

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MICHEAL D. BRISTOL,

Petitioner,

vs.

Case No. 14-4695

AMERICAN WATER,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case on February 17, 2015, in Pensacola, Florida, before R. Bruce McKibben, a duly-designated Administrative Law Judge with the Division of Administrative Hearings, pursuant to authority set forth in section 120.57(1), Florida Statutes. Unless specifically stated otherwise herein, all references to the Florida Statutes will be to the 2014 codification.

APPEARANCES

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For Respondent: Rodrick D. Holmes, Esquire
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STATEMENT OF THE ISSUE

Whether Respondent, American Water Service Company, Inc., ("American Water"), discriminated against Petitioner, Micheal D. Bristol ("Bristol"), in violation of the Florida Human Rights Act and, if so, what penalty should be imposed?

PRELIMINARY STATEMENT

On March 7, 2014, Bristol filed an Employment Complaint of Discrimination with the Florida Commission on Human Relations ("FCHR"). The complaint alleged discrimination by Bristol's employer, American Water, on the basis of Bristol's handicap or disability. FCHR issued a Determination: No Cause dated September 8, 2014. Bristol timely filed a Petition for Relief from an Unlawful Employment Practice on October 9, 2014. The Petition was forwarded to the Division of Administrative Hearings and assigned to the undersigned.

At the final hearing, Bristol testified on his own behalf and called four additional witnesses: Sonya Jackson, RN, a contract nurse with American Water; Preston Pallas, senior Human Relations ("HR") business partner with American Water; Laura Delles, HR business partner with American Water; and Travis Stabler, Bristol's domestic partner. Bristol's exhibits 1-3, 5-6, 10-11, 13, 16, 19-21, and 23 were admitted into evidence. American Water did not call any witnesses, having presented its case-in-chief through Bristol's witnesses. American Water's

exhibits 6, 12-13, 30-31, 34, and 36-37 were admitted into evidence. American Water filed a Motion in Limine just prior to commencement of the final hearing, seeking to exclude all evidence and testimony concerning Bristol's Family Medical Leave Act ("FMLA") leave taken during his employ at American Water. The motion was denied with leave to raise objections to such testimony during final hearing.

The parties agreed to order a transcript of the final hearing. The parties requested 20 days after filing of the transcript at DOAH to submit their proposed recommended orders; the request was granted. The Transcript was filed at DOAH on March 5, 2015. Each party timely filed a Proposed Recommended Order and each was considered in the preparation of this Recommended Order.^{1/}

FINDINGS OF FACT

1. Bristol is a 33-year-old, Caucasian male. He has been diagnosed with lumbar disk degeneration, depression, and anxiety. He holds a General Education Degree. At all times relevant hereto, Bristol was employed by American Water as a customer service representative. A customer service representative fields calls from American Water's customers concerning complaints, renewals, changes in services, or other issues. The customer service representative uses a telephone

and computer to respond to between 60 and 100 customer inquiries per day. The customer's account information is brought up on the customer service representative's computer in order to assist with whatever issue is raised concerning the customer's complaint or issue.

2. American Water is a utilities company that contracts with municipalities to provide water and sewer services to the citizens of the cities. It is a national company with water utility customers in several states. It is governed in part by the Public Utilities Commission and is charged with meeting certain standards regarding customer complaints. Having customer service representatives who are available and qualified is an important factor in meeting those standards.

3. There are between 200 and 250 customer service representatives at American Water's office in Pensacola, Florida, where Bristol was employed. American Water has another customer service center in Alton, Illinois, with about 200 customer service representatives. Calls coming in from customers are routed to the first available representative, regardless of at which service center they are working. Each representative sits in a cubicle with a desk holding two computer monitors, a telephone, and other necessary equipment. The customer service representatives wear headsets for the

telephone which have cords of five to six feet in length. The back side of the cubicle is open to a common area.

