STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GERALD L. BETTS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 09-2392
	)	
SEMINOLE COUNTY SCHOOL BOARD,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

On August 27, 2009, an administrative hearing in this case was held in Sanford, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Gerald L. Betts, pro se
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For Respondent: Robert J. Sniffen, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether the Seminole County School Board (Respondent) discriminated against Gerald L. Betts

(Petitioner) on the basis of disability or otherwise retaliated against the Petitioner for requesting an accommodation of a disability.

PRELIMINARY STATEMENT

By a complaint dated October 7, 2008, and filed with the Florida Commission on Human Relations (FCHR), the Petitioner alleged that the Respondent discriminated against him by denying a reasonable accommodation for a disability (chemical sensitivity). The Petitioner also alleged that the Respondent retaliated against him for requesting the accommodation.

By a Determination: No Cause dated March 25, 2009, FCHR stated that there was "no reasonable cause to believe that an unlawful employment practice occurred" and advised the Petitioner of his right to dispute the determination. The Petitioner did so by filing a Petition for Relief dated April 23, 2009, with FCHR. The petition was forwarded to the Division of Administrative Hearings, which scheduled and conducted the proceeding.

At the hearing, the Petitioner testified on his own behalf, presented the testimony of one witness, and had Exhibits numbered 1 through 4 admitted into evidence. The Respondent presented the testimony of three witnesses and had Exhibits numbered 3, 5, 7 through 9, 17 through 20, 22 through 25, 30 through 32, and 38 admitted into evidence.

The Transcript of the hearing was filed on September 17, 2009. On September 28, 2009, the Respondent filed a Consented Motion for Extension of Time to File Proposed Recommended Order, which was granted by Order of September 28, 2009. Both parties filed Proposed Recommended Orders on October 19, 2009, that have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. At all times material to this case, the Petitioner was employed by the Respondent as a part-time custodian. For the past 11 years, the Petitioner was assigned to work at Indian Trails Middle School (Indian Trails).

2. The Petitioner's work schedule at Indian Trails, since his initial employment and through the 2007-2008 school year, required that he work from 6:00 p.m. to 10:00 p.m., Monday through Friday.

3. In addition to working for the Respondent at Indian Trails, the Petitioner worked for Siemens AG (Siemens) as a full-time custodian, working 40 hours per week.

4. The Petitioner had been an employee of Siemens (or predecessor companies) for about 16 years. The Petitioner's schedule at Siemens required him to work from 8:30 a.m. to 5:00 p.m., Monday through Friday.

5. On April 28, 2008, Lois Chavis assumed the position of principal at Indian Trails. Ms. Chavis was charged with resolving various problems that existed at the school.

6. Ms. Chavis quickly observed that the condition of the school facility was, as described at the hearing, "filthy." In addition to her own observation, she heard complaints from both teachers and parents of children attending Indian Trails about the cleanliness and condition of the school.

7. Soon after becoming the school principal, Ms. Chavis met with the custodial staff and expressed her concern about the condition of the school campus. She anticipated that the conditions of the school would then improve, but the progress was minimal.

8. Ms. Chavis became aware that some custodial employees used work hours for television viewing or phone conversations, that some custodial employees routinely left campus before completion of assigned work schedules, and that one custodian operated a "car detailing" business from the back of the school. There was no credible evidence presented that the Petitioner engaged in any of the referenced behavior.

9. Ms. Chavis initiated efforts to contract with a private cleaning service to assume janitorial responsibilities for the school, a solution she successfully implemented at another school to which she had been previous assigned.

10. In June 2008, the Petitioner advised Ms. Chavis that he was having medical problems related to his use of "DMQ," a cleaning product used to clean the Indian Trails locker rooms. He provided to Ms. Chavis a copy of a physician's letter dated June 5, 2008, advising that the Respondent not be exposed to "solvents" for at least three months.

