STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DAVID W. DEY,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 06-3532
	)	
CITY OF KISSIMMEE,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the formal hearing in this proceeding on April 19 and 20, 2007, in Kissimmee, Florida, on behalf of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Edward Gay, Esquire
1516 East Concord Street
Orlando, Florida 32803

For Respondent: Leonard A. Carson, Esquire
Lucille E. Turner, Esquire
Carson & Adkins
2958 Wellington Circle North
Suite 200
Tallahassee, Florida 32309

STATEMENT OF THE ISSUE

The issue for determination is whether Respondent discriminated against Petitioner on the basis of a handicap, in violation of Section 760.10, Florida Statutes (2003).

PRELIMINARY STATEMENT

On March 16, 2006, Petitioner filed an Employment Charge of Discrimination with the Florida Commission on Human Relations (Commission). On August 14, 2006, the Commission issued a Determination: No Cause.

On September 15, 2006, Petitioner timely requested an administrative hearing by filing a Petition for Relief with the Commission. The Commission referred the matter to DOAH to conduct the hearing.

At the hearing, Petitioner testified, called four other witnesses, and submitted 32 exhibits for admission into evidence. Respondent called four witnesses and submitted 74 exhibits for admission into evidence.

The identity of the witnesses and exhibits, and the rulings regarding each, are reported in the three-volume Transcript of the hearing filed with DOAH on May 18, 2007. Pursuant to an order granting an unopposed motion to extend the time for filing proposed recommended orders (PROs), the parties timely filed their respective PROs on June 15, 2007.

FINDINGS OF FACT

1. Petitioner has been employed by the City of Kissimmee (the City) from July 17, 1989, to the present as a tele-communicator in the Communications Center of the Police

Department. Petitioner and his health care provider advised the City sometime in 1995 that Petitioner is diabetic.

2. Diabetes has impaired Petitioner's work schedule and his willingness to train other employees but has not handicapped Petitioner. The diabetes has not substantially limited Petitioner in a major life activity and has not substantially limited Petitioner from performing a class of jobs or broad range of jobs in various classes.

3. Petitioner is able to care for himself. Petitioner clothes himself, bathes, shaves, brushes his teeth, and combs his hair. Petitioner checks his own blood sugar level regularly during waking hours.

4. Petitioner is able to perform other major life activities. Those activities include walking, driving a vehicle, performing manual tasks, seeing, speaking, hearing, learning, talking, and performing the duties of his occupation.

5. Petitioner has walked for several years approximately 1.25 miles a day. Petitioner drives his own vehicle.

6. Petitioner performs manual tasks. Petitioner operates a computer, though he has some difficulty doing so. Several months ago, Petitioner helped a friend hang an interior door. Petitioner has also helped friends paint walls in recent years.

7. Petitioner has difficulty with his uncorrected vision. With reading glasses, however, Petitioner reads documents most of the time.

8. Petitioner uses a device identified in the record as a CPAP machine to assist him in breathing at night. However, Petitioner does not need to use the machine during the work day to do his job.

9. No health care provider has advised Respondent that Petitioner is disabled. Petitioner's diabetic specialist is Dr. Jose Mandry. Dr. Mandry did not testify at the hearing.

10. Dr. Mandry informed Respondent that Petitioner has diabetes in a note the City received on or about February 6, 1995, when Respondent attempted to schedule Petitioner for a night shift in the Communications Center. The note from Dr. Mandry did not indicate that Petitioner was handicapped (disabled), or that any accommodations were required in order for Petitioner to continue working. The note requested the City to keep Petitioner on daytime shifts "if possible." The note did not indicate that a daytime schedule was medically necessary. Rather, the note indicated that working day shifts would be "desirable."

11. On March 23, 1995, Dr. Mandry provided another letter to the City regarding Petitioner's medical condition. The note

stated that Petitioner needed to “be accommodated with a normal daytime work schedule.”

12. In July 1995, the City established a regular daytime work schedule for Petitioner. The City never regarded Petitioner as disabled, and the daytime work schedule for Petitioner was not an “ADA Accommodation.”

