STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JIMMY OATES,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 08-2573
	)	
WAL-MART STORES EAST,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Upon due notice, a disputed-fact hearing was held in this case on October 15, 2008, in Gainesville, Florida, before Ella Jane P. Davis, a duly-assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Jimmy Oates, pro se
2115 Northeast 7th Avenue
Gainesville, Florida 32641

For Respondent: Lindsay C. O'Brien, Esquire
Michelle Tatum, Esquire
Ford and Harrison, LLP
225 Water Street, Suite 710
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STATEMENT OF THE ISSUE

Whether Respondent Employer committed an unlawful employment practice against Petitioner on the basis of his race, color, disability/handicap, and/or age.[1/]

PRELIMINARY STATEMENT

On November 20, 2007, Petitioner filed a Charge of Discrimination with the Florida Commission on Human Relations (FCHR), alleging Respondent Wal-Mart Stores East LP (Wal-Mart) violated Chapter 760, Florida Statutes, by discriminating against Petitioner on the basis of his race, color, or disability/handicap and/or age. On May 15, 2008, FCHR issued its Notice of Determination: No Cause.

Petitioner filed a Petition for Relief on May 22, 2008. On or about May 23, 2008, FCHR referred the case to the Division of Administrative Hearings (DOAH). A Notice of Hearing was issued, scheduling the case for hearing on August 7-8, 2008. The original hearing date was continued once, upon Respondent's unopposed motion, and the case was ultimately set for hearing on October 15-16, 2008. The hearing was begun and concluded on October 15, 2008.

At hearing, Petitioner testified on his own behalf and had Exhibits P-1, and P-3 through P-5, admitted in evidence. There was no Exhibit P-2.[2/] Respondent presented the oral testimony of Thomas Horton (by telephone) and Jennifer Chewning. Respondent had Exhibits R-1 through R-7 admitted in evidence. The necessary verifications regarding out-of-state telephonic testimony by Mr. Horton, together with required duplicate exhibits, were timely-filed on October 20, 2008.

A Transcript was filed on November 17, 2008. Only Respondent timely-filed a Proposed Recommended Order on December 1, 2008. Petitioner did not file a proposed recommended order, despite having been sent an instructional Post-Hearing Order on November 18, 2008. Respondent's timely-filed Proposed Recommended Order has been considered in preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is an African-American male who was 66-68 years of age at all times material.

2. Petitioner worked successfully, in a variety of positions, for Respondent from March 20, 1999, until July 29, 2007. By all accounts, he was an excellent employee in each position. He has, at his own expense, trained for, and received, a security guard license and education as a fork lift operator.

3. The published job description for employment as a Wal-Mart Garden Center Sales Associate, has, since May 2005, required, among other "essential functions," that one be able to:

> While moving within the department over uneven surfaces and moving up and down a ladder, frequently lifting, sorting, carrying, and placing merchandise and supplies of varying sizes, constantly lifting up to 50 pounds without assistance and over 50 pounds with team lifting.

On March 3, 2006, Petitioner signed this job description, signifying that he possessed the ability at that time to perform all its essential functions.

4. On a Saturday in July 2007, Petitioner was still working for Respondent as a Garden Center Sales Associate. Early that day, Petitioner and a cashier were alone in the garden center of Respondent's store at 13th Avenue, Gainesville, Florida. Upon her request, Petitioner loaded 83 bags of top soil into a customer's truck without assistance. Later that same day, Petitioner's wrist began to hurt.

5. The following Monday, Petitioner's hand was swollen. He approached Store Manager Thomas Horton, and told Mr. Horton that he needed to see a doctor. Petitioner did nothing to alert Mr. Horton that he might have had an on-the-job injury. Mr. Horton orally authorized Petitioner to go to a doctor.

6. Petitioner unilaterally selected Dr. Youssef W. Wassef to treat his wrist. There is no evidence of the workers' compensation process, pursuant to Chapter 440, Florida Statutes, ever being invoked.

