STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

THOMAS BYRD,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 09-5546
	)	
LEWARE CONSTRUCTION CO., INC.,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the final hearing in this proceeding for the Division of Administrative Hearings (DOAH) on January 13, 2010, by video teleconference in Tallahassee and Fort Myers, Florida.

APPEARANCES

For Petitioner: Gary Lee Printy, Esquire
Stephen E. Rengel, Esquire
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For Respondent: William R. Mabile, III
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STATEMENT OF THE ISSUE

The issue is whether Respondent discriminated against Petitioner on the basis of Petitioner's age or perceived

disability in violation of the Florida Civil Rights Act, Chapter 760, Florida Statutes (2008).[1]

PRELIMINARY STATEMENT

On April 8, 2009, Petitioner filed a Charge of Discrimination with the Florida Commission on Human Relations (the Commission). The Charge of Discrimination alleges that Respondent discriminated against Petitioner on the basis of Petitioner's age and disability.

The Commission investigated the allegations in the Charge of Discrimination and determined on September 30, 2009, that no reasonable cause exists to believe that an unlawful employment practice occurred. The Commission dismissed the charge of discrimination; Petitioner filed a Petition for Administrative Hearing on October 7, 2009; and the Commission referred the matter to DOAH to conduct a final hearing.

At the hearing, Petitioner testified in his own behalf, presented the testimony of one other witness, and submitted two exhibits for admission into evidence. Respondent presented the testimony of five witnesses and submitted six exhibits for admission into evidence.

The identity of the witnesses and exhibits, and any associated rulings, are reported in the Transcript of the hearing filed with DOAH on February 10, 2010. Petitioner and

Respondent timely filed their respective Proposed Recommended Orders ("PROs") on February 12 and 15, 2010.

FINDINGS OF FACT

1. Petitioner is an "aggrieved person" within the meaning of Subsections 760.02(6) and (10). Petitioner is a 51-year-old white male who had cancer in one kidney at the time of an alleged unlawful employment practice.

2. Respondent is an "employer" within the meaning of Subsection 760.02(7). Respondent is a construction company engaged in the business of building bridges and other highway structures in Florida. For the reasons set forth hereinafter, a preponderance of the evidence does not show that Respondent discriminated against Petitioner on the basis of Petitioner's age or perceived disability.

3. Respondent employed Petitioner as a crane operator on February 22, 2008, at a pay rate of $18.00 per hour. Petitioner listed his residence as Naples, Florida. Petitioner was unaware that he had any disability and did not disclose any disability at the time of his initial employment.

4. Petitioner solicited employment from Respondent and was not recruited by Respondent. Petitioner relocated from Wyoming to Florida to be with his family.

5. Respondent assigned Petitioner to a construction job that was under the supervision of Mr. Scot Savage, the job

superintendent. Mr. Brandon Leware was also a superintendent on the same job. Mr. William (Bill) Whitfield was the job foreman and Petitioner's immediate supervisor.

6. Sometime in October 2008, medical tests revealed that cancer may be present in one of Petitioner's kidneys. The treating physician referred Petitioner to a specialist, David Wilkinson, M.D., sometime in October 2008.

7. Medical personnel verbally confirmed the diagnosis of cancer to Petitioner by telephone on October 30, 2008. On the same day, Petitioner voluntarily resigned from his employment during a verbal dispute with his supervisors. Petitioner did not disclose his medical condition until after he voluntarily resigned from his employment.

8. The verbal dispute involved Petitioner and several of his supervisors. On October 30, 2008, Mr. Whitfield, the foreman, assigned work to several employees, including Petitioner. Mr. Whitfield proceeded to complete some paperwork and, when he returned to the job site, discovered the work assigned to Petitioner had not been performed.

9. When confronted by Mr. Whitfield, Petitioner refused to carry out Mr. Whitfield’s directions. Mr. Whitfield requested the assistance of Mr Savage. Mr. Savage directed Petitioner to return to work or quit. Petitioner quit and walked off the job.

10. As Petitioner was walking off the job, Petitioner turned around and stated that he had cancer. Petitioner then left the job site. Petitioner's statement that he had cancer was the first disclosure by Petitioner and first notice to Respondent that Petitioner had cancer.

11. The medical condition did not prevent Petitioner from performing a major life activity. Respondent did not perceive Petitioner to be impaired before Petitioner voluntarily ended his employment. None of the employees of Respondent who testified at the hearing regarded Petitioner as impaired or handicapped or disabled or knew that Petitioner had cancer prior to Petitioner's statement following his abandonment of his job on October 30, 2008.[2]

12. Within a week after Petitioner voluntarily left his position, Petitioner returned, approached Vice-President Mr. Scott Leware, and asked for his job back. Mr. Leware advised him that he would not get his job back. At the time, Mr. Leware was unaware that Petitioner had cancer. Mr. Leware was the ultimate decision-maker, and Mr. Leware was unaware that Petitioner had cancer when Mr. Leware made that decision approximately a week after Petitioner voluntarily left his employment.

13. The terms of employment did not entitle Petitioner to a per diem payment while employed with Respondent. Petitioner's

residence in Naples was within 75 miles of the job site where Petitioner worked.

14. Respondent did pay for the hotel room that Petitioner used at the Spinnaker Inn while on the job, but not other per diem expenses, including meals. The cost of the hotel ranged between $50 and $60 a night.