13. The City employee who granted the request for a daytime schedule was identified in the record as Police Department Commander Johns. Commander Johns did not have authority to provide an ADA accommodation.

14. The authority to provide an ADA accommodation is vested in the city manager and city attorney. They make a final determination of whether the City will provide an ADA accommodation to a particular employee. The city manager and city attorney did not authorize the City to provide any ADA accommodation to Petitioner.

15. The daytime schedule granted to Petitioner is part of Respondent’s general practice and policy of working with impaired employees and employees who have personal needs. The policy attempts to help such employees with their schedules when it is possible to do so without an adverse impact on the City’s ability to provide services.

16. Assuming arguendo that City employees had the authority to provide ADA accommodations to Petitioner in the

absence of a formal determination by the city manager and city attorney, Petitioner relies on evidence of interactions between City employees and Petitioner in an attempt to show the City provided Petitioner with ADA accommodations. The relevant evidence involves two time periods. The first is the period from June 4, 1996, until June 5, 2002. The second is the period from June 5, 2002, through March 16, 2006, when Petitioner filed the Charge of Discrimination with the Commission. The record evidence does not support a finding that City employees provided an ADA accommodation to Petitioner.

17. The daytime work schedule authorized in 1995 remained in effect until June 4, 1996, when Dr. Mandry advised the City that Petitioner could work up to 12 hours a day, as long as the 12 hours were daytime hours. Between 1996 and June 5, 2002, the City allowed Petitioner to work overtime when he wanted to, based on Petitioner's self-assessment of his physical condition.

18. Petitioner acknowledged the overtime schedule in a memo that he wrote to Lieutenant Donna Donato on June 5, 2002 (the memo). The memo described Petitioner's plans for his future work schedule.

19. The memo stated that Petitioner was providing notice "that due to self-assessed health issues" Petitioner intended to restrict the amount of his overtime in the future. (emphasis added). In relevant part, the memo advised the City that

Petitioner did not intend to “demand the imposition of the restrictions [on his work schedule] as addressed by City Management in June of 1995.” Instead, the memo advised that Petitioner would address his concerns “to the best of [his] abilities by modifying [his] agenda. . . ."

20. Petitioner listed a number of items that may be fairly described as terms or conditions for when and under what circumstances Petitioner would work overtime. Petitioner provided no new medical evidence to support a finding of medical necessity for the terms and conditions that Petitioner prescribed in the memo. Petitioner acknowledged that his concerns were based on “self-assessed health issues” and asserted that “no further documentation should be necessary.”

21. Petitioner did provide a note from Dr. Mandry on June 20, 2002. The note states:

> The following is a letter as requested by the above-captioned patient [David Dey]. As you know, he suffers from diabetes and also requires insulin for his control. David needs to monitor glucose levels and follow fairly stable meal patterns in order to try to achieve good control of diabetes and avoid complications. It would certainly be to his advantage and much preferable if he could have a stable work shift where he could regulate his meals and his injections properly. (emphasis added)

Respondent's Exhibit 18 (Hereinafter R-18, etc.).

22. During the second period of time between June 5, 2002, and the Charge of Discrimination, the City hired a new manager for the Communications Center. In July 2002, the City hired Ms. Jean Moe to manage the Communications Center at the Police Department, and Ms. Moe remains responsible for the supervision and management of Petitioner. Ms. Moe is diabetic.

23. Ms. Moe met with Petitioner on August 6, 2002. The two discussed the issues Petitioner raised in his memo and agreed on a number of items outlined in Ms. Moe's memo of August 6, 2002 (the Moe memo). The Moe memo provides in relevant part:

> Beginning today, August 6, 2002 you will only work your twelve (12) hour shift assignment [sic]. You will not volunteer or be assigned any overtime. You are also no longer on the standby schedule. Here you had some concern on the overtime issue, however, as stated by your doctor in writing he is recommending that you do not work any extra hours. Should he feel your health improves and he authorizes your overtime, I will take his note under advisement. That does not mean I will immediately give you overtime but will review his letter and his suggestion.
>
> Along with the above issues, your supervisor has been advised under no circumstances will you miss your assigned lunchtime or breaks, these are important to keep you regulated on your medication per your doctor.
>
> You also requested you be allowed to lift your feet after working several hours, this will also be under consideration when I receive a note from your doctor stating it

> would be another requirement for health reasons.

