STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

EDWARD RHOADES,)
)
Petitioner,)
)
vs.) Case No. 10-9220
)
WERNER ENTERPRISES, INC.,)
)
Respondent.)
_________________________________)

RECOMMENDED ORDER

An administrative hearing was conducted in this case on March 3, 2011, by video teleconference in Tallahassee and Gainesville, Florida, before James H. Peterson, III, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Edward Rhoades, pro se
7470 NW 167th Place
Trenton, Florida 32693

For Respondent: Ignacio J. Garcia, Esquire
Ogletree, Deakins, Nash,
Smoak & Stewart, P.C.
100 North Tampa Street, Suite 3600
Tampa, Florida 33602

STATEMENT OF THE ISSUES

I. Whether Respondent subjected Petitioner to employment discrimination by refusing to hire Petitioner based upon Petitioner's disability.

II. Whether Respondent failed to make reasonable accommodations for Petitioner's physical disabilities.

PRELIMINARY STATEMENT

On June 11, 2009, Petitioner filed a complaint (Complaint) with the Florida Commission on Human Relations (the Commission or FCHR) alleging employment discrimination by Respondent. The Complaint was assigned FCHR No. 200902077 (Complaint).

The Commission investigated the Complaint and, on April 16, 2010, issued a Determination, which found "No Cause." On that same day, the Commission issued a Notice of Determination of No Cause (Notice) on the Complaint finding that the Commission "has determined that there is no reasonable cause to believe that an unlawful employment practice occurred." The Notice advised Petitioner of his right to file a Petition for Relief for an administrative hearing on his Complaint within 35 days. Petitioner timely filed a Petition for Relief.

On September 17, 2010, the Commission filed a Transmittal of Petition with the Division of Administrative Hearings (DOAH) for assignment of an administrative law judge to conduct an administrative hearing.

An administrative hearing for this case was originally scheduled for December 29, 2010, but upon Respondent’s Unopposed Motion for Continuance, was continued and then rescheduled for March 3, 2011. At the administrative hearing, Petitioner testified on his own behalf and offered one composite exhibit which was received into evidence as Petitioner’s Exhibit P-1, without objection. Respondent presented the telephone testimony of Respondent’s director of compliance, Scott Hollenbeck, and offered thirteen exhibits which were received into evidence without objection as Respondent’s Exhibits R-1 through R-13.

The evidentiary portion of the hearing concluded on March 3, 2011. The parties were given 10 days from the filing of the transcript within which to file their respective proposed recommended orders. The one-volume Transcript of these proceedings was filed March 24, 2011. Respondent requested additional time for the parties to file their proposed recommended orders, which request was granted, and the deadline for filing proposed recommended orders was extended until April 18, 2011. Petitioner filed a letter with a “final statement” on March 29, 2011, and Respondent filed its Proposed Recommended Order on April 4, 2011. Petitioner’s final statement and Respondent’s Proposed Recommended Order have been considered in preparing this Recommended Order.

FINDINGS OF FACT

1. Respondent is a trucking company that has over 7,000 trucks that carry payload throughout the country.

2. Petitioner alleges that Respondent did not hire him as a truck driver because Petitioner is disabled, or because Respondent perceived that Petitioner had a disability. Petitioner's claimed disabilities are a skip of the heart and lower back pain.

3. Petitioner completed his initial application for a truck driving position with Respondent on November 6, 2008, which Respondent received on December 10, 2008.

4. In accordance with Respondent's hiring process, once Respondent receives an initial application for a driver position, it conducts a preliminary review of the information provided by the applicant. If an applicant provides sufficient information to pass preliminary review, Respondent then sends the applicant a pre-approval letter with an attached "Pre-Training Checklist," which sets forth a number of requirements for hiring.

5. Respondent's Pre-Training Checklist requires applicants to have three years of work history. Respondent uses work histories for references from previous employers to check on the background of its applicants as part of Respondent's obligation to the public to ensure that the drivers it hires will be safe.

6. Respondent's pre-approval letter advises applicants that "[t]his pre-approval is contingent upon further background investigations, including motor vehicle reports and the successful completion of the hiring process."

7. Petitioner's initial application contained no work history. Instead, Petitioner wrote in his application that he had lost his job because the company he was working for had gone out of business, and that he was a stay-at-home dad.

8. Although Respondent sent Petitioner a pre-approval letter, Respondent requested Petitioner to submit additional information regarding his income and work history.

9. Petitioner then submitted information demonstrating that he had no work history in the three years prior to his application. Thereafter, Respondent declined to hire Petitioner based upon his lack of work history.

10. Although Petitioner claims that Respondent failed to hire him because Petitioner was disabled, the evidence submitted by Petitioner was insufficient to show that Petitioner ever informed Respondent of his alleged disability during the application process.

