STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEREK GRIFFIN,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 10-2586
	)	
WYNDHAM VACATION OWNERSHIP,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

A final hearing was conducted in this case in Shalimar, Florida, on July 9, 2010, before Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Derek Griffin, pro se
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Ft. Walton Beach, Florida 32547

For Respondent: W. Douglas Hall, Esquire
Carlton Fields, P.A.
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STATEMENT OF THE ISSUE

The issue is whether Respondent committed an unlawful employment practice by discriminating or retaliating against Petitioner based on an alleged disability.

PRELIMINARY STATEMENT

On October 29, 2009, Petitioner Derek Griffin (Petitioner) filed an Employment Complaint of Discrimination with the Florida Commission on Human Relations (FCHR). The charge alleged that Respondent Wyndham Vacation Ownership (Respondent) had discriminated and retaliated against Petitioner based upon a disability by terminating his employment following a work-related injury.

On April 9, 2010, FCHR issued a Determination: No Cause. On May 10, 2010, Petitioner filed a Petition for Relief. FCHR referred the case to the Division of Administrative Hearings on May 13, 2010.

A Notice of Hearing, dated May 26, 2010, scheduled a hearing for July 9, 2010.

During the hearing, Petitioner testified on his own behalf and presented the testimony of two witnesses. Petitioner offered 21 exhibits that were received into evidence.

Respondent presented the testimony of two witnesses. Respondent offered 17 exhibits that were received into evidence.

A hearing Transcript was filed with the Division of Administrative Hearings on July 30, 2010. Petitioner filed a Proposed Recommended Order on August 10, 2010. Respondent filed a Proposed Recommended Order on August 9, 2010.

Hereinafter, all references shall be to Florida Statutes (2009) unless otherwise noted.

FINDINGS OF FACT

1. Petitioner was hired by Respondent as a Maintenance Technician III in March 2007. He held that position until his employment ended in January 2009.

2. Petitioner was responsible for performing maintenance duties at two of Respondent's properties. The Majestic Sun is a 96-room, 10-story high-rise. Beech Street has 48 units in 24 two-story buildings. Both properties are located in Destin, Florida.

3. A Maintenance Technician III is required to perform a wide range of maintenance duties. The position involves the following: (a) moving and lifting furniture, refrigerators, stoves, televisions, and washers and dryers; (b) stooping and kneeling to repair toilets, sinks, water heaters and air conditioners; (c) climbing on ladders to change light bulbs, repairing ceiling fans and performing other work; and (d) climbing stairs.

4. The written Job Description Summary for the Maintenance Technician III position describes the physical requirements as follows: “Lift and carry up to 50 pounds; stand, sit and walk for prolonged periods of time; climb up and down several flights of stairs; frequent reaching, stooping, bending and kneeling;

manual dexterity and mobility; extensive prolonged standing and walking."

5. Petitioner injured his knee in a job-related incident on September 6, 2008. He was treated at the Destin Emergency Care Center and placed on restrictions requiring "no work for now." He was unable to work for approximately a week and a half.

6. On September 17, 2008, Petitioner was given a Workers' Compensation Uniform Medical Treatment Status Reporting Form imposing medical restrictions of no lifting, pushing or pulling greater than 10 pounds, and no ladders or stairs for four weeks. With those restrictions, Petitioner returned to work on light duty on September 18, 2008.

7. While on light duty, Petitioner was given only those functions of his job that did not require him to exceed his medical restrictions. Other employees had to perform all of Petitioner's other functions.

8. Petitioner's work restrictions were extended for another four weeks by a Workers' Compensation Uniform Medical Treatment Status Reporting Form dated October 15, 2008. The October 15 form imposed the same medical restrictions as the September 17 form.

9. Petitioner aggravated his knee injury approximately a week later. On October 22, 2008, he was given a Workers'

Compensation Uniform Medical Treatment Status Reporting Form imposing the following work restrictions: (a) desk duty only; (b) no lifting, pushing, or pulling at all; and (c) no standing or walking for more than 15 minutes at a time.

10. Petitioner returned to work for a day or two after being restricted to desk duty. Respondent, however, had no desk-duty position available for him, so Petitioner was placed on a leave of absence beginning October 24, 2008.

