STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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| GLEN W. SELLERS, | ) | |
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| Petitioner, | ) | |
| | ) | |
| vs. | ) | Case No. 06-2414 |
| | ) | |
| LAKE COUNTY SHERIFF'S OFFICE, | ) | |
| | ) | |
| Respondent. | ) | |
| | ) | |

RECOMMENDED ORDER

Upon due notice, a disputed-fact hearing was held in this cause on September 7, 2006, in Tallahassee, Florida, before Ella Jane P. Davis, a duly-assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Glen W. Sellers, pro se
210 Jasper Street
Bushnell, Florida 33513

For Respondent: Linda G. Bond, Esquire
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Post Office Box 10507
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STATEMENT OF THE ISSUE

Whether Respondent is guilty of an unlawful employment practice, to wit: constructively discharging Petitioner on the basis of handicap discrimination without reasonable accommodation.

## PRELIMINARY STATEMENT

On December 8, 2005, Petitioner filed a Charge of Discrimination, on the basis of handicap, with the Florida Commission on Human Relations (FCHR). On June 5, 2006, FCHR entered its Determination: No Cause. Petitioner timely-filed his Petition for Relief, and on or about July 10, 2006, the case was referred to the Division of Administrative Hearings (DOAH).

At the disputed-fact hearing on September 7, 2006, the parties' Joint Pre-hearing Stipulation was admitted as Joint Exhibit "A," a composite in two parts. Petitioner testified on his own behalf and had Exhibits P-1, P-3, P-4, and P-5 admitted in evidence. Respondent presented the oral testimony of Sheriff Chris Daniels and Chief Deputy Gary Borders. Respondent's Exhibits R-1, through R-3, and R-5 were admitted in evidence.

The parties stipulated to November 15, 2006, as the date for filing their proposed recommended orders.

The Transcript was filed on September 25, 2006. The parties were given notice of the filing of the Transcript by a Post-hearing Order which also set out how to prepare a recommended order.

Respondent filed its Proposed Recommended Order timely on November 15, 2006. Petitioner has filed no proposal.

## FINDINGS OF FACT

1. Respondent Lake County Sheriff's Office (LCSO), constitutes an "employer" as defined in Chapter 760, Florida Statutes.

2. Chris Daniels took office as the elected Sheriff of Lake County, Florida, in January 2005. He had been with Respondent LCSO for 18 years. The sheriff is the chief law enforcement officer for Lake County; operates the Lake County Jail for the Board of County Commissioners; and manages security and bailiffs for the Lake County Courthouse. His responsibilities also include providing final approval for staffing levels at the Lake County Jail.

3. In 2005, Petitioner had been employed as a detention officer at the Lake County Jail for 16 years. He is a certified corrections officer.

4. Corrections/detention officers assigned to the inmate housing/security areas at the jail work 12-hour shifts from 6:00 a.m. to 6:00 p.m. They are assigned to either "A," "B," "C," or "D" Squads. The squads rotate from day to night, and from night to day, shifts every four months. Officers assigned to inmate security are not normally assigned permanent shifts. Petitioner was such an officer.

5. Working on rotating shifts is an essential function of working in the inmate housing area of the jail, as detailed in the job description for corrections officers as follows:

> 6. . . . ensures a timely transmission of pertinent information and materials to other correctional personnel assigned to the same and/or the next shift.

6. Petitioner understood at the beginning of his employment with LCSO that he was expected to work rotating shifts, and he did, in fact, work rotating shifts until 1996.

7. Other corrections officers assigned to laundry, the jail kitchen, inmate transportation and other administrative functions permanently work days from 8:30 a.m. to 5:00 p.m. Monday through Friday, without shift changes. Such positions with permanent day shifts have become available over the years. However, Petitioner last sought such a position in 1997 or 1998.

8. Petitioner was working as a detention/corrections officer for Respondent when he was diagnosed with diabetes in 1996.

9. Petitioner's diabetes causes tingling in his hands and feet, impotence, floaters in his eyes, dizziness, profuse sweating, frequent urination, a weakening immune system and occasional outbreaks of boils. Petitioner’s Exhibit 4 reveals that he takes multiple oral medications and that each kind of medication ideally should be taken at the same time of day, each

day, but there are instructions on how to compensate if a dose is missed. With the exception of working rotating shifts, Petitioner was able at all times to perform the essential functions of a corrections officer for Respondent.

10. The Veterans' Administration pays Petitioner $218.00 per month because it believes his diabetes was induced by Agent Orange he encountered while in Viet Nam.