11. Petitioner argued at the final hearing that tax returns and Social Security Benefit Statements submitted to Respondent as part of the application process to verify Petitioner's earnings should have alerted Respondent to the fact

that Petitioner was disabled.[1/] Those returns and statements, however, standing alone, do not demonstrate that Respondent was made aware that Petitioner was claiming to be disabled, especially in light of the fact that Petitioner produced no evidence that Respondent received any other information whatsoever from Petitioner, Petitioner's truck-driving school, or any other entity about Petitioner's claimed disability or physical limitations, prior to making the decision not to hire Petitioner.

12. Respondent denied receiving such information, and it is found that Respondent did not receive information from any person or entity regarding Petitioner's alleged disability prior to making the decision not to hire Petitioner.

13. Regarding Respondent's alleged failure to accommodate, Petitioner testified that, in order to accommodate his disability, he would not be able to load or unload trucks, and would need to be given time to visit his doctor.

14. Petitioner, however, failed to show that he ever requested an accommodation from Respondent.

15. Moreover, the ability to load and unload trucks is an essential duty of the driver position for which Petitioner applied.

16. At the final hearing, Respondent provided evidence that it employs and provides accommodations for a number of drivers with disabilities.

17. Respondent's evidence that it hires disabled persons is consistent with guidelines adopted by Respondent stating that Respondent "provides equal employment opportunities to all employees and applicants for employment without regard to race, color, religion, sex, national origin, age, disability, marital status or veteran status in accordance with applicable federal and state laws."

18. In sum, Petitioner failed to demonstrate that Respondent discriminated against him by refusing to hire him because of his disability or that Respondent failed to make reasonable accommodations for Petitioner's disability. Rather, based upon the evidence adduced at the final hearing, it is found that Respondent decided not to hire Petitioner because he failed to provide three years of work experience required of all applicants.

CONCLUSIONS OF LAW

19. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding. See §§ 120.569, 120.57(1), and 760.11, Fla. Stat. (2010)[2/]; see also Fla. Admin. Code R. 60Y-4.016.

20. The Florida Civil Rights Act of 1992 (the Act) is codified in sections 760.01 through 760.11, Florida Statutes. "The Act, as amended, was patterned after Title VII of the Civil Rights Acts of 1964 and 1991, 42 U.S.C. § 2000, et seq., as well as the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623. Federal case law interpreting Title VII and the ADEA is applicable to cases arising under the Florida Act." Fla. State Univ. v. Sondel, 685 So. 2d 923, 925 n.1 (Fla. 1st DCA 1996), (citing Fla. Dep't of Comm. Aff. v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991)).

21. Section 760.10 provides, in pertinent part:

> (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.
>
> (b) To limit, segregate, or classify employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities, or adversely affect any individual's status as an employee, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.

22. The three-part "burden of proof" pattern developed in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), applies.

Under that test, first, Petitioner has the burden of proving a prima facie case of discrimination by a preponderance of the evidence. Second, if Petitioner sufficiently establishes a prima facie case, the burden shifts to Respondent to "articulate some legitimate, nondiscriminatory reason" for its action. Third, if Respondent satisfies this burden, Petitioner has the opportunity to prove by a preponderance of the evidence that the legitimate reasons asserted by Respondent are in fact mere pretext. 411 U.S. at 802-04.

23. To establish a prima facie case of discrimination, Petitioner must prove by a preponderance of the evidence: (1) that he is a handicapped person within the meaning of Subsection 760.10(1)(a); (2) that he is a qualified individual; and (3) that Respondent discriminated against him on the basis of his disability. See Earl v. Mervyns, 207 F.3d 1361, 1365 (11th Cir. 2000); Byrd v. BT Foods, Inc., 948 So. 2d 921, 925 (Fla. 4th DCA 2007).

24. Petitioner failed to establish a prima facie case of discrimination.

25. As to the first element, the term "handicap" in the Florida Civil Rights Act is treated as equivalent to the term "disability" in the Americans with Disabilities Act. Byrd, 948 So. 2d at 926.

26. "The ADA defines a 'disability' as 'a physical or mental impairment that substantially limits one or more of the major life activities of such individual, a record of such impairment; or being regarded as having such an impairment." 42 U.S.C. § 12102(2). 'Major life activities' include 'functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." 948 So. 2d at 926, (citing Bragdon v. Abbott, 524 U.S. 624(1998); 45 C.F.R. § 84.3(j)(2)(ii); and 28 C.F.R. 41.31(b)(2)(1997)).

27. Other than his brief testimony on the issue and evidence in the form of tax statements indicating that he has received Social Security benefits, Petitioner did little to support his claim that he is disabled. As noted by the Supreme Court in Cleveland v. Policy Mgmt. Systems Corp., 526 U.S. 795 (1999), made in the context of an employment discrimination claim under the Americans with Disabilities Act, "the nature of an individual's disability may change over time, so that a statement about that disability at the time of an individual's application for SSDI benefits may not reflect an individual's capacity at the time of the relevant employment decision." 526 U.S. at 805.