4. It is imperative that American Water maintain an adequate workforce of representatives each day. Using historical data, American Water tries to estimate the number of representatives who must be working each hour of each day. Some days historically have more incoming calls than other days, and American Water staffs accordingly. It is understood that some employees may need to take sick leave from time to time. All employees are given vacation days. Thus, making sure that there are enough workers on any given day is a moving target, yet it is integral to the work being done. American Water has instituted policies to help assure adequate staff. For example, there is a limit on the number of employees who may be on vacation at any given time. Some employees are allowed to work part time, but with a very definitive schedule. All employees are required to notify American Water immediately if they are unable to work on their assigned dates and times. Attendance is a singularly important requirement for an American Water customer service representative.

5. At some point in time after he was first hired by American Water, Bristol was diagnosed with a degenerative disk disorder. The disorder causes him discomfort, making it

difficult to sit for long periods of time. (However, see paragraph 19, below.)

6. Bristol left his employment with American Water in October 2010. In May 2011, he returned to American Water, again as a representative in the customer service center. He had the same duties as in his previous employment.

7. As Bristol began to experience more problems with his back, he began to use up all of his annual leave and sick leave when he felt he was unable to work. There was no evidence presented at final hearing as to how many annual leave hours employees receive, but each employee is allowed 80 sick leave hours per year. In 2012, Bristol applied for additional leave under FMLA and was approved for 480 hours, equivalent to 60 full work days. American Water approved intermittent leave under FMLA for one day per month with up to two days per time. During calendar year 2012, Bristol used some but not all of his FMLA leave.

8. Bristol reapplied for FMLA leave again in February 2013, and was approved for another 480 hours. In that year, he used all 480 hours of FMLA leave. Bristol took leave whenever he felt like his back pain would prevent him from working. The leave was described as "intermittent" because there was no regular schedule or times associated with the leave. His

schedule was, therefore, contrasted from a part-time employee who works fewer hours on a predetermined but regular schedule.

9. On or about November 18, 2013, Bristol was notified that his FMLA leave had been used up. He had also exhausted his annual leave and sick leave allotment. Despite the fact that Bristol's intermittent leave had created scheduling problems for the company, an employee of American Water provided Bristol with the necessary paperwork for requesting leave under the Americans with Disability Act ("ADA"). Part of that paperwork was a Health Care Provider Statement ("HCPS") to be completed by his physician. Bristol was advised that after completing the HCPS, American Water would try to ascertain whether there were any accommodations they could provide to him on the job. Bristol submitted the HCPS to his treating physician to be completed and returned to American Water.

10. Meanwhile, American Water tried to accommodate Bristol's condition. He was provided an ergonomic work station, having a desk that could be raised or lowered, allowing Bristol to work while standing or sitting. He could change positions as needed to alleviate his back pain as much as possible. He could move, albeit not very far, within his small work area. Contradictory testimony was presented as to the exact size or configuration of the work space, so how much Bristol was able to move around is not clear. It is clear, however, that American

Water attempted to accommodate his needs as much as the situation allowed.

11. Bristol's physician, Dr. Carie Fletcher, completed and signed the HCPS on November 26, 2013. The form was provided to American Water. Based upon the information supplied by Dr. Fletcher, American Water notified Bristol by letter dated December 2, 2013, that the current ergonomic work station and job duties were sufficient accommodations for the malady described by his doctor. Bristol said he did not believe the accommodations were sufficient.

12. American Water thereafter asked Dr. Fletcher whether she had anything to add concerning Bristol's disability or impairment. In response to that inquiry, Dr. Fletcher amended her previous submission, specifically on sections 4(b) and 7 of the form. Section 4(b) asks this question: "Is the Patient 'substantially limited' as to the condition, manner, or duration under which the Patient can perform that major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." Dr. Fletcher had originally stated, "Cannot stand/sit for prolonged periods (>1 hr), cannot lift objects >25 lbs secondary to back pain." Upon American Water's inquiry, she added this statement: "May expect exacerbation of back pain/DJD intermittently, up to 5-7 occurrences per month,

at two days per occurrence."^{2/} The question at section 7 of the form asked, "Does the diagnosed condition or conditions affect the Patient's ability to perform any one of the essential functions of the Patient's position?". Dr. Fletcher originally stated: "Recommend allowing frequent position changes, limit lifting; will likely still experience intermittent exacerbations of back pain." When American Water asked for additional detail, Dr. Fletcher added: "Please allow pt to stand and walk at liberty for approx five minutes every hour." The amendments were provided to American Water on December 10, 2013.