11. At Petitioner's request, Respondent allowed Petitioner to work a permanent day shift from 1996 to June 30, 2005, when he retired.

12. Petitioner testified he has worked in the past as a military medic and as a physician's assistant in correction facilities, so he is knowledgeable about the horrific, and sometimes fatal, effects of uncontrolled diabetes.

13. Petitioner expected to live a normal life so long as he controlled his diabetes.

14. Petitioner claims to have explained over the years to all his superiors that he needed to consistently take his medications at the same time of day. However, he did not offer any evidence in the present proceeding to explain why he could not take his medications consistently on a 24-hour clock, e.g. during nights, as opposed to during days. There have been periods when he experienced problems with his diabetes while

working a permanent day shift. His medications have been adjusted several times since 1996.

15. All witnesses agreed that Petitioner spent 18 months alone in a permanent day position in the third-floor control room. Petitioner claimed that he was assigned this long period of duty on the third-floor as "punishment" for being allowed to permanently work a day shift. He maintained, without any supporting evidence, that being assigned to a single position for more than a few months this way was unusual. However, although Respondent assigned Petitioner to the third-floor control room alone for a duration of 18 months, Respondent also assigned a non-diabetic employee alone there for about one year. Petitioner speculated, again without any supporting evidence, that the non-diabetic employee was also being punished for something. Both Petitioner and the non-diabetic employee experienced being confined to the control room without a restroom. Having to urinate when no other officer could stand-in for them created a hardship on both men. On one occasion, the non-diabetic employee urinated in a garbage can.

16. At the date of hearing, Gary Borders had been with LCSO for 17 years and served as its Chief Deputy.[1/] On the date of hearing, and at all times material, Chief Borders' duties included responsibility for the day-to-day operations of the

Lake County Jail and the Lake County Courthouse and for training.

17. Petitioner claims to have frequently protested to many superiors about not having a restroom on the third-floor and not being allowed to bring food in for his diabetes. He also claimed to have specifically asked Chief Borders to be transferred from service on the third-floor, but Chief Borders did not recall more than one vague conversation concerning Petitioner's complaint about how long Petitioner had been posted there and that he had told Petitioner he, Borders, had no problem with Petitioner's being transferred elsewhere in the jail.

18. It is not clear when, precisely, this 18 month-period occurred. Because Petitioner was on a permanent day shift from 1996-1997 to 2005 (eight years), and Petitioner testified his 18-month posting on the third-floor was "over" and was from 2003-2005, his time on the third-floor was not affirmatively shown to have occurred within the 365 days immediately preceding the filing of his Charge of Discrimination with FCHR on December 8, 2005.

19. When Sheriff Daniels took office in January 2005, Chief Borders advised him that because the date for the squads to rotate shifts (see Finding of Fact 4) was due to occur on May 1, 2005, the number of persons assigned to permanent shifts

was affecting Chief Borders' ability to make assignments. When corrections officers working in inmate housing of the jail are assigned permanent shifts, staff shortages can occur on other shifts. Chief Borders further advised the new sheriff that he, Borders, was receiving additional requests for permanent shifts.

20. While discussing why there were so many employees assigned permanent shifts, and not subject to the standard four months' rollover of the squads from day-to-night and night-to-day shifts, Sheriff Daniels and Chief Borders concluded that LCSO needed a formal method of differentiating between those employees who genuinely <u>needed</u> a permanent day or night shift and those employees who merely <u>wanted</u> a permanent shift assignment.

21. To determine which employees needed a permanent shift as an accommodation for their specific condition or situation, Sheriff Daniels instructed Chief Borders to send a memorandum to the 12-14 employees assigned to permanent shifts, requiring those employees to provide medical evidence of their need for a permanent shift assignment.

22. On March 25, 2005, Chief Borders sent all employees assigned to permanent shifts the following memorandum:

> There is a requirement for rotating shift work for Detention Deputies, Auxiliary Detention Deputies and Deputy Sheriffs at the Lake County Sheriff's Office.

> Please ask your physician to review the Job Description for Detention Deputy (or Auxiliary) and ask if you can perform all the job requirements. If you are cross-sworn, also have your physician review the Deputy Sheriff job description and ask if you can perform all of the job requirements for that position.
>
> When your job description(s) have been reviewed, bring your physician's letter and all related supporting material (diagnosis, prognosis, treatment notes, test results and any other documents that would assist the agency in evaluating your request) to me so that our agency physician can review them for possible accommodation.
>
> Because shift changes will take place on May 1, 2005, you must have your documents to me no later than 5:00 P.M. on Friday, April 15, 2005. If I do not hear back from you by Friday, April 15, 2005 at 5:00 P.M., I will take it that you are available for rotating shift work assignment.

