STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

KURT G. MAHLER, Petitioner, vs. MARION COUNTY BOARD OF COUNTY COMMISSIONERS, Respondent.	)	Case No. 12-2177

RECOMMENDED ORDER

An administrative hearing was conducted in this case on August 9, 2012, in Ocala, Florida, before James H. Peterson, III, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Kurt G. Mahler, pro se
3382 Southwest 165th Loop
Ocala, Florida 34473

For Respondent: Michael H. Bowling, Esquire
Bell and Roper, P.A.
2707 East Jefferson Street
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STATEMENT OF THE ISSUE

Whether the Marion County Board of County Commissioners (County or Respondent) discriminated against Kurt G. Mahler (Petitioner) on the basis of Petitioner's disability.

PRELIMINARY STATEMENT

On December 3, 2011, Petitioner filed a Charge of Discrimination (Complaint) with the Florida Commission on Human Relations (the Commission or FCHR) alleging employment discrimination by the County. Petitioner marked the boxes labeled "Disability/Handicap" and "Retaliation" as the basis for the alleged discrimination on the Complaint form. At the hearing, however, Petitioner withdrew his claim of retaliation. The Complaint was assigned FCHR No. 201200563.

The Commission investigated the Complaint and on May 18, 2012, 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 stating 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 June 20, 2012, 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.

Prior to the hearing, Petitioner’s counsel’s Motion to Withdraw as Counsel for Petitioner was granted. Thereafter,

Petitioner filed a letter indicating that he wished to withdraw his Complaint, but subsequently decided to proceed, and appeared at the hearing pro se.

At the final hearing, Petitioner called three witnesses, testified on his own behalf, and offered three exhibits received into evidence as Petitioner's Exhibits P-1, P-2, and P-3 (a composite) without objection. The County presented the testimony of three witnesses and offered six exhibits received into evidence as Respondent's Exhibits R-5 through R-9, and R-11.

The proceedings were recorded and a Transcript was ordered. The parties were given 30 days from the filing of the Transcript within which to submit their proposed recommended orders. The Transcript, consisting of one volume, was filed on August 20, 2012, and the parties timely filed their respective Proposed Recommended Orders, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner was first employed by the County from May, 1997, until September 2006, when he was administratively discharged after exhausting of all of his leave time (sick, holiday, vacation, and personal) following a motorcycle accident on May 3, 2006.

2. After being cleared by his doctor, Petitioner was rehired by the County as a heavy equipment operator on November 26, 2006, and he worked for the County in that capacity until his termination on June 2, 2011.

3. The position of heavy equipment operator for the County held by Petitioner involved the operation of dump trucks, bucket trucks, and other large equipment. The County's heavy equipment is often operated in close proximity to pedestrians, bicyclers, and traffic, and operation of the heavy equipment in a safe manner is essential to the position.

4. Historically, Petitioner was regarded as a good employee with respect to his knowledge, attendance, and effort. However, during the two years prior to his termination, there were incidences involving safety, judgment, or carelessness that ultimately led to the County's decision to terminate Petitioner's employment.

5. On May 17, 2011, Petitioner exited the County vehicle he was driving, County truck P-87, when he pulled off the road to move a tree limb from the roadway. He exited the vehicle without putting it in park. As a result, the truck moved forward approximately six feet and hit a power pole.

6. The accident was reported on a Marion County Incident Report that same day. Upon reviewing the report, County Roads Superintendent Chad Schindehette, who had just recently been

hired by the County six days before, reviewed Petitioner's personnel file to determine the appropriate discipline to recommend.

7. Review of Petitioner's personnel file revealed that Petitioner was still on probation from an accident that occurred on February 15, 2011, when Petitioner accidentally drove a County boom truck into a 4x4 wooden post of a County fuel bay.

8. Petitioner's personnel file also indicated a number of other disciplinary actions that Petitioner received since his rehire in 2006, including a letter of counseling on September 5, 2007, for disregarding the safety of fellow employees in an incident involving spinning tires and mud; a letter of counseling on June 4, 2009, for lack of good judgment involving a County truck hitting a pole saw that Petitioner was holding; a written reprimand on July 14, 2010, regarding abrasiveness with co-workers; revocation of Petitioner's safe operator award on October 20, 2010, for backing a County truck into another County vehicle; and a letter of counseling on April 25, 2011, for inattention or carelessness in allowing a trim tractor to run out of fuel.

9. After reviewing Petitioner's personnel file, Mr. Schindehette recommended to his supervisor, County Engineer Mounir Bouyounes, that Petitioner be terminated. At the time that he recommended that Petitioner be terminated,

Mr. Schindehette was unaware of any medical condition that Petitioner might have that would affect his ability to perform his job.

10. As a result of the recommendation to terminate Petitioner, Mr. Bouyounes held a meeting on March 26, 2011, with Petitioner, Mr. Schindehette, and Petitioner's direct supervisor, Vic Pollack, to discuss the facts surrounding the recommendation for Petitioner's termination. During that meeting, for the first time, Petitioner advised that he believed his medication could be the cause of his accidents and his lack of judgment.