11. Petitioner requested leave under the Family Medical Leave Act (FMLA). His request was denied on November 21, 2008, because he did not provide all of the required information. The obligation to provide that information is the employee's. FMLA leave was denied not by Respondent but by Cigna, which is a third-party administrator for these benefits.

12. Because FMLA leave had been denied, Petitioner's employment was protected from termination for only 30 days from the date he went on leave, through November 24, 2008. Employees receiving workers' compensation benefits are not protected from termination. If a worker is not on FMLA leave, Respondent's policy is that he or she may be terminated after 30 days of leave.

13. Even though Respondent could have terminated Petitioner after November 24, 2008, it did not do so. Petitioner was medically restricted to desk duty throughout

November and December 2008. He remained on a leave of absence during that time and began receiving workers' compensation benefits from the date his leave of absence commenced.

14. On December 16, 2008, Petitioner's supervisor, John Diaz, e-mailed the Assistant Resort Manager at the Majestic Sun to ask about Petitioner's status. Mr. Diaz had hired a temporary employee to cover for Petitioner while he was on leave. The cost of the temporary employee was significantly more than the cost of a regular employee. Mr. Diaz was concerned about the impact of the temporary help on his budget. Mr. Diaz also was concerned about the lack of information that he had received regarding the date Petitioner would return to work.

15. Mr. Diaz's inquiry was forwarded to Raina Ricks, a Human Resources Generalist in Respondent's Human Resources (HR) Department. Ms. Ricks responded on December 16 and 18, 2008, reporting that Petitioner's physician had recommended surgery. She expected to have information about his surgery schedule and recovery period within a few days.

16. The next day, December 19, 2008, Ms. Ricks e-mailed Melanie Doubleday, an Analyst in Respondent's HR Department, to ask about Respondent's policy on the length of time an employee can remain on active status and not be terminated while unable to work due to a job-related injury. Ms. Doubleday is located

in Respondent’s office in Orlando, Florida. Ms. Ricks asked Ms. Doubleday at what point Petitioner would possibly be terminated if he could not return to work soon.

17. Ms. Doubleday responded on December 22, 2008, providing Respondent’s approved guidelines for processing workers’ compensation injuries. She explained that if the employee is eligible for FMLA, they would remain on workers’ compensation for the duration of their FMLA leave and not be terminated during that leave. If not eligible for FMLA, the employee would receive 30 days of leave.

18. Ms. Ricks updated Mr. Diaz and Chrysse Langley, the Resort Manager, by e-mail the following day, December 23, 2008. Ms. Ricks explained that, since Petitioner’s FMLA leave had been denied, he was subject to termination 30 days following the commencement of his leave on October 24, 2008. Ms. Ricks had also been told by Petitioner’s workers’ compensation caseworker that they still did not have an exact date for Petitioner’s surgery, but that once the procedure was complete, he should be able to perform his normal job duties without restrictions within two to four weeks, or six weeks at the most. Ms. Ricks asked Mr. Diaz and Ms. Langley for their thoughts on terminating Petitioner.

19. Mr. Diaz responded later that day, stating that he was “not trying to have [Petitioner] terminated.” Mr. Diaz's

concern was that he had not received any information about when Petitioner would be required to return to work, and Petitioner himself did not seem particularly motivated to return. If Petitioner could return to work without restrictions within eight weeks, Mr. Diaz was prepared to "live with that."

20. Ms. Langley also responded later that day and confirmed that she and Mr. Diaz both wanted to keep Petitioner, if feasible. She also said that Respondent should proceed with hiring the temporary employee who had been covering for Petitioner during his absence, because Mr. Diaz was planning to terminate one of the other Maintenance Technician III's for poor job performance. Subsequently, the temporary employee was hired to replace the other Maintenance Technician III.

21. Two weeks later, on January 5, 2009, Ms. Doubleday e-mailed Ms. Ricks regarding Petitioner's "exhausted leave of absence." She said Petitioner was entitled to 30 days of leave and must then either return to active status or be terminated. For consistent application of Respondent's policies, she instructed Ms. Ricks to send Petitioner a Return to Work/Administrative Termination Letter.

22. Ms. Ricks' employment with Respondent ended a few days later as part of a corporate restructuring. She did not send the "Return to Work" letter before she left.