23. The process envisioned by the Sheriff and Chief was that when an employee, who wanted an accommodation, provided the requested information from his own treating physician, that employee's supervisor would pass the information along to LCSO's physician, and an interactive process would begin. As of the date of hearing, LCSO had employees working in modified jobs, including job sharing, and an accommodation had been made for a person in a wheelchair. In 2005, LCSO also fully intended to accommodate those employees who provided proof from their physicians of their need for other accommodations.

24. Petitioner testified that he did not want to repeatedly roll over from day-to-night shifts every four months because past experience had taught him that each time his shift changed, it took him at least two weeks to properly regulate and space his intake of food, liquids, and medications, in such a way that his diabetes was controlled and he felt alert and capable.

25. In response to receiving the March 25, 2005, memorandum, Petitioner presented Chief Borders with a note from Petitioner's primary physician, Dr. Gelin, written on a prescription pad, stating:

> brittle diabetic pt needs to work day shift only.

26. Petitioner did not present any other written information in response to Respondent LCSO’s detailed request. Petitioner testified that he discussed Dr. Gelin’s note with Chief Borders to the extent that he told Borders that if anyone on behalf of LCSO phoned Dr. Gelin, Dr. Gelin would discuss or fax further information to that person; Chief Borders does not recall this conversation. Chief Borders is a diabetic himself, but he had never heard the term, "brittle diabetic."

27. It is Petitioner's position that because, in Dr. Gelin's private conversations with Petitioner, Dr. Gelin had told Petitioner that “any doctor” should know the sequelae and

effects of "brittle diabetes," all Petitioner's LCSO superiors needed to do was pass on Dr. Gelin's prescription note to LCSO's consulting physician in order for Petitioner to be accommodated. Petitioner believed it was his superiors' duty to make Dr. Gelin submit the written materials they wanted.

28. Sheriff Daniels generally distrusted the information that physicians submitted on prescription pads, because, in his experience, when the employee or physician was pressed for details, there was often no supporting information forthcoming. Therefore, he did not believe the information on Petitioner's prescription slip, as described to him by Chief Borders, was sufficient to begin the interactive process with LCSO's Human Resources Department or its consulting physician. Neither Sheriff Daniels nor Chief Borders presented Petitioner's prescription slip to them. It was decided between the Sheriff and the Chief, that Chief Borders would try to get more detailed information from Petitioner.

29. Petitioner testified that he tried to get more information from his primary physician, Dr. Gelin, but Dr. Gelin would not provide in writing the detailed information requested by LCSO's March 25, 2005, memorandum.

30. On April 22, 2005, Chief Borders wrote Petitioner that Dr. Gelin's prescription pad note was insufficient and that

Petitioner would not be reassigned to a permanent day shift position, stating:

> I have reviewed the information provided by your physician and find there is insufficient evidence presented to justify a permanent shift assignment.
>
> As such, your request is denied. You will rotate day/nights with your assigned shift during the normal rotation.

31. None of the 12-14 employees assigned to permanent shifts, had submitted the requested information, so all of them, including Petitioner, were assigned to a rotating shift. The Sheriff and Chief received no report of complaints from any employee.

32. However, on April 26, 2005, Petitioner received a memo stating that effective May 4, 2005, he would be assigned to "C" squad.

33. "A" Squad, where Petitioner was then assigned, was scheduled to rotate from day shift to night shift on May 1, 2005, and "C" Squad was due to rotate from the night shift to the day shift on the same date. Accordingly, LCSO’s purpose in transferring Petitioner to “C” Squad was to provide him with four more months (until September 1, 2005) to obtain the required medical opinion and detailed supporting documentation from his treating physician.

34. The "A" to "C" Squad change also would have allowed Petitioner to remain on a day shift, without interruption, and allow him an additional four months in which to gather medical information from any appropriate source to support his request to indefinitely remain on a permanent day shift.

35. In fact, Petitioner was regularly seeing Dr. Flores, at the Veterans' Administration, as well as Dr. Gelin. Dr. Flores coordinated oversight of Petitioner's medical condition with Dr. Gelin, who is Petitioner's private physician. However, Petitioner did not approach Dr. Flores, and he did not go back to Dr. Gelin, until after Petitioner retired.