11. Thereafter, a pre-termination hearing was held on June 2, 2011, attended by Petitioner and Petitioner's supervisors, including County Human Resources Director Drew Adams. During the pre-termination hearing, Petitioner again blamed his past accidents and behavior on his medication. In support, Petitioner presented two letters from doctors suggesting that Petitioner's medication may have caused the incidents. One of the letters indicated that changing Petitioner's medication might resolve the problem in the future. Petitioner asked for two weeks to see if a change in medication might solve his attention problems that he claimed were responsible for his accidents.

12. Mr. Adams was unaware prior to the June 2, 2011, pre-termination hearing that Petitioner was taking medications which might impact his performance or that Petitioner had any job restrictions as a result of any disability.

13. After the pre-termination hearing, Mr. Adams checked with the County's Health Clinic Supervisor regarding Petitioner's medical condition and any medical limitations with regard to Petitioner's employment with the County. The most recent work duty status forms for Petitioner, dated February 10, 2011, and March 5, 2010, indicated that Petitioner could perform his job without restrictions.

14. Mr. Adams concluded that termination was appropriate. Petitioner's employment with the County was terminated June 2, 2011.

15. At all pertinent times, the County had a pre-termination and anti-discrimination policy in effect. Petitioner was aware of these policies. Petitioner, however, did not avail himself of his right, included in these policies, to appeal the decision to terminate his employment.

16. The decision to terminate Petitioner's employment was consistent with the County's prior termination decisions for employees with similar disciplinary histories with regard to safety.

17. The evidence showed that the decision to terminate Petitioner's employment was a legitimate, non-discriminatory decision based upon Petitioner's repeated safety violations and disciplinary history. Petitioner did not show that the County's reasons for terminating his employment were mere pretext, or that the County otherwise discriminated against him because of his medical condition.

18. There is no evidence that the County was aware of Petitioner's claim that his medication may have caused his accident on May 17, 2011, or the adverse incidences documented in his personnel file, prior to Mr. Schindehette's recommendation that Petitioner be terminated.

19. There is also no evidence that Petitioner ever requested an accommodation based upon his medical condition or reaction to medication prior to the recommendation that he be terminated.

20. In sum, Petitioner did not show that the County discriminated against him because of his disability.

CONCLUSIONS OF LAW

21. 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(4)(b), Fla. Stat. (2012)[1/]; see also Fla. Admin. Code R. 60Y-4.016.

22. 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 Cmty. Aff. v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991)).

23. 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.

24. As developed in federal cases, a prima facie case of discrimination under Title VII may be established by statistical proof of a pattern of discrimination, or on the basis of direct

evidence which, if believed, would prove the existence of discrimination without inference or presumption. Usually, however, direct evidence is lacking and one seeking to prove discrimination must rely on circumstantial evidence of discriminatory intent, using the three-part shifting "burden of proof" pattern established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). See Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997).

25. In this case, Petitioner did not have direct evidence of discrimination. Therefore, 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.

26. To establish a prima facie case of discrimination based on disability, Petitioner must prove by a preponderance of the evidence: (1) that he is a handicapped [or disabled] 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).

27. Petitioner failed to establish a prima facie case of discrimination based on his disability.

28. 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.

29. "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)).

30. Petitioner presented letters from doctors suggesting that his medication may be the reason for his disciplinary history regarding safety. Although, arguably, that evidence

could support a finding that Petitioner is “handicapped” or “disabled” within the meaning of the law, 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.

31. 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 Cnty. 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)).

32. As noted in the Findings of Fact, above, operation of the County's heavy equipment in a safe manner is essential to the position of heavy equipment operator. Respondent need not waive essential elements of a position to accommodate Petitioner. Id.

33. Instead of supporting a finding that Petitioner was qualified for the job, Petitioner's job performance indicated that he could not meet the essential requirement of operating heavy equipment in a safe manner.

34. Finally, Petitioner failed to show that Respondent discriminated against him because of his disability. The undisputed testimony showed that the County fired Petitioner because of his repeated safety violations and disciplinary history. There is no evidence that Petitioner's alleged disability played a role in the County's decision.

35. In fact, there is no evidence that Petitioner even mentioned his alleged disability until after a recommendation for his termination based upon Petitioner's history of carelessness. And the evidence showed that Petitioner did not ask for any accommodation prior to that recommendation.

36. Petitioner's request for an accommodation was untimely and does not otherwise excuse his past misconduct. Cf., e.g., Hill v. Kan. City Area Transp. Auth., 181 F.3d 891, 894 (8th Cir. 1999)(request untimely where employee did not request accommodation until she had been caught twice sleeping on the job). Moreover, as in Hill, Petitioner offered no assurance that his requested accommodation would remedy his job performance difficulties. Id.

37. 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).

38. Even if Petitioner had established a prima facie case, Respondent's evidence presented at the final hearing which refutes Petitioner's argument that Respondent's actions were discriminatory. Respondent provided persuasive evidence that the reasons it terminated Petitioner were legitimate, non-discriminatory reasons based upon Petitioner's repeated safety violations and disciplinary history.

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

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 12th day of October, 2012, 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 12th day of October, 2012.

ENDNOTE

[1/] Unless otherwise indicated, all references to statutes or rules are to the current, 2012, versions, which have not been substantively revised since the relevant facts in this case.

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.