28. Whether Petitioner sufficiently proved that he is "handicapped" or "disabled" within the meaning of the law,

however, need not be determined because Petitioner failed to prove the other two elements required to prove discrimination by failing to show 2) that he is a qualified individual, or (3) that Respondent discriminated against him on the basis of his disability.

29. In order to show that he is "qualified," Petitioner must show that he can perform the essential functions of the job, either with or without reasonable accommodation. McCaw Cellular Commc'ns of Fla. v. Kwiatek, 763 So. 2d 1063, 1065 (Fla 4th DCA 1999), (citing 42 U.S.C.A. §1211(8)). An employer is not required to reallocate job duties to change the functions of a job. Earl, 207 F.3d at 1367. "[T]he duty to accommodate does not require an employer to lower its performance standards, reallocate essential job functions, create new jobs, or reassign disabled employees to positions that are already occupied." Salmon v. Dade County Sch. Bd., 4 F. Supp. 2d 1157, 1162 (S.D. Fla. 1998), (citing 29 C.F.R. § 1630.2(0)(2); 42 U.S.C. 12111(9)).

30. Petitioner was not qualified to be a truck driver for Respondent for two reasons. First, he did not have the three years of work history required for all applicants. This requirement is for adequate background checks to help assure public safety. Second, Petitioner was not able to load and unload truck trailers as required of all of Respondent's

drivers. Both requirements were essential elements of the position sought by Petitioner and, as noted above, Respondent need not waive essential elements of a position to accommodate Petitioner.

31. Finally, Petitioner failed to show that Respondent discriminated against him because of his disability. In fact, the evidence was insufficient to show that Respondent was even aware that Petitioner claimed to be disabled at the time of his application.

32. In addition to Respondent's denial that it was aware of Petitioner's alleged disability at the time of Petitioner's application,[3/] Petitioner himself testified that he never told Respondent of his disability and had no knowledge whether Respondent received information regarding his disability from other sources while his application was pending.

33. In sum, Petitioner failed to present a prima facie case. Failure to establish a prima facie case of discrimination ends the inquiry. Cf. Ratliff v. State, 666 So. 2d, 1008, 1013 n.6 (Fla. 1st DCA), aff'd, 679 So. 2d 1183 (Fla. 1996)(same rationale in case regarding racial discrimination).

34. Even if Petitioner had established a prima facie case, Respondent's evidence presented at the final hearing refuted Petitioner's argument that Respondent's actions were discriminatory. Respondent provided persuasive evidence that

the reason it did not hire Petitioner is that he did not have three years of work experience required of all applicants in order to conduct an adequate background check. At the final hearing, Petitioner agreed that Respondent needs to obtain work histories from applicants so that it can check references from previous employers.

35. Petitioner otherwise failed to demonstrate, as he must to prevail in his claim, that Respondent's proffered reason for not hiring Petitioner was not the true reason, but merely a pretext for discrimination. McDonnell Douglas, 411 U.S. at 802-03.

36. No discriminatory intent or effect was shown and Petitioner failed to establish that Respondent discriminated against Petitioner based upon Petitioner's alleged disability.

37. Petitioner also did not to establish that Respondent failed to reasonably accommodate Petitioner's alleged disability. The undisputed evidence demonstrated that Petitioner never asked Respondent for an accommodation for a disability. Cf. Gaston v. Bellingrath Gardens and Home, Inc., 167 F.3d 1361, 1363-64 (11th Cir. 1999) (must request an accommodation and be denied such prior to bringing a reasonable accommodation claim under the ADA).

48. In sum, Petitioner failed to prove that Respondent discriminated against Petitioner because he is disabled, or that

Respondent failed to make reasonable accommodations for Petitioner's alleged physical disabilities.

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 Complaint and Petition for Relief.

DONE AND ENTERED this 14th day of April, 2011, in Tallahassee, Leon County, Florida.

JAMES H. PETERSON, III
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of April, 2011.

1/ The tax statements consist of forms 1040EZ for 2006 and 2007 signed by Petitioner and his wife. On both forms, the lines for "occupation" next to Petitioner's wife's signature state, "Disable/Cashier." The occupation lines on both forms next to Petitioner's signature state, "Disable." The Social Security Benefit Statements consist of five Form SSA-1099 Social Security Benefit Statements for years 2005 through 2007, including Petitioner's wife's 2005 statement for benefits totaling

$9,494.40, Petitioner's 2006 statement for benefits totaling $7,542.00, Petitioner's wife's 2006 statement for benefits totaling $9,882.00, Petitioner's 2007 statement for benefits totaling $7,794.00, and Petitioner's wife's 2007 statement for benefits totaling $10,206.00.

[2/] Unless otherwise indicated, all references to statutes or rules are to the current, 2010, versions, which have not been substantively revised since the relevant hiring decision in this case.

[3/] See Finding of Fact 13, supra.

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.