36. Petitioner had hoped to work another six years before retiring, but on May 13, 2005, while still assigned to the day shift, Petitioner submitted a letter of resignation, hoping that someone in his chain of command would try to talk him out of leaving. He expected his supervisors to "workout" a permanent day shift for him, instead of permitting him to retire.[2/]

37. Petitioner's resignation letter stated:

> Regrettable [sic] I am submitting my letter of resignation effective June 30, 2005. Your recent decision denying me permission to remain on the day shift in spite of my doctor's recommendation to remain on the day shift because of my medical condition (brittle diabetic) has forced me to retire earlier than I had planned to. There is no other way that I can regulate my medication switching from days to nights . . .

38. Respondent never required Petitioner to work the night shift, and he never did work the night shift after 1996-1997.

39. Petitioner gave notice of his retirement in May 2005, rather than work in "C" Squad on the day shift until September 1, 2005, or continue to try to obtain additional medical information that would allow him to indefinitely remain on a permanent day shift. Petitioner elected to retire effective June 30, 2005, because, upon advice of “Retirement” he believed it was more financially beneficial for him to retire in June 2005, rather than wait until January 2006.[3/]

40. Since January 1, 2006, Petitioner has been employed managing real property in Florida and Costa Rica.

41. Petitioner testified that when he retired, he could perform all the duties required by his detention/corrections officer job description, and perhaps other duties as well, except for the rotating shifts. He believes, but offered no supporting documentation, that rotating shifts are counter-productive and are on their way out in most jails. He further testified that he could probably even work the rotating shifts required by this employer but he believed that to do so would have put him in a health crisis due to his diabetes and multiple medications.

## CONCLUSIONS OF LAW

42. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this cause, pursuant to Sections 120.569, and 120.57(1), and Chapter 760, Florida Statutes.

43. The shifting burdens of proof in discrimination cases have been cogently explicated in the seminal case of Department of Corrections v. Chandler, 582 So. 2d 1183 (Fla. 1st DCA 1991) which stated:

> Pursuant to the [Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981)] formula, the employee has the initial burden of establishing a prima facie case of intentional discrimination, which once established raises a presumption that the employer discriminated against the employee. If the presumption arises, the burden shifts to the employer to present sufficient evidence to raise a genuine issue of fact as to whether the employer discriminated against the employee. The employer may do this by stating a legitimate, nondiscriminatory reason for the employment decision, a reason for which is clear, reasonably specific, and worthy of credence. Because the employer has the burden of production, not of persuasion, which remains with the employee, it is not required to persuade the trier of fact that its decision was actually motivated by the reason given. If the employer satisfied its burden, the employee must then persuade the fact finder that the proffered reason for the employment decision was a pretext for intentional discrimination. The employee may satisfy this burden by showing directly that a discriminatory reason more likely than not motivated the decision, or indirectly by showing that the proffered reason for the

> employment decision is not worthy of belief. If such proof is adequately presented, the employee satisfies his or her ultimate burden of demonstrating by a preponderance of the evidence that he or she has been a victim of intentional discrimination.

44. To establish a prima facie case of constructive (or other) termination by an employer's handicap discrimination, a petitioner must prove (1) he is handicapped within the meaning of Chapter 760, Florida Statutes, “The Florida Civil Rights Act"; (2) he is otherwise qualified for his job, with or without reasonable accommodation; and (3) he was terminated solely by reason of his handicap. See Hilburn v. Murata Electronics North America, Inc., 181 F.3d 1220 (11th Cir. 1999); Gordon v. E.L. Hamm & Assoc., Inc., 100 F.3d 907 (11th Cir. 1999); and Brand v. Florida Power Corporation, 633 So. 2d 504 (Fla. 1st DCA 1994).

45. Petitioner has failed to establish the first element of the prima facie test, because he has not shown that he is “handicapped” within the meaning of Chapter 760, Florida Statutes, or that his employer perceived him as handicapped.

46. In Brand, supra, the court adopted the definition of “handicap” found in Section 504 of Title V of the Rehabilitation Act of 1973, and stated:

> i. Section 504 specifically refers to 29 U.S.C. Sec. 706(8)(B) for the definition thereof. The latter defines an "individual with handicaps," subject to certain exceptions not applicable to this case, as one "who (i) has a physical or mental

> impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment." Examples of major life activities include caring for oneself, breathing, learning, and working. (Emphasis supplied). Id. at 510, FN 10.[4/]

47. Almost the identical definition of "disability" is set out in the Americans With Disabilities Act (ADA). See 42 U.S.C. § 12102(2).

