STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JESSIE HILL,

Petitioner,

vs. Case No. 14-0040

FIVE STAR QUALITY CARE, INC.
(RIVERIA),

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was conducted on March 7, 2014, in Daytona Beach, Florida, before W. David Watkins, the duly-designated Administrative Law Judge of the Florida Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: David W. Glasser, Esquire
116 Orange Avenue
Daytona Beach, Florida 32114

For Respondent: J. Robert McCormack, Esquire
Ogletree, Deakins, Nash,
Smoak, and Stewart, P.C.
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Tampa, Florida 33602

STATEMENT OF THE ISSUE

Whether Respondent terminated the Petitioner from employment based upon the Petitioner's disability and/or perceived disability in violation of the Florida Civil Rights Act of 1992.

PRELIMINARY STATEMENT

On June 12, 2013, Petitioner filed an Employment Complaint of Discrimination (Complaint) against Five Star Quality Care, Inc. (Riviera Assisted Living) (Respondent). The Complaint alleged an unlawful employment practice against Petitioner based on his disability and stated:

> I was hired in the position of carpet cleaner/ maintenance/housekeeping. After I completed the training and a background check, my employer asked me to take a reading test. After I took the reading test, they told me they could not use me because they wanted an experienced reader.
>
> While I am able to read, I do have some reading problems and/or a learning disability and cannot read as well as I would like to. I have experience as a carpet cleaner and believe I can read well enough and/or I could have received help in the workplace to assist with my reading problems and/or been given oral directions to be able to perform.
>
> I believe I was let go based upon my disability and/or perceived disability in violation of the Americans with Disabilities Act and the Florida Civil Rights Act of 1992. The company policy says the company helps people with disabilities.

Following its investigation, by Notice dated December 13, 2013, the Florida Commission on Human Relations (FCHR) issued a "Determination: No Cause" (Determination). The Determination was forwarded to Petitioner and to Respondent's counsel. Thereafter, being dissatisfied with the FCHR determination, Petitioner filed a

Petition for Relief (Petition) that was date-stamped by the FCHR as being received on December 30, 2013.

The matter was referred to the Division of Administrative Hearings (DOAH) on January 7, 2014, and assigned to the undersigned to conduct a formal administrative hearing. On February 17, 2014, a Notice of Hearing was issued setting the final hearing for March 7, 2014. Prior to the hearing, the parties filed a Joint Pre-hearing Stipulation, which included a stipulation of facts not in dispute. To the extent relevant, those stipulated facts have been incorporated into this Recommended Order.

The final hearing was held as noticed at the Volusia County Courthouse Annex, in Daytona Beach, Florida. At the hearing, Petitioner testified on his own behalf and presented the testimony of his father, Karol Knox Hill. Petitioner offered one exhibit, which was received in evidence subject to a hearsay objection. Respondent presented the testimony of David Hornfeck and Emily Shannon, and offered 19 exhibits which were received in evidence without objection.

At the conclusion of the hearing the parties requested that they be permitted to file their proposed recommended orders within 20 days of the filing of the official transcript at DOAH. That request was granted. However, on March 27, 2014, the parties requested an extension of time for filing their proposed orders to

30 days from the date of transcript filing. That request was granted.

The hearing Transcript was filed on April 10, 2014. Thereafter, Respondent filed its Proposed Recommended Order on May 13, 2014. On June 6, 2014, Petitioner filed a Motion for Enlargement of Time to file his proposed recommended order, stating that he had only recently learned that the Transcript had been filed at DOAH on April 10, 2014. The motion was served by electronic mail on counsel for Respondent. By Order dated June 16, 2014, the undersigned granted the requested extension of time, requiring Petitioner to file his proposed recommended order by not later than July 1, 2014. The Order also provided:

> 3. In order to minimize any prejudice to Respondent by virtue of it having already filed its Proposed Recommended Order, Respondent may, at its option, file a response to Petitioner's proposed recommended order within 10 days of it being filed at the Division.

Two days later, on June 18, 2014, Respondent filed its Objection to Petitioner's Motion for Enlargement and/or Motion for Reconsideration. Respondent's Motion for Reconsideration was denied by Order dated June 20, 2014. On June 23, 2014, Petitioner filed his Proposed Recommended Order, and on July 3, 2014, Respondent filed an Objection to Petitioner's Proposed Recommended Order. The undersigned has given due consideration to both Proposed Recommended Orders and Respondent's July 3, 2014, filing

in the preparation of this Recommended Order.

Unless otherwise noted, all statutory references are to Florida Statutes (2013).

