

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

STEWART R. GILLMAN, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 06-1242  
 )  
 SAINT LEO UNIVERSITY, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the formal hearing in this proceeding on October 3 and 4, 2006, in Tampa, Florida, for the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Robert F. McKee, Esquire  
Kelly & McKee, P.A.  
1718 East Seventh Avenue, Suite 301  
Post Office Box 75638  
Tampa, Florida 33675-0638

For Respondent: Scott A. Fisher, Esquire  
Fowler White Boggs Banker  
501 First Avenue North, Suite 900  
St. Petersburg, Florida 33701

STATEMENT OF THE ISSUE

The issue is whether Respondent discriminated against Petitioner because of his disability by refusing to renew Petitioner's contract for employment.

PRELIMINARY STATEMENT

On September 19, 2005, Petitioner filed a Charge of Discrimination with the Florida Commission on Human Relations (FCHR). The Charge of Discrimination alleged that Respondent discriminated against Petitioner based on his disability, failed to reasonably accommodate Petitioner, and created a hostile work environment. On March 16, 2006, FCHR issued a "no cause" determination. Petitioner requested an administrative hearing by filing a Petition for Relief on April 12, 2006. FCHR forwarded the Petition to DOAH to conduct the hearing.

Prior to the hearing, Petitioner withdrew the allegations that Respondent failed to provide a reasonable accommodation and created a hostile environment. The only allegation at issue during the administrative hearing was the allegation that Respondent discriminated against Petitioner because of his disability by not renewing Petitioner's teaching contract.

At the hearing, Petitioner testified, presented the testimony of four witnesses, and submitted 32 exhibits for admission into evidence. Respondent presented the testimony of seven witnesses and submitted 64 exhibits for admission into evidence.

The identity of the witnesses and exhibits, and the rulings regarding each, are reported in the four-volume Transcript of the hearing filed with DOAH on October 30, 2006. Pursuant to

the agreement of the parties and a subsequent unopposed request for extension of time by Respondent, Petitioner and Respondent timely filed their respective Proposed Recommended Orders (PROs) on December 1 and 4, 2006.

#### FINDINGS OF FACT

1. Respondent is a private university located in Pasco County, Florida (Saint Leo or the university). Respondent employed Petitioner as an assistant professor from sometime in January 2000 until the end of the 2005-2006 school year in May 2006. Petitioner initially taught sports management courses in the Business Department of Saint Leo and, following the university reorganization, taught sports management courses in the Sports Management Department of the School of Business (the Department).

2. The Charge of Discrimination and Petition for Relief allege, in relevant part, that Respondent violated Section 760.10, Florida Statutes (2004), when Respondent allegedly discriminated against Petitioner because of Petitioner's handicap. Neither the Charge of Discrimination nor the Petition for Relief expressly allege that Respondent violated the Americans with Disabilities Act (ADA) of 1990, Pub. L. No. 101-336, 104 Stat. 328, codified as amended at 42 U.S.C. Sections 12101-12213 (2000). However, judicial decisions

discussed in the conclusions of law instruct the trier of fact to make findings in a manner that is consistent with the ADA.<sup>1</sup>

3. Petitioner is a person with a handicap within the meaning of Subsection 760.10(1)(a), Florida Statutes (2000). Petitioner was paralyzed in an automobile accident on December 19, 2001, and is a disabled person within the meaning of 42 U.S.C. Section 12112 (2004).

4. Petitioner is a qualified person within the meaning of 42 U.S.C. Section 12111(8) (2004). Petitioner is a person with a disability who can perform the essential functions of a tenured employee.

5. Petitioner was qualified for the position for which Respondent employed Petitioner in January 2000. Petitioner received his doctorate of education in sports management from the United States Sports Academy in 1990. Although Petitioner had no prior experience teaching at the college level, Petitioner was the only doctorate teaching sports management courses in the Business Department of the university when Respondent employed Petitioner in January 2000. At the time, Respondent needed a doctorate to teach sports management courses in order to satisfy the accreditation requirements of the Southern Association of Colleges and Schools (SACS).