23. Denise Sniadecki, one of Respondent's HR Managers, assumed Ms. Ricks' responsibilities. She did not know about Ms. Doubleday's earlier e-mail or the denial of Petitioner's FMLA leave. Respondent's HR system, Oracle, showed Petitioner's employment status as "Leave - Workers Comp - FMLA," indicating that he was on FMLA leave, despite the denial of his FMLA application two months earlier. Ms. Sniadecki thus assumed Petitioner was nearing the end of his FMLA leave, which would have expired on January 24, 2009, 12 weeks after his medical leave began on October 24, 2008. Ms. Sniadecki e-mailed Ms. Doubleday on January 20, 2009, asking what letter she should send to Petitioner in light of the fact that his leave would soon be ending.

24. After a further exchange of e-mails, Ms. Sniadecki e-mailed Ms. Doubleday on January 21, 2009, and explained that Petitioner was listed in Oracle as being on FMLA leave, that he had not been terminated after 30 days, and that she was just getting involved because of Ms. Ricks' departure. She asked whether she should process Petitioner's employment as having been terminated 30 days after his leave commenced on October 24, 2008.

25. Ms. Doubleday responded later that day. She said that Petitioner's status should be changed in Oracle to "WC/Non FMLA" and suggested he be terminated that day.

26. Coincidently, Petitioner came to the workplace that same day, January 21, 2009, to drop off his latest Workers' Compensation Uniform Medical Treatment Status Reporting Form. Petitioner's knee surgery had taken place a week to 10 days earlier. The form he brought in on January 21, 2009, imposed job restrictions of no lifting, pushing or pulling greater than 10 pounds, no ladders, and limited kneeling or squatting for four weeks.

27. Mr. Diaz informed Ms. Sniadecki of Petitioner's new work restrictions by e-mail that day. Mr. Diaz was not comfortable having Petitioner return to work on light duty because the medical restrictions severely limited his ability to do what the job required and he might further injure his knee. Mr. Diaz assumed Respondent still planned to administratively release Petitioner later that week. Mr. Diaz copied Ms. Langley on the e-mail.

28. Ms. Langley responded a short time later, stating that there was no position that would fit Petitioner's latest job restrictions.

29. Ms. Sniadecki responded shortly afterward and told Mr. Diaz that Petitioner "will not be returning as we do not have light duty available for him."

30. Petitioner was terminated effective January 24, 2009. Ms. Doubleday and Ms. Sniadecki made the decision to terminate

Petitioner based solely on the application of company policy. Mr. Diaz was not involved in the decision to terminate.

31. Ms. Sniadecki sent Petitioner a letter dated January 26, 2009, stating he had been administratively terminated for failure to return from leave because he could not perform the essential functions of the Maintenance Technician III position with his medical restrictions. The reference to failure to return from leave referred to Petitioner's inability to return to work without medical restrictions. Petitioner was invited to reapply for employment upon receiving a release to return to work. All of this was consistent with Company policy.

32. Petitioner continued to be subject to medical restrictions for six months after his employment with Respondent ended. According to Workers' Compensation Uniform Medical Treatment Status Reporting Forms given to Petitioner in March and April 2009, he was subject to restrictions against lifting, pushing, or pulling greater than 20 pounds until the end of July 2009. The form given to him on July 29, 2009, stated he had reached maximum medical improvement and imposed a permanent restriction against pushing, pulling or pulling greater than 50 pounds. He was given a two percent permanent impairment rating of the body as a whole.

33. Petitioner never reapplied to Respondent for employment. He continued to receive workers' compensation benefits until he reached maximum medical improvement.

34. At the time of the hearing, Petitioner had found other employment.

35. Petitioner presented no credible evidence showing that he has a disability for purposes of the Americans with Disabilities Act ("ADA") or the Florida Civil Rights Act ("FCRA"). To the contrary, he testified that, as of January 21, 2009, the date he attempted to return to work, he believed he could do everything the job required, with the possible exception of squatting down. Petitioner failed to present persuasive evidence that he has any impairment that substantially limits one or more major life activities.

