STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SCOTT A. ROBERTS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 09-4131
	)	
CITY OF APOPKA, FLORIDA,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case in Apopka, Florida, on February 3, 2010, before Jeff B. Clark, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Scott A. Roberts, pro se
2839 West Fairbanks Avenue
Winter Park, Florida 32789

For Respondent: Thomas A. Moore, Esquire
Moore, Peterson & Zeitler, P.A.
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Orlando, Florida 32853-6636

STATEMENT OF THE ISSUES

Whether Respondent, City of Apopka, Florida, was guilty of an unlawful employment practice against Petitioner, Scott A. Roberts, according to the Florida Civil Rights Act of 1992, as

amended, based on his "disability"; and whether or not he received "disparate treatment."

PRELIMINARY STATEMENT

On February 25, 2009, Petitioner presented a Charge of Discrimination alleging that Respondent had discriminated against him based on a disability. His Charge of Discrimination states, in part,

> 1) I was denied re-hire to the position of Engineer-Paramedic on or about September 29, 2008. I was previously employed by the Respondent as an Engineer-Paramedic until I retired on November 4, 2004 with a Disability Pension.
>
> * * *
>
> 3) I believe that I have been discriminated against because I am Regarded As Disabled in violation [o]f the Americans With Disabilities Act of 1990.

On June 26, 2009, Petitioner was mailed a Notice of Determination: No Cause by the Florida Commission on Human Relations ("Commission"), which advised that based on the Commission's investigation of the Charge of Discrimination, it was "determined that there is no reasonable cause to believe that an unlawful employment practice has occurred."

On July 28, 2009, Respondent authored a 16-page Petition for Relief, which broadened the allegation of unlawful employment practice to include "disparate treatment." On August 3, 2009, the Commission forwarded the Petition for Relief

to the Division of Administrative Hearings ("DOAH) requesting assignment of an Administrative Law Judge to conduct proceedings required by law and to submit a recommended order to the Commission. On August 3, 2009, an Initial Order was sent to both parties requesting, inter alia, mutually-convenient dates for a final hearing. Based on the parties' response to the Initial Order, on August 18, 2009, the case was scheduled for final hearing on October 27, 2009, in Apopka, Florida.

On October 2, 2009, Petitioner requested a continuance; as a result, on October 14, 2009, the case was rescheduled for December 2, 2009. On November 25, 2009, Petitioner filed a motion for continuance, and the case was rescheduled for February 3, 2010.

The final hearing took place, as rescheduled, on February 3, 2010. Petitioner testified in his own behalf and presented five witnesses: George Lee Bronson, Richard Anderson, Mark Frye, Sharon Thornton, and Kevin Kwader. Petitioner's Exhibits A through P were admitted into evidence and marked accordingly. In addition to cross-examination of Petitioner's witnesses, Respondent called George Lee Bronson as its witness. Respondent's Exhibits R1 through R17 were admitted into evidence. Respondent proffered one exhibit, marked Respondent's Proffered Exhibit 1. The parties' joint Exhibits 1 through 9 were admitted into evidence.

The following depositions were admitted in lieu of live testimony of the deponents: Drs. Stephen Goll, Joseph Rojas, and Barry Portnoy; and Timothy Roberts.

The parties stipulated that John Howe was promoted in 2009 to a position that Petitioner had sought in his re-employment effort.

The two-volume Transcript of Proceedings was filed with the clerk of DOAH on March 1, 2010. Both parties timely submitted Proposed Recommended Orders.

All statutory references are to 2008 Florida Statutes, unless otherwise indicated.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the formal hearing and on the entire record of this proceeding, the following Findings of Fact are made:

1. Petitioner is a 47-year-old Caucasian male, who, in November 2004, retired from Respondent's Fire Department as a engineer-paramedic as being permanently and totally disabled.

2. Respondent is a municipality in Orange County, Florida.

3. After Petitioner suffered a job-related injury that resulted in an anterior disc excision and fusion, C5-C6 and C6-C7, he elected to pursue disability retirement. In furtherance of his claim of total disability, he was examined by three physicians, Drs. Portnoy, Rojas, and Goll. Drs. Portnoy

and Rojas determined that Petitioner had medical limitations that disqualified him from employment as a firefighter. Dr. Goll, prior to Petitioner's decision to proceed with a disability pension, had opined that he was fit for duty without limitations. Dr. Goll had the same opinion in January 2009.

