STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

KIM C. RHODE, Petitioner, vs. JOHN CARLO, INC., Respondent.	)	Case No. 07-3973

RECOMMENDED ORDER

Pursuant to notice, a hearing was held on January 28, 2008, in New Port Richey, Florida, before Carolyn S. Holifield, Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Kim C. Rhode, pro se
Post Office Box 1093
New Port Richey, Florida 34656

For Respondent: Alysa J. Ward, Esquire
Glenn, Rasmussen, Fogarty & Hooker, P.A.
100 South Ashley Street, Suite 1300
Tampa, Florida 33602

STATEMENT OF THE ISSUE

The issue for determination is whether Respondent, John Carlo, Inc., discriminated against Petitioner, Kim C. Rhode, on the basis of a handicap/disability within the meaning of Section 760.10, Florida Statutes (2006).[1/]

PRELIMINARY STATEMENT

On September 18, 2006, Petitioner, Kim C. Rhode, filed an Employment Complaint of Discrimination with the Florida Commission on Human Relations ("FCHR"), which alleged that he was denied reasonable accommodations for and terminated from his job because of his disability by Respondent, John Carlo, Inc. ("JCI"). After completing an investigation, the FCHR issued a "Notice of Determination: No Cause," finding no reasonable cause to determine that the alleged discrimination took place and notifying Petitioner of his right to a hearing. Petitioner filed a Petition for Relief on August 24, 2007, and the matter was referred to the Division of Administrative Hearings.

On October 10, 2007, Respondent filed a Motion for Summary Final Order, which was denied in an Order issued on November 9, 2007.

At hearing, Petitioner testified on his own behalf and offered and had one exhibit received into evidence. The record was left open to allow Petitioner to late-file the exhibit. As of this date, the exhibit has not been filed and, thus, is not a part of the record. Respondent presented the testimony of Jon Ford and Douglas Tyus, managers for JCI. Respondent's Exhibits 1, 2, 3, 6, 7, 8, 10, 11, 12, 14, 15, 16, 18, 19, 20, and 21 were received into evidence. At Respondent's request, the undersigned took official recognition of 49 C.F.R. Section

391.41; Section 316.302, Florida Statutes; and the Florida Department of Highway Safety and Motor Vehicles Medical Examination Form.

A Transcript of the hearing was filed on February 15, 2008. At the conclusion of the hearing, the time for filing proposed recommended orders was set for ten days after the transcript was filed. Petitioner did not file a proposed recommended order. Respondent timely filed Proposed Findings of Fact and Conclusions of Law, which have been considered in preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner, Kim C. Rhode ("Petitioner"), is an insulin-dependent diabetic, whose condition was first diagnosed in 1961. Since that time, Petitioner has been using insulin to control the effects of diabetes.

2. Petitioner was employed by JCI from March 16, 2005, through August 2, 2006, in the position of fuel driver.

3. During most of the time Petitioner was employed with JCI, he resided at 16108 U.S. Highway 19, Hudson, Florida. The last several months of his employment at JCI, Petitioner resided on Rowan Avenue in New Port Richey, Florida.

4. During the term of his employment with JCI, Petitioner reported to work at 813 East Sligh Avenue, Tampa, Florida ("the Sligh Avenue work site"). The Sligh Avenue work site was about

39 miles from Petitioner's residence in Hudson, Florida, and even fewer miles from his residence in New Port Richey, Florida.

5. Initially, Petitioner's duties at JCI required that he drive a 2500-gallon fuel truck and/or a 300-gallon fuel truck from the Sligh Avenue work site to the JCI construction project at the Tampa International Airport and the JCI I-275 construction project. Petitioner fueled and maintained the equipment at the two JCI construction project sites in Tampa, Florida. After completing those job responsibilities, Petitioner drove the fuel truck back to the Sligh Avenue work site, where he also fueled and maintained equipment.

6. The 2500-gallon fuel truck was equipped with air conditioning; the 300-gallon fuel truck was not air conditioned.

7. Both the 2500-gallon fuel truck and the 300-gallon fuel truck driven by Petitioner were required by law to display "Hazardous Materials" placards. In order to drive such vehicles, Petitioner was required to have a Class "A" Commercial Driver's License.