6. Respondent does not allege that Petitioner is not qualified to perform the requirements of a tenured employee.

Respondent argues, and submitted evidence intended to prove, that Petitioner either lacked the motivation to perform the required job duties or simply refused to perform those duties.

7. On November 12, 2004, Respondent notified Petitioner that Respondent would not renew Petitioner's teaching contract at the end of the 2005/06 school year. The refusal to renew Petitioner's teaching contract was an adverse employment action.

8. There is no direct evidence that the adverse employment action was motivated by discrimination. However, the circumstantial evidence, taken as a whole, supports a reasonable inference by the trier of fact that the adverse employment action was motivated by both legitimate non-discriminatory and discriminatory reasons.

9. Legitimate non-discriminatory reasons, in part, motivated the adverse employment action against Petitioner. When a third-year review of Petitioner's job performance began on August 26, 2004, Petitioner had not prepared sufficient papers for conferences, had not demonstrated consistency in presenting papers at conferences, and had not served on any conference panels. Petitioner had not published a sufficient number of articles or books and had not engaged in sufficient scholarly research.

10. Petitioner did not submit any paper or abstract to present at a conference until June 2004. The first paper was

accepted for publication in November 2004. In September 2004, Petitioner had his first test bank accepted for inclusion in a textbook published by another author.

11. Petitioner utilized at least one course syllabus that was below grade level. The syllabus included some grammatical errors and inaccurate information.

12. Petitioner episodically cited incorrect facts during class. Petitioner was occasionally late to class for up to five minutes.

13. Petitioner frequently read from the textbook when lecturing students. Petitioner sometimes did not give prior notice to his supervisor of his unavailability for a class. The supervisor was unable to arrange for a substitute. Petitioner sometimes cancelled classes without providing class notes for the substitute.

14. Petitioner failed to maintain consistent office hours for academic advice of students. One faculty member in an adjacent office provided academic advice to Petitioner's students in Petitioner's absence.

15. Petitioner failed to attend a meeting in Atlanta, Georgia, as a reviewer on a national council chaired by Petitioner's supervisor. Petitioner did not ascertain the correct starting time or location of the meeting.

16. The failure to attend the meeting in Atlanta caused the council to be short a reviewer for one year. The inclusion of Petitioner as a reviewer on the council would have provided Petitioner with an opportunity to improve his national reputation and meet many influential people in his field of employment.

17. Record evidence supports a reasonable inference that discriminatory reasons, in part, motivated the adverse employment action against Petitioner. Two of four evaluators in the third-year review of Petitioner's job performance that began on August 26, 2004, referred to Petitioner's disability in their formal evaluations.

18. The two evaluators testified at the hearing that Petitioner's disability did not influence their evaluations. Their testimony is neither credible nor persuasive to the trier of fact.

19. The testimony of the two evaluators, among other considerations, is not plausible. The testimony does not adequately explain why the evaluations address Petitioner's disability if the evaluators disregarded the disability in evaluating Petitioner.<sup>2</sup>

20. The immediate supervisor of Petitioner commented on Petitioner's disability in her third-year evaluation of Petitioner. The supervisor stated she was "extremely

disappointed" during the previous academic year when Petitioner declined her request to "be a role model and show our students what individuals with handicaps could achieve." The supervisor further explained in her evaluation that "disability sport has - become a major segment of - our sport business industry - and there are many career opportunities for students in this area."

21. The supervisor further stated in her third-year evaluation of Petitioner that she could not "fully understand what it is like to have [Petitioner's] disability." However, the supervisor stated that she had "worked with physically challenged individuals for approximately 16 years, and they never ceased to amaze [her] at what they could do."

22. One of three outside evaluators also included references to Petitioner's handicap in the third-year evaluation of Petitioner. The evaluator devoted approximately one-third of the evaluation to a discussion of his experience working with one disabled colleague who had been seriously injured in a motorcycle accident and was, like Petitioner, wheelchair bound.

23. After recounting the many laudable accomplishments of the evaluator's disabled colleague after becoming disabled approximately 12 years ago, the evaluator stated that his disabled colleague did not consider himself disabled. The evaluator explained that his disabled colleague "never makes



excuses for his special challenge nor does he ask or demand special considerations due to his situation."

