STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JONATHAN A. RACE,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 05-3971
	)	
ORANGE COUNTY FIRE RESCUE,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

This cause came on for formal hearing before Robert S. Cohen, Administrative Law Judge with the Division of Administrative Hearings, on January 13, 2006, in Orlando, Florida.

APPEARANCES

For Petitioner: Jonathan A. Race, pro se
1081 Dean Street
St. Cloud, Florida 34771

For Respondent: Gary M, Glassman, Esquire
Orange County Attorney's Office
Litigation Section
435 North Orange Avenue, 3rd Floor
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STATEMENT OF THE ISSUE

The issue is whether Respondent engaged in the practice of discrimination against Petitioner when terminating him from employment as a firefighter due to a medical condition.

PRELIMINARY STATEMENT

On February 17, 2005, Petitioner filed a Charge of Discrimination with the Florida Commission on Human Relations ("FCHR"), alleging that Respondent terminated his employment as a certified firefighter for a medical condition due to his wearing a pacemaker. On September 14, 2005, the FCHR issued a Determination: No Cause in which it found no unlawful employment practice had occurred in Petitioner's termination. On October 19, 2005, Petitioner filed a Petition for Relief with the FCHR in which he alleged that his termination for his medical condition was improper due to the fact that he was not pacemaker dependent, based upon findings made by his cardiologist. The matter was referred to the Division of Administrative Hearings on October 20, 2005, and was assigned to the undersigned Administrative Law Judge. The matter proceeded to hearing in Orlando, Florida, on January 13, 2006.

At the hearing, Petitioner presented the testimony of Mr. David Hart, testified in his own behalf, and offered Exhibit Nos. 1 through 10, all of which were accepted into evidence. Respondent presented the testimony of Chief Jeffrey Holden and offered Exhibit Nos. 1 through 6, all of which were accepted into evidence.

A Transcript was filed on March 8, 2006. After the hearing, Petitioner filed correspondence that will be considered

as Proposed Findings of Fact and Conclusions of Law on February 23, 2006. Respondent, after requesting extensions of time, which, for good cause, were granted, filed its Proposed Findings of Fact and Conclusions of Law on May 1, 2006.

References to statutes are to Florida Statutes (2005) unless otherwise noted.

FINDINGS OF FACT

1. Petitioner, Jonathan Race, was employed by Respondent, Orange County Fire Rescue Department, since January 1989, and worked in the Operations Division as a Lieutenant/EMS Supervisor. In this role, he managed, coordinated, and performed firefighting and emergency rescue services.

2. In the mid-1990s, Petitioner was diagnosed with atrial fibrillation which ultimately resulted, in July 2001, in his undergoing an open heart surgical procedure known as the "MAZE" procedure.

3. Following the open heart surgery, Petitioner had a pacemaker installed in August 2001.

4. Petitioner's cardiologist from 1997 to January, 2005, was Arnold Einhorn, M.D.

5. Barry Portnoy, M.D., is a physician under contract with Orange County to perform annual physical examinations for members of the Orange County Fire Rescue Department.

6. While Dr. Einhorn served as Petitioner's cardiologist, he had periodic conversations with Dr. Portnoy concerning Petitioner's cardiac condition.

7. On May 20, 2003, Dr. Einhorn wrote a letter to Dr. Portnoy in which he stated that Petitioner, "continues to be on medical therapy with beta blockers and Digoxin and his underlying heart rate is in the 30s and this making him dependent on the pacemaker approximately 80% of the time." Dr. Einhorn concluded at that time that Petitioner needed to continue with his medications and use of the pacemaker. Petitioner, concluded, Dr. Einhorn, "is dependent on the pacemaker."

8. On January 16, 2004, Dr. Portnoy conducted an annual physical for Petitioner.

9. On February 6, 2004, Dr. Portnoy stated in his evaluation of Petitioner: "Classification deferred pending additional information. . . . Employee may continue in his/her present duties for no more than 30 days while awaiting further evaluation."

10. On June 4, 2004, Dr. Portnoy completed his evaluation of Petitioner, imposing a restriction of "No functioning as a member of a team or independently where sudden incapacitation could result in harm to himself, risk to others, or mission failure."

11. Dr. Portnoy placed Petitioner on light duty, which resulted in his assignment to an office job at fire headquarters.

12. Respondent's policy dictates that, when an employee is placed on light duty, a medical review is conducted. After being placed on restricted or light duty, a medical review of Petitioner was commenced in June 2004.

13. Respondent's medical review committee requested that Petitioner obtain from his cardiologist, Dr. Einhorn, information concerning Petitioner's cardiac condition.

14. On January 5, 2005, Dr. Einhorn, at Petitioner's request, sent a letter to Dr. Portnoy in which he stated, in part, "We have been trying to wean the patient off beta blockers and Digoxin to see if the patient is still pacemaker dependent. He is now not on any Digoxin and Toprol and interrogation of his pacemaker revealed 30% atrial paced with 16 runs of atrial fibrillation."