R-19.

24. In 2004, the City Police Department considered changes to the normal work schedule for employees in the Communication Center. The City advised employees, including Petitioner, that the City would require employees to rotate work shifts between daytime and night shifts.

25. On July 14, 2004, Petitioner wrote to the City Human Resources Department and requested a “final, permanent accommodation . . .” for daytime work only. Petitioner provided copies of documents from Dr. Mandry, which did not include a medical opinion that Petitioner is disabled.

26. Assistant Human Resources Director Andrea Walton wrote to Dr. Mandry on July 15, 2004, and requested clarification of his letters in order for the City to arrange an appropriate schedule for Petitioner. Ms. Walton specifically inquired about the possibility of Petitioner's working a rotating work schedule and asked Dr. Mandry to clarify Petitioner's ability to work overtime. The City wanted Dr. Mandry to clarify previous statements that Petitioner could work overtime as a parking enforcement specialist but that Petitioner's overtime work as a tele-communicator must be limited.

27. Dr. Mandry responded to Ms. Walton on July 26, 2004. The response explained that Petitioner was able to work in a rotating schedule and for unspecified amounts of overtime if control is optimal and under ideal circumstances. Dr. Mandry was unable at that time to give more specific information to the City. He explained:

> With regards to some of the other issues, again, it is very difficult, if not impossible, for me to give you a specific answer, and I would rather you talk to Mr. Dey specifically so that he can let you know what his current limitations are.

R-27.

28. On August 3, 2004, Ms. Beth Stefek, the director of Human Resources for the City, wrote to Petitioner and explained that the City was willing to work with Petitioner to arrive at an appropriate work schedule. Ms. Stefek did not indicate that the City considered Petitioner to be disabled.

29. Sometime after August 3, 2004, Petitioner experienced further difficulties in controlling his diabetes. On August 10, 2004, Dr. Mandry wrote to the City again. Dr. Mandry told the City:

> I just saw David today who seems to be having some further difficulties with his health and his control of diabetes. At this time, I have reviewed his records, and I think it would clearly be in his best interest that from now on, he work only on a stable daytime work shift only [sic]. He certainly is not doing well when he tries to

> do overtime, and traditionally in the past has always become more complicated and his health has deteriorated whenever he tries to do either night shifts or overtime shifts. I have, therefore, at this time, recommended that David should not be allowed to work any overtime and/or nighttime shift. Of course, he needs to have accommodations for meals and monitoring or blood sugar levels as necessary, and he needs to have access to food in case he becomes hypoglycemic.

R-29.

30. The difficulties Petitioner experienced in controlling his diabetes were attributable to an increase in stress that Petitioner experienced between June and September 9, 2004. Petitioner's father died in June 2004, and three hurricanes impacted Petitioner's home from August through September 2004. The hurricanes also increased stress at work due to increased demand on City services. On August 15, 2004, Petitioner advised Ms. Moe that he was intentionally running his blood sugars "higher than desired" at work to "offset and reduce the possibility of a hypoglycemic situation."

31. Toward the end of August 2004, the City moved Petitioner to the night shift in the Communications Center. Petitioner worked the night shift for a few nights.

32. On September 5, 2004, Petitioner advised Ms. Moe that he was available to be part of a voluntary group of dispatchers to work catastrophic disasters like hurricanes if she decided to form the group. On or about September 9, 2004, while Petitioner

was at home, Petitioner fell unconscious and was transported to the hospital for treatment.

33. On September 16, 2004, Dr. Mandry wrote to the City and advised that it was necessary for Petitioner to refrain from working "any overtime shifts and/or nighttime shifts." On or about September 21, 2004, Petitioner returned to work, and the City placed Petitioner on a daytime work schedule through the remainder of 2004.

34. On January 6, 2005, Ms. Moe advised Petitioner the City needed Petitioner to work the night shift for a few nights. However, the City was able to satisfy its needs without placing Petitioner on the night shift at that time.