13. American Water's HR personnel discussed the doctor's recommendations and decided that the ergonomic work area and the extension cord on the telephone headset would allow Bristol the movement and flexibility needed. Lifting heavy objects was not part of Bristol's job duties, so that was not discussed.

14. Dr. Fletcher did not specifically suggest intermittent leave for Bristol, nor did she state that he would need to take leave five to seven times per month at one to two days per time. Rather, her response to American Water's inquiry was that Bristol "may expect exacerbation" of his condition five to seven times a month. In section 8 of the form - which is the section for the physician to recommend accommodations - Dr. Fletcher wrote only, "As noted above." (Again, see endnote 2, below).

15. On January 31, 2014, American Water again contacted Dr. Fletcher for additional information. She was asked about Bristol's mental or psychological disorder, to which she replied, "depression and anxiety" but that the condition did not currently limit Bristol's activities. As to the lumbar disk degeneration, the limitations were listed as, "limits his ability to sit/stand/lift items and duration of work tolerated." Dr. Fletcher was provided a matrix outlining Bristol's essential job functions and asked what accommodations might be warranted for each.

16. Dr. Fletcher replied to those inquiries on February 6 as follows (paraphrased):

As for typing, Bristol may need to take breaks every hour;

As for sitting, Bristol should be allowed to move/walk for five minutes every hour;

As for standing, Bristol should be allowed to sit/rest for five minutes every hour;

As to whether he could work full time, i.e., attendance, yes, as long as the previously noted accommodations were provided.

17. It is significant that Dr. Fletcher again did not recommend intermittent leave for Bristol. Bristol nonetheless continued to ask American Water to approve intermittent leave as an accommodation. The primary reason American Water would not approve intermittent leave for Bristol was that it was necessary

to be able to staff the customer service center at all times. Allowing employees to miss work randomly would adversely affect American Water's ability to insure adequate staff. In fact, American Water considered Bristol a very good employee and would have preferred to retain him if possible. This was despite an allegation that Bristol had forwarded computer screen shots of customers to his personal email address, a terminable offense.

18. American Water considered its actions to be in compliance with the recommendations of Dr. Fletcher. Although attached to a headset wire, Bristol had some minimal ability to move about his work space. He was able to stand when he needed to stand and sit when he needed to sit. He was not required to lift anything over 25 pounds. He was able to leave his work station to walk around every hour or so, but would have to log out temporarily to do so. Employees could log out using a special "AUX" code for bathroom breaks.

19. It must be noted that during the entirety of the final hearing, Bristol sat without taking (or asking for) any breaks. He did not take advantage of breaks requested by others; rather, he remained seated as he talked with his counsel. His willingness and ability to remain seated during the final hearing flies in the face of his stated difficulties while working at American Water. While there may be some unstated reason that Bristol did not need relief at the final hearing,

without some explanation that fact significantly affects the credibility of his testimony.^{3/}

20. Bristol continued to miss many days (or parts of days) at work after his FMLA leave was used up. Being away from one's work station for over an hour was considered an absence by American Water.^{4/} He presumed that those absences would ultimately be covered or approved under his anticipated ADA leave, but no one ever told him that would be the case (nor did he inquire about it). His presumption was based on the fact that his prior absences while applying for FMLA leave had been covered once FMLA was approved. While waiting for a response to the ADA leave request, Bristol continued working at American Water - and continued missing all or parts of days from work. He would ask his direct supervisor, Shelby Weese, about the status of his ADA application from time to time, but she did not have any information from HR to share with him.

21. On February 13, 2014, Bristol and his union representative (Courtney Brown) met with HR business partner Delles. Bristol at that time explained that he believed his ADA leave would be retroactively applied to his unexcused absences. At this meeting, Delles explained that the FMLA leave Bristol had taken previously was mandated by law, i.e., American Water could not object to the leave once Bristol was approved. To obtain FMLA leave, an employee needs only to work the

requisite number of hours in their job. Thus, he was allowed to miss numerous days of work without recourse. The ADA leave, however, was different; the requirements for approval of ADA leave are more stringent than for FMLA leave. An employer does not have to grant ADA leave, but is required to approve FMLA leave if the employee qualifies.