7. On or about August 2, 2007, Dr. Wassef provided a note that said:

> Patient should not allowed [sic] to lift more then [sic] 15 lb.

This note was provided to Respondent's store personnel office by Petitioner at or about the same time he got it.

8. According to the August 2, 2007, restrictions placed on Petitioner by his treating physician, Petitioner was unable to perform the essential functions of the Garden Center Sales Associate position.

9. Petitioner testified that he last worked on July 29, 2007.

10. On or about September 6, 2007, Petitioner delivered to his store's personnel office another note from Dr. Wassef, stating:

> Patient should continue until further notice on full-time, light duties, no lifting or pushing.

This note also placed medical restrictions on Petitioner which made him unable to fulfill the essential functions of his Garden Center Sales Associate position.

11. It is unclear whether Petitioner was working or was on the equivalent of sick leave from Monday, July 30, 2007, until September 7, 2007. It is most probable, based on the evidence as a whole, that at least after receiving the August 2, 2007, doctor's note, Wal-Mart did not allow Petitioner to work in the capacity of a Garden Center Sales Associate. Specifically, Mr. Horton testified that he "called back" Petitioner sometime during the back-to-school/college season, which "season" would

have been in late August or early September, to work in a temporary position. The temporary position assigned Petitioner was described by Ms. Chewning, the store's Personnel Manager, as a “May I assist you?” position. In this temporary position, which lasted only a few weeks, Petitioner was only required to walk around and point out to inquiring shoppers their requested back-to-school/college materials. Wal-Mart did not require Petitioner to work outside his medical restrictions. When the back-to-school/college season ended, so did the temporary position.

12. When the back-to-school/college season ended and the temporary sales associate position was eliminated, there were no positions available at Petitioner’s store that he could perform with his medical restrictions on lifting and pushing. Also, at that point in time, Mr. Horton began to lay off people in some positions. However, Petitioner remained on leave and was not laid off.

13. Although Petitioner referred to a People Greeter position in his November 20, 2007, discrimination complaint before FCHR, there is no credible record evidence that Petitioner requested a Wal-Mart People Greeter position as an “accommodation” of his condition prior to filing his discrimination complaint or that a People Greeter position was vacant at any time material to this case. However, the

published job description for employment as a Wal-Mart People Greeter has, since May 2005, required, among other "essential functions" that the incumbent be able to:

> Provide shopping carts to customers by pushing or pulling up to 10 pounds of pressure . . . Frequently lifting, placing and deactivating items weighing up to 10 pounds without assistance, and regularly lifting merchandise over 10 pounds with team lifting.

14. Petitioner documented at hearing, via an old doctor's report, that in 1991, he had severe arthritis in both his elbows and that surgery was contemplated at that time. However, there is no clear evidence that he had the surgery or, if he had the surgery, what was its outcome. There also is no persuasive evidence that Respondent's personnel office or any Wal-Mart employee material to the instant case knew about this doctor's report prior to the present litigation.

15. Petitioner demonstrated at hearing that his elbows are visible in the short-sleeve shirts worn by Wal-Mart employees. He believes his elbows stick out farther than other people's elbows, and he speculated that his superiors and store personnel office employees decided visually that he had a handicap because "my arms stick out" and because of a scar on one arm. The undersigned observed his demonstration. If there is a deformity, it is not substantial, and the scar is not visible without close inspection. Sometime in August-September 2007,

probably during the back-to-school/college season, Mr. Horton observed Petitioner wearing what Mr. Horton believed to be a brace on Petitioner's hand, but which was, in fact, a wristband. However, no evidence supporting Petitioner's theory that any superiors or personnel office employees did, in fact, perceive him as disabled/handicapped was adduced.

16. Petitioner denied ever being handicapped or unable to perform the essential functions of his job as a Wal-Mart Garden Center Sales Associate. Mr. Horton and Jennifer Chewning each credibly denied ever perceiving Petitioner as handicapped, even up to the date of the hearing.