8. At the time Petitioner was hired by JCI, he presented an unexpired Minnesota Class "A" Commercial Driver's License. That license showed an expiration date of May 12, 2005. Insulin-dependent diabetes does not appear as a restriction on Petitioner's Minnesota license.

9. Just prior to the expiration of his Minnesota Class "A" Commercial Driver's License, Petitioner presented a current Florida Class "A" Commercial Driver's License. Petitioner's Florida Class "A" Commercial Driver's License did not include any medical restrictions.

10. Applicable federal regulations and State law mandate that a medical examination be performed as part of the application process for a Florida Class "A" Commercial Driver's License.[2/] Physicians performing such examinations are required to use a standard form that requires taking a medical history from the applicant, which includes any history of diabetes.[3/] The form also provides notice of the legal restriction to licensing insulin-dependent diabetics.

11. On or about May 5, 2005, Petitioner had a medical examination in connection with his application for a Florida Class "A" Commercial Driver's License. At this proceeding, Petitioner acknowledged that during the medical examination, he did not expressly inform the medical examiner of his insulin-dependent diabetes. Moreover, there is no indication that Petitioner disclosed that he had insulin-dependent diabetes on the required medical form that was to be completed in connection with this medical examination.[4/]

12. All drivers of commercial motor vehicles operated on the public highways of Florida are subject to the rules and

regulations contained in 49 C.F.R., Parts 382, 385 and 390-397. See § 316.302(1), Fla. Stat.

13. 49 C.F.R. Section 391.41 (a) and (b)(3) provides that "a person shall not drive a commercial motor vehicle[5/] unless he/she is physically qualified to do so" and that a person is physically qualified to drive such a motor vehicle "if that person has no established medical history of diabetes mellitus currently requiring insulin for control." Because drivers of commercial vehicles in Florida are subject to the above-referenced federal regulations, a person with an established history of insulin-dependent diabetes is not qualified to drive a commercial vehicle with "Hazardous Material" placards in intrastate commerce.

14. JCI is a multi-state construction company, headquartered in Detroit, Michigan, that builds heavy highway projects, civil project, and airport runways. The Central Division is one of JCI's three regional divisions and includes projects in Tampa and Orlando, Florida. Each individual construction project within that particular division has its own budget.

15. In addition to the three regional divisions, JCI has a separate division, Florida Equipment and Maintenance Department ("Equipment and Maintenance Department"), which services construction projects, using its own budget. The Equipment and

Maintenance Department provides fuel and maintenance services to JCI construction projects. The individual construction project receiving the services then pays the Equipment and Maintenance Department for those services out of its allocation budget.

16. Expenses for the construction projects are initially approved by project managers, then sent to the appropriate regional manager for approval, and finally sent to Central Accounting in Michigan for payment. At all times material to this action, Jon Ford was the JCI Central Florida Regional manager.

17. While Petitioner was employed by JCI, he was assigned to and supervised by the Equipment Maintenance Department, which was headquartered in Jacksonville, Florida. Petitioner reported to JCI's fleet manager for Florida.

18. During the first nine months of Petitioner's employment with JCI, from March 2005 through December 2005, the fleet manager was Larry LeClair. For the remainder of Petitioner's tenure with JCI, from January 2006 through August 2, 2006, the fleet manager was Doug Tyus.

19. Prior to being hired and after he was hired, Petitioner never notified anyone at JCI, including the JCI Human Resources Office, of his medical condition. Rather, JCI did not become aware of Petitioner's insulin–dependent diabetes until Petitioner suffered the first of three serious diabetic episodes

on the job. As a result of the first episode, Petitioner "blacked out." During the second and third episodes, Petitioner nearly blacked out. Petitioner described the two near-blackout experiences as situations where he "just kind of lost what [he] was doing" and "needed help."

20. The first diabetic episode occurred at the Sligh Avenue work site in December 2005, about nine months after Petitioner was hired at JCI. The second diabetic episode occurred in or about February or March 2006, while Petitioner was at the JCI construction project at the Tampa International Airport.

21. Once JCI was on notice of Petitioner's insulin-dependent diabetes, the company removed Petitioner's duties insofar as those duties involved driving the 2500-gallon fuel truck and the 300-gallon fuel truck to the Tampa International Airport construction project and the I-275 construction project.