15. Based upon the information received from Dr. Einhorn by Dr. Portnoy, Respondent sent Petitioner a letter dated February 17, 2005, which stated that Respondent had determined there was a preponderance of evidence that restrictions placed on Petitioner by Dr. Portnoy would continue indefinitely and that Petitioner would not be able to return to his position in the Operations Division as Lieutenant/EMS Supervisor.

Respondent concluded that under Article 34.11 of the Collective Bargaining Agreement, Petitioner would be medically separated from his employment with the County, effective March 26, 2005, at 19:30 hours.

16. While on light office duty, Petitioner was given additional time to pursue other jobs with Orange County.

17. Petitioner did not find another job with Orange County.

18. On March 10, 2005, after Petitioner had received the February 17 letter from Respondent, Amish Parikh, M.D., wrote a letter "To Whom It May Concern", in which he stated that Petitioner "is now pacing only 0.8% of the time and it is not considered pacemaker-dependent. I believe the pacemaker is not a limiting factor in his ability to perform his job and he should be permitted to return to full duty without restrictions." Nothing in this letter makes reference to any medications Petitioner would be required to take in the future.

19. On April 15, 2005, after Petitioner had been terminated from his employment with Respondent, Petitioner was examined by another cardiologist, Sunil M. Kakkar, M.D., who concluded that Petitioner was not pacemaker dependent and could return to full duties with Respondent.

20. Neither Dr. Parikh nor Dr. Kakkar testified at the hearing. Their written reports appear to be based upon one visit by Petitioner with each of them.

21. On March 23, 2005, Dr. Portnoy reviewed the March 10 letter from Dr. Parikh.

22. Dr. Portnoy did not change his determination that Petitioner was pacemaker dependent after his review of Dr. Parikh's letter. Dr. Portnoy did not lift the restrictions he had imposed on Petitioner.

23. At the time of hearing, Petitioner continued to take medications, both aspirin and Toprol, for his cardiac condition.

24. David Hart worked as a firefighter with Respondent from March 16, 1981, through his voluntary retirement, with the rank of Engineer, on February 10, 2005.

25. Mr. Hart was diagnosed with atrial fibrillation in 1992 and was treated for the condition with medications for the ensuing six years. Mr. Hart had a pacemaker implanted in October of 1998, and had the pacemaker in place through his retirement.

26. While still employed by Respondent, Mr. Hart's private cardiologist, Dr. Filart, provided Respondent and Dr. Portnoy with information concerning the pacemaker, and determined that Mr. Hart was not pacemaker dependent.

27. Based upon Dr. Filart's determination that Mr. Hart was not pacemaker dependent, Mr. Hart was not removed from duty or placed on restricted duty due to his pacemaker.

28. Mr. Hart agreed that the decision with respect to pacemaker dependency should be made by the patient's cardiologist.

29. Petitioner claims that he was discriminated against by Respondent due to disparate treatment between himself and David Hart. He alleges he is not pacemaker dependent, is similar to Mr. Hart, and, therefore, should not have been medically separated from his employment with Respondent.

CONCLUSIONS OF LAW

30. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. §§ 120.569, 120.57(1), and 760.01, et. seq., Fla. Stat.

31. Petitioner is an “aggrieved person” and Respondent is an "employer" within the meaning of Subsections 760.02(10) and (7), Florida Statutes, respectively. Section 760.10, Florida Statutes, makes it unlawful for Respondent to discharge or otherwise discriminate against Petitioner based on an employee’s disability.

32. In Petitioner's Employment Complaint of Discrimination, he alleges that he is not disabled because of

his pacemaker, but has been regarded by Respondent as disabled because of the pacemaker. Therefore, he claims, Respondent violated the Florida Civil Rights Act when it failed to retain him as an employee despite the fact he has a pacemaker.

33. In a disability discrimination case alleging discriminatory discharge, in order to establish a prima facie case of discrimination, a petitioner must demonstrate that (1) he is physically disabled; (2) he is a "qualified individual," meaning he can perform the essential functions of the job in question with or without reasonable accommodation; and (3) he was discriminated against because of his disability. Lucas v. W.W. Granger, Inc., 257 F.3d 1249, 1255 (11th Cir. 2001); Reed v. Heil Co., 206 F.3d 1055, 1061 (11th Cir. 2000).

34. No direct evidence of discrimination exists in this case. A finding, if any, must be based on circumstantial evidence.

35. The burden of proof in discrimination cases involving circumstantial evidence is set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973). Federal discrimination law may be used for guidance in evaluating the merits of claims arising under Chapter 760. Tourville v. Securex, Inc., 769 So. 2d 491 (Fla. 4th DCA 2000); Greene v. Seminole Electric Co-op., Inc., 701 So. 2d 646 (Fla. 5th DCA 1997); Brand v. Florida Power Corp., 633 So. 2d 504 (Fla. 1st DCA 1994).

36. Florida courts have recognized that actions for discrimination on the basis of disability are analyzed under the same framework as Americans with Disabilities Act (ADA) claims. Chanda v. Englehard/ICC, 234 F.3d 1219 (11th Cir. 2000). 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. Chanda, Id. at 1221. In this matter, at no time has Petitioner alleged that he is restricted in the manner in which he can perform any major life activity.