35. Petitioner responded to Ms. Moe on January 6, 2005, by stating that he was going to begin a search within the City for another position that would meet his medical needs. On January 20, 2005, Petitioner inquired about an opening within the City for a parking enforcement specialist. On January 25, 2005, Petitioner informed Ms. Moe and others at the City that he would not consider either the parking enforcement position or a community service officer (CSO) position that had become available because both jobs contradicted his "medical requirements."

36. On April 4, 2005, Ms. Moe sent a memo to Petitioner advising him that the City would place Petitioner on a list

identified in the record as the call-back list for emergency back-up in the Communication Center. Ms. Moe specified that the placement of Petitioner on the call-back list was subject to the work conditions previously established in July 1995 by Commander Johns.

37. Ms. Moe advised Petitioner that he would be placed on the call-back list effective April 20, 2005, but only in those weeks when he was scheduled to work 33 hours so that his work week did not exceed 40 hours. She assured Petitioner that absent some extraordinary circumstances, the City would not call Petitioner back to work a night shift and would not schedule Petitioner on a call-back that would result in Petitioner working more than 40 hours in a work week.

38. The memo from Ms. Moe expressly indicated that the City did not consider the Petitioner to be ADA disabled. Ms. Moe told Petitioner to advise her if he thought there was some medical or ADA reason why he could not be on the call-back list.

39. On April 13, 2005, Attorney Edward R. Gay wrote to the City on behalf of Petitioner. Mr. Gay stated that Petitioner believed there was a medical reason that prevented Petitioner from being placed on the call-back list.

40. On April 21, 2005, Attorney Lucille Turner, the City's special labor counsel, responded to Mr. Gay. Ms. Turner

provided Mr. Gay with a copy of the City's April 4, 2005, memo detailing the call-back restrictions applicable to Petitioner. Ms. Turner repeated that it was not the City's intent to call Petitioner back to work a night shift or to schedule Petitioner to work more than 40 hours a week in the absence of "some extraordinary circumstance."

41. The City, through its counsel, expressly advised Petitioner that the City had never undertaken a formal review of whether Petitioner should be classified as a person protected by the ADA. Instead, the City had informally worked to develop a work schedule for Petitioner that takes into account the information provided by Petitioner's health care providers.

42. The City provided Petitioner with written guidance concerning the procedure for Petitioner to follow to seek a classification from the City as ADA disabled. In relevant part, the letter advises:

> If [Petitioner] believes that his diabetes (or any other medical condition) requires the City to not include him on the call back list, or to change his work schedule, he should provide the City with further information in support of his request. This should include information about the legal basis for his disability claim . . . [keeping in mind case law cited earlier in the letter indicating diabetes is not a per se disability]. . . . The City will then review the information to determine whether Mr. Dey has a disability as defined by the

> ADA, and, if so, what accommodations can be reasonably made.

R-54, at 3.

43. Petitioner did not ask to be classified as disabled. Rather, Dr. Mandry wrote to the City on June 8, 2005. Dr. Mandry stated that he was writing at the request of Petitioner. In relevant part, Dr. Mandry explained:

> Mr. Dey is by no means disabled, and he can clearly work and satisfy the capacities of his job as long as there is some stability involved in it. (emphasis added)

R-1.

44. In March and August 2005, the City did not select Petitioner to fill respective vacancies for a shift supervisor in the Communication Center and a parking enforcement specialist for the City. Neither action constituted an adverse employment action against Petitioner.

45. The job duties for the vacant shift supervisor in March 2005 required the successful applicant to work night shifts. Petitioner did not apply for the shift supervisor position.

46. When the City posted the notice of vacancy for the shift supervisor, Petitioner requested Ms. Moe to provide Petitioner with information about the job requirements for the position. Ms. Moe responded on March 14, 2005, and advised Petitioner that the position was night shift duty and required

the supervisor to train other employees. On March 23, 2005, Petitioner wrote to Ms. Moe indicating he had concluded that multiple aspects of my physical disability are contradictory to the requirements of the supervisory position and that he had elected not to apply for the position.

47. If Petitioner were to have applied for the shift supervisor position, Petitioner was not qualified to perform the essential requirements of the position. Petitioner was unable or unwilling to work the night shift and was unable or unwilling to train subordinate employees.