48. Many federal guidelines/regulations recognize diabetes as a "physical or mental impairment." See 45 C.F.R. 84.1 (A)(A)(3), also cited as 45 C.F.R. Part 84, Appendix A, Subpart A, 3, dealing with Medicaid. However, nowhere have these guidelines been shown to create even a rebuttable presumption. Affirmative proof of "disability" is still required to state a prima facie case under both the ADA and The Rehabilitation Act.

49. Obviously, at the time Petitioner resigned, Respondent LCSO did not regard him as handicapped or disabled, because LCSO was seeking to have Petitioner establish that fact by providing detailed information from his doctor. Indeed, the lynchpin of this case is the Respondent Employer's attempts to let Petitioner prove-up his disability/handicap so as to justify an accommodation. Respondent knew Petitioner had diabetes and that he had been assigned to a permanent shift for a long period of time at his own request, as had approximately 13 other

similarly situated employees, but it did not know how, or if, Petitioner's diabetes, or the respective conditions of the other employees, substantially limited their respective major life activities in March of 2005. Respondent did not terminate Petitioner; Respondent changed Petitioner's squad so as to allow Petitioner to continue working only days, and to allow him additional time to provide the medical information necessary to support his request for a continued accommodation.

51. In Toyota Manufacturing, Kentucky, Inc., v. Williams, 122 S. Ct. 681 (2002), the United States Supreme Court, in a unanimous decision, provided guidance, for purposes of the ADA, as to how "handicap/disability" is to be proven. See also 42 U.S.C. Section 12112(a) (2000); Mont-Ros v. City of West Miami, 111 F. Supp. 2d. 1338 (S.D. Fla. 2000); D'Angelo v. Conagra Foods, Inc., 422 F.3d 1220 (11th Cir. 2005).

52. Merely having an "impairment" does not make one disabled for purposes of ADA. Claimants also need to demonstrate that their impairment substantially limits a "major life activity." The word "substantial" clearly precludes impairments that interfere in only a minor way with the performance of manual tasks from qualifying as disabilities. See Albertson's, Inc., v. Kirkinburg, 527 U.S. 555, 119 S. Ct. 2162 (1999),(explaining that a "mere difference" does not amount to a "significant restrict[tion]" and therefore does not satisfy

the EEOC's interpretation of "substantially limits"). To present a prima facie case, the employee must prove that the extent of limitation on a major life activity in terms of his own experience is substantial. Corrective measures (internal to the body and brain or external via hearing aids or glasses) must also be included within the assessment of disability.

53. "Major life activities" thus refers to those activities that are of central importance to daily life. In order for performing manual tasks to fit into this category -- a category that includes such basic abilities as walking, seeing, and hearing, -- the manual tasks in question must be central to daily life. If each of the tasks included in the major life activity of performing manual tasks does not independently qualify as a major life activity, then together they must do so. To be “substantially limited,” the employee must be significantly restricted in his ability to perform either a class of, or a broad range of, jobs in various classes as compared to the average person having comparable training, skills, or abilities. To be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives, such as working. The impairment's impact must also be permanent or long-term. See 29 C.F.R. § 1630.2 (j) (2) (ii-iii)

(2001); Richio v. Miami Dade County, 163 F. Supp. 2d 1352 (U.S. So. Dist. Fla. 2001).

54. It is insufficient for individuals attempting to prove disability status under this test to merely submit evidence of a medical diagnosis of an impairment. Instead, the ADA requires those "claiming the Act's protection . . . to prove a disability by offering evidence that the extent of the limitation [caused by their impairment] in terms of their own experience . . . is substantial." Albertson's, Inc., v. Kirkinburg, supra, at 567, 119 S. Ct. 2162.

55. An individual assessment of the effect of an impairment is particularly necessary when the impairment, like diabetes, is one whose symptoms vary widely from person to person. When addressing the major life activity of performing manual tasks, the central inquiry must be whether the claimant is unable to perform the variety of tasks central to most people's daily lives, not whether the claimant is unable to perform the tasks associated with his specific job.