11. The Respondent used DMQ in an effort to combat Methicillin-Resistant Staphylococcus Aureus (MRSA), a contagious bacterial infection. There was no evidence presented that DMQ is not a safe cleaning product when used properly.

12. The Petitioner has alleged that use of DMQ caused him to lose his sense of taste and smell. There was no medical evidence presented at the hearing to establish that the Petitioner's alleged condition was related to the use of DMQ or of any other cleaning products used by the Respondent.

13. The Petitioner has claimed that Ms. Chavis advised him he would be terminated if he could not use the DMQ. The evidence established that after the Petitioner informed Ms. Chavis of the situation, he was advised that he could use cleaning products other than DMQ, and his work assignment was changed from locker room to cafeteria cleaning. There was no medical evidence presented at the hearing that the Petitioner was unable to safely use cleaning products other than DMQ.

14. There was no credible evidence presented that the Respondent failed or refused to provide a reasonable accommodation to the Petitioner for the alleged sensitivity to DMQ.

15. In June 2008, the Respondent executed a contract with a private cleaning service that became effective on July 1, 2008. After contracting with the private vendor, several of the Indian Trails custodians had their employment terminated.

16. In August 2008, Ms. Chavis decided to alter the work schedules of the remaining Indian Trails custodial staff in an effort to improve accountability and job performance. The revised schedules, which were to take effect on August 18, 2008, required the custodial staff to work from 2:00 p.m. to 6:00 p.m., Monday through Friday, which placed the custodial staff on the campus when other employees were present.

17. The Indian Trails assistant principal provided copies of the revised schedules to the remaining custodians.

18. After receiving the revised schedule, the Petitioner requested that Ms. Chavis permit him to continue working his previous schedule from 6:00 p.m. to 10:00 p.m. because the new 2:00 p.m. to 6:00 p.m. schedule conflicted with his primary employment at Siemens. The Petitioner also made the same request to the Respondent’s executive director of Human

Resources and Professional Standards, John Reichert. Both Ms. Chavis and Mr. Reichert denied the Petitioner's request.

19. There is no evidence that the Petitioner's request to retain his original work schedule was related to any medical condition.

20. The Petitioner did not report for work at Indian Trails on August 18 through 20, 2008. He called in "sick" on August 18, 2008, but was not ill. The Petitioner reported to Indian Trails for work at 6:00 p.m. on August 21, 2008, but was advised that he was required to work his assigned shift from 2:00 p.m. to 6:00 p.m.

21. The Petitioner reported for work at Siemens on each day during August 18 through 21, 2008, and on each scheduled work day during September 2008.

22. After August 21, 2008, the Petitioner did not again report for work at Indian Trails.

23. The Petitioner's accrued leave time with the Respondent was expended as of August 25, 2008.

24. After the Petitioner's leave time was exhausted, he was initially suspended without pay and subsequently terminated from employment for repeated and continuing absence from duty without approved leave. The Petitioner's termination was effective on October 15, 2008.

25. The suspension and termination were implemented pursuant to the relevant provisions of the collective bargaining agreement between the Respondent and the Non-Instructional Personnel of Seminole County. There is no evidence that the Respondent failed to properly and appropriately apply the referenced contractual provisions.

26. There was no evidence that the Petitioner's work schedule was altered by the Respondent in retaliation for his request that his disability be accommodated or for any other reason.

CONCLUSIONS OF LAW

27. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2009).

28. Chapter 760, Part I, Florida Statutes (2008), sets forth the Florida Civil Rights Act of 1992 (the "Act") that prohibits employers from discriminating against employees on the basis of handicap. Florida courts have determined that Title VII federal discrimination law should be used as guidance when applying the provisions of the Act. Florida Department of Community Affairs v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991); School Board of Leon County v. Hargis, 400 So. 2d 103 (Fla. 1st DCA 1981).