22. After Petitioner's first diabetic episode, JCI refitted the smaller truck (the 300-gallon tank) with an 80-gallon tank, which was an amount below the level requiring a "Hazardous Material" placard and limited Petitioner to driving that truck.

23. After Petitioner's second diabetic episode, JCI reasonably had safety concerns regarding Petitioner driving any

type of fuel truck over the public roads and at the Tampa International Airport. Based on these concerns, JCI reassigned Petitioner to a fixed location, the Sligh Avenue work site.

24. When Petitioner was reassigned to the fixed location, Mr. LeClair told Petitioner the change was being made because of the "issue of people getting hurt at the airport."

25. After Petitioner was reassigned to the fixed location, his job duties remained the same--fueling and maintaining equipment used at JCI construction sites. He simply was no longer allowed to drive the refitted 80-gallon fuel truck to the Tampa International Airport and the I-275 construction projects. Nevertheless, after the reassignment, Petitioner's title, compensation, and benefits remained the same.

26. Petitioner claims that he is disabled by virtue of his having insulin-dependent diabetes. Petitioner alleges that as a result of this disability, JCI discriminated against him by: (1) reassigning him to a fixed location; (2) denying his request for an accommodation; and (3) terminating his employment.

27. Petitioner asserts that in March 2006, he made a request to his supervisor for an accommodation, namely air conditioning for the 80-gallon fuel truck that he drove at work. Notwithstanding this assertion, during his testimony Petitioner conceded that Mr. Tyus, his supervisor, initiated a discussion about getting air conditioning for the truck. Mr. Tyus brought

up the issue, in or about April 2006, after he discovered that the 80-gallon fuel truck did not have air conditioning. In response to this comment, Petitioner told Mr. Tyus that he would appreciate it if Mr. Tyus was able to get the truck air conditioned, but that it was not "a big deal." In fact, Petitioner admitted "making a light joke" about getting the truck air conditioning by telling Mr. Tyus that the "air conditioning [in the truck] works great . . . with [the] windows down and [going] 60 miles an hour."

28. During Petitioner's employment with JCI, at any one time there may have been a maximum of 20 members of the Central Division construction crew out of Orlando assigned to construction projects in Tampa who lived more than 100 miles from Tampa. Those employees were lodged at the Days Inn--Tampa North ("Days Inn") in Tampa, Florida, at JCI's expense. The lodging expenses for these employees were allocated to the budget of the project on which they were employed.

29. As set forth in paragraph 4, during Petitioner's employment with JCI, he lived approximately 39 miles or less from his regular job site located on Sligh Avenue in Tampa, Florida.

30. JCI never assigned Petitioner to a work location more than 100 miles from his home.

31. From January 25, 2006, through June 23, 2006, Petitioner stayed at the Days Inn, incurring $7,000.00 for lodging expenses that were billed to JCI.

32. Mr. Tyus did not approve Petitioner staying at the Days Inn in connection with his employment at JCI and until June 2, 2006, was unaware Petitioner was staying there.

33. On June 2, 2006, Mr. Tyus first learned that Petitioner was staying at the Days Inn at JCI's expense after his [Mr. Tyus'] supervisor, Raymond Pace, notified him. Upon inquiry, Mr. Tyus advised Mr. Pace that he had not authorized Petitioner's stay at the Days Inn and was not aware that the stay had been authorized.

34. Prior to taking disciplinary action against Petitioner for incurring the lodging expenses, Mr. Tyus and Mr. Pace conducted an investigation to determine if anyone in the JCI organization had approved Petitioner's staying at the Days Inn. As of June 23, 2006, neither Mr. Pace nor Mr. Tyus had been able to ascertain who, if anyone, had authorized Petitioner's stay at the Days Inn or the reason for his stay.

35. Initially, the $7,000.00 in lodging expenses was erroneously allocated to JCI's I-275 project. After the error was discovered and no determination could be made as to who approved Petitioner's staying at the Days Inn, Mr. Pace and Mr. Tyus decided that Petitioner's lodging expenses at the Days

Inn, incurred from January 25, 2006, through June 23, 2006, should be reallocated to the Equipment and Maintenance Department, the unit to which Petitioner was assigned.

