane winds.



Blackwater is located two to three hours from Crawfordville. He began this duty sometime after the October 14, 2004, meeting.

24. Accommodations for the foresters were provided in a hotel in Crestview. Mr. Bennett was required to share a room with another forester. The roommate to whom he was assigned snored loudly and Mr. Bennett could not obtain the amount or quality of sleep that he needed. This resulted in aggravating his bipolar disorder.

25. The lack of regular sleep, along with the side effects of the lithium he was taking, caused Mr. Bennett's eyes to burn. He had headaches and felt the onset of a manic episode. By the third night his respiration rate increased and he was feeling very stressed. He called his girlfriend and she suggested that she should come get him. He agreed and she drove from the Tallahassee area to Crestview and, beginning after midnight, followed him as he drove his state-assigned vehicle back to Crawfordville, where he ingested some Zyprexa and went to sleep.

26. Mr. Bennett had access to a telephone in Crestview and two-way radio equipment in his truck, but he made no effort to contact his superiors to inform them that he had decamped. Two or three days later he talked to Mr. Weber and explained to him the reason he abandoned his position. Mr. Weber told him that he needed to get some help.

27. The events surrounding the Blackwater forest episode occurred during the work week October 25-29, 2004. Mr. Bennett returned to work Monday, November 1, 2004, after he was able to take his medicine, rest, and achieve stability. Ultimately his superiors sent him back to Blackwater where he stayed in a private room and performed in accordance with expectations.

28. Before Mr. Bennett's planned stay was completed, he was pulled from the Blackwater operation and told he was to be terminated. Although a written reprimand was drafted addressing the camera incident, and another was drafted with regard to the unauthorized departure from the Blackwater operation in October, the letters were never dated, signed, or presented to him. Rather, these matters were addressed in a letter dated November 12, 2004, announcing that he was being recommended for termination. This was signed by Elaine Cooper, Chief of Personnel Management.

29. The letter of November 12, 2004, addressed his failure to follow procedures when purchasing the camera and his unauthorized departure from the Blackwater operation in October. He was notified that his actions constituted a violation of "AP&P No. 5-3, Section V, Insubordination, (Page 3), and Poor Performance, (Page 20), respectively." The letter set a meeting for November 30, 2004, and informed him that he could attend and answer the charges against him.

30. Mr. Bennett responded with a short letter dated November 28, 2004, addressed to Elaine Cooper, Chief of Personnel Management, which informed her that he had a disability which he could manage. He further noted that his disability could cause him to become irritable or angry. He did not reveal his bipolar disorder in this letter. This letter was delivered to Ms. Cooper at the predetermination conference.

31. In a letter dated November 29, 2004, a longer letter was prepared for Ms. Cooper. This letter provided his version of his employment experience as a forester and included a public records request. It did not assert that he was disabled. This letter was delivered to Ms. Cooper at the predetermination conference.

32. At no time prior to November 30, 2004, did Mr. Bennett claim to have a disability or ask for an accommodation as a result of a claimed disability. At no time prior to November 28, 2004, was Mr. Bennett perceived to be disabled by his employer or any of its representatives. When he did inform Ms. Cooper that he believed he had a disability, he did not reveal the nature of his disability.

33. In a letter dated December 6, 2004, addressed to Mr. Bennett, Ms. Cooper noted that at the predetermination conference on November 30, 2004, he informed her for the first time that he believed he had a disability. The letter stated

that his doctor should be provided with Mr. Bennett's position description and should comment on his ability to perform in accordance with the position description, with or without an accommodation. No deadline was provided as to when a response was due.

34. In an e-mail dated December 9, 2004, Mr. Bennett asked Ken Weber for one-half day of leave so that he could have his doctor address the matters contained in Ms. Cooper's letter of December 6, 2004.

35. On December 13, 2004, Mr. Weber presented Mr. Bennett with a letter dated December 10, 2004, signed by Ms. Cooper, which informed him that he was terminated effective December 16, 2004.