56. Despite Petitioner’s reliance on the EEOC guidelines regarding persons with diabetes, the United States Supreme Court has cautioned against blindly following those guidelines in Sutton v. United Air Lines, Inc. 527 U. S. 471, 119 S. Ct. 2139 (1999). The Sutton court found that blindly following a regulation's formula, without considering measures that mitigate

such an impairment, runs directly counter to the individualized inquiry mandated by the ADA. Following the EEOC approach would often require courts and employers to speculate about a person's condition and would, in many cases, force them to make a disability determination based on general information about how an uncorrected impairment usually affects most individuals rather than on an individual employee's actual condition. The approach required by Sutton requires the employer to view each employee on a case by case basis at the present time, not at some other point in time. Collado v. United Parcel Services, 419 F.3d 1143 (11th Cir. 2005), further holds that the long term existence of an "impairment" is not enough to establish a "disability."

57. Petitioner only provided information to the Respondent that indicated that his doctor had diagnosed him as a "brittle diabetic" and that he needed to work a permanent day shift. Petitioner did not provide Respondent with any information regarding the limitations of any major life function or any reason why Petitioner needed to work the permanent day shift, other than the mere diagnosis of diabetes.

58. Even if diabetes has an adverse impact on a person's life, such as causing migraines and depression, such conditions do not automatically equate to a substantial limitation on a major life activity. Cash v. Smith, 231 F.3d 1301, 1306 (11th

Cir. 2000); Collado v. United Parcel Service, supra. The inability to work a certain shift is not a substantial limitation on the major life activity of working. (Presumably, the inability to work rotating shifts falls in the same category.) Providing Respondent with a diagnosis only indicating the need to work a particular shift does not give rise to a "disability" as defined by the Rehabilitation Act or the ADA so as to require Respondent to provide Petitioner with the requested accommodation. See concerning shift work, Smith v. Federal Express Corporation, 2005 U.S. Dist. LEXIS 31268; subsequent history at 2006 U.S. LEXIS 17960 (11th Cir. Ga. July 17, 2006); Mont-Ros v. City of West Miami, supra.

59. If Petitioner intended to show a substantial limitation on the major life function of working, his claim fails because he testified that he was able to work so long as he did not have to work a rotating shift. Proving a substantial limitation on the major life activity of working requires that an individual show he is unable to work in a broad class of jobs. Rossbach v. City of Miami, 371 F.3d 1354, 1360-61 (11th Cir. 2004). Here, Petitioner is able to work as a corrections officer for any employer who does not require rotating shifts. Even so, just as “police officer” is not a broad class of jobs, neither is "corrections officer." Likewise, there is an even broader class of jobs beyond working in the corrections field

that Petitioner could perform. For his condition to be a "disability," the employee must be precluded by his condition from more than one type of job, even if the job foreclosed is his job of choice. Cash v. Smith, supra.

60. Even though Respondent had allowed Petitioner and others to work a permanent shift in the past, without there being a legal necessity to do so, discontinuing this practice is not a violation of ADA, especially when Petitioner concedes, as here, that he is unable to work rotating shifts, an essential requirement for working in the security area of this particular employer's jail. See Holbrook v. City of Alpharetta, 112 F.3d 1522, 1528 (11th Cir. 1997). In Holbrook, a newly appointed police chief discontinued the practice of allowing a detective who was visually impaired and unable to drive, from working on certain kinds of cases, because he was unable to perform the essential functions of his position. Even though a previous police chief had allowed the restricted case load, the newly appointed chief was not bound to allow the practice to continue in the face of a bona fide job requirement.

61. An employee's condition has to be evaluated for ADA purposes as manifested at the time of the adverse employment action. Cash v. Smith, supra.; Browning v. Liberty Mut. Ins. Co., 178 F.3d (8th Cir. 1999) Cf., Hilburn v. Murata Electronics, Inc., supra. Looking at the evidence presented at

hearing in the light most favorable to Petitioner, it does not demonstrate disability. It was stipulated that Petitioner is diabetic. He proved that he currently takes multiple oral medications for diabetes and other medical conditions, and his testimony is credible that he was taking all these, or similar, oral medications at all times material to this case, but the evidence does not show that he is currently dependent on injectible insulin. It is also clearly Petitioner's belief that he could not regulate his medication, food, and liquids if he were rotated from a day shift to a night shift every four months. Yet, he testified that he had consistently been on the day shift for eight years, ever since he was diagnosed with diabetes. Therefore, Petitioner's "belief," sincere though it may be, is of little evidentiary value. He did not produce any evidence that he has tried to cope with rotating day to night shifts for any portion of the period he has been diagnosed with diabetes. He also did not produce evidence as to why he could not properly space out his medications, food, and liquids regularly at night, although it is possible for him to do so during the day. He has had changes of medications and problems regulating his medications, etc. even on the day shift, so any current nexus between night shift, or rotating shift, work and a predictable resultant health crisis, which he was trying to establish, is even more tenuous. Although Petitioner believed