17. When he had been hired in 1999, Petitioner acknowledged receipt and understanding of the policies contained within Respondent's Associates Handbook. Petitioner again acknowledged receipt and understanding of these policies on March 29, 2001, when he was issued a revised Associates Handbook.

18. Wal-Mart regularly offers leaves of absence to any associate who has a medical condition that is not perceived by the employee or management as a "disability" under the Americans with Disabilities Act (ADA) or the Florida Civil Rights Act, but whose condition prevents him from performing his job.
Ms. Chewning testified that the Request for Leave of Absence

form described below is used specifically for situations not covered by the ADA or by State disability laws.[3/]

19. The form upon which an employee may apply for such a leave of absence advises that the leave of absence is without pay; that there will be no accrual of benefits or seniority during the leave of absence; and that the employee must pay his own insurance premiums during this period. Grant of the requested leave is dependent upon the treating physician's verification of the employee's medical condition. (See Finding of Fact 20.) Based on Petitioner's inability to perform the essential functions of any available position within the store in September 2007, Ms. Chewning offered Petitioner such a leave of absence.

20. Petitioner disputes some of the contents of the Request for Leave of Absence form in evidence, which completed form Mr. Horton retroactively approved on September 21, 2007, for Petitioner to be on continuous leave beginning September 7, 2007, with a return date of December 31, 2007. However, Petitioner admits that he signed this form. The date beside Petitioner's signature seems to be September 19, 2007. Petitioner's signature on this form signifies that he was requesting "medical leave," thereby acknowledging:

> A medical condition (including pregnancy and childbirth, and on-the-job Workers' Comp. injuries) requiring time away from work.

> The Health Care Provider’s Section, below, must be completed and signed. Before returning, associate must submit a return-to-work statement/release from a Health Care Provider detailing restrictions, if any. . . .
>
> * * *
>
> . . . I fully understand Wal-Mart’s Leave of Absence Policy.

Petitioner also agreed that on or about September 19, 2007, as reflected on the portion of this Request for Leave of Absence form which was filled-in by Dr. Wassef, Petitioner’s doctor had certified that Petitioner should begin medical leave on September 9, 2007, and continue through September 30, 2007.

21. Petitioner asserted that on or about September 13, 2007, he delivered to someone other than Ms. Chewning in Respondent's personnel office another note from Dr. Wassef stating:

> Patient has partial permanent disability.[4] Does not need sick leave. He needs to continue to work full-time with limited lifting, pulling, and pushing.

22. Petitioner asserted that on or about October 29, 2007, Petitioner delivered to someone other than Ms. Chewning in Respondent's personnel office the last note he had received from Dr. Wassef, which stated:

> Patient able to work full-time with limited lifting to 20 pounds.

23. Ms. Chewning testified that neither the September 13, 2007, nor the October 29, 2007, medical notes contemporaneously reached either herself or Petitioner's personnel file. According to the last medical note she received prior to hearing, Petitioner could not even perform the essential functions of a People Greeter position. (See Findings of Fact 10 and 13.) Reviewing Dr. Wassef's September 13, 2007, and October 29, 2007, notes for the first time at hearing, she pointed out that, according to the most recent note, Petitioner was still medically restricted from performing some of the essential functions of his Garden Center Sales Associate's position. (See Findings of Fact 3 and 22.) She has never received a medical release permitting Petitioner to return to full functioning as a Garden Center Sales Associate.