22. At the meeting with Delles, Bristol advised her that he would be filing a claim against American Water with the Employee Equal Opportunity Commission. This was despite the fact that American Water had attempted to provide accommodations. Further, Bristol had never been chastised or reprimanded by American Water for applying for ADA leave or FMLA leave. In fact, American Water had prompted Bristol to apply for ADA when his FMLA leave was exhausted.

23. All the while, Bristol continued to be absent from work in excess of his available leave. Bristol had been notified on June 12, 2013, that he was being issued a Level I verbal warning for non-attendance pursuant to American Water's attendance policy. On that same day, he was notified that he was being issued a Level II written warning for non-attendance due to a second occurrence. On November 15, 2013, he was given a Level III final written warning for non-attendance.

24. A Level I verbal warning is issued when an employee uses up his sick leave and annual leave and then misses between

one hour and one full day of work, i.e., an unexcused absence. The warning would remain "active" in an employee's file for up to six months. A Level II written warning is issued when the employee has a second unexcused absence while the verbal warning was still active. The Level II warning would remain active for up to 12 months. A Level III final warning is issued when there is a third unexcused absence while the Level II warning was still active. If there is a fourth unexcused absence, the employee's contract of employment will be terminated. American Water followed its progressive discipline policy regarding Bristol's absences.

25. On February 24, 2014, Bristol was notified by American Water that his employment was being terminated. The stated reason for the termination of employment was excessive absences. The letter of notification indicated absences of over one hour on 34 additional days following his final written warning.

26. Bristol refused to accept the accommodations suggested by American Water. He maintained that the only way he could continue working was to be allowed to take intermittent leave whenever he felt the need. American Water could not agree to that plan because it had a defined need for customer service representatives to be available on the days they were scheduled, except for normal expectation of sickness or other unforeseen reasons for being absent. Otherwise, American Water would find

it impossible to effectively schedule the necessary number of representatives on any given day.

27. American Water did not offer Bristol an alternative job because, as a union member, he was in the only job covered by the union. Whether he could have withdrawn from the union was not discussed with Bristol (or addressed at final hearing).

28. After termination of his employment at American Water, Bristol became employed as a "salad chef" at a local restaurant called Jaco's. He works approximately seven hours each day and stands for the duration of his work shift, but he gets to walk around the kitchen area. Bristol did not say whether Jaco's was asked to provide any accommodations for his disability. This fact, too, negatively colors Bristol's credibility concerning his claims against American Water.

CONCLUSIONS OF LAW

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

30. The Florida Civil Rights Act of 1992 (the "Act" or "FCRA") is codified in sections 760.01-760.11, Florida Statutes. The Act's general purpose is "to secure for all individuals within the state freedom from discrimination because of race,

color, religion, sex, national origin, age, handicap, or marital status and thereby to protect their interest in personal dignity, to make available to the state their full productive capacities, to secure the state against domestic strife and unrest, to preserve the public safety, health, and general welfare, and to promote the interests, rights, and privileges of individuals within the state." § 760.01, Fla. Stat. When "a Florida statute [such as the FCRA] is modeled after a federal law on the same subject, the Florida statute will take on the same constructions as placed on its federal prototype." Brand v. Florida Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994). Therefore, the FCRA should be interpreted, where possible, to conform to Title VII of the Civil Rights Act of 1964, which contains the principal federal anti-discrimination laws.

31. Also, FCRA discrimination claims are analyzed under the same framework as claims under the Americans with Disabilities Act. See Rabb v. Sch. Bd. Orange Cnty, 590 Fed. Appx. 849, 850 (11th Cir. 2014); D'Angelo v. ConAgra Foods, Inc., 422 F.3d 1220 (11th Cir. 2005).

32. Section 760.10 provides, in relevant part:

- (1) It is unlawful employment practice for an employer:
 - (a) To discharge or 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.

33. American Water is an employer pursuant to section 760.02(7), Florida Statutes. Bristol is an employee as defined in 42 U.S.C. § 12111(4).