24. The evaluator went on to compare Petitioner's paralysis with the evaluator's self-proclaimed "disability" following open heart surgery. The evaluator stated that he had undergone open heart by-pass surgery and did not let his "disability" prevent him from achieving performance standards. After recounting numerous professional accomplishments after his surgery, the evaluator explained:

The reason I have provided this information is not to brag but rather to illustrate that if one has a positive attitude about life he/she can do anything he/she wishes whether or not they are disabled. A disability is an extra challenge in life not a sentence to do less. I have not let my disability negatively affect my career.

Respondent's Exhibit 44 at 4.

25. When prima facie evidence shows that an adverse employment action is motivated by both non-discriminatory and discriminatory considerations, an employer does not escape liability under the ADA on the ground that the adverse employment action was not motivated "solely" by prohibited discrimination. Rather, judicial decisions discussed in the conclusions of law require the trier of fact to apply a so-called motivating-factor standard, or mixed-motive standard.<sup>3</sup> The motivating-factor standard requires the trier of fact to

determine whether the prohibited discriminatory motive made the difference in the decision to take the adverse employment action.<sup>4</sup>

26. The motivating factor standard has been judicially explained as a "but-for" standard.<sup>5</sup> Liability for prohibited discrimination requires the trier of fact to find that Respondent would not have taken the adverse employment action but-for the prohibited discrimination.

27. The but-for standard requires the trier of fact to determine whether the evidence supports a reasonable inference that Petitioner's failure to comply with performance standards for tenure was caused by his handicap.<sup>6</sup> If the evidence supports such an inference, the adverse employment action would not have been taken but-for the prohibited discrimination.

28. The record evidence supports a reasonable inference that Petitioner's failure to comply with performance standards for tenure by the beginning of the third-year review on August 26, 2004, was caused by his handicap. The inference is supported, in relevant part, by comparing the record evidence of Petitioner's performance during his employment before his disabling accident on December 19, 2001, with Petitioner's performance from the date of the accident until the beginning of the third-year review on August 26, 2004.

29. Prior to the accident on December 19, 2001, Petitioner taught classes at Saint Leo for four semesters.<sup>7</sup> Petitioner received four evaluations by three different evaluators. Even though it was Petitioner's first teaching experience at the college level, all but one of those evaluations rated Petitioner's job performance as "outstanding." The one exception rated Petitioner's job performance in his first year as "satisfactory." In the second year, however, the same evaluator rated Petitioner's job performance as "outstanding."

30. The supervisor for Petitioner during the first and second academic years of employment was the acting chair of the Business Department at Saint Leo. The supervisor rated Petitioner's job performance during the first year as "satisfactory." However, a second-line evaluator who was also a dean at Saint Leo rated Petitioner's job performance during the first year as "outstanding."

31. In the second academic year, the supervisor rated Petitioner's job performance as "outstanding." The supervisor found that Petitioner was "developing into a highly competent and effective classroom teacher."

32. An outside evaluator retained to evaluate Petitioner during the second academic year found that Petitioner had made "positive contributions to [the] sport management program." The evaluator recommended that Respondent retain Petitioner based on

Petitioner's academic background, sport management experience, and teaching performance.

33. Prior to the accident, Petitioner was selected to serve on the Panel of Reviewers for the Sport Management Program Review Council (SMPRC) to review institutional portfolios. The selection provided Petitioner with an opportunity for professional development, an improved national reputation, and enhanced professional relationships. However, the opportunity was postponed due to the accident that paralyzed Petitioner.

34. On January 29, 2002, Petitioner received a fifth evaluation by a fourth evaluator. The dean of the School of Business (the Dean) evaluated Petitioner's job performance for the four academic semesters that Petitioner worked before the accident. The Dean found that Petitioner was:

[A]cademically competent and very committed to Saint Leo University and the well being of his students. Stewart is relatively new to university level teaching and the expectations associated with this level of performance. His classroom manner is casual yet he holds the students to high performance standards. Stewart will need to identify an area of research interest and begin to prepare papers for the conferences in his discipline. I approached him with an idea and a willingness to co-author a paper. Unfortunately, due to his accident, Stewart will be involved full-time for the next six months in rehabilitation and relearning. Stewart has excellent potential to develop into an effective senior faculty member.