36. On or about June 23, 2006, Mr. Pace and Mr. Tyus decided that Mr. Tyus would direct Petitioner to vacate the room at the Days Inn immediately and that no disciplinary action would be taken with respect to the charges incurred through that day.

37. On June 23, 2006, Mr. Tyus advised Petitioner by telephone that Petitioner's stay at the Days Inn violated JCI's travel policy and instructed him to vacate the room and check out of the motel immediately.

38. Petitioner left the motel on June 23, 2006, but did not check out at the front desk. As a result of his failure to check out, the Days Inn continued to bill JCI for the room that Petitioner had occupied.

39. On or about July 3, 2006, Mr. Pace notified Mr. Tyus that Petitioner had incurred more than $400.00 in additional motel expenses since June 23, 2006. Shortly thereafter, Mr. Tyus contacted Petitioner to ask him how the charges had arisen. Petitioner explained that he vacated the room at the Days Inn on January 23, 2006, but did not check out or turn his key in at the front desk.

40. Mr. Tyus viewed Petitioner's conduct (i.e., leaving the motel without checking out) as unreasonable and a disregard of company funds, an offense for which Petitioner's employment could be terminated. Nonetheless, Mr. Tyus decided to give Petitioner an opportunity to clear up the billing issue with the Days Inn and get a credit for the days charged to JCI, as a result of Petitioner's failure to check out.

41. Mr. Tyus gave Petitioner two weeks to clear up the $400.00 bill at the Days Inn, during which time Mr. Tyus authorized Petitioner to go to the Days Inn during working hours to attend to the matter. During the two-week period, Petitioner contacted the manager of the motel in an attempt to resolve the $400.00 lodging costs. However, he was unable to persuade the manager of the Days Inn to take the $400.00 charges off JCI's bill.

42. Petitioner never resolved the $400.00 billing issue.

43. In light of Petitioner's conduct, Mr. Tyus, in consultation with Mr. Pace, decided to terminate Petitioner's employment. The termination process was conducted in consultation with the JCI Human Resources Office.

44. On August 2, 2006, Mr. Tyus informed Petitioner of JCI's decision to terminate his employment because of the additional unauthorized expenses Petitioner incurred after

June 23, 2006, and for his failure to follow his supervisor's instructions and disregard for company funds.

45. After being told that his employment with JCI was terminated, Petitioner offered to write a check to cover the $400.00 motel charges, but Mr. Tyus did not accept that offer as a means of resolving the issue. Mr. Tyus believed that the offer came too late and that Petitioner, in the prior two weeks, had not appeared to take the matter of misusing the company's funds seriously.

46. The Separation Notice issued to Petitioner stated that Petitioner was discharged for the following reasons: "[Petitioner] failed to check out of an unauthorized motel room properly. Resulting in over $400.00 in charges to JCI. [sic] He had very clear instructions and just left. He never checked out."

47. JCI's company policies are included in a publication, Carlo Companies Handbook ("Handbook"), which is distributed to employees. Upon being employed by JCI, Petitioner received a copy of the Handbook.

48. The Handbook requires JCI drivers to comply with all applicable U.S. Department of Transportation ("DOT") regulations and to notify the Human Resources Office of any medical condition that might affect the employee's ability to safely operate a company vehicle. Contrary to this policy, Petitioner

never notified the Human Resources Office staff or anyone at JCI that he had insulin-dependent diabetes, a condition that might affect his ability to drive a commercial vehicle.

49. The fleet manager of the Equipment and Maintenance Department is required to administer JCI's safety policies, which include compliance with applicable DOT regulations and Florida law. In accordance with those provisions, had Petitioner disclosed that he was an insulin-dependent diabetic, he would not have qualified for the job of fuel truck driver.[6/]

50. The Handbook includes the company's non-discrimination policy which prohibits discrimination without regard to the employees' "race, religion, sex, age, color, or national origin or other factor prohibited by law." The Handbook also provides the procedures for filing a complaint of discrimination with JCI. Although he was aware of JCI's discrimination policy and the procedures for filing a complaint, Petitioner never filed a complaint regarding any disability.

51. The Handbook includes a policy whereby employees could request reasonable accommodations for a disability. The policy required that the employee notify appropriate JCI staff, in writing, "as soon as possible, but within 182 days after the day you know or reasonably should know that an accommodation is needed."