FINDINGS OF FACT

Based upon the testimony and documentary evidence presented at hearing, the demeanor and credibility of the witnesses, and on the entire record of this proceeding, the following findings of fact are made:

1. Respondent is an assisted-living facility/nursing home providing care to elderly individuals and/or individuals needing care on a consistent basis.

2. On March 13th and 17th, 2013, Respondent ran announcements in the Daytona Beach News Journal that it had an opening for a fulltime "houseman." The same publication also announced openings for CNA's, and Med Techs, but not for a carpet cleaner.

3. On April 11, 2013, Petitioner appeared at Respondent's location to submit an application for employment. Both Petitioner and Petitioner's father had heard from an acquaintance who was employed by Respondent that a position was being created by Respondent for a carpet cleaner. Petitioner was interested in that position since he was experienced in cleaning carpets. There is no indication in this record that Petitioner or his father was aware of the published opening for a "houseman."

4. As a matter of convenience, Petitioner's father completed the application because, as he testified, Petitioner was able to complete the application on his own, but not as quickly as the father. Since they had other appointments to get to later that morning, it was decided to have the father fill out the application.

5. The employment application completed by Petitioner's father included a space for applicants to indicate what type of employment was desired. In this space, Petitioner's father wrote "carpet cleaning."

6. Subsequent to the submittal of Petitioner's application, Respondent's Director of Environmental Maintenance and Housekeeping, David Hornfeck, took Petitioner on a tour of the facility. During this tour, Mr. Hornfeck advised Petitioner that if hired, his job duties would include housekeeping, maintenance, carpet cleaning, and painting, among others.

7. Respondent does not have and never has had a position limited to cleaning carpets.

8. By letter dated April 17, 2013, Petitioner was conditionally offered the position of housekeeper by Respondent. The letter advised Petitioner that before he could be hired it would be necessary for him to obtain fingerprints, have a background screening, and pass a drug screen. Petitioner successfully completed those requirements.

9. After completing the application process, Petitioner was told by Respondent to return to Respondent's location to attend orientation. Petitioner appeared at the facility and attended a two-day orientation during which he watched various videos and was oriented to the facility.

10. On April 24, 2013, Petitioner signed a job description acknowledging that he was aware he would be working as a "housekeeper" within the housekeeping department and that he understood the nature and scope of the position.

11. According to the written job description, the position of housekeeper required "Sufficient education to demonstrate functional literacy." Additionally, under "Essential Functions and Responsibilities," the job description required that the candidate: be "Able to understand and to follow written and verbal directions"; be "Able effectively to communicate with the staff members and residents through verbal and/or written means"; be able to "Post signs indicating a safety hazard any time housekeeping activities pose environmental hazards to staff, residents, visitors or others in the building"; and be able to "Familiarize self with Material Safety Data Sheets (MSDS) and Universal Worker Precautions for all housekeeping chemicals and cleaning supplies."

12. Upon successfully completing the orientation, Petitioner was given a name tag with his name and the word "housekeeping" on

it. He was told he would be called by Respondent and informed when he would be starting work.

13. Petitioner was hired for the 11:00 p.m. to 7:30 a.m. shift. He would have been the only one working in maintenance during that shift. If needed, Petitioner would have been responsible for the entire facility during his shift.

14. During orientation, it was brought to Mr. Hornfeck's attention that Petitioner might not have the ability to read well. As a result, Petitioner was invited back to the facility and asked to read some passages from the job description.

15. Petitioner failed to demonstrate sufficient literary skills, which resulted in Mr. Hornfeck advising him that his employment was terminated. Mr. Hornfeck made the decision to terminate the Petitioner's employment on this basis.

16. Petitioner attended normal classes in school through the end of the sixth grade. However, he was placed in special education classes which were specifically focused on improving his reading skills for the seventh and eighth grade. Thereafter, Petitioner was homeschooled beginning in the ninth grade.

17. Petitioner's father conceded that even he didn't realize the extent of his son's reading difficulties until he reviewed the intellectual, behavior, and academic evaluation report prepared by Dr. JoEllen Rogers, a licensed school psychologist, in August 2013.

18. Psychologist Rogers was retained by Petitioner's counsel to conduct her evaluation of Petitioner sometime subsequent to Petitioner's termination by Respondent. Psychologist Rogers' evaluation reported that Petitioner has a Full Scale I.Q. of 97 and "is currently functioning in the Mild Mental Retardation range of intellectual development."

