

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

E. MORRIS COLEY,)
)
 Petitioner,)
)
 vs.) Case No. 09-3830
)
 BAY COUNTY BOARD OF COUNTY)
 COMMISSIONERS,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a hearing was held before Diane Cleavinger, Administrative Law Judge, Division of Administrative Hearings, on September 29, 2009, by video between Pensacola and Panama City, Florida.

APPEARANCES

For Petitioner: Cecile M. Scoon, Esquire
25 East 8th Street
Panama City, Florida 32401

For Respondents: Reynaldo Velazquez, Esquire
Velazquez Law Firm, P.A.
100 Almeria Avenue, Suite 340
Coral Gables, Florida 33134

STATEMENT OF THE ISSUE

Whether Petitioner was the subject of an unlawful employment action.

PRELIMINARY STATEMENT

On January 16, 2009, Petitioner filed a Complaint of Discrimination with the Florida Commission on Human Relations (FCHR). The Complaint alleged that Petitioner had been subjected to an unlawful employment practice based on his handicap (diabetes) when he was not offered or provided adequate reasonable accommodations for his handicap and was eventually terminated from his employment with Respondent.

Petitioner's Complaint was investigated by FCHR. On June 15, 2009, FCHR issued a determination of no cause on Petitioner's Complaint. Petitioner disagreed with FCHR's determination and filed a Petition for Relief. The Petition for Relief was based on the same allegations as the original Complaint. Subsequently, the Petition was forwarded to the Division of Administrative Hearings.

At the hearing, Petitioner testified on his own behalf and presented the testimony of seven additional witnesses. Petitioner also offered ten exhibits into evidence. Respondent presented the testimony of two witnesses and offered twelve exhibits into evidence.

After the hearing, Petitioner filed a Proposed Recommended Order on November 20, 2009. Respondent filed a Proposed Recommended Order on November 15, 2009.

FINDINGS OF FACT

1. Respondent is an employer within the meaning of Chapter 760, Florida Statutes.

2. Petitioner has had diabetes since his youth and requires regular insulin and other medications for his condition. However, even with medication, Petitioner experiences a variety of symptoms due to low or high blood sugar. At the time relevant to this proceeding, Petitioner's symptoms ranged from mild to severe and included periods of disorientation, faintness and passing out.

3. Around October 1986, Petitioner was hired by Bay County (County) as an Equipment Operator. In that position, he was required to drive trucks. At the time of his employment, the County was aware of Petitioner's diabetes. However, the evidence was not clear that the County was aware of the severity of Petitioner's diabetic symptoms at the time of his hire or that Petitioner's diabetes might have been severe enough to constitute a handicap at the time of his hire.

4. Unfortunately, Petitioner had two accidents during his tenure as an Equipment Operator. Petitioner's first accident occurred in 1989 and resulted in a reduction of pay. Petitioner's second accident occurred in 1990 and led to his demotion from the Equipment Operator position.

5. After his demotion, Petitioner assumed the position of Maintenance II with the County. In October 2005, the County changed the title of the Maintenance II position to Senior Maintenance Worker. Under either title, the duties of the maintenance position required heavy physical labor outdoors. The duties included shoveling, lifting, road work and ditch work. Such work was performed in all types of weather experienced in North Florida, including high heat conditions. Petitioner remained in the Senior Maintenance Worker position until December 2, 2007.

6. At some point around early 2005, during Petitioner's employment as a maintenance worker with the County, his diabetes became a handicap that impacted his major life functions. Petitioner experienced many episodes where he became uncooperative, faint and/or disoriented because of his diabetes. Some of the episodes occurred without warning when Petitioner would become uncommunicative, begin wandering, or pass out. Other episodes had some warning when Petitioner would report that he felt ill and needed to rest or take medication. The evidence demonstrated that Petitioner's supervisors and co-workers were aware of his diabetic condition and would assist him in recuperating from these hypoglycemic or other diabetic-related episodes. Additionally, although the record is not clear, there was some evidence that summer heat in combination

with strenuous labor exacerbated Petitioner's ability to control his diabetic symptoms. On the other hand, there was some evidence that indicated Petitioner could experience symptoms from his diabetes under any environmental or working conditions. In 2005, the episodes were significant enough for the County to require Petitioner to undergo a medical examination to assess his fitness to safely perform his duties as a maintenance worker. At that time, the doctor recommended that Petitioner learn to control his diabetes better and be monitored for several months to see if Petitioner gained control of his diabetic episodes. Significantly, the doctor did not find Petitioner unfit to perform his duties as a maintenance worker.