15. Mr. Brandon Leware followed Petitioner to a gas station and paid for gasoline for Petitioner's vehicle. Mr. Leware and Petitioner then went to the Spinnaker Inn where Petitioner resided in a room paid for by Respondent. Mr. Leware advised the manager of the Spinnaker Inn that Respondent would pay for Petitioner's lodging for that night, but not after that night.

16. The rate of compensation that Respondent paid Petitioner was within the normal range of compensation paid to crane operators employed by Respondent. Crane operator compensation ranges from $16.00 to $20.00 an hour. Respondent paid Petitioner $18.00 an hour. A preponderance of the evidence does not show that Respondent ever offered to pay Petitioner $22.00 an hour.

17. The allegation of age discrimination is not a disputed issue of fact. Petitioner admitted during his testimony that he never thought Respondent discriminated against him due to his age.

18. Respondent employed another crane operator with cancer at the same time that Respondent employed Petitioner. The other crane operator is identified in record as Mr. Roddy Rowlett. Mr. Rowlett's date of birth was October 14, 1949.

19. Mr. Rowlett notified Respondent that he had cancer, and Respondent did not terminate the employment of Mr. Rowlett. Mr. Rowlett continued to work as a crane operator until a few weeks before his death.

20. A preponderance of evidence does not show that age, cancer, or perceived impairment were factors in how Respondent treated Petitioner during his employment with Respondent. A preponderance of the evidence does not show that Respondent hired anyone to replace Petitioner.

CONCLUSIONS OF LAW

21. DOAH has jurisdiction over the parties and the subject matter of this proceeding. §§ 120.569 and 120.57(1). DOAH provided the parties with adequate notice of the final hearing.

22. Petitioner bears the burden of proof in this proceeding. Petitioner must show by a preponderance of the evidence that Respondent discriminated against him on the basis of a disability or perceived disability. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973).

23. Petitioner must first establish a prima facie case of discrimination. McDonnell Douglas, 411 U.S. at 802; Munoz v.

Oceanside Resorts, Inc., 223 F.3d 1340, 1345 (11th Cir. 2000). Petitioner can meet his burden of proof with either direct or circumstantial evidence. Damon v. Fleming Supermarkets of Florida, Inc., 196 F.3d 1354, 1358 (11th Cir. 1999), cert. denied, 529 U.S. 1109 (2000).

24. Direct evidence must evince discrimination without the need for inference or presumption. Beaver v. Rayonier Inc., 200 F.3d 723, 726 (11th Cir. 1999); Standard v. A.B.E.L. Services., Inc., 161 F.3d 1318, 1330 (11th Cir. 1998). In other words, direct evidence is so blatant that its intent could be nothing other than to discriminate. Earley v. Champion Int'l Corp., 907 F.2d 1077, 1081 (11th Cir. 1990).

25. There is no direct evidence of discrimination or retaliation in this case. In the absence of direct evidence, Petitioner must meet his burden of proof by circumstantial evidence.

26. In order to establish a prima facie case of disability discrimination, a preponderance of the circumstantial evidence must show that Petitioner is disabled, that he was qualified for the job, and that Respondent discriminated against Petitioner based on the disability. Pritchard v. Southern Company Services, 92 F.3d 1130 (11th Cir. 1996). Petitioner is considered disabled under the Americans with Disabilities Act (ADA) and Florida law, if he has a physical or mental impairment

that substantially limits one or more of his major life activities, has a record of such impairment, or is regarded by Respondent as having such an impairment. Talley v. Family Dollar Stores of Ohio, Inc., 542 F.3d 1099, 1105 (6th Cir. 2008); Pritchard, 92 F.3d at 1134.

27. It is undisputed that Petitioner was not in fact disabled on October 30, 2008, at the time of the alleged adverse employment action. Petitioner does not claim that his medical condition prevented him from performing any major life activity.

28. A preponderance of the evidence shows that Respondent did not perceive Petitioner to be disabled, that Respondent did not take any adverse employment action against Petitioner, and that Respondent did not discriminate against Petitioner based on a perceived disability. The testimony of Petitioner to the contrary is not credible or persuasive. The failure to establish the last prong of the conjunctive test for a prima facie case of discrimination ends the inquiry. Mayfield v. Patterson Pump Co., 101 F.3d 1371 (11th Cir. 1996); See also Reeves v. Sanderson Plumbing Products., Inc., 530 U.S. 133, 142, 120 S. Ct. 2097, 2106 (2000); Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997); Ratliff v. State, 666 So. 2d 1008, 1012 n.6 (Fla. 1st DCA 1996), aff'd, 679 So. 2d 1183 (1996) (citing Arnold v. Burger Queen Systems, 509 So. 2d 958 (Fla. 2d DCA 1987)).

RECOMMENDATION

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

RECOMMENDED that the Commission enter a final order finding Respondent not guilty of the allegations against Respondent and dismissing the Charge of Discrimination and Petition for Administrative Hearing.

DONE AND ENTERED this 2nd day of March, 2010, in Tallahassee, Leon County, Florida.

DANIEL MANRY
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 2nd day of March, 2010.

ENDNOTES

1/ References to chapters, sections, and subsections are to Florida Statutes (2008), unless stated otherwise.

2/ Petitioner testified that blood in a urinal on the job site revealed his cancer to his employers, caused them to perceive him as having a disability, as being unsafe to operate a crane, and led to them terminating his employment. The trier of fact finds that testimony to be less than credible and persuasive and in conflict with a preponderance of the evidence.

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.