19. The job description signed by Petitioner on April 24, 2013, included a space for applicants to indicate "any accommodations that are required to enable me to perform these duties." Petitioner did not list any desired accommodations.

20. At hearing, Petitioner conceded that he never told any employee of Respondent that he had a disability.

21. When asked on direct examination to describe his need for help reading, Petitioner testified simply that he has trouble reading in that he does not understand some words and that he "can't read that well."

22. There was no evidence adduced at hearing which indicated or suggested that Respondent knew Petitioner had taken special education classes in the seventh and eighth grades, or that Respondent had any actual or constructive knowledge of any alleged disability.

CONCLUSIONS OF LAW

23. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this cause pursuant to

sections 120.569 and 120.57(1), Florida Statutes (2013).

24. Petitioner claims he was terminated from employment based upon disability or perceived disability, in violation of the Florida Civil Rights Act of 1992 ("FCRA").

25. Section 760.10(1)(a), Florida Statutes, makes it unlawful for an employer to take adverse action against an individual because of the individual's handicap. Under the FCRA, an employer commits an unlawful employment practice if it terminates or retaliates against employees based on their protected status, which in this case, is handicap. See § 760.10(1)(a), Fla. Stat.

26. Section 760.11(7) permits a party who receives a no cause determination to request a formal administrative hearing before the Division of Administrative Hearings. "If the administrative law judge finds that a violation of the Florida Civil Rights Act of 1992 has occurred, he or she shall issue an appropriate recommended order to the commission prohibiting the practice and recommending affirmative relief from the effects of the practice, including back pay." Id.

27. Florida's chapter 760 is patterned after Title VII of the Civil Rights Act of 1964, as amended. Consequently, Florida courts look to federal case law when interpreting chapter 760. Valenzuela v. GlobeGround N. Am., LLC., 18 So. 3d 17 (Fla. 3rd DCA 2009).

28. Petitioner has the burden of proving by a preponderance of the evidence that Respondent discriminated against him. See Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981). A party may prove unlawful discrimination by direct or circumstantial evidence. Smith v. Fla. Dep't of Corr., Case No. 2:07-cv-631, (M.D. Fla. May 27, 2009); 2009 U.S. Dist. LEXIS 44885 (M.D. Fla. 2009).

29. Direct evidence is evidence, that, "if believed, proves [the] existence of [a] fact in issue without inference or presumption." Burrell v. Bd. of Tr. of Ga. Military College, 125 F.3d 1390, 1393 (11th Cir. 1997). Direct evidence consists of "only the most blatant remarks, whose intent could be nothing other than to discriminate" on the basis of an impermissible factor. Carter v. City of Miami, 870 F.2d 578, 582 (11th Cir. 1989).

30. The record in this case did not establish unlawful discrimination by direct evidence.

31. To prove unlawful discrimination by circumstantial evidence, a party must establish a prima facie case of discrimination by a preponderance of the evidence. If successful, this creates a presumption of discrimination. The burden then shifts to the employer to offer a legitimate, non-discriminatory reason for the adverse employment action. If the employer meets that burden, the presumption disappears and the employee must

prove that the legitimate reasons were a pretext. Valenzuela v. GlobeGround N. Am., LLC., supra. Facts that are sufficient to establish a prima facie case must be adequate to permit an inference of discrimination. Id.

32. Accordingly, Petitioner must prove discrimination by indirect or circumstantial evidence under the McDonnell Douglas framework. Petitioner must first establish a prima facie case by showing: (1) he is a member of a protected class; (2) he was qualified for the job; (3) he was subjected to an adverse employment action; and (4) other similarly-situated employees, who are not members of the protected group, were treated more favorably than Petitioner. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). "When comparing similarly situated individuals to raise an inference of discriminatory motivation, these individuals must be similarly situated in all relevant respects." Jackson v. BellSouth Telecomm., 372 F.3d 1250, 1273 (11th Cir. 2004).

33. The term "handicap" in the FCRA is treated as equivalent to the term "disability" in the Americans with Disabilities Act. Ross v. Jim Adams Ford, Inc., 871 So. 2d 312 (Fla. 2d DCA 2004).

34. Pursuant to 42 U.S.C. § 12102(1) the term "disability" is defined as either (a) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (b) a record of such impairment; or (c) being

regarded as having such an impairment." "Reading" is one of the enumerated "major life activities" contained within 42 U.S.C. § 12102(2).

35. However, as the court stated in Morisky v. Broward County, 80 F.3d 445, 448 (11th Cir. 1996): "While illiteracy is a serious problem, it does not always follow that someone who is illiterate is necessarily suffering from a physical or mental impairment. Id. at 448, citing Jones v. Bowen, 660 F. Supp. 1115, 1121 (C.D. Ill. 1987).