Respondent's Exhibit 10.

35. After the accident on December 19, 2001, Petitioner taught three academic semesters before his third-year review that began on August 24, 2004, and led to the adverse employment action on November 12, 2004. During the semester that began in January 2002, Petitioner was on medical leave to undergo surgery and recover. Petitioner worked during the semester that began in August 2002, but returned to medical leave during the semester that began in January 2003 in order to undergo additional surgery. Petitioner worked the two semesters that began in August 2003 and January 2004. On August 24, 2004, at the start of the fourth semester of work after the accident, Respondent began the third-year review that led to the adverse employment action on November 12, 2004.

36. During the three semesters that Petitioner worked between the accident and the start of the third-year review, the Dean, who evaluated Petitioner on January 29, 2002, did not pursue the idea he had described for co-authoring a paper with Petitioner. Petitioner was learning to adjust to life in a wheel chair. Petitioner experienced, and continues to experience, a great deal of pain unless Petitioner takes pain medication. Petitioner has also had to learn new toileting skills and has expressed embarrassment over his condition.

37. Petitioner did not attend the council meeting in Atlanta, Georgia, because he became confused over the correct time and location of the meeting. Petitioner did not make a volitional choice not to attend the meeting.

38. On December 5, 2003, Dr. Michael Moorman was Petitioner's immediate supervisor. Dr. Moorman found that the quality of Petitioner's classroom teaching was "outstanding."

39. After December 5, 2003, Respondent changed the job performance standards for employees teaching sports management courses at Saint Leo.<sup>8</sup> While Petitioner was on medical leave, each school at Saint Leo designated a program as a "flagship" program. Each flagship program would be funded and supported in an effort to enable the program to grow into a nationally recognized program that would serve as a paragon for other Saint Leo programs to emulate. The job performance requirements in each flagship program were also intended to establish a standard for emulation by other programs.

40. The School of Business designated the Sport Management Program as its flagship program and reorganized the program into the Sport Management Department. In February 2003, Respondent commissioned an outside study of the Department. The study concluded that the Department lacked academic rigor, failed to challenge students, and was poorly organized for the purpose of becoming a flagship program for Saint Leo.

41. Respondent searched for a nationally known professor to chair the Department. Respondent wanted someone who could make the necessary curriculum changes, improve the Department's national recognition, increase the academic rigor of the Department, and enhance the national reputation of its professors, including Petitioner.

42. In August 2003, Respondent selected a person to chair the Department. After December 5, 2003, the new chair succeeded Dr. Moorman as Petitioner's immediate supervisor.

43. The new chair found, during the academic semester that began in January 2004, Petitioner did not meet the job performance requirements of the new flagship Department of Sport Management. One deficiency the chair described in her third-year evaluation of Petitioner pertained to errors in a syllabus used by Petitioner. For example, the syllabus continued to use the title "Saint Leo College" instead of "Saint Leo University."

44. The new chair confided to an associate in the Department that the vice president of Academic Affairs (Vice President) had told the new chair in so many words that Petitioner would have been fired long ago if Petitioner had not been in a car accident. The associate testified to the statement she attributed to the new chair, and the associate's testimony is found to be credible and persuasive. The Vice President denied making the statement to the new chair during

his testimony, and that portion of his testimony is found to be credible and persuasive.

45. The statement attributed to the Vice President that he would have fired Petitioner but-for the accident conflicts with the predominantly "outstanding" job performance of Petitioner prior to his accident. The testimony of the new chair also conflicts with two evaluations of Petitioner's job performance by different deans on January 29, 2002, and December 5, 2003. Both of those evaluations occurred after the accident, but before the new chair became the immediate supervisor of Petitioner sometime after December 5, 2003. It is more likely that the new chair expressed her own view that the university was holding Petitioner to a lower standard of job performance because of his disability.

46. When the third-year review process began on August 26, 2004, Petitioner was no longer the only doctorate employed in the Department. However, he was the only disabled doctorate employed in the Department.

47. The record evidence supports a reasonable inference that Respondent required Petitioner to comply with standards exemplified by unidentified disabled persons described in two of the four third-year evaluations of Petitioner.<sup>9</sup> Respondent did not require non-disabled employees to comply with similar standards.



