STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TIM A. WEAVER,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 05-2971
	)	
SWIFT TRANSPORTATION,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

This cause came on for formal hearing before Harry L. Hooper, Administrative Law Judge with the Division of Administrative Hearing, on October 20, 2005, in Ocala, Florida.

APPEARANCES

For Petitioner: Tim A. Weaver, pro se
15054 Northeast 150th Lane
Fort McCoy, Florida 32301

For Respondent: No Appearance

STATEMENT OF THE ISSUE

The issue is whether Respondent discriminated against Petitioner because he was disabled.

PRELIMINARY STATEMENT

In a Petition filed with the Florida Commission on Human Relations (FCHR) on February 10, 2005, Petitioner Tim A. Weaver (Mr. Weaver) alleged that Respondent Swift Transportation Corporation (Swift) refused to hire him because of an alleged

disability. The disability alleged was obesity, tremors, and sleep apnea. On July 5, 2005, FCHR issued its "Determination: No Cause." Subsequently the case was forwarded to the Division of Administrative Hearings on August 18, 2005.

At the hearing, Mr. Weaver testified on his own behalf. Swift presented the testimony of Scott Johnson (Mr. Johnson), its Ocala terminal manager, and offered one Exhibit into evidence, which was admitted.

No Transcript was filed. Neither Petitioner nor Respondent filed proposed recommended orders.

References to statutes are to Florida Statutes (2004) unless otherwise noted.

FINDINGS OF FACT

1. Mr. Weaver is a person who worked as a long haul truck driver for six months at Lester Coggins Trucking, Inc. He quit that job because Coggins uses a team approach and he wished to be a solo driver. Mr. Weaver is six feet tall and currently weighs about 296 pounds.

2. Swift is a corporation engaged in trucking operations throughout the United States and in portions of Canada. It employs approximately 15,000 truck drivers. The typical tractor and trailer combination operated by Swift weighs 80,000 pounds.

3. Mr. Johnson oversees the operation of 415 trucks at Swift's Ocala terminal.

4. Swift, like many motor carrier companies in early 2005, was anxious to find additional qualified drivers. Accordingly, applicants were sought by Mr. Johnson. The persons who responded were given an orientation on January 17 and 18, 2005. Mr. Weaver was one of the applicants that attended the orientation.

5. The U.S. Department of Transportation has by regulation set medical standards for persons driving commercial vehicles. In order to determine compliance with those standards, prospective drivers are required to submit to a physical examination. On January 18, 2005, Mr. Weaver was examined by Kim A. Nordelo, a physician's assistant.

6. At the time of the examination Mr. Weaver weighed 366 pounds and showed signs of excessive nasal breathing. The physician's assistant was of the opinion that he might be afflicted with sleep apnea and suggested he be evaluated to rule-out sleep apnea.

7. Sleep apnea is often associated with morbid obesity. Mr. Weaver was found to be morbidly obese on the comment sheet contained in the Medical Examination Report for Commercial Driver Fitness Determination. Nevertheless, the physician's assistant provided a Medical Examiner's Certificate authorizing him to operate trucks for three months.

8. A person who has sleep apnea may sleep for a normal number of hours but the quality of the sleep is denigrated by respiratory problems, often as a result of obesity. Because the quality of sleep is poor, a person with sleep apnea may fall asleep while driving.

9. When Swift's personnel reviewed the Medical Examination Report, they decided that Mr. Weaver should be evaluated for the purpose of ruling out sleep apnea, and that he should not be allowed to drive even though he had a medical clearance for three months.

10. This decision was made because Swift feared that Mr. Weaver might lapse into sleep while driving an 80,000-pound tractor and trailer rig at great speed on public roads. Additionally, Swift determined that permitting him to drive for them would conflict with federal regulations addressing driver qualifications.

11. Mr. Weaver was informed that after evaluation for sleep apnea, if he was medically qualified, they would employ him.

12. Mr. Weaver did not have the money required for the medical evaluation. Accordingly, he did not obtain the evaluation and whether or not he is medically qualified to drive a big truck remains in doubt.

13. No evidence was offered by Mr. Weaver that would support his charge that he was not hired because he was obese. No evidence was offered by Mr. Weaver that would tend to prove that Swift found him to be disabled or regarded him as disabled.