36. Petitioner likewise failed to demonstrate that he was a qualified individual for purposes of the ADA or FCRA. At the time he was terminated, Petitioner was subject to medical restrictions prohibiting him from lifting, pushing or pulling greater than 10 pounds, using ladders, and kneeling or squatting for more than a limited period of time. These are essential functions of the Maintenance Technician III position. The greater weight of the evidence demonstrates that Petitioner was unable to perform the essential functions of the job at the time

he was terminated, either with or without a reasonable accommodation.

37. Petitioner presented no evidence that he engaged in any protected activity that would support a retaliation claim. When asked why he thought Respondent had retaliated against him, Petitioner responded that it was "because of his injury" and "because [Mr. Diaz] was upset because he didn't have the staff to do the job." Even if this testimony is accepted as true, it does not constitute protected activity and will not support a claim for retaliation.

38. In addition, Petitioner failed to demonstrate a causal connection between his termination and any protected activity. The greater weight of the evidence demonstrated that Petitioner was terminated because he could not perform the essential functions of the Maintenance Technician III position, not because he engaged in any sort of protected activity. Petitioner failed to prove any facts to support a retaliation claim.

39. Petitioner attempted to demonstrate that other injured employees received more favorable treatment than he did. None of the alleged comparators identified by Petitioner was similarly situated to him. One of them had a knee injury, but her position required that she work at a desk, so the injury did not interfere with her ability to perform the essential

functions of her job. The other alleged comparators were maintenance technicians, but none of them had an injury like Petitioner's that required a lengthy leave of absence. None of them was subject to medical restrictions limiting them to desk duty for even a short period of time.

40. Even if the other employees were similarly situated to Petitioner, such a showing would not support a claim of discrimination or retaliation. Petitioner would need to present evidence demonstrating that non-disabled employees were treated more favorably than he was, and he did not do that. In short, Petitioner failed to identify any comparators that would support his claim for discrimination or retaliation.

CONCLUSIONS OF LAW

41. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to Sections 120.569, 120.57(1), and 760.11, Florida Statutes.

42. Section 760.10(1)(a) of the FCRA provides that it is unlawful for an employer to discriminate against any individual based on such individual's handicap.

43. Disability discrimination claims brought pursuant to FCRA "are analyzed under the same framework as the ADA." See Chanda v. Engelhard/ICC, 234 F.3d 1219, 1221 (11th Cir. 2000); Wimberly v. Securities Tech. Group, Inc., 866 So. 2d 146 (Fla.

4th DCA 2004); and Razner v. Wellington Regional Medical Ctr., Inc., 837 So. 2d 437, 440 (Fla. 4th DCA 2002).

44. To prove disability discrimination, a claimant must establish a prima facie case, showing the following: (a) he or she is disabled; (b) he or she was a "qualified individual"; and (c) he or she was subjected to unlawful discrimination because of a disability. See Earl v. Mervyns, Inc., 207 F.3d 1361, 1365 (11th Cir. 2000). The burden of proof is on the plaintiff. Id. at 1367.

45. A disability is "a physical or mental impairment that substantially limits one or more major life activities." See 42 U.S.C. § 12102(1)(A). For a major life activity to be substantially limited, a person must either be unable to perform it or be "significantly restricted as to the condition, manner or duration" under which he can perform it, as compared to the average person in the general population. See 29 C.F.R. § 1630.2(j).

46. In making the "substantially limited" determination, the permanent or long-term impact, or expected impact of the condition must be considered. See Chanda, 234 F.3d at 1222. Temporary injuries and impairments of limited duration are not disabilities under the ADA. See Wimberly 866 So. 2d at 147.

47. The evidence here indicates that Petitioner's knee

injury was an impairment. However, the knee injury did not significantly restrict a major life activity.

48. Major life activities include "walking" and "working in a broad class of jobs." See 42 U.S.C. § 12102(2)(A). In this case, Petitioner produced no persuasive evidence that he was significantly restricted in either activity. Accordingly, Petitioner did not prove the first prong of his prima facie case, that he was disabled.