48. The Vice President testified that the references in the evaluations to standards exemplified by other disabled persons did not influence his decision to take the adverse employment action on November 12, 2004. That portion of the testimony of the Vice President is neither credible nor persuasive.

49. The Vice President, in relevant part, relied on the third-year evaluations. His denials of influence conflict with other relevant evidence.

50. Before the Vice President began the third-year review process on August 26, 2004, he conferred with the new chair and reviewed Petitioner's record, including Petitioner's record of "outstanding" performance on or before December 5, 2003. In a letter to Petitioner dated August 26, 2004, the Vice President told Petitioner, in relevant part, that he had "serious concerns regarding your performance."

51. The Vice President instructed the Dean and the new chair to "carefully monitor" Petitioner's "teaching and professional development activities in the fall semester of 2004." However, neither the Dean nor the chair monitored Petitioner's activities, and the Vice President initiated the adverse employment action on November 12, 2004, prior to the conclusion of the fall semester.

52. Respondent applied a different timeline to Petitioner's tenure track than the timeline that Respondent generally applied to the tenure track of other employees. Tenure track employees may apply for tenure after their fifth year of employment, but may apply no later than their seventh year of employment. Most tenure track employees apply for tenure during their sixth year of employment.

53. Employees on tenure track at Saint Leo receive annual contracts for their first, second, and third years of employment. Tenure track employees that receive a favorable third-year review are given a two-year employment contract after the third and fifth years of employment.

54. Petitioner began his tenure track in January 2000. The seventh year of his tenure track would have expired at the end of the academic semester in December 2006.<sup>10</sup>

55. The third year of Petitioner's tenure track would have expired at the end of the academic semester in December 2002. Due to the accident on December 19, 2001, however, Respondent extended the time for the third-year review until August 26, 2004. The extension provided Petitioner with seven academic semesters, rather than six, before the third-year review began.<sup>11</sup>

56. Although Respondent extended the time for beginning the third-year evaluation, Respondent did not extend the seven-year limit for tenure. Respondent thereby reduced the time

after the third-year evaluation in which Petitioner had to correct his deficient job performance to a period less than that enjoyed by non-disabled employees.

57. Other tenure track employees normally have 14 academic semesters in which to complete their seven-year tenure track. Upon the expiration of six academic semesters, Respondent conducts a third-year evaluation. A tenure track employee then has eight more academic semesters, or four academic years, in his or her tenure track.

58. Respondent reduced Petitioner's tenure track by a semester when Respondent terminated Petitioner's employment at the end of the academic semester in May 2006, rather than at the end of the academic semester in December 2006. By extending the third-year evaluation by a semester and reducing the remaining tenure track by an additional semester, Respondent reduced by one year the period that non-disabled tenure track employees have after their third-year review to complete their tenure track requirements.

59. The Vice President has conducted third-year reviews on approximately 20 tenure track employees at Saint Leo since 1997. He has terminated the employment of two of those candidates. Petitioner is one of the two terminated from employment.

60. The Vice President acknowledged in his testimony that he may have given Petitioner more time if the adverse employment

decision were based solely on research and acceptable publication levels. Petitioner's teaching performance on and before December 5, 2003, was predominantly "outstanding." Moreover, one of the outside evaluators found that syllabi deficiencies were nothing that could not be easily corrected. Another evaluator found the syllabi "are consistent with guidelines established by NASSM/NASPE." It is unlikely, therefore, that the adverse employment action was motivated by job performance deficiencies in teaching, research, and syllabi.

61. The Vice President relied on findings of evaluators that evaluated Petitioner, in relevant part, on Petitioner's inability to comply with standards exemplified by other disabled persons. The Vice President articulated no intelligible standards he used for discerning whether, or to what degree, the disability of Petitioner influenced the negative opinion of the evaluator. Moreover, the Vice President did not undertake an independent determination of whether Petitioner's handicap prevented Petitioner from complying with applicable job performance requirements by August 26, 2004.