24. Ms. Chewning testified that Wal-Mart has a policy that a medical leave of absence may not extend beyond one year. However, neither its printed non-ADA leave of absence policy in evidence nor the Request for Leave of Absence form in evidence specifies a one year maximum leave. More than a year after Petitioner's leave began on September 7, 2007, and nearly 10 months after the leave was supposed to end on December 31, 2007, Wal-Mart has not taken steps to terminate Petitioner, because of the current litigation that began with Petitioner's filing his complaint with FCHR on November 20, 2007. Ms. Chewning

testified that, as of the date of hearing on October 15, 2008, Respondent had not terminated Petitioner; Petitioner remained on his approved unpaid leave of absence; and if Petitioner brings in a doctor's note saying he can perform all the essential functions listed on his Garden Center Sales Associate's job description, including but not limited to being able to lift 50 pounds, Wal-Mart will put Petitioner back in his Garden Center Sales Associate position, and he will retain his salary level, his accrued years of service, and all his benefits as they existed at the beginning of his leave of absence.

25. Petitioner erroneously perceives himself as having been terminated and wants to go back to work, but he has not yet presented any doctor's release that allows him to perform regularly the functions of a Garden Center Sales Associate.

26. There is no evidence herein that under similar conditions Wal-Mart has treated any person of any race other than African-American differently than Petitioner has been treated.

27. There is no evidence herein that under similar conditions Wal-Mart has treated any person of any age other than 66-68 years of age, differently than Petitioner has been treated.

CONCLUSIONS OF LAW

28. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this cause, pursuant to Sections 120.569, 120.57(1), and Chapter 760, Florida Statutes (2007-2008).

29. The initial burden of proof and duty to go forward herein is upon Petitioner. This type of case is subject to a "shifting burden of proof," only if Petitioner can first establish a prima facie case that some type of disparate treatment has, in fact, occurred. Where Petitioner cannot establish each element of a prima facie case of discrimination, the burden of proof never shifts to the Respondent Employer to articulate a legitimate, non-discriminatory reason or reasons for taking the employment action(s) which Petitioner claims are adverse to him and discriminatory. See Texas Dept. of Comm. Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981); Pace v. Southern Railway System, 701 F.2d 1383, 1391 (11th Cir. 1983).

30. An adverse employment action equates to a "significant change in employment status, such as hiring, firing, failure to promote, reassignment with significantly different responsibilities or a decision causing a significant change in benefits." See Burlington Indus. Inc. v. Ellerth, 524 U.S. 742, 761 (1998). See also Davis v. Town of Lake Park, Fla., 245 F.3d

1232, 1239 (11th Cir. 2001), and Frederick v. Sprint/United Management Co., 246 F.3d 1305, 1311 (11th Cir. 2001). Without initial evidence that such a significant change has occurred, the burden does not shift.

31. Because there is no evidence of discrimination via treatment of Petitioner, disparate from treatment of any other employee, regardless of race or color, Petitioner has not presented a prima facie case of racial discrimination. See Texas Dept. of Community affairs v. Burdine, supra; McDonnell-Douglas v. Green, 411 U.S. 792 (1973); and Dept. of Corrections v. Chandler, 582 So. 2d 1183 (Fla. 1st DCA 1991).

32. Because there is no evidence of age discrimination via treatment of Petitioner disparate from that of any other employee, regardless of age, Petitioner has not presented a prima facie case of age discrimination. See cases cited, supra; and Chapman v. A.I. Transport, 229 F.3d 1012, 1024 (11th Cir. 2000).

33. Petitioner was not terminated, let alone terminated by reason of a handicap. Therefore, Petitioner could not prove he was terminated solely by reason of a handicap, which is a threshold requirement of a prima facie case of handicap discrimination. See Hilburn v. Murata Electronics North America, Inc., 181 F.3d 1220 (11th Cir. 1999).

34. Petitioner also has not met the generally-accepted legal definitions of “disabled” or “handicapped,” and he has presented none of the usual indicators that would establish that he was "disabled" or "handicapped," as those terms are generally understood in employment law. Therefore, the issue of whether or not the Employer failed to "accommodate" Petitioner’s disability/handicap need not be addressed. See cases cited supra and Toyota Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184, 122 S. Ct. 681 (2002); Albertson’s, Inc. v. Kirkinburg, 527 U.S. 555, 119 S. Ct. 2162 (1999); Collado v. United Parcel Service, Co., 419 F.3d 1143 (11th Cir. 2005); Sutton v. Lader, 185 F.3d 1203, 1209 (11th Cir. 1999); Hedberg v. Indiana Bell Telephone Co., Inc., 47 F.3d 928, 932 (7th Cir. 1995); Lucas v. W.W. Grainger, Inc., 257 F.3d 1249, 1255 (11th Cir. 2001).