7. Petitioner was never denied a break that he needed as a result of his diabetes and was not disciplined because of his diabetic episodes. Indeed, throughout Petitioner's employment as a maintenance worker, the County reasonably accommodated Petitioner's diabetic condition and, as needed, allowed him to sit in the shade, eat, rest, test his blood sugar levels, and/or take medications. County supervisors provided Petitioner candy bars or soft drinks to help resolve his diabetic episodes, allowed Petitioner to take unscheduled breaks, leave work early because of his diabetes, and, at least once, provided a County vehicle to transport Petitioner to his home to get medications.

8. Throughout the years of his employment with the County, Petitioner submitted job interest forms to the County. The job interest forms did not demonstrate that there were job openings or positions available at the time Petitioner expressed an interest in those jobs. The jobs Petitioner expressed an interest in were equipment operator, heavy equipment operator, lab field technician, dump truck driver, parks maintenance worker, traffic sign technician, and water treatment plant operator trainee.

9. Petitioner was interested in the positions identified in the job interest forms because he wanted to better himself professionally. Importantly, Petitioner did not pursue the jobs identified in the various job interest forms he submitted as reasonable accommodations for his diabetes. The fact that the County's doctor indicated in a 2005 medical examination and report assessing Petitioner's fitness for duty that work under less strenuous conditions might be warranted should Petitioner not gain better control of his diabetes does not demonstrate that Petitioner requested or required transfer to another position in order to reasonably accommodate his diabetes. Indeed, the documentary evidence demonstrated Petitioner did gain control over his diabetic episodes in 2006 and 2007 with reports of such episodes being substantially reduced and one doctor, in 2007, advising the County that Petitioner could drive

a truck as long as he monitored his blood sugar adequately. The evidence did not demonstrate that Petitioner sought transfer to a lighter-duty position as a reasonable accommodation until late 2007 as described later in this Recommended Order.

10. Moreover, all but one of the job interest forms Petitioner submitted during his employment with the County sought reemployment to the equipment operator position from which he was demoted. All of these positions required driving or operating machinery. They all required heavy physical exertion and lifting between 45-to-90 pounds. All positions also required exposure to the heat from the sun and exhaust from machinery. However, the evidence demonstrated that these positions were not as strenuous as the maintenance position that Petitioner held. These positions were also promotions from his maintenance worker position. Additionally, Petitioner offered no evidence that his driving had improved or that he was qualified to operate heavy equipment or drive trucks given his insulin-dependent diabetes and the severe symptoms that he experiences as a result of his diabetes. In fact, since Petitioner's symptoms included disorientation, faintness and passing out, it would have been negligent for the County to allow Petitioner to operate trucks or other heavy equipment. In short, none of the equipment operator/driver positions constituted a reasonable accommodation for Petitioner.

11. As for the other jobs of Laboratory Analyst I, Parks Maintenance Worker, Traffic and Sign Technician or the Water Treatment Plant Operator Trainee positions that Petitioner expressed an interest in, Petitioner did not know the minimum qualifications for these positions and did not offer any evidence that he was qualified for such positions. Similarly, Petitioner offered no evidence that he sought these positions as reasonable accommodations for his diabetes. Additionally, Petitioner's interest in these jobs was expressed prior to 2007 or 2008, well outside the relevant time period for purposes of this discrimination claim.

12. In September 2007, Petitioner provided the County a Family Medical Leave Act certification from Dr. Steven Wise that stated he could perform all of the essential functions of the maintenance worker position he held. The doctor's notes do not state that he is unable to perform the duties of his maintenance worker position under current working conditions. In fact, Petitioner never gave the County any document that stated he could not perform the duties of the maintenance worker position and needed a less strenuous and hot job in order to accommodate his diabetes.

13. On October 18, 2007, Petitioner conducted himself in a rude, combative, and extremely argumentative manner during a

County-sponsored Diabetes Awareness Seminar. As a result, Petitioner was suspended without pay for one day.