62. The job performance requirements for tenure are prescribed in the Collective Bargaining Agreement (CBA) and a Faculty Handbook (FHB). The CBA provides, in relevant part:

Promotion and tenure decisions at Saint Leo University are made on the basis of documented and evaluated performance in

three areas: (1) teaching; (2) scholarly growth [sic] (3) institutional and community service.

(a) Tenure and Promotion: The primary criteria for decisions regarding reappointment, tenure and promotion are excellence in classroom teaching and in facilitating student learning. Teaching Faculty must demonstrate excellence in teaching, a part of which is academic advising. Teaching faculty must demonstrate excellence in either (1) scholarly growth or (2) institutional and community service.

Scholarly growth may be demonstrated through professional development and/or research. The definition of professional development and scholarly research will be determined by the relevant School. The University will recognize both traditional and non-traditional means of demonstrating professional development and/or research.

Respondent's Exhibit 1 at 44.

63. The FHB describes guidelines for promotion and tenure applications in terms similar to those in the CBA. The FHB provides, in relevant part:

Promotion and tenure decisions at Saint Leo University are made on the basis of documented and evaluated performance in three areas: teaching; professional development, research, and scholarly growth; and institutional and community service. For teaching faculty excellence in teaching and demonstrated student learning are essential to tenure and promotion. Either professional development, research and scholarly growth or institutional and community service must be judged excellent for tenure.

Respondent's Exhibit 2 at 73.

64. The School of Business does not provide written job performance requirements that determine the tenure requirements for scholarly research and professional development. Testimony at the hearing suggested tenure requires at least two publications or presentations each year. However, that testimony is belied by predominantly "outstanding" job performance evaluations of Petitioner during his first two academic years in which Petitioner published no articles and made no presentations.

65. In the three complete academic semesters that Petitioner had available to him after the accident to pursue his scholarly research, one article authored by Petitioner was accepted for publication and a test bank authored by Petitioner was included for publication in a text book. Petitioner also attended three conferences.

#### CONCLUSIONS OF LAW

66. DOAH has jurisdiction over the Parties and the subject matter of this proceeding. §§ 120.57(1), 120.569, and 760.11 Fla. Stat. (2006). DOAH provided the parties with adequate notice of the administrative hearing.

67. The Florida Civil Rights Act enacted in Chapter 760, Florida Statutes (2004), must be construed in a manner consistent with applicable federal law. Ross v. Jim Adams Ford,

871 So. 2d 312 (Fla. 2d DCA 2004). In relevant part, the state law must be construed in a manner consistent with the ADA and interpretive judicial decisions. Smith v. Avatar Properties, Inc., 714 So. 2d 1103, 1106 (Fla. 5th DCA 1998); Greene v. Seminole Electric Cooperative, Inc., 701 So. 2d 646, 647 (Fla. 5th DCA 1997); Brand v. Florida Power Corporation, 633 So. 2d 504 (Fla. 1st DCA 1994).

68. Petitioner has the burden of proof in this proceeding. Petitioner must show by a preponderance of the evidence that Petitioner is an individual with a disability, is a qualified individual, and was discriminated against by his employer because of the disability. 42 U.S.C. § 12112 (2000).

69. Petitioner satisfied his burden of proof concerning the first two statutory requirements. A preponderance of evidence shows that Petitioner is a qualified individual with a disability.

70. There is no direct evidence that the adverse employment action taken against Petitioner was motivated by prohibited discrimination. In the absence of direct evidence of discrimination, circumstantial evidence relevant to the allegation of discrimination generally must be analyzed under the so-called burden-shifting framework. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

71. The circumstantial evidence of record supports a reasonable inference that the adverse employment action was motivated by both non-discriminatory and discriminatory reasons. The ADA does not limit liability to an adverse employment action that is motivated "solely" by discrimination. Rather, the ADA imposes a so-called "motivating-factor standard" to mixed-motive cases, including this proceeding. McNely v. Ocala Star-Banner Corporation, 99 F.3d 1068, 1073 (11th Cir. 1996).<sup>12</sup>

72. The motivating-factor standard imposes liability if a prohibited reason is but one factor in an employer's decision to take adverse employment action, so long as the inclusion of the prohibited factor made the difference in the decision. Id. For reasons stated in the findings of fact, the record evidence supports a reasonable inference by the trier of fact that the prohibited factor of Petitioner's handicap made the difference in Respondent's decision not to renew Petitioner's employment contract, and the handicap caused Petitioner's inability to comply with job performance requirements by August 26, 2004. Cf. Hawkins v. Dale Medical Center, 2006 U.S. Dist. LEXIS 35522, at 7 (S.D. Ala. 2006) (failure to show job performance deficiencies were caused by physical impairment fails to demonstrate that disability was a "but-for" cause for termination of employment).