48. The Communications Center receives 911 calls from the public. Employees receive calls and dispatch them to the police department and fire department 24 hours a day.

49. The work schedule at the Communication Center is divided into two shifts. The day shift begins at 6 a.m. and ends at 6 p.m. The night shift begins at 6 p.m. and ends the following day at 6 a.m.

50. Approximately four to six employees work each 12-hour shift in the Communications Center. However, only one supervisor works each shift.

51. A shift supervisor oversees the duties of all employees at the Communications Center and trains, advises, and assists subordinates. Supervisors are routinely required to work overtime, perform on-call duty, fill in for other shift

supervisors, and hold over for indefinite times at the end of a shift to handle ongoing calls.

52. Petitioner claims to suffer from hypoglycemic episodes in which he becomes unresponsive and dysfunctional. Petitioner has previously asked on two separate occasions to be relieved of responsibility to train personnel because it was too stressful for him. In each instance, the City relieved Petitioner of any training responsibilities.

53. In August 2005, Petitioner applied for a job opening as a parking enforcement specialist for the City. The City selected another candidate identified in the record as Ms. Evelyn Thurman.

54. The selection of Ms. Thurman over Petitioner to fill the vacant position of parking enforcement specialist was not an adverse employment action against Petitioner. Ms. Thurman was more qualified by training and experience.

55. When the City selected Ms. Thurman to fill the vacant position of parking enforcement specialist, Ms. Thurman had 24 years of law enforcement and security experience in various agencies. From 1980 until 1996, Ms. Thurman worked as a crime scene investigator for the City of Miami Police Department, where she received numerous commendations, and her performance evaluations rated her as an above average employee. Ms. Thurman

also worked at the Sheriff's Office in Tampa, Florida, and in Security at the Florida Department of the Lottery.

56. Petitioner was unable to meet the essential functions of the job requirements for a parking enforcement specialist. A parking enforcement specialist routinely works alone and is required to work at night. The nature of the job does not permit the type of schedule Petitioner requires.

57. The work schedule of a parking enforcement specialist is not limited to daytime hours that do not exceed 33 to 40 hours a week. A parking enforcement specialist may be required to work evening shifts, long hours, overtime, and holidays.

58. A parking enforcement specialist also must adjust his or her work schedule when needed. A parking enforcement specialist also must be available during emergencies to alleviate calls for service from patrol officers.

59. A parking enforcement specialist works alone. Petitioner suffers from hypoglycemic episodes in which he becomes unresponsive and dysfunctional. The episodes can occur at any time, and Petitioner prefers not be alone on the job if possible.

60. On October 31, 2005, Ms. Moe issued a verbal reprimand to Petitioner for insubordination. The verbal reprimand is not an adverse employment action against Petitioner. The City did

not reduce Petitioner's pay and did not change the terms, conditions, or privileges of Petitioner's employment as a result of the reprimand.

61. In preparation for Hurricane Wilma earlier in October 2005, Ms. Moe sent an e-mail to employees in the Communication Center instructing them to come to work the following day with the supplies they would need if events required them to stay at the Communication Center during the hurricane (the Moe email). Petitioner and most of the other employees did not bring their hurricane supplies with them when they reported to work the morning after the Moe email.

62. The City sent Petitioner and the other employees home to fetch their supplies and did not impose a time limit for the task. Petitioner took about 90 minutes to get his supplies and return to work, and the span included the regular lunch hour. The time he took was not an issue of concern and did not provide a basis for the verbal reprimand.

63. Petitioner did not eat lunch during the time he retrieved his supplies. Later in the day, Petitioner requested a meal break, and his supervisor denied the request. Petitioner took a second meal break.

64. On October 23, 2005, Ms. Moe delivered to Petitioner a Notice of Intent to Discipline for insubordination. On October 31, 2005, Ms. Moe issued an Oral Warning to Petitioner.

65. Petitioner grieved the verbal reprimand. During the grievance procedure, the City offered to rescind the warning to resolve the grievance. Petitioner rejected the offer as unsatisfactory unless the City also destroyed the record of the discipline. The City advised Petitioner that it could not destroy the document because the document was a public record.