52. During the time Petitioner was employed at JCI, he never mentioned his diabetic condition to Mr. Tyus. Moreover, Petitioner never made a written request or otherwise contacted the JCI Human Resources Office or anyone else at JCI about air conditioning for the truck as an accommodation for a disability.

53. During Petitioner's employment with JCI, the Handbook included a travel policy which required that the executive administrative assistant in the corporate office coordinate "all travel over 100 miles outside the employee's normal work location." The policy specified "any travel necessitating airline travel, automobile rental, and/or hotel reservations."

54. While an employee of JCI, Petitioner was aware that the travel policy allowed employees to be reimbursed for travel expenses, only when they were required to travel over 100 miles to work.

55. In order to minimize the negative side affects/impact of his insulin-dependent diabetes, Petitioner must control and monitor his blood sugar levels, take insulin when necessary, and eat meals and snacks on a regular schedule. Petitioner has successfully controlled his diabetes by doing the foregoing and Petitioner considers those activities "minor inconvenience[s]."

56. Petitioner considers his diabetic condition to be a "limited restriction." Petitioner testified that fluctuations in his blood sugar level (either high or low) may affect his

eye-hand coordination and vision and weaken his legs. However, Petitioner testified that these events/symptoms have happened "zero" times in the last year and only three times in the year and a half (March 2008 through August 2006) that he was working for JCI.

57. Despite Petitioner's assertion to the contrary, his diabetic condition does not limit his ability to work and care for himself. For example, during the time Petitioner worked for JCI, despite having insulin-dependent diabetes, he came to work everyday and performed his job responsibilities. Moreover, Petitioner lives independently, takes care of himself and his household responsibilities, does his own grocery shopping, and drives himself to and from work.

58. Petitioner presented no evidence of specific conduct, documents, or statements to establish the alleged discrimination. Moreover, no one at JCI ever told Petitioner that he was reassigned to the Sligh Avenue work site and/or terminated from his position with JCI because of a disability. In fact, at this proceeding, Petitioner acknowledged that he has no factual basis for his allegations and stated, "At this point, it's all theory."

59. Petitioner testified that he believes JCI terminated his employment because of his disability and not for the reasons JCI gave him. Petitioner bases this belief on the fact that,

although Petitioner was initially denied unemployment compensation, JCI did not contest his claim at the appellate level.

60. Despite his allegation that he is disabled, no physician has placed any restrictions on his working conditions. Furthermore, Petitioner has never been pronounced disabled by a medical care provider, a government agency (i.e., Social Security Administration) or court.

61. Two months after JCI terminated his employment, Petitioner began working at a business that assembles shower doors. Petitioner voluntarily left that job for a higher paying job. In the former job, Petitioner verbally advised the employer that he was a diabetic, but did not indicate that the condition was a disability and that he required an accommodation. On his current job, Petitioner has not reported that he has insulin-dependent diabetes and has not requested any type of accommodation.

CONCLUSIONS OF LAW

62. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. §§ 120.565, 120.57(1), and Chap. 760.01, et. seq., Fla. Stat. (2007).

63. The Florida Civil Rights Act of 1992 (FCRA), Sections 760.01 through 760.11, Florida Statutes, make it unlawful for an employer to commit an unlawful employment practice.

64. Subsection 760.10(1), Florida Statutes, makes it an unlawful employment practice for an employer to take adverse employment action against any individual because of such individual's "race, color, religion, sex, national origin, age, handicap, or marital status."

65. Petitioner alleges that JCI terminated his employment because of his handicap/disability and, thus, violated the FCRA.

66. Federal discrimination laws may be used for guidance in evaluating the merits of claims arising under Chapter 760, Florida Statutes.

67. Florida courts construe handicap discrimination actions under the FCRA in conformity with the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. Section 12111(8), as interpreted by federal courts. Wimberly v. Securities Technology Group, Inc., 866 So. 2d 146 (Fla. 4th DCA 2000); Tourville v. Securex, Inc., 769 So. 2d 491 n.1 (Fla. 4th DCA 2000); Greene v. Seminole Electric Co-op., Inc., 701 So. 2d 646 (Fla. 5th DCA 1997).