RECOMMENDATION

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

RECOMMENDED that a final order be entered granting Petitioner's Charge of Discrimination and Petition for Relief for the reasons stated herein, and reinstating Petitioner to his position of employment with back pay and benefits.

DONE AND ENTERED this 29th day of December, 2006, in Tallahassee, Leon County, Florida.



---

DANIEL MANRY  
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 29th of December, 2006.

ENDNOTES

1/ See Smith v. Avatar Properties, Inc., 714 So. 2d 1103, 1106 (Fla. 5th DCA 1998) (FCRA should be construed in conformity with ADA); Brand v. Florida Power Corporation, 633 So. 2d 504, 509 (Fla. 1st DCA 1994) (state statute modeled after federal statute takes on same construction as federal statute).

2/ The testimony of the two evaluators is also inconsistent with other evidence discussed infra.

3/ See McNely v. Ocala Star-Banner Corporation, 99 F.3d 1068, 1073-1078 (11th Cir. 1996) (jury instruction requiring jury to find that adverse employment action was based "solely" on disability does not accurately describe applicable legal standard to be applied in ADA cases).

4/ McNely, 99 F.3d at 1073 and 1078.

5/ McNely, 99 F.3d at 1073.

6/ Cf. Hawkins v. Dale Medical Center, 2006 U.S. Dist. Lexis 35522, at 7 (M.D. Ala. 2006) (failure to make connection between handicap and performance deficiencies is a fatal evidentiary gap under the "but-for" standard).

7/ Petitioner taught during the semesters that began in January and August 2000 and 2001.

8/ The trier of fact draws no inference that the change in performance standards was motivated by a prohibited discriminatory purpose. However, the increased performance standards exacerbated the inability to meet job performance requirements caused by Petitioner's intervening handicap.

9/ One evaluator viewed himself as disabled after open heart surgery. If one were to accept the characterization as accurate, Petitioner was also required to comply with standards exemplified by an identified disabled person.

10/ This calculation assumes that one year of a tenure track is comprised of two academic semesters, excluding summers. Petitioner began employment in the academic semester that began in January 2000. The second semester of that tenure track year would have ended at the conclusion of the academic semester in December 2000. The second tenure year would have ended in December 2001, the third in December 2002, the fourth in December 2003, the fifth in December 2004, the sixth in December 2005, and the seventh in December 2006.

11/ The first four semesters expired before the accident from January 2000 through December 2001. Petitioner was on medical leave during the academic semesters that began in January 2002 and January 2003. Thus, the fifth semester was the academic semester that expired in December 2002. The sixth semester expired in December 2003, and the seventh semester expired in May 2004. The third-year evaluation began at the start of the eighth semester in August 2004.

12/ A majority of federal circuit courts have adopted the motivating factor standard of liability under the ADA. They are the First, Second, Fourth, Seventh, Eighth, and Eleventh Circuit Courts of Appeal. A minority of federal circuits employ the so-called "solely" standard for liability. They are Third, Fifth, Sixth, Ninth, and Tenth Circuit Courts of Appeal. Relevant judicial decisions are discussed in Park, S., "Comment: Curing Causation: Justifying A 'Motivating-Factor Standard Under the ADA, Fla. St. Univ. Law Review (Fall 2004).

COPIES FURNISHED:

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

Robert F. McKee, Esquire  
Kelly & McKee, P.A.  
1718 East Seventh Avenue, Suite 301  
Post Office Box 75638  
Tampa, Florida 33675-0638

Scott A. Fisher, Esquire  
Fowler White Boggs Banker  
501 First Avenue North, Suite 900  
St. Petersburg, Florida 33701

Cecil Howard, General Counsel  
Florida 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.