36. A Special Accommodation for Disability was prepared by Dianna Byrd, a medical doctor, on December 28, 2004, stating that Mr. Bennett should be allowed regular and appropriate lunch breaks and should be allowed to take a five minute break during stressful situations. It further stated that the Department should allow his fiancé to call-in sick for him and that he should be allowed to visit the doctor when he had an appointment.

37. At the time Dr. Byrd described these accommodations, Mr. Bennett's employment relationship with the Department had been severed. It must be noted that even at this late date, no

diagnosis was provided. Even when he filed his Charge of Discrimination with FCHR December 21, 2004, he failed to reveal the nature of his asserted disability.

CONCLUSIONS OF LAW

38. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. §§ 120.57(1) and 760.11, Fla. Stat.

39. Sections 760.01-760.11 and 509.092, comprise the Florida Civil Rights Act. § 760.01, Fla. Stat.

40. The Department is subject to Section 760.10, because it employs, "15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year. . . ." § 760.02(7). Fla. Stat.

41. Section 760.10, Florida Statutes, provides as follows:

(1) It is an unlawful employment practice for an employer:

(a) To discharge or to fail to refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.

(b) To limit, segregate, or classify employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities, or adversely affect any

individual's status as an employee, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.

42. Disabled, or handicapped (the term used by the Florida Act), persons are protected by the Florida Civil Rights Act. It is an unlawful employment practice for an employer to refuse to hire or to refuse to provide an accommodation to a disabled person.

43. FCHR and the Florida courts have determined that federal discrimination law should be used as guidance when construing provisions of Section 760.10. See Brand vs. Florida Power Corp, 633 So. 2d 504, 509 (Fla. 1st DCA 1994); Florida Department of Community Affairs vs. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991).

44. Mr. Bennett had the opportunity to provide either direct or circumstantial evidence of discrimination. If he had offered direct evidence of discrimination, and if the fact finder had accepted that evidence, then Mr. Bennett would have proven discrimination. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e, et seq. Mr. Bennett produced no competent direct evidence of discrimination. Accordingly, proof of discrimination, if discrimination can be proved, must be accomplished using circumstantial evidence.

45. The Supreme Court of the United States established, in McDonnell-Douglas Corporation vs. Green, 411 U.S. 792 (1973), and Texas Department of Community Affairs vs. Burdine, 450 U.S. 248 (1981), the analysis to be used in cases alleging discrimination. This analysis was reiterated and refined in St. Mary's Honor Center vs. Hicks, 509 U.S. 502 (1993).

46. Pursuant to this analysis, Mr. Bennett has the burden of establishing a prima facie case of unlawful discrimination by a preponderance of the evidence. If a prima facie case is established, the Department must articulate some legitimate, non-discriminatory reason for the action taken against Mr. Bennett. Once this non-discriminatory reason is offered by the Department, the burden then shifts back to Mr. Bennett to demonstrate that the offered reason is merely a pretext for discrimination. As the Supreme Court stated in St. Mary's Honor Center, before finding discrimination, "[t]he fact finder must believe the plaintiff's explanation of intentional discrimination." 509 U.S. at 519. The Petitioner bears the ultimate burden of persuading the fact finder that he has been the victim of illegal discrimination based on disability.

47. To prove a prima facie case, Mr. Bennett must provide evidence that: (1) he was handicapped; (2) that he was able to perform the duties of a forester with or without accommodation;

(3) that he suffered an adverse employment decision because of his disability; and (4) that he was replaced by a non-disabled person or was treated less favorably than non-disabled persons. Retton vs. Department of Corrections, 9 F.A.L.R. 2423, FCHR Order No. 86-045, (FCHR December 18, 1986), citing McDonnell Douglas and Wolfe vs. Department of Agriculture and Consumer Services, 8 F.A.L.R. 426 (FCHR Sept. 27, 1985). The elements of a plaintiff's prima facie case necessarily vary according to the facts of the case and the nature of the claim. LaPiererre vs. Benson Nissan, Inc., 86 F.3d 444 (5th Cir. 1996).

48. Under the Americans with Disabilities Act (ADA), the term "disability" means, with respect to an individual:

- (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such impairment.

See, 29 C.F.R. § 1630.2(i) and Section 760.22(7).