68. The burden of proof in discrimination cases involving circumstantial evidence is set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-803 (1973). Where, as in this case,

there is no direct evidence of discrimination, a claimant must meet his burden of proof by establishing a prima facie case of discrimination. If a prima facie case is established, the burden shifts to the employer to articulate a non-discriminatory reason for the adverse employment action. If the employer offers a non-discriminatory reason for its actions, the burden then shifts back to the claimant/petitioner that the reasons articulated by the employer were pretextual.

69. In order to establish a prima facie case of discrimination based on a disability/handicap under the ADA, Petitioner must establish that: (1) he has a disability; (2) he is a "qualified" individual at all material times; and (3) he was discriminated against because of his disability. Gordon v. E.L. Hamm & Associates, 100 F.3d 907, 910 (11th Cir. 1996); Brand v. Florida Power Corp., 633 So. 2d 504, 510 (Fla. 1st DCA 1994).

70. The ADA and the FCRA define "disability" and "handicap," respectively, as a physical or mental impairment that substantially limits one or more of the major life activities of such an individual; a record of such an impairment; or being regarded as having such an impairment. See 42 U.S.C. 12102(2); 29 C.F.R. § 1630.2(g)(1)-(3); and § 760.22(7), Fla. Stat.

71. Petitioner does not allege and the record does not support a finding that he has a record of a physical impairment

or is regarded as having such an impairment. Rather, Petitioner claims that he has a disability by virtue of being an insulin-dependent diabetic. Accordingly, the analysis related to Petitioner's disability is limited to whether the alleged disability is a physical impairment that substantially limits one or more of Petitioner's major life activities. 42 C.F.R. § 12102(2)(A).

72. The only physical impairment that Petitioner has alleged, his insulin-dependent diabetes, is not a disability per se. See Arrington v. Southwestern Bell Telephone Co., 93 Fed. Appx. 593 (5th Cir. 2004). In order to constitute a disability under the ADA, Petitioner's impairment must be a "substantial limitation" on his major life activities. Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 194-195 (2002).

73. The pertinent federal regulation defines "major life activities" to include functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 29 C.F.R. § 1630.2(i).

74. To be "substantially limited" from 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. Moreover, the impairment's impact must also be permanent or long-term. Toyota, 534 U.S. at 197.

75. 29 C.F.R. Section 1630.2(j)(3) provides that with respect to the major life activity of working, "substantially limits" means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities. See Toyota, 534 U.S. at 198. According to that provision, the inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

76. In Sutton v. United Airlines, Inc., 527 U.S. at 482-483, the U.S. Supreme court determined that "[a] person whose physical or mental impairment is corrected by medication or other measures does not have an impairment that presently 'substantially limits' a major life activity." Therefore, whether a person has a disability under the ADA "depends on whether the limitations an individual with an impairment actually faces are in fact limiting." Id. at 488.

78. In order to prevail in a disability discrimination case, Petitioner must establish all three elements listed in paragraph 69 above.

79. Here, Petitioner did not establish the first element of the prima facie test in that he failed to show that he is disabled/handicapped within the meaning of the law. While it is undisputed that Petitioner has insulin-dependent diabetes,

Petitioner failed to present evidence to show that this physical impairment "substantially limited" any of his "major life activities." To the contrary, the clear evidence showed that despite Petitioner's diabetes, he remained able to care for himself and carry out all major life activities.

80. Because Petitioner did not establish that he is "disabled" or "handicapped" within the meaning of the ADA and the FCRA, his disability discrimination claim must fail.

81. Even if it were assumed, for argument's sake, that Petitioner had a disability under the ADA and FCRA, to establish a case of discrimination, he would have to prove the second element of the prima facie test--that he is qualified for the job of fuel truck driver. The clear and undisputed evidence established that federal regulations and Florida law prohibit insulin-dependent diabetics from driving the type of commercial vehicles Petitioner drove when he was initially hired by JCI. Therefore, as a matter of law, Petitioner was not qualified to drive the 2500-gallon fuel truck and the 300-gallon fuel truck. However, the evidence established that after JCI reassigned Petitioner to a fixed location and transferred him to a truck with a smaller fuel tank, he was qualified for the position in that he could perform, without reasonable accommodation, the essential functions of the position. See 42 U.S.C. § 12111(8).