4. In 2009, Petitioner sought re-employment with Respondent. Incidental to his effort to be re-employed, he had an additional examination by Dr. Portnoy. Dr. Portnoy examines "thousands" of firefighters for Central Florida municipalities and usually conducts examinations for Respondent.

5. Based on Dr. Portnoy's 2009 examination of Petitioner, Dr. Portnoy determined that Petitioner "was not qualified to be a firefighter for the City of Apopka."

6. The National Fire Protection Association Standard 1582 ("NFPSA 1582") is referenced in Subsection 633.34(5), Florida Statutes, dealing with physical qualifications of a firefighter. While not required by statute, this standard is relied on by physicians conducting qualifying examinations. Petitioner's surgery is a basis for disqualification under NFPSA 1582.

7. Respondent accepted Dr. Portnoy's opinion and did not re-employ Petitioner based on that opinion.

8. Kevin Kwader, offered by Petitioner as an individual who received disparate treatment, apparently had cervical surgery; however, it is unclear whether the surgery was as

comprehensive as Petitioner's. Mr. Kwader was returned to work by the surgeon who performed the surgery with "no restrictions." He was never evaluated by the physician conducting annual physical examinations for Respondent as "not fit for duty."

9. Petitioner did not seek accommodation for a disability; in fact, he indicated, specifically, that he was not seeking any accommodation.

CONCLUSIONS OF LAW

10. The Division of Administrative Hearings has subject matter jurisdiction over timely-filed claims pursuant to Subsections 760.11(4)(b) and 120.57(1) and Section 120.569, Florida Statutes (2009).

11. The relevant provisions of Chapter 760, Florida Statutes, commonly called the "Florida Civil Rights Act," specifically Sections 760.01 through 760.11, Florida Statutes, are closely patterned after Title VII of the Federal Civil Rights Act of 1964. Therefore, cases interpreting the Federal Civil Rights Act have been deemed applicable to and persuasive in interpreting the relevant provisions of Chapter 760, Florida Statutes. Green v. Burger King Corp., 728 So. 2d 369 (Fla. 3d DCA 1999); Greene v. Seminole Electric Cooperative, Inc., 701 So. 2d 646, 647 (Fla. 5th DCA 1997); Florida State University v. Sondel, 685 So. 2d 923 (Fla. 1st DCA 1996).

12. The United States Supreme Court has established an analytical framework within which courts should examine claims of discrimination. In cases alleging discriminatory treatment, Petitioner has the initial burden of establishing, by a preponderance of the evidence, a prima facie case of discrimination. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993); Combs v. Plantation Patterns, 106 F.3d 1519 (11th Cir. 1997).

13. The burden of proof and the order of production in this case was established by the United States Supreme Court in McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1978), as refined by the Court in Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981), and in St. Mary's Honor Center v. Hicks, supra. In these three cases, the Court developed a three-step allocation of the burden of production.

14. Under the McDonnell Douglas model, the petitioner bears the initial burden of establishing a prima facie case of discrimination. Proof of a prima facie case under McDonnell-Douglas raises a presumption that the respondent's decision was motivated by discrimination. St. Mary's Honor Center v. Hicks, 509 U.S. at 506. Demonstrating a prima facie case is not onerous; it requires only that Petitioner establish facts

adequate to permit an inference of discrimination. McDonnell-Douglas, supra, at 802.

15. The purpose of the three-step allocation of the burden of production is to assist Petitioner in proving unlawful discrimination when proof of discriminatory intent or motivation is required. Because the Court recognized that it is very difficult to prove discriminatory intent or motivation, the prima facie case of discrimination prescribed in McDonnell-Douglas and Burdine requires only that Petitioner establish that he or she is a member of the protected class and has been denied the benefits available under the law. St. Mary's Honor Center, 113 S. Ct. at 2746-49; Barth v. Gelb, 2 F.3d 1180, 1185-86 (D.C. Cir. 1993).