49. Major life activities include, "functions such as, caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 CFR § 1630.2(i).

50. A bipolar disorder may under certain circumstances constitute a disability covered by the ADA, especially if it is severe. Den Hartog vs. Wasatch Acad., 129 F.3d 1076 (10th Cir.



1997). While it is easy for an employer to determine that an employee or applicant for employment is blind or unable to walk, for example, and thus disabled, it is much more difficult for an employer to determine that an employee has a bipolar disorder. This is especially true in the case where the employee undertakes to hide his condition.

51. The definition of bipolar disorder was not provided in the record. However, the Fifth Circuit Court of Appeals has described the attributes of bipolar disorder thusly:

Bipolar disorder is a psychosis involving a mood disorder characterized by swings from mania to depression. Mania is characterized by elevated mood and associated behavioral responses. Characteristics of mania are hyperactivity, optimism, flamboyance, loud, pressured speech, garrulousness, and distractibility, delusions of grandeur, disorganized behavior patterns, and poor judgment. Depression is characterized by lowered mood state and related behavior, worthlessness, social withdrawal, psychomotor retardation and vegetative somatic symptoms including anorexia, weight loss, and insomnia. The disability experienced from bipolar disorder ranges from mild to severe.

Taylor vs. Principal Fin. Group, Inc., 93 F.3d 155 (5th Cir.)(citing Alan Balsam M.D. & Albert P. Zabin, Disability Handbook 628-629 (1990)), cert. denied, 519 U.S. 1029 (1996).

52. Mr. Bennett had been prescribed Lithium and Zyprexa and took them as prescribed and was able to satisfactorily perform his job. Mr. Bennett's menacing actions at the Bear

Creek Facility on August 9, 2004, do not fit within the definition of bipolar disorder recited above. His actions were instead the result of poor anger management.

53. The events surrounding the failure to follow procedures with regard to purchasing the camera do not fit within the definition of bipolar. This was, viewing the matter most favorably to the Department, at best, a failure to strictly abide by instructions. The more likely interpretation from the facts presented was that this incident was a make weight charge designed to enhance the appropriateness of his termination.

54. The departure without leave from the Blackwater operation was an action within the definition of bipolar disorder in that he used poor judgment. However, it is equally likely that he used poor judgment because his judgment is inherently poor, rather than a disability.

55. Upon consideration of all of the evidence, it is determined that Mr. Bennett was not disabled under the ADA. Therefore, he failed to prove the first requirement of a prima facie case.

56. The second requirement, that he was able to perform the duties of a forester with or without an accommodation, was proved.

57. The third requirement, that he suffered an adverse employment decision because of his disability, was not proven.

The Department had no knowledge that Mr. Bennett was afflicted with a bipolar disorder. It could not have made a decision based on that which it did not know.

58. The fourth requirement, that he was replaced by a non-disabled person or was treated less favorably than a non-disabled person, was not proved. There was no evidence adduced as to his replacement, if there was a replacement. And he was not treated any differently than a non-disabled person.

59. If one assumes for sake of argument that Mr. Bennett proved a prima facie case, the Department proved nondiscriminatory reasons for terminating Mr. Bennett. As noted before, the incident involving the purchase of the camera does not appear to be particularly egregious misconduct. However, departing a distant work area without permission is serious. This is particularly true when the one doing the departing is driving an assigned vehicle having a two-way radio.

60. When Mr. Bennett eventually claimed a disability, the Department was perhaps precipitous in its decision not to wait until it was fully informed. However, that is of no consequence. The Department evidenced no discrimination in the case of Mr. Bennett when making its termination decision and a last minute claim of disability is insufficient to end the process.

61. An employer cannot be liable under the ADA for discharging an employee when it indisputably had no knowledge of the disability. Morisky vs. Broward County, 80 F.3d 445 (11th Cir. 1996).

RECOMMENDATION

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

RECOMMENDED that the Commission dismiss Mr. Bennett's petition.

DONE AND ENTERED this 19th day of December, 2005, in Tallahassee, Leon County, Florida.



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HARRY L. HOOPER  
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Filed with the Clerk of the  
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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.