14. On November 1, 2007, Petitioner erupted into a profanity-laced tirade at the workplace only one week after serving the suspension for his outburst during the County's Diabetes Awareness Seminar. Petitioner gestured his middle finger at a co-worker, threatened to beat an employee's a ___, and told the co-worker f_ _ _you, "if you stand up I will kick you're [sic] a _ _," "loud mouth punk," and "you smart mouth d _ _ _head." Petitioner directed his threats and profanity at co-workers and supervisors in response to another person who had parked their vehicle improperly and blocked or interfered with Petitioner's ability to move his parked vehicle.

15. At the time, Petitioner was undergoing a change from insulin shots to a continuous insulin pump. Such a change requires a period of adjustment in order for the pump to provide the correct dose of insulin to the user. There was no evidence that the County was aware of the change in Petitioner's insulin regimen at the time of these outbursts. Additionally, the evidence was unclear that the change in Petitioner's insulin regimen caused either of these outbursts although such behavior is consistent with a hypoglycemic reaction.

16. As a result of Petitioner's behavior, the County recommended his termination. Notably, such aggressive outbursts

could have led to any employee's termination, irrespective of whether the employee was handicapped or not, since the ability to get along with co-workers is essential to any working environment. Petitioner was provided a pre-termination hearing prior to the County making a final decision on his recommended discharge.

17. During Petitioner's pre-termination hearing, he explained that his profanity-laced outburst resulted from a low blood sugar episode and that he felt it was due to the changes he was undergoing in his insulin regimen. Petitioner's spouse, who is a nurse, also explained his diabetic condition to the County Manager. Petitioner also submitted a note from his physician, Dr. Steven Wise, stating that a "job requiring less heavy physical exertion" would help Petitioner control his diabetes. Petitioner asked that he remain employed with the County and be allowed to transfer to a job with little or no physical exertion, less manual labor, and that was not exposed to the elements. Based upon Petitioner's claim that his diabetes caused the outburst, his wife's explanation of his diabetic condition, and the doctor's note, the County decided to provide Petitioner an opportunity to remain employed in a less strenuous position.

18. Ms. Smith, the County's Human Resources Director, reviewed Petitioner's personnel file to ascertain what jobs he

had previously demonstrated an interest in and what positions he might be qualified for. After review, the Solid Waste Attendant position was the only position the County had available in November 2007 that fit the less heavy physical exertion requirement requested by Petitioner. At hearing, Petitioner submitted a list of available County jobs for 2007 and 2008. The list does not indicate which of the jobs was available in November 2007 when Petitioner first sought a job transfer as a reasonable accommodation. Additionally, the jobs Petitioner expressed an interest in were the same jobs Petitioner had expressed an interest in that were discussed earlier in this Recommended Order. As to those positions, the record shows that either Petitioner was not qualified for those jobs or there was no substantial or credible evidence that demonstrated the availability of any other less strenuous positions that Petitioner was qualified for in November 2007.

19. Sometime after the pre-termination hearing, the County offered Petitioner the position of Solid Waste Attendant. At some point, the County met with Petitioner before he accepted the Solid Waste Attendant position. At that meeting, Petitioner was told about the duties of the Solid Waste Attendant position. Those duties included counting money, inputting data into a computer, and/or processing paperwork. Two of the essential functions of the Solid Waste Attendant position were the ability

to use computers and the ability to make correct change when handling cash.

20. At the time, and even though Petitioner now admits he is not good at math and has not used a computer to any great extent, Petitioner was pleased with the Solid Waste Attendant position and did not raise any concerns or objections regarding his ability to perform the duties of that job. In fact, Petitioner testified during the hearing that he "thought that it would be a good job." Petitioner accepted the Solid Waste Attendant position and started work on December 3, 2007. He did not lose any pay or benefits when he was transferred to the Solid Waste Attendant position.

21. As with any other County employee, Petitioner was on performance probation status when he assumed the Solid Waste Attendant position. The County's probationary employee policy allows employees to be discharged prior to the completion of the probationary period.

22. Petitioner was in the Solid Waste Attendant position for approximately two and a half months. With the exception of two weeks (December 28, 2007, until January 14, 2008) that he missed because of hand surgery on his non-dominant left hand, Petitioner spent the remaining ten weeks in training. However, prior to Petitioner's leaving for surgery on his left hand he

was having problems performing the Solid Waste Attendant's duties.

23. Upon Petitioner's return to work on January 14, 2008, Petitioner was placed on light duty. He was not restricted in relation to the use of his left hand. However, for a short time, use of his left hand was difficult since it required elevation.