35. Also note that in Warren v. Volusia Co., Florida, 188 Fed Appx. 859 (11th Cir. 2006), a physician’s notation that the employee could only perform light duty or sedentary jobs was held not to be the equivalent of a request for accommodation.

36. However, assuming, arguendo, but not ruling, that Petitioner were handicapped/disabled, and even assuming, again without ruling and without any evidence to that effect, that the two medical notes received by Wal-Mart’s personnel office, and even the two medical notes not proven to have been received by

the personnel office, constituted Petitioner's requests for accommodation, no vacant position fitting Petitioner's medical restrictions existed in his Wal-Mart store at the crucial times. At all times relevant, no People Greeter position or other light duty position was vacant. An employer is not required to displace another employee from an existing position or to create a new position just so that a handicapped employee may fill it.

37. On the most important allegation, termination, this case represents a situation in which pure lack of communication between the parties has fostered and prolonged litigation. Petitioner believed he was terminated, but Respondent was simply waiting for Petitioner to present its store personnel office with a medical release from his doctor stating Petitioner could perform the essential functions of his job description before putting Petitioner back in his Garden Center Sales Associate position. Now, Petitioner runs the risk that Wal-Mart may activate its policy to actually terminate Petitioner for failure to return an appropriate medical note before the approved leave of absence ran out on December 31, 2007, or before one year had run from September 7, 2007. That would be tragic and totally contrary to the evidence given at hearing, but the undersigned cannot second-guess what may occur in the future. For now, the Findings of Fact do not support a conclusion that Petitioner has

been discriminated against in any of the statutorily protected classes.

RECOMMENDATION

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

RECOMMENDED that the Florida Commission on Human Relations enter a final order dismissing Petitioner's Complaint of Discrimination and Petition for Relief.

DONE AND ENTERED this 2nd day of February, 2009, in Tallahassee, Leon County, Florida.

ELLA JANE P. DAVIS
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 2nd day of February, 2009.

ENDNOTES

1/ Boxes for these categories/classes of discrimination were checked on the complaint brought before the Florida Commission on Human Relations (FCHR). Also in the body of his complaint before FCHR, Petitioner claimed the Employer failed to accommodate him as it had "older and perceived as disabled employees who are white" with a light duty position. The

Petition for Relief, which FCHR referred to DOAH, specifies no category(ies) or classes of discrimination, but the Petition was not challenged for sufficiency, and at hearing, the foregoing categories were orally stipulated to be at issue.

2/ The body of the Transcript accurately reflects that there is no Exhibit P-2, but the Transcript's Table of Contents page is out-of-sync with the contents of the Transcript.

3/ However, no witness linked this policy to either of the Associates Handbooks signed-for by Petitioner and described in Finding of Fact 17.

4/ "Permanent partial disability" (PPD) is a legal term of art in workers' compensation practice, signifying that no further improvement is possible because "maximum medical improvement" has been reached. Medical physicians may disagree upon when a particular disability becomes permanent. In the workers' compensation forum, it is not up to physicians, but up to a Judge of Compensation Claims, to determine whether PPD has been reached. Neither party herein has asserted that this note rendered Petitioner permanently handicapped for purposes of Chapter 760, Florida Statutes. As to whether the note specifying "limited lifting, pulling, and pushing" would have permitted Petitioner to work as a People Greeter is moot, as no People Greeter position was vacant. There is also a subsequent medical note. (See Findings of Fact 22-23 and Warren v. Volusia County, Florida, cited in Conclusion of Law 35.)

COPIES FURNISHED:

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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.