CONCLUSIONS OF LAW

66. DOAH has jurisdiction over the parties to and the subject matter of this proceeding pursuant to Chapter 760, Florida Statutes (2005),[1] the Florida Civil Rights Act (FCRA). §§ 120.569 and 120.57(1), Fla. Stat. (2006). DOAH provided the parties with adequate notice of the final hearing.

67. Subsection 760.10(1)(a) makes it an unlawful employment practice for an employer to discriminate against a person because of the person's disability. Florida courts construe disability discrimination actions under the FCRA in conformity with the Americans with Disabilities Act, 42 U.S.C. § 12101, et. seq. (ADA). Lenard v. ALPHA, A Beginning, Inc., 945 So. 2d 618 (Fla. 2d DCA 2007). Judicial decisions by federal courts interpreting the ADA are controlling in this proceeding. Wimberly v. Securities Technology Group, Inc., 866 So. 2d 146 (Fla. 4th DCA 2004); Tourville v. Securex, Inc., 769 So. 2d 491 n.1 (Fla. 4th DCA 2000); Greene v. Seminole Electric Coop., Inc., 701 So. 2d 646 (Fla. 5th DCA 1997).

68. Petitioner has the burden of proof in this proceeding. Petitioner must show by a preponderance of the evidence that he has a statutorily covered disability; he is a qualified individual; and Respondent discriminated against Petitioner through an adverse employment action based on Petitioner's disability. Lenard, 945 So. 2d at 618; Gordon v. E.L. Hamm & Associates, 100 F.3d 907, 910 (11th Cir. 1996).

69. A preponderance of the evidence does not support a finding that Petitioner is disabled within the meaning of the ADA and FCRA. It is undisputed that Petitioner is diabetic. However, there is insufficient evidence to show that the impairment satisfies the legal test of a disability.

70. As a general rule, a physical or mental impairment is not automatically a "disability" under the ADA. Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 195, 122 S. Ct. 681, 151 L. Ed. 2d 615 (2002); Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 565-66, 119 S. Ct. 2162, 144 L. Ed. 2d 518 (1999); Wimberly, 866 So. 2d at 147. In order for an impairment to rise to the level of a disability, the impairment must substantially limit a major life activity of the petitioner. Albertson's, 527 U.S. at 565; Wimberly, 866 So. 2d at 147.

71. Major life activities include activities such as self-care, manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 29 C.F.R. § 1630.2(i). An

impairment "substantially limits" a major life activity if it prevents a petitioner from performing a major life activity that the average person in the general population can perform or significantly restricts the condition, manner or duration of a major life activity as compared to the condition, manner, and duration under which the average person in the general population can perform the same activity. 29 C.F.R. § 1630.2(j)(1) (2005).

72. A preponderance of the evidence does not show that diabetes substantially limits Petitioner's ability to perform a major life activity. The evidence shows that Petitioner is able to care for himself, perform manual tasks, walk, see, hear, speak, breathe, learn, and work.

73. Diabetes does not significantly restrict the ability of Petitioner to perform either a class of jobs or a broad range of jobs in various classes when compared to the average person having comparable training, skills, and abilities. The inability to perform a single, particular job is not a substantial limitation on the major life activity of working. 29 C.F.R. § 1630.2(j)(3)(i); Lenard, 945 So. 2d at 618; Dupre v. Charter Behavioral Health Systems of Lafayette, Inc., 242 F.3d 610, 611-612 (5th Cir. 2001).

74. Evidence that diabetes limits Petitioner to daytime shifts, either prevents or limits overtime, and requires breaks

to test his blood sugar and take sustenance does not satisfy the requirements for a disability. See, e.g., Colwell v. Suffolk County Police Department, 158 F.3d 635, 644-45 (2d cir. 1998) (medical restrictions on work schedule, including days only, indoors only, limited overtime, no late or rotating shifts, and no stress and confrontation, was insufficient to show police officer recovering from cerebral hemorrhage was unable to work a class or broad range of jobs, and officer was not substantially limited in major life activity of working).