24. Importantly, the evidence did not demonstrate that Petitioner's surgery on his left hand significantly interfered with his ability to perform the duties of the Solid Waste Attendant position over the period of time he worked in that position. Nor, was there any credible evidence that Petitioner's large hands hindered his ability to use the computer keyboard at work. Petitioner's difficulties in mastering the duties required in the position did not involve the speed with which he could input data into the computer system. His problems did involve his ability to do math, understand the waste computer program and learn the codes for appropriately accounting for solid waste disposal.

25. John Beals, Rose Day, and Cynthia Thompson trained Petitioner in the duties of the Solid Waste Attendant position for periods ranging from a couple of weeks to two months. Petitioner was provided training on how to complete solid waste

attendant paperwork, computer operation, scale operation, customer service, and cash-handling procedures.

26. Despite the training, his job performance in the Solid Waste Attendant position was unsatisfactory. Specifically, Petitioner was unable to retain the information necessary to complete solid waste attendant tasks, did not understand the WasteWork computer program, did not count money correctly when giving change, could not remember account numbers or material codes relevant to required environmental accounting for solid waste processing, failed to complete forms correctly, and could not multi-task while processing customers leaving waste at the solid waste facility.

27. Petitioner's performance did not improve after his return from the hand surgery.

28. As a result of Petitioner's inability to understand the Solid Waste Attendant's job duties and unsatisfactory work performance in the position, the County terminated Petitioner's employment during his probationary period. There was no credible evidence that Petitioner's termination was based on his diabetic condition or was a pretext for discrimination based on his handicap. Petitioner simply could not perform the essential functions of the Solid Waste Attendant job. Finally, the evidence did not demonstrate that any other position was available to Petitioner for which he was qualified. Given these

facts, the evidence did not demonstrate that Petitioner was discriminated against based on his handicap and the Petition for Relief should be dismissed.

CONCLUSIONS OF LAW

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

30. Under the provisions of Section 760.10(1), Florida Statutes, 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.

31. FCHR and the Florida courts have determined that federal discrimination law and the Americans with Disabilities Act of 1990 (ADA) should be used as guidance when construing provisions of Section 760.10, Florida Statutes. See Greenberg v. BellSouth Telecommunications, Inc., 498 F.3d 1258, 1263-64 (11th Cir. 2007); Florida Dept. of Community Affairs v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991); and Brand v. Florida Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994). Under this analysis, a Petitioner must establish he (1) is disabled, (2) is a qualified individual, and (3) was subjected to unlawful

discrimination because of his disability. In relation to the third prong, the term "unlawful discrimination" may include not making reasonable accommodations for an employee that meets parts 1 and 2 of the foregoing test. See Holly v. Clairson Industries, L.L.C., 492 F.3d 1247, 1262 (11th Cir. 2007).

32. In this case, the evidence showed that, in 2005, Petitioner's diabetes was a handicap as defined in Chapter 760, Florida Statutes. However, the evidence was clear that Petitioner's diabetic condition had been reasonably accommodated by the County when he was employed as a maintenance worker and as a Solid Waste Attendant. Specifically, the County provided Petitioner unscheduled breaks whenever he had diabetic episodes, allowed him to rest, eat, and/or test his blood sugar level, provided a County vehicle and employee to transport Petitioner when necessary from work locations to County facilities or his home to pick up his medication, allowed Petitioner to leave work early when he did not feel well, and provided food or drink to him to help control his sugar level. Indeed, Petitioner was never denied a break he needed as a result of his diabetes and was not disciplined because of his diabetic episodes. The evidence did not demonstrate that the County was obligated to consider transferring Petitioner to a less strenuous position until November 2007, when Petitioner first asked for the accommodation.

33. The evidence did show that once the County was aware of Petitioner's change in his insulin regimen in November 2007 and based upon Petitioner's claims that his diabetes caused his outburst, his wife's explanation of his diabetic condition, and the doctor's note, the County willingly provided Petitioner an opportunity to remain employed in a less strenuous and hot position and offered Petitioner the position of Solid Waste Attendant. At the time, the Solid Waste Attendant position was the only position the County had available that fit the less heavy physical exertion requirement Petitioner felt he needed.

34. Additionally, Petitioner did not lose any pay or benefits when he was transferred to the Solid Waste Attendant position.