36. A diagnosis of mild mental retardation coupled with testimony that one is "a very slow learner" and is "very slow at comprehending things," has been held to be insufficient to demonstrate a disability under the ADA. Martin v. Discount Smoke Shop, Inc., 443 F. Supp. 2d 981 (C.D. Ill. 2006). The evidence presented by Petitioner in this record is no greater than that adduced in the Martin case. Hence, Petitioner has failed to meet his burden of demonstrating a substantially limiting impairment.

37. 42 U.S.C. § 12111(8) requires that a plaintiff under the ADA be able to perform the essential functions of the job which such individual holds or desires. Slomcenski v. Citibank, N.A., 432 F.3d 1271 (11th Cir. 2005). The ADA and hence the FCRA therefore impose a requirement that "qualified individuals with disabilities" be capable of performing the essential functions of the job either with or without a reasonable accommodation. Id.

38. In determining the essential functions of the job, consideration is given to an employer's judgment as to what functions of a job are essential and to the employer's written job description. 42 U.S.C. § 12111(8); Davis v. Fla. Power & Light Co., 205 F.3d 1301 (11th Cir. 2000). In the instant case, several aspects of Respondent's "Housekeeper" job description required, at a minimum, functional literacy. Accordingly, Petitioner has failed to demonstrate that he was a "qualified individual with a disability" as defined under the requisite laws.

39. The ADA only imposes a duty to provide reasonable accommodations for "known disabilities" unless doing so would result in undue hardship to the employer 42 U.S.C. § 12112(5).

40. Thus, even if Petitioner had successfully demonstrated that he suffers from a disability, liability under the ADA requires the employer to have discriminated "because of the employee's disability." Courts have held that this requires the employer to have actual knowledge of the alleged disability at the time it took the adverse employment action. Howard v. Steris Corp., 121 FEP Cases (BNA) 357 (11th Cir. 2013) citing, Cordoba v. Dillard's, Inc., 419 F.3d 1169, 1185 (11th Cir. 2005). Other courts have required, at a minimum, constructive knowledge of the alleged disability. Hedberg v. Indiana Bell Telephone Co., Inc., 47 F.3d 928 (7th Cir. 1995).

41. Vague or conclusory statements revealing an unspecified incapacity are not sufficient to put an employer on notice of its obligations under the ADA. Morisky v. Broward Cnty., 80 F.3d 445, 448 (11th Cir. 1996). The vague and conclusory statements referenced in the Morisky case consisted of the plaintiff informing the employer that she had taken special education courses and could not read or write. The 11th Circuit addressed the narrow issue of whether knowledge that an applicant for employment has a disability is imputed to a prospective employer which has knowledge that the applicant has taken special education courses and cannot read or write.

42. In the instant case, Petitioner provided far less information than the plaintiff in Morisky. While Petitioner testified that he took special education courses in the seventh and eighth grades, there was no evidence that Respondent was ever informed of this fact. Further, Petitioner insisted that he possessed the ability to read. His comment to the Respondent at the critical juncture simply acknowledged that he could not read very well. He never indicated that he could not read or that his poor reading skills were attributable to a disability. Indeed, even at the hearing, Petitioner testified that he merely had difficulty understanding certain words and that his reading skills were sufficient to enable him to complete employment applications (albeit more slowly than his father).

43. Petitioner did not demonstrate that his poor reading skills were a disability. Psychologist Rogers' evaluation merely reported a slightly below average IQ. More importantly, Petitioner did not establish that Respondent was aware of any alleged disability at the time Petitioner's employment was terminated. Rather, Respondent reasonably concluded that Petitioner did not possess the requisite reading skills to enable him to safely and effectively perform the duties associated with the housekeeper position. This conclusion constitutes a legitimate business reason for terminating Petitioner's employment.

44. Based on the foregoing, it is concluded that Petitioner has failed to meet his burden of demonstrating he suffers from a disability, and further has failed to meet his burden of demonstrating Respondent had actual (or even constructive) knowledge of any such disability at the time Petitioner's employment was terminated.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations dismiss the Petition for Relief from an Unlawful Employment Practice filed against Respondent.

DONE AND ENTERED this 21st day of July, 2014, in Tallahassee, Leon County, Florida.

W. DAVID WATKINS
Administrative Law Judge
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Filed with the Clerk of the
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this 21st day of July, 2014.

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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.