75. A preponderance of the evidence does not support a finding that Petitioner is disabled because Respondent regarded Petitioner as disabled. See 42 U.S.C. § 12102(2)(C) (person meets statutory requirements for disability if employer regards person as disabled). The purpose of this provision is to cover individuals "rejected from a job because of the 'myths, fears and stereotypes' associated with disabilities." 29 C.F.R. 1630, App. § 1630.2(l); School Bd. of Nassau Cty. v. Arline, 480 U.S. 273, 284, 94 L. Ed. 2d 307, 107 S. Ct. 1123 (1987).

76. A preponderance of the evidence shows that Respondent did not regard Petitioner as disabled. The City consistently told Petitioner the City did not regard him as disabled and advised Petitioner of the need for a formal determination by the city manager and city attorney in order for Petitioner to obtain an ADA disability and accommodation.

77. Assuming arguendo that the impairment of diabetes renders Petitioner disabled within the meaning of the ADA and FCRA, a preponderance of the evidence does not support a finding that Respondent based an adverse employment action on Petitioner's disability. It is undisputed that Petitioner did not apply for the promotion to shift supervisor. The failure to apply for a promotion precludes a prima facie showing of discrimination. Pritchard v. Office Max, Inc., 2000 U.S. App. Lexis 437 (6th Cir. 2000); Allen v. Michigan Department of Corrections, 165 F.3d 405, 410 (6th Cir. 1999).

78. A preponderance of the evidence shows that Petitioner was not qualified to perform the essential functions of the job of shift supervisor with or without reasonable accommodations within the meaning of 42 U.S.C. Section 12112(a). Wood v. Green, 323 F.3d 1309, 1312 (11th Cir. 2003); Cramer v. Florida, 117 F.3d 1258, 1264 (11th Cir. 1997). It is undisputed that the job opening at issue was one for the night shift. It is also undisputed that Petitioner was unwilling to work the night shift. Even if Petitioner were willing to work the night shift, Petitioner is unwilling to train employees. It is undisputed that the supervisor is required to train employees.

79. A preponderance of the evidence does not support a finding that Respondent discriminated against Petitioner by selecting Ms. Thurman over Petitioner in August 2005.

Petitioner was not a qualified employee able to perform the essential functions of the job with or without reasonable accommodations within the meaning of 42 U.S.C. Section 12112(a). The parking enforcement specialist position required a person able to work nights and extended hours when required. Petitioner is unable, or unwilling, to comply with those requirements. Wood v. Green, 323 F.3d 1309, 1312 (11th Cir. 2003); Cramer v. Florida, 117 F.3d 1258, 1264 (11th Cir. 1997).

80. A preponderance of the evidence does not support a finding that the alleged disability made a difference in Respondent's decision to select Ms. Thurman over Petitioner. The evidence does not show that Respondent would have selected Petitioner "but for" the alleged disability. McNely v. Ocala Star-Banner Corp., 99 F.3d 1068, 1076 (11th Cir. 1996). Rather, the evidence shows that Respondent selected Ms. Thurman because of her extensive law enforcement experience, which was more directly related to the enforcement functions of the job.

81. A preponderance of the evidence does not support a finding that the verbal reprimand of Petitioner constituted an adverse employment action. Not all conduct by an employer that negatively affects an employee constitutes adverse employment action. Hooks v. Bank of America, 183 Fed. Appx. 833; 2006 U.S. App. Lexis 11354 (11th Cir. 2006); Davis v. Town of Lake Park, 245 F.3d 1232, 1238 (11th Cir. 2001). The verbal reprimand did

not result in a serious and material change in the terms, conditions, or privileges of employment. Davis, 245 F.3d at 1239. Moreover, the evidence is insufficient to show that Respondent would not have disciplined Petitioner but for the alleged disability. McNely, 99 F.3d at 1076.

RECOMMENDATION

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

RECOMMENDED that the Commission enter a final order dismissing the Petition for Relief.

DONE AND ENTERED this 16th day of July 2007, in Tallahassee, Leon County, Florida.

DANIEL MANRY
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of July 2007.

ENDNOTE

1/ All statutory references are to Florida Statutes (2005) unless otherwise stated.

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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.