29. The Respondent is an "employer" as defined in Subsection 760.02(7), Florida Statutes (2008).

30. Subsection 760.10, Florida Statutes (2008), states, in relevant part, as follows:

> (1) It is an unlawful employment practice for an employer:
>
> (a) To discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.
>
> * * *
>
> (7) It is an unlawful employment practice for an employer, an employment agency, a joint labor-management committee, or a labor organization to discriminate against any person because that person has opposed any practice which is an unlawful employment practice under this section, or because that person has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section.

31. In this case, the Petitioner has alleged that the Respondent discriminated against him on the basis of disability and, thereafter, retaliated against him for requesting an accommodation for his disability.

32. The Petitioner has the burden of establishing discrimination either by direct or indirect evidence. Direct evidence is that which would prove the fact of discrimination

without use of inference or presumption, such as deliberate speech. There is no evidence of direct discrimination by the Respondent in this case. Lacking direct evidence of discrimination, the Petitioner must establish a case of indirect discrimination.

33. The United States Supreme Court set forth the analysis that must be applied in considering an employment discrimination claim under Title VII in McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973), as refined in Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), and St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

34. The Petitioner has the initial burden of establishing a prima facie case of unlawful discrimination. In order to meet the initial burden, the Petitioner must establish that: (1) he is a member of a protected class; (2) he was subjected to an adverse employment action; (3) the Respondent treated similarly situated employees more favorably; and (4) he was qualified to do the job.

35. When a charge of discrimination is based on a disability, the Act is construed in accordance with the Americans with Disabilities Act (ADA), 42 U.S.C. Section 12101, et seq. D'Angelo v. ConAgra Foods, Inc., 422 F.3d 1220 (11th Cir. 2005); Razner v. Wellington Regional Medical Center, Inc., 837 So. 2d 437 (Fla. 4th DCA 2002).

36. The Act does not set forth a definition of the term "handicap." In relevant part, the ADA defines "disability" as a physical or mental impairment that substantially limits one or more major life activities, a record of such an impairment, or having been regarded as having such an impairment. See 42 U.S.C. § 12102(1).

37. Regulations adopted by the Equal Employment Opportunity Commission (EEOC) define major life activities as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." See 29 C.F.R. § 1630.2(i).

38. The EEOC regulations provide that "substantially limits" means an individual is "unable to perform a major life activity that the average person in the general population can perform" or that the individual is "significantly restricted as to the condition, manner, or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." See 29 C.F.R. § 1630.2(j).

39. The EEOC regulations identify three factors relevant to the determination of whether an individual is substantially limited in a major life activity: (1) the nature and severity of the impairment, (2) the duration or expected duration of the

impairment, and (3) the permanent or long-term impact, or the expected permanent or long-term impact of or resulting from the impairment. See 29 C.F.R. § 1630.2(j)(2).

40. In this case, the evidence failed to establish that the Petitioner is a member of a protected class by way of a disability. There was no evidence that the Petitioner was or is substantially limited in any major life activity. There was no evidence that the Petitioner was or is unable to care for himself, perform manual tasks, walk, see, hear, speak, breathe, learn or work. There was no evidence that the Petitioner was ever regarded as having a substantial limitation on any major life activity. The fact that the Respondent was advised he could use cleaning products other than DMQ is insufficient to establish that the Petitioner was regarded by the Respondent as disabled, particularly in light of the fact that the Petitioner continued to work for the Respondent as well as in his primary employment as a custodian for Siemens.

41. As for the remaining factors in the prima facie discrimination analysis, there was no evidence that the Petitioner was required to continue using the DMQ cleaning solution about which he complained after he advised Ms. Chavis of the situation. The Petitioner was subjected to an adverse employment action (termination), but the action was clearly related to the Petitioner's failure to report for work at the

scheduled time. There was no evidence that the schedule change or the termination was related to any disability or that either one occurred as retaliation for his request for accommodation of his medical condition.

42. There was no evidence that the Respondent treated similarly situated employees more favorably than the Petitioner. All of the custodial staff remaining after the private vendor took over cleaning responsibilities at the school had their working schedules altered to require that they be present on campus during the day.