14. Swift has strict and widely disseminated policies prohibiting discrimination in its work force. It is absolutely clear, that as a matter of corporate policy, Swift has no interest in the color, race, sex, or medical condition of a driver, so long as he or she can safely pilot their vehicles upon the streets and highways of America.

CONCLUSIONS OF LAW

15. 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.

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

17. Swift 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.

18. 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.

19. Disabled, or handicapped, 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.

20. 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).

21. Mr. Weaver 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. Weaver would have proven discrimination. Civil Rights Act of 1964, § 701 et seq.,

42 U.S.C.A. § 2000e, et seq. Mr. Weaver produced no competent direct evidence of discrimination. Accordingly, proof of discrimination, if discrimination can be proved, must be accomplished using circumstantial evidence.

22. 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).

23. Pursuant to this analysis, Mr. Weaver 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, Swift must articulate some legitimate, non-discriminatory reason for the action taken against Mr. Weaver. Once this non-discriminatory reason is offered by Swift, the burden then shifts back to Mr. Weaver to demonstrate that the offered reason is merely a pretext for discrimination. As the Supreme Court stated in Hicks, before finding discrimination, "[t]he fact finder must believe the plaintiff's explanation of intentional discrimination." 509 U.S. at 519.

24. To prove a prima facie case, Petitioner must provide evidence that: (1) he was handicapped; (2) that he was able to perform the duties of a long-haul truck driver satisfactorily,

with or without accommodation; and (3) that he suffered an adverse employment decision because of his disability. Retton v. Department of Corrections, 9 F.A.L.R. 2423, FCHR Order No. 86-045, (FCHR December 18, 1986), citing McDonnell Douglas and Wolfe v. Department of Agriculture and Consumer Services, 8 F.A.L.R. 426 (FCHR Sept. 27, 1985).

25. The FCHR has found that obesity and resultant sleep apnea may be a handicap pursuant to Section 760.10. See Engleka v. Sun Coast Hospital, Inc., Case Number 92-6338 (DOAH June 11, 1994), Stewart v. Wackenhut Corporation, 10 F.A.L.R. 4624 (FCHR 1988), and Fenesy v. G.T. E. Data Services, Inc., 3 F.A.L.R. 1764A (FCHR 1981).

26. 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 an impairment.
>
> See 29 C.F.R. § 1630.2(i)

27. 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)

28. Obesity may run the continuum from pleasantly plump, to corpulent, to morbid obesity. Obesity is different from being legless or sightless, for example, because one can end the condition of obesity by eating less. Physiologically, however, eating less seems to be impossible for some people and may result in the inability to care for oneself, or the inability to walk, or the inability to work. Under those circumstances, obesity is a disability.

29. Mr. Weaver, to his credit, is a person with the discipline to combat his obesity though diet. Indeed, from January 18, 2005, until the date of the hearing, October 20, 2005, he had shed 70 pounds and appeared at the hearing to be robust rather than morbidly obese.

30. In any event, Mr. Weaver did not demonstrate at the hearing that on January 18, 2005, he was unable to care for himself, walk, perform manual tasks, see, hear, or work. In other words, he was not disabled by morbid obesity or by sleep apnea in accordance with the guidance in Title 29 C.F.R. Section 1630.2(i).

31. Moreover, a person asserting disability must demonstrate that he or she is unable to work in a broad range of jobs. In Sutton v. United Airlines, 527 U.S. 471 ((1999) for example, severely myopic twin sisters, who were pilots, sought employment with a national air carrier who rejected them because

their vision, correctible to 20/20, did not meet United's standard for uncorrected vision. It was noted that there were many jobs for which they were qualified, including jobs piloting aircraft. In Toyota Manufacturing v. Williams, 534 U.S. 184 (2002), a woman claiming to be disabled from performing her automobile assembly line job because of carpal tunnel syndrome and related impairments, sued her former employer, for failing to provide her with a reasonable accommodation. The court held that the central inquiry must be whether the claimant is unable to perform the variety of tasks central to most people's daily lives.

32. As noted before, Mr. Weaver is able to perform the variety of tasks central to most people's daily lives and can perform a variety of jobs and for that reason is not disabled.

33. It is unclear whether he currently has sleep apnea, or whether he had sleep apnea on January 18, 2005, because he has not been evaluated. But because sleep apnea can cause fatigue during the waking hours, and because it is possible Mr. Weaver could go to sleep while propelling a huge truck down the highway, it is reasonable for Swift to refuse him that opportunity.