he could not regulate his diabetes if rotated at four-month intervals or placed on the night shift, he never provided his employer with the required supportive medical documentation to that effect. Accordingly, Respondent Employer LCSO had no reason to view Petitioner as handicapped. Petitioner provided a brief medical diagnosis, which equates with, at best, proof of an "impairment", and at worst, equates with his own unsupported belief, but he provided no medically documented limitations, which would have equated with a "substantial limitation on a major life activity."[5/] As the court indicated in Robinson v. Hoover Enterprises, LLC, U.S. Dist. Ct. N.D. Ga., Atlanta Div., 16 Am. Disabilities Cases (BNA) 328, 2004 U.S. Dist. LEXIS 25375, being under the care of a physician does little more than establish that one suffers from a physical impairment. In Warren v. Volusia Co., Florida, 188 Fed. Appx. 859 (11th Cir. 2006), a physician's notations that the employee could only perform light duty or sedentary jobs was not the equivalent of a request for accommodation. Petitioner herein testified that he could perform all the duties of the LCSO detention officer position, but to do so might create a health crisis for him. He provided no medical verification of his layman's prognosis. Finally, Respondent Employer never put him on the night shift. Respondent Employer made no change in Petitioner's working hours/shift and gave him four additional months to provide the

required supportive medical documentation to prove-up any entitlement to an accommodation. Petitioner did not get such documentation and elected to retire.

62. Significantly, Respondent was willing to provide Petitioner, and any other employee, with a reasonable accommodation if the employee provided the requested detailed information. Respondent even went an extra step to allow Petitioner additional time on the day shift to gather the necessary supporting data for his accommodation request.

63. Moreover, Petitioner did not suffer constructive discharge as generally understood. To prove a constructive discharge, one must demonstrate that working conditions were so intolerable that a reasonable person in that position would have felt compelled to resign. The situation here, with the four months' extension of a day shift, does not meet that standard. See Durley v. APAC, Inc., 236 F.3d 651, (11th Cir. 2000).

64. In the present case, Respondent did not force Petitioner to go to a rotating shift like the other 11-13 employees previously assigned to permanent shifts. At least for "due process" purposes, resignations of public employees are presumptively voluntary, the presumption to be overcome only by proof of coercion, duress, or deceit/misrepresentation of a material fact. Hargray v. City of Hallandale, 57 F.3d 1560 (11th Cir. 1995). This case does not present a "due process'

issue, but there also are neither allegations, nor proof, of coercion, undue duress, deceit, or misrepresentation by LCSO in this regard.[6/]

65. Petitioner exercised his choice to resign rather than to obtain additional information from either Dr. Gelin or Dr. Flores or to otherwise provide information to Respondent supporting his request for an accommodation.[7/] The fact that Respondent failed to react to Petitioner's letter of resignation as Petitioner had hoped does not translate to intolerable working conditions. Respondent had no obligation to coax Petitioner into remaining employed.

66. In summation, Petitioner herein did not establish a prima facie case of disability discrimination by Respondent's declining to immediately place him on a permanent day shift in March-May 2005, because he is not "disabled" as defined by the Florida Civil Rights Act (FCRA), the Rehabilitation Act, or the ADA. Petitioner also did not state a prima facie case of discrimination, because his resignation was not an adverse employment action of Respondent. Petitioner voluntarily resigned.

67. Petitioner's complaints about his posting for 18 months on the third-floor day shift fail for all the foregoing reasons, but also for others.[8/] At the disputed-fact hearing herein, it was not entirely clear that Petitioner attributed his

third-floor situation to handicap discrimination. At the disputed-fact hearing, Petitioner did not detail any particular hardship at all arising from the "no food" rule on the third-floor. He did attribute his 18 months' assignment on the third-floor to "punishment" for being allowed to work a permanent day shift, but that is not the same thing as contending that the employer intentionally discriminated against him due to an impairment or handicap/disability. Furthermore, Petitioner's construction of events (that he was being "punished" for a handicap accommodation, the permanent day shift) is not credible in light of the evidence as a whole, and specifically in the face of evidence that a non-handicapped employee had also worked there for at least 12 months. Also, Petitioner testified he could fulfill all requirements of a detention officer job description, except rotating shifts. On the third-floor, he had no rotating shift. He also testified that he coped with the third-floor assignment's lack of a restroom better than the non-handicapped employee, so it appears that the benefit he desired (a day shift) was not, in any significant way, offset by the lack of a restroom or snacks. It was not proven that Petitioner clearly articulated his reasons for his request(s) for transfer from the third-floor to his superiors or ever clearly gave his diabetes as a reason for a transfer request. The only accommodation Petitioner has ever requested was to remain on a