16. Once the presumption of discriminatory intent is raised, Respondent is able to rebut it by introducing admissible evidence of a reason, which, if believed by the trier-of-fact, supports a finding that discrimination was not the cause of the challenged action. Equal Employment Opportunity Commission v. Navy Federal Credit Union, 424 F.3d 397, 405 (4th Cir. 2005); and Grigsby v. Reynolds Metals Co., 821 F.2d 590, 594 (11th Cir. 1987). Respondent is required only to produce admissible evidence, which would allow the trier-of-fact rationally to conclude that the decision complained of had not been motivated by discriminatory animus. Texas Department of Community Affairs

v. Burdine, 450 U.S. at 257. Respondent "need not persuade the court that it was actually motivated by the proffered reasons . . . [i]t is sufficient if [Respondent's] evidence raises a genuine issue of fact as to whether it discriminated against [Petitioner]." Id. at 254. This burden is characterized as "exceedingly light." Perryman v. Johnson Products Co., Inc., 698 F.2d 1138, 1142 (11th Cir. 1983).

17. Where Respondent meets this burden, Petitioner has the opportunity to demonstrate that Respondent's articulated reason for the adverse action is a mere pretext for discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. at 804; Roberts v. Gadsden Memorial Hospital, 835 F.2d 793, 796 (11th Cir. 1988). This demonstration merges with Petitioner's ultimate burden of showing that Respondent intentionally discriminated against Petitioner. St. Mary's Honor Center v. Hicks, 509 U.S. at 511; Pignato v. American Trans Air, Inc., 14 F.3d 342, 347 (7th Cir. 1994). Put another way, once Respondent succeeds in carrying its intermediate burden of production, the ultimate issue in the case becomes whether Petitioner has proven that Respondent intentionally discriminated against him because of his disability. Turnes v. AmSouth Bank, N.A., 36 F.3d 1057, 1061 (11th Cir. 1994). Once Respondent produces evidence of a legitimate, nondiscriminatory reason for the challenged action, any presumption of discrimination arising out of the prima facie

case "drops from the case." See Krieg v. Paul Revere Life Ins. Co., 718 F.2d 998, 1001 (11th Cir. 1983), cert. den., 466 U.S. 929 (1984); Navy Federal Credit Union, 424 F.3d at 405. The ultimate burden remains upon Petitioner to prove that Respondent intentionally discriminated against him. Burdine, 450 U.S. at 256. Stated another way, "[t]he ultimate question in a disparate treatment case is not whether [Petitioner] established a prima facie case or demonstrated pretext, but 'whether the defendant intentionally discriminated against the [Petitioner].'" Pashoian v. GTE Directories, 208 F. Supp. 2d 1293, 1308 (M.D. Fla. 2002).

18. Subsection 760.10(1)(a), Florida Statutes, states:

> (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.

19. Respondent is an "employer" as defined in Subsection 760.02(7), Florida Statutes, which provides:

> (7) "Employer" means any person employing 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such a person.

20. The unlawful employment practice alleged in this case is discrimination based on disability. In order to prove a prima facie case of discrimination based on disability, Petitioner must prove that he was: (1) a member of the protected class, (2) qualified to do the job; (3) subjected to adverse employment action; and (4) replaced by a person outside the protected class or suffered from disparate treatment because of membership in the protected class. Kelliher v. Veneman, 313 F.3d 1270, 1275 (11th Cir. 2002); Williams v. Vitro Services Corporation, 144 F.3d 1438, 1441 (11th Cir. 1998); Anderson v. Lykes Pasco Packing Co., 503 So. 2d 1269, 1270 (Fla. 2d DCA 1986).

21. Petitioner has failed to prove that he is qualified to do the job, an essential element of a prima facie case, or assuming, arguendo, that he is qualified to do the job and that the reason given for not hiring him is pretextual. Respondent clearly relied on the medical opinion of an independent physician that Petitioner was not qualified to be a firefighter, a legitimate non-discriminatory business reason for not hiring Petitioner.

RECOMMENDATION

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

RECOMMENDED that the Florida Commission on Human Relations enter a final order dismissing with prejudice the Petition for Relief for failure to establish an unlawful discriminatory act by Respondent, City of Apopka, Florida.

DONE AND ENTERED this 20th day of April, 2010, in Tallahassee, Leon County, Florida.

JEFF B. CLARK
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of April, 2010.

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.