34. The second factor Mr. Weaver must prove, if he is to make out a prima facie case, is that he was able to perform the duties of a long-haul truck driver satisfactorily. A person who

might go to sleep while driving a tractor and trailer rig cannot perform the duties of driver.

35. The third factor Mr. Weaver must prove, if he is to make out a prima facie case, is that he suffered an adverse employment decision because of his disability. Since he wasn't disabled, he couldn't prove this factor, although being refused employment is an adverse employment decision.

36. Assuming arguendo that Mr. Weaver is disabled, Title 29 C.F.R. Section 1630(b)(1)(c) and (e) provide affirmative defenses to an allegation of discrimination as follows:

> § 1630.15 Defenses.
>
> Defenses to an allegation of discrimination under this part may include, but are not limited to, the following:
>
> * * *
>
> (b) Charges of discriminatory application of selection criteria--
>
> (1) In general. It may be a defense to a charge of discrimination, as described in § 1630.10, that an alleged application of qualification standards, tests, or selection criteria that screens out or tends to screen out or otherwise denies a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished with reasonable accommodation, as required in this part.
>
> * * *
>
> (c) Other disparate impact charges. It may be a defense to a charge of discrimination

> brought under this part that a uniformly applied standard, criterion, or policy has a disparate impact on an individual with a disability or a class of individuals with disabilities that the challenged standard, criterion or policy has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished with reasonable accommodation, as required in this part.
>
> * * *
>
> (e) Conflict with other federal laws. It may be a defense to a charge of discrimination under this part that a challenged action is required or necessitated by another Federal law or regulation, or that another Federal law or regulation prohibits an action (including the provision of a particular reasonable accommodation) that would otherwise be required by this part.
>
> * * *

37. With regard to Title 29 C.F.R. Section 1630(b)(1), the standard used by Swift to screen out Mr. Weaver, possibility of sleep apnea, is job related and permissible.

38. With regard to Title 29 C.F.R. Section 1630(b)(1)(c), because sleep apnea causes sleepiness during waking hours, and thus can present a danger to Mr. Weaver and others, the policy is job-related and cannot be cured with reasonable accommodation.

39. With regard to Title 29 C.F.R. Section 1630(b)(1)(e), to permit Mr. Weaver to drive a commercial vehicle when he has or may have sleep apnea would conflict with another federal

regulation. In this case permitting Mr. Weaver to drive a Swift truck would conflict with regulations promulgated by the Federal Motor Carrier Safety Administration. Those regulations, found at Title 49 C.F.R. Section 391.42, state that a driver should have, "no established medical history or clinical diagnosis of a respiratory dysfunction likely to interfere with his ability to control and drive a commercial motor vehicle safely.

40. Insofar as the record currently stands, sleep apnea, a respiratory dysfunction has not been ruled out and until it is, the requirements of motor carrier safety trump the ADA. It is not in the best interest of Swift, Mr. Weaver, or the driving public to have a sleeping driver at the wheel of a large truck.

41. Mr. Weaver intimated that perhaps it was the duty of Swift to provide an evaluation to rule out sleep apnea since he did not have the funds for it. However, Mr. Weaver provided no law that required Swift to provide an evaluation to a job applicant and none has been found.

42. Assuming arguendo that Mr. Weaver proved a prima facie case, Swift provided nondiscriminatory reasons for its actions. Mr. Weaver did not prove that these reasons were pretextual.

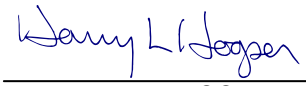
43. Mr. Weaver was given the keys to employment when Swift told him to get an evaluation for sleep apnea. He did not avail himself of this opportunity and therefore Swift is absolved of all responsibility with regard to his employment.

RECOMMENDATION

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

RECOMMENDED that Mr. Weaver's Petition be dismissed.

DONE AND ENTERED this 5th day of December, 2005, in Tallahassee, Leon County, Florida.



HARRY L. HOOPER
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 5th day of December, 2005.

COPIES FURNISHED:

Denise Crawford, Agency Clerk
Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

Tim A. Weaver
15054 Northeast 150th Lane
Fort McCoy, Florida 32154

Stephen J. Beaver, Esquire
Swift Transportation
Post Office Box 29243
Phoenix, Arizona 85038

Cecil Howard, General Counsel
Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

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.