day shift, and he was placed on a day shift on the third-floor. In any case, it was not affirmatively established that any part of Petitioner's 18-month tour of duty on the third-floor occurred less than 365 days before Petitioner filed his Charge of Discrimination with FCHR on December 12, 2005. Therefore, the third-floor situation is barred from consideration herein by Section 760.10 (11), Florida Statutes.

## RECOMMENDATION

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

RECOMMENDED that the Florida Commission on Human Relations enter a final order dismissing the Petition for Relief.

DONE AND ENTERED this 25th day of January, 2007, in Tallahassee, Leon County, Florida.

ELLA JANE P. DAVIS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of January, 2007.

## ENDNOTES

[1/] Respondent's Proposed Recommended Order represents that Sheriff Daniels died on October 14, 2006, and that Gary Borders became Acting Sheriff at that time.

[2/] Petitioner presented figures showing the amount he believed he had lost in retirement and social security benefits as a result of his June 30, 2005, retirement. For a number of reasons, these figures are flawed, but due to the recommendation in this order, it is not necessary to discuss his figures or their flaws.

[3/] Petitioner understood "Retirement's" explanation, perhaps incorrectly, to mean that he would only get one pay raise if he worked another four months but would get two raises if he retired by July 2005. However, there is no evidence of coercion, deceit, undue duress, or misrepresentation of a material fact, by anyone.

[4/] Due to the First District Court of Appeal's disagreement with Kelley v. Bechtel Power Corp., 633 F. Supp. 927 (S. D. Fla. 1986) and its interpretation of Bisbee v. Thatcher Glass Mfg. Co., F.A.L.R. 892-A, 893-A (FCHR 1981), it is not necessary to distinguish those cases.

[5/] Petitioner's case is clearly distinguishable from Fraser v. Goodale, 342 F.3d 1032 (7th Cir. 2001). Therein, a "brittle diabetic" described, in considerable detail, the meaning and effect of that term, including her dependence on injected insulin and essential major modifications of a normal lifestyle throughout a 24-hour day, (including diet, sleeping, naps, monitoring blood sugar, etc. which she could document). Fraser is further distinguished in Collado v. U.S. Parcel Service, supra at Finding of Fact 58.

[6/] See n. 3.

[7/] The undersigned acknowledges that some case law also supports the premise that once an employee has identified a disability, it becomes the employer's duty to determine the best accommodation which will not be unreasonable. Cases concerned with this premise most often hinge on whether or not, after the employee has made a prima facie case of disability to the employer and the employer has responded by offering some type of accommodation, the accommodation offered by the employer is (a) not adequate and/or (b) the employee's alternatively proposed

accommodation is unreasonable or an undue hardship on the employer, given the employer's situation on a case by case basis. See Warren v. Volusia Co., Florida, supra at Finding of Fact 61, and Holbrook v. City of Alpharetta, supra at Finding of Fact 60, holding that once a qualified employee asks for an accommodation, the employer must make a reasonable effort to determine the appropriate accommodation. See also W. W. Glassner, Inc. 257 F.3d 1249 (11th Cir. 2001); Moses v. American Nonwovens, Inc., 97 F. 446 (11th Cir. 1996); and Wooten v. Farmland Foods, 58 F.3d 382 (8th Cir. 1995).

However, it is not the employer's duty to prove to itself that an employee does have a substantially limiting impairment. Herein, Petitioner would not respond to the employer's attempt to investigate in order to determine what, if any, accommodation was appropriate. An employer's duty to produce an accommodation for a substantially limiting impairment (disability) only arises after the employee proves he has a substantially limiting impairment (disability).

[8/] Petitioner did not raise the issue of his long third-floor assignment in his Charge of Discrimination. Apparently, this concern arose during FCHR's investigation of the constructive termination allegations contained in the December 8, 2005, Charge of Discrimination. However, the issue was acted upon in FCHR's Determination: No Cause and was specifically set out in the Petition for Relief. Therefore, it falls under the broad category of "handicap discrimination" which may be addressed in this proceeding before DOAH. That said, having heard the evidence concerning this period, any remedy appears to be barred by the statute of limitations as set out in the body of this Recommended Order.

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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.