49. Even if Petitioner's knee injury was a disability, his claim still would fail. The ADA does not protect all disabled persons from discrimination in employment; it only protects a "qualified individual." See 42 U.S.C. § 12112(a). A "qualified individual" is "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position." See 42 U.S.C. § 12111(8). That is, the ADA does not protect a complainant unless he or she can prove that some reasonable accommodation would have allowed him or her to perform the essential functions of the job. See LaChance v. Duffy's Draft House, Inc., 146 F.3d 832, 835 (11th Cir. 1998).

50. There is no dispute that the essential functions of Petitioner's Maintenance Technician III job include much strenuous labor. The written description of the job states as follows: "Lift and carry up to 50 pounds; stand, sit and walk for prolonged periods of time; climb up and down several flights

of stairs; frequent reaching, stooping, bending and kneeling; manual dexterity and mobility; extensive prolonged standing and walking."

51. Petitioner's medical limitations precluded him from doing most, if not all, of those essential functions. Moreover, Petitioner never identified (in the workplace or at hearing) any accommodation that would have allowed him to perform those functions.

52. Petitioner essentially contends that Respondent should have allowed him to take continuing leave until he was fully able to return to work, or create a light-duty position for him until he could return to his job. Neither of these is required by the law.

53. There is no obligation for an employer to create a light duty position. See Terrell v. U.S. Air, 132 F.3d 621, 626 (11th Cir. 1998).

54. One court put it succinctly: "There is no obligation under the Act to employ people who are not capable of performing the duties of the employment to which they aspire." See Sutton v. Lader, 185 F.3d 1203, 1211 (11th Cir. 1999) (judgment for employee reversed; employee contended he should have put on light duty until he was able to return to work).

55. It was Petitioner's burden to identify an accommodation that would have allowed him to perform the

essential functions of his job—including the lifting. See Gaston v. Bellingrath Gardens & Home, Inc., 167 F.3d 1361, 1364 (11th Cir. 1999). Petitioner did not identify such an accommodation.

56. It follows that an employer has no duty to allow an employee to continue in a light-duty position the employer had created for him. See Holbrook v. City of Alpharetta, 112 F.3d 1522, 1528 (11th Cir. 1997).

57. For all of these reasons, Petitioner did not prove his prima facie case. His claim of disability discrimination is without merit.

58. To establish a prima facie case of retaliation, a complainant must prove the following: (a) that he or she engaged in a statutorily-protected expression or protected activity; (b) that he or she suffered an adverse employment action; and (c) that a causal link exists between the protected expression and the adverse action. See Hairston v. Gainesville Sun Publishing Co., 9 F.3d 913, 919 (11th Cir. 1993).

59. Petitioner here presented no evidence that he engaged in any protected activity. He testified that Respondent retaliated against him because of his injury and because Mr. Diaz was upset that he did not have the staff to do the job. Being injured and/or creating problems with covering the job are not statutorily-protected expressions.

60. Petitioner likewise failed to prove a causal connection between his termination and any protected activity. The greater weight of the evidence demonstrates that Petitioner was terminated because he could not perform the essential functions of the Maintenance Technician III position, not because he engaged in some sort of unidentified protected activity.

61. It is beyond the scope of this case for the undersigned to determine whether Respondent's decision to terminate Petitioner's employment was wise or overly harsh. The only issue is whether the termination was based upon unlawful discrimination. "`The employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason.'" See Department of Corrections v. Chandler, 582 So. 2d 1183, 1187 (Fla. 1st DCA 1991), quoting Nix v. WLCY Radio/Rahall Communications, 738 F.2d 1187 (11th Cir. 1984). Regardless whether a decision seems "prudent or fair," a court must not "second-guess the wisdom of [that] decision." See Chapman v. AI Transport, 229 F.3d 1012, 1030 & n.18 (11th Cir. 2000) (*en banc*).

62. More particularly, an employer does not have to hold open the job of an employee who is on leave due to a work-related injury. A policy protecting an employee on leave from

termination is a business decision that must not be second-guessed. Respondent could have terminated Petitioner much earlier than it did, without committing disability discrimination. Workers' compensation benefits, of course, would continue after the termination, as they did here.

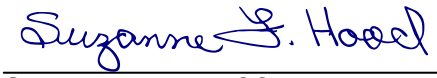
RECOMMENDATION

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 the Petition for Relief.

DONE AND ENTERED this 18th day of August, 2010, in Tallahassee, Leon County, Florida.



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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.