43. The evidence established that the Petitioner was qualified to do the job, as he continued to work as a custodian at Indian Trails until the date upon which the schedule change became effective, as well as in the same position at his primary job at Siemens even after the termination action commenced.

44. Because the Petitioner failed to establish a prima facie case of discrimination, the analysis normally ends, and the Respondent has no obligation to articulate a legitimate non-discriminatory reason for taking the action. Pace v. Southern Railway System, 701 F.2d 1383, 1391 (11th Cir. 1983)("By definition, failure to establish a prima facie case means that the plaintiff has failed to proffer proof sufficient to impose even a burden of rebuttal on the defendant" and citing Burdine at 253-254).

45. Assuming that the Petitioner is determined to have established a prima facie case of discrimination, this Recommended Order includes consideration of the evidence presented at the hearing by the Respondent which was intended to establish a legitimate, nondiscriminatory reason for the employment decision.

46. The Respondent is required only to "produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus." Burdine, at 257. The Respondent "need not persuade the court that it was actually motivated by the proffered reasons . . ." Id., at 254. The burden has been characterized as "exceedingly light" (Perryman v. Johnson Products Co., Inc., 698 F.2d 1138, 1142 (11th Cir. 1983)).

47. The Respondent has articulated a legitimate, nondiscriminatory reason for the employment actions taken. Here, the evidence established that the rationale for the schedule change was based on the Respondent's interest in requiring the custodial staff to be on campus when other employees were present. The new schedules were a reasonable response to the apparent abuses that previously occurred when the custodial staff arrived at the end of the regular workday. The termination of the Petitioner's employment was directly related to his failure to report for duty.

48. Assuming the Petitioner's establishment of a prima facie case and the Respondent's articulation of a legitimate, nondiscriminatory reason for the employment decision, the burden shifts back to the Petitioner, who must prove that the reason offered by the Respondent is not the true reason, but is mere pretext for the decision. McDonnell Douglas at 805. There is no evidence in this case that the Respondent's rationale was a pretext for discrimination on the basis of disability.

49. The ultimate burden of persuading the trier of fact that there was intentional discrimination by the Respondent remains at all times with the Petitioner. Burdine at 253. In this case, the burden has not been met.

50. The analysis as to the charge of retaliation is essentially similar to that of the discrimination charge. The Petitioner first must establish a prima facie case of retaliation at which point the burden shifts to the Respondent to negate the inference of retaliation by presenting legitimate, non-discriminatory reasons for its actions taken. Finally, the burden returns to the Petitioner to prove that the Respondent's rationale was mere pretext for the retaliation. Woodruff v. Sch. Bd. of Seminole County, 304 Fed. Appx. 795 (11th Cir. Fla. 2008); Stewart v. Happy Herman's Cheshire Bridge, 117 F.3d 1278, 1287 (11th Cir. 1997).

51. To establish a prima facie case of retaliation, the Petitioner must establish that: (1) he engaged in a statutorily protected expression; (2) he was the subject of an adverse employment action; and (3) there was a causal link between the protected expression and the adverse action. Farley v. Nationwide Mutual Insurance Co., 197 F.3d 1322, 1337 (11th Cir. 1999); Rocky v. Columbia Lawnwood Reg. Medical Center, 54 F. Supp. 2d 1159, 1165 (S.D. Fla. 1999). It is unnecessary to address the first two factors because there is no evidence whatsoever that there was any connection between the Petitioner's request for an accommodation and either the revised work schedule or his subsequent termination for failure to report for work.

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 filed by Gerald L. Betts in this case.

DONE AND ENTERED this 20th day of November, 2009, in Tallahassee, Leon County, Florida.

William F. Quattlebaum

WILLIAM F. QUATTLEBAUM
Administrative Law Judge
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Filed with the Clerk of the
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this 20th day of November, 2009.

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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.