37. If Petitioner succeeds in making a prima facie case, the burden shifts to Respondent to articulate some legitimate, nondiscriminatory reason for its conduct. If Respondent carries this burden of rebutting Petitioner's prima facie case, Petitioner must demonstrate that the proffered reason was not the true reason, but merely a pretext for discrimination. McDonnell Douglas, supra at 802-03.

38. Applying the required standard of proof, Petitioner has failed to establish any claim of unlawful discrimination. With respect to the first factor establishing discrimination on the basis of a disability, the ADA and FCRA define "disability" as 1) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; 2) a record of such impairment; or 3) being regarded as having

such impairment. Smith v. City of Des Moines, 99 F.3d 1466, 1474 (8th Cir. 1996); see also Sutton v. United Airlines, Inc., 527 U.S. 471, 489 (1999).

39. In the present case, Petitioner claims not to have a disability, but is regarded by Respondent as having one. An employee is considered disabled if he is regarded as having an impairment that substantially limits a major life activity. Wooten v. Farmland Foods, 58 F.3d 382, 385 (8th Cir. 1995). Working is considered a major life activity which, if substantially limited or regarded as substantially limited by an impairment, would thus qualify the employee as disabled. 29 C.F.R § 1630.2(I); Wooten, id.

40. "Working," however, does not mean working at a particular job of the employee's choice. Wooten, id.; Smith, supra, at 1474. An impairment that disqualifies a person from only a narrow range of jobs is not considered a substantially limiting one. Sutton, supra at 491; Stewart, supra at 1285, citing Pritchard v. Southern Co. Services, 92 F.3d 1130, 1132 (11 Cir.), amended on rehearing, 102 F.3d 1118 (11th Cir. 1996); Wooten, supra, citing Heilwell v. Mount Sinai Hospital, 32 F.3d 718,723 (2d Cir. 1994).

41. In this case, Petitioner's evidence demonstrated that Respondent believed that Petitioner, due to his pacemaker, was unable to perform only one specific job, namely, Lieutenant/EMS

Supervisor. Petitioner failed to present any evidence that Respondent regarded him as unable to perform a broad range of jobs. In fact, based upon Respondent's testimony, the opposite is true. Respondent placed Petitioner on light office duty, and considered him able to perform this job. Further, even after Respondent told Petitioner he would be terminated from this particular position with the County, he was given the opportunity to find another position with the County.

42. Petitioner has failed to establish that he was regarded by Respondent as having an impairment that qualified him as disabled. Therefore, although the evidence supports that Petitioner is unfit to perform his duties as a Lieutenant/EMS Supervisor, he has not proven that he has met the first factor in establishing a prima facie case of disability discrimination, namely, that he is, in fact, "disabled." Therefore, his claim of disability discrimination must be dismissed. See Bridges v. Bossiter, 92 F.3d 329 (5th Cir. 1996) (holding that an impairment that prevents one from becoming a firefighter only affects a narrow range and class of job, and therefore is not a substantial limitation on the major life activity of working).

43. Petitioner also claims that he was treated differently from another firefighter, David Hart, who also has a pacemaker and worked several years with the pacemaker in place prior to his voluntary retirement. To establish a disparate treatment

claim, Petitioner must demonstrate: 1) he belongs to a protected class (in this case a person with a disability); 2) that he was qualified for the job; and 3) that a similarly situated employee outside his protected class did not receive similar treatment. Alexander v. Fulton County, 207 F.3d 1303, 1336 (11th Cir. 2000).

44. As set forth above, Petitioner is not disabled from performing the major life activity of working. He is only precluded from performing his previous job as a Lieutenant/EMS Supervisor. Moreover, Mr. Hart received clearance to continue as a firefighter from Dr. Portnoy, Respondent's physician, based upon Mr. Hart's treating cardiologist's findings. In the present case, Respondent's physician, Dr. Portnoy, reasonably concluded, based upon the finding of Petitioner's long-time cardiologist, Dr. Einhorn, that Petitioner was unfit to remain in his position as a Lieutenant/EMS Supervisor. Petitioner's attempts to have additional cardiologists clear him to work in that position occurred after Dr. Einhorn and Dr. Portnoy reached their conclusions, were based upon a single or very few visits, and therefore do not carry the same weight as the seven years of care provided to Petitioner by Dr. Einhorn. Without the testimony of one or both of these later treating physicians, Petitioner has not met his burden of overcoming the medical findings of both Dr. Einhorn and Dr. Portnoy.

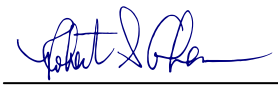
45. In conclusion, Petitioner presented no credible and persuasive evidence that Respondent's articulated reasons for its actions were a pretext for discrimination. There is no evidence to support a finding that Respondent violated Chapter 760, Florida Statutes, or the ADA.

RECOMMENDATION

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

RECOMMENDED that the Commission enter a Final Order finding that the Respondent did not discriminate against Petitioner and dismissing the Petition for Relief.

DONE AND ENTERED this 11th day of May, 2006, in Tallahassee, Leon County, Florida.



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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.