82. Again, assuming, for the sake of argument, that Petitioner established the first two elements of the prima facie test for discrimination, in order to prevail, he must then establish that he was discriminated against because of his disability. Petitioner asserts that JCI discriminated against him by: (1) reassigning him to a fixed location; (2) refusing his request for an accommodation; and (3) terminating his employment.

83. With regard to Petitioner's alleged request for an accommodation (i.e., air conditioning for the 80-gallon fuel truck), assuming he was a "qualified person with a disability," the evidence did not establish that Petitioner needed an accommodation to perform the essential functions of the job or that he requested such an accommodation. See Stewart v. Happy Herman's Cheshire Bridge, 117 F.3d 1278, 1286 (11th Cir. 1997).

84. Again, assuming, for the sake of argument, that Petitioner established the first two elements of the prima facie test for disability discrimination, he must then show that JCI reassigned him to a fixed location because of his disability. Petitioner presented no evidence that JCI had a discriminatory reason for the reassignment. Rather, JCI presented clear and undisputed evidence that Petitioner was reassigned to a fixed location due to safety reasons, after he had two diabetic episodes, one in which he blacked out and a second one in which

he nearly blacked out. It is not discriminatory for an employer to reassign an employee when it discovers that an employee has an impairment that poses a safety threat. Rather, it is a legitimate non-discriminatory reason.

85. Finally, assuming, for the sake of argument, that Petitioner met the first two elements of the prima facie test for disability discrimination, there is no evidence that JCI terminated Petitioner's employment because he was disabled. The clear and undisputed evidence established that JCI terminated Petitioner's employment because of his failure to follow his supervisor's instructions and disregard for company funds. While Petitioner may disagree with JCI's decision, it had a legitimate non-discriminatory reason for its action.

86. For the reasons set forth above, Petitioner failed to establish a prima facie case of disability discrimination and, therefore, failed to meet his burden of proof. Accordingly, his FCRA claim must be dismissed.

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 4th day of April, 2008, in Tallahassee, Leon County, Florida.

CAROLYN S. HOLIFIELD
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 4th day of April, 2008.

ENDNOTES

1/ All references are to 2006 Florida Statutes, unless otherwise indicated.

2/ 49 C.F.R. § 391.41(a); and § 322.59(1), Fla. Stat.

3/ 49 C.F.R. § 391.43(f).

4/ The medical form required by the Florida Department of Highway Safety and Motor vehicles has a section in which the "driver" is instructed to check the appropriate "yes" or "no" box to indicate whether he has one or more of the conditions listed on the form. The form expressly lists "diabetes or elevated blood sugar." If the applicant answered yes to the inquiry about diabetes, he then was required to check the appropriate box to indicate whether the diabetes or elevated blood sugar was "controlled by diet, pills, [or] insulin."

5/ 49 C.F.R. Section 390.5 defines a commercial motor vehicle to include a "self-propelled . . . vehicle used on the highway . . . to transport passengers or property when the vehicle . . . is used in transporting material found by the Secretary of Transportation to be hazardous . . . and transport[ing] in a quantity requiring placarding under regulations prescribed by

the Secretary under 49 C.F.R., subtitle B, chapter I, subchapter C."

6/ 49 C.F.R. Section 391.64(a)(1) provides a limited exemption from disqualification for persons who have insulin-dependent diabetes. However, there is no evidence that Petitioner is eligible for such exemption. This section exempts from the provisions of 49 C.F.R. Section 391.41(b)(3) a driver who was a participant in good standing on March 31, 1996, in a waiver study program concerning the operation of commercial motor vehicles by insulin-controlled diabetic drivers if the driver is physically examined every year by a board-certified/eligible endocrinologist attesting to the fact that the driver is: (1) otherwise qualified under 49 C.F.R. Section 391.41; (2) free of insulin reactions; (3) able to and has demonstrated willingness to properly monitor and manage his/her diabetes; and (4) not likely to suffer any diminution in driving ability due to his/her diabetic condition.

COPIES FURNISHED:

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

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

Alysa J. Ward, Esquire
Glenn, Rasmussen, Fogarty
& Hooker, P.A.
100 South Ashley Drive, Suite 1300
Tampa, Florida 33602

Kim C. Rhode
Post Office Box 1093
New Port Richey, Florida 34656

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.