35. A person is a qualified individual with a disability when he can "perform the essential functions of the job in question with or without reasonable accommodations." Lucas v. W.W. Grainger, Inc., 257 F.3d 1249, 1255 (11th Cir. 2001). The record is clear that Petitioner could not perform the essential functions of the Solid Waste Attendant position whether or not he was afforded reasonable accommodation. Two of the essential functions of the Solid Waste Attendant position are being able to use computers and make correct change when handling cash.

36. Petitioner admitted that he was not comfortable using a computer and he rarely used his home computer. Petitioner

also testified that he was not good in math. The co-workers responsible for training Petitioner provided undisputed testimony regarding his unsatisfactory job performance in the Solid Waste Attendant position. Specifically, Petitioner was unable to retain the information necessary to complete solid waste attendant tasks, did not understand the WasteWork computer program, did not count money correctly when handling cash, could not remember account numbers or material codes required in accounting for the disposal of solid waste, failed to complete forms correctly, and could not multi-task while processing customers leaving solid waste at the facility. Clearly, Petitioner could not perform the essential functions of the Solid Waste Attendant position with or without reasonable accommodation. See Wofsy v. Palmshores Ret. Cmty., 285 Fed. Appx. 631, 634 (11th Cir. 2008)(plaintiff was not a qualified individual because he could not perform an essential function of the driver position as a result of his refusal to drive outside of local area); and Williams v. Motorola, Inc., 303 F.3d 1284, 1290-91 (11th Cir. 2002)(plaintiff was not a qualified individual because of her inability to handle stress and work reasonably well with others).

37. To the extent Petitioner contends the County failed to reasonably accommodate him by not placing him in a position he specifically requested on the job interest forms, the facts

establish that every form he completed since 1990, sought positions that entailed a promotion. In general, “[A] qualified individual with a disability is not entitled to the accommodation of [his] choice, but only to a reasonable accommodation.” Stewart v. Happy Herman’s Cheshire Bridge, Inc., 117 F.3d 1278, 1285-1286 (11th Cir. 1997). Employers are not required to promote disabled employees in order to accommodate the employee’s disability. See Lucas v. W.W. Grainer, Inc., 257 F.3d 1249, 1256 (11th Cir. 2001). (ADA does not “require the employer to promote a disabled employee” as a reasonable accommodation). There was no credible or substantive evidence that demonstrated Petitioner was qualified to drive trucks or operate heavy equipment in light of his two prior accidents and the symptoms he experiences due to his insulin-dependent diabetes. Moreover, there was no credible or substantive evidence that Petitioner was qualified for any of the other jobs that he expressed an interest in during the hearing. Expression of interest is insufficient to demonstrate qualification. Finally, except for the Solid Waste Attendant position, the evidence did not demonstrate that any of the positions on the 2007 job’s list were available or open at the time Petitioner asked to be transferred to another less strenuous and hot position as an accommodation for his diabetes.

38. Ultimately, Petitioner did not establish the discrimination prong of the prima facie case. Petitioner is required to show that he was subjected to unlawful discrimination because of his disability. See Doe v. DeKalb County Sch. Dist., 145 F.3d 1441, 1445 (11th Cir. 1998). Specifically, Petitioner "must show that he has suffered an adverse employment action because of his disability." Id. at 1445.

39. In this case, Petitioner's discharge in 2008, from the Solid Waste Attendant position resulted from his inability to retain the information necessary to complete solid waste attendant tasks, understand the WasteWork computer program, count money correctly when handling cash, remember account numbers or material codes necessary to track the disposal of solid waste, complete forms correctly, and multi-task while processing customers at the solid waste facility. Petitioner's only testimony specifically addressing his unsatisfactory work performance as a Solid Waste Attendant conceded his failure, but attempted to justify his poor performance by claiming that he was not good at math, was not comfortable using a computer, rarely used his home computer, and that his large hands hindered his ability to use the computer keyboard at work. None of these reasons relate to Petitioner's handicap or are handicaps in and of themselves. Moreover, there was no evidence that

Petitioner's training was inadequate or discriminatory. Given the lack of evidence demonstrating discrimination based on handicap or a failure to accommodate Petitioner's handicap, the Petition for Relief should be dismissed.

RECOMMENDATION

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

RECOMMENDED that the Petition for Relief be dismissed.

DONE AND ENTERED this 31st day of December, 2009, in Tallahassee, Leon County, Florida.

Diana Cleavinger

DIANE CLEAVINGER
Administrative Law Judge
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Filed with the Clerk of the
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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.