34. The term "discriminate" as used in section 760.10 includes "not making reasonable accommodations to the known physical or mental limitations of an . . . employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of such covered entity". 42 U.S.C. § 12112(b)(5)(A). A "failure to make reasonable accommodation" claim does not require animus or intent; it occurs when the covered entity fails to fulfill its duty to make a reasonable accommodation to the known physical or mental limitations of an otherwise qualified employee with a disability. However, the employer must demonstrate that the proposed accommodation would impose an undue hardship on the operation of the business. See Nadler v. Harvey, No. 06-12692, 2007 WL 2404705 (11th Cir. Aug. 24, 2007).

35. In the present case, American Water attempted to provide Bristol with reasonable accommodations for his disability. The work station was modified to allow Bristol opportunity to sit or stand as needed, and the extended

telephone cord gave him some range of motion (albeit not much, and not as much as Bristol wanted). From the totality of the evidence presented, the accommodation was sufficient. Bristol's demand for unlimited and unscheduled absences was not an accommodation that could be granted by American Water if it was to maintain a regular and reliable workforce each day.

36. Bristol's request for intermittent leave was not an accommodation for doing the job of customer service representative; it was an accommodation for not violating American Water's absentee policy. The job of customer representative was one that had to be performed on-site, thus American Water's proposed on-site accommodation was reasonable. The request for intermittent leave was not reasonable as it did not relate to Bristol's ability to perform the functions of the position.

37. Still, an analysis of Bristol's claim is in order to make it clear that, even without an accommodation, his claim for relief fails.

38. To establish a prima facie case of disability discrimination under the ADA and FCRA, the employee must show: (1) he has a disability; (2) he is a qualified individual, meaning he is able to perform the essential functions of the position with or without accommodation; and (3) the employer unlawfully discriminated against him because of the disability.

Raytheon Co. v. Hernandez, 540 U.S. 44, 49 n.3 (2003); D'Angelo v. ConAgra, supra; Holly v. Clairson Indus. L.L.C., 492 F.3d 1247, 1255-56 (11th Cir. 2007); and Morisky v. Broward Cnty., 80 F.3d 445, 447 (11th Cir. 1996).

39. Bristol meets the first prong of the analysis, as his degenerative disk disease substantially limits one or more of his major life activities. Further, American Water tacitly accepted the fact that Bristol was a disabled person.

40. To satisfy the second prong, Bristol must show that he is a qualified individual with a disability. That is, he must show that he is "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8); Davis v. Fla. Power & Light Co., 205 F.3d 1301, 1305 (11th Cir. 2000). There is a two-step inquiry to be made in order to determine whether the individual is a "qualified individual" under the ADA: 1) Whether the individual satisfies the requisite skills, experience, education and other job-related requirements, and 2) Whether the individual can perform the essential functions of the position, with or without accommodations. Criado v. IBM Corp., 145 F.3d 437, 443 (1st Cir. 1998).

41. Clearly Bristol satisfied the first part of the inquiry. He had already proven that he could handle the

requirements of the job and was considered a good employee. However, the position required the employee to be present at the customer call center in order to perform those functions. The reasonable accommodations suggested by American Water to allow Bristol to be present were rejected by Bristol as inadequate. Rather, he demanded intermittent leave as an accommodation, in effect allowing him to work at a completely random schedule as allowed by his back pain. American Water clearly articulated the reasons such a schedule would not be acceptable and that attendance at the call center was paramount. Inasmuch as Bristol could not perform the functions of the job from his home, he could not perform the job functions with or without an accommodation.

42. The third prong of the discrimination inquiry is whether the employee was subjected to unlawful discrimination. There is no evidence in the record that American Water discriminated against Bristol at all. The employer consented to Bristol's use of FMLA leave; it assisted Bristol in attempting to obtain leave under the ADA; American Water provided an ergonomic work station. In total, the record is clear that American Water wanted Bristol to be an employee, but Bristol's inability to work - even with accommodations - did not allow him to do so. Bristol, just like every other employee in the customer call center, was expected to be at work on a regular

and predictable schedule (excluding emergencies or occasional sick days). He was treated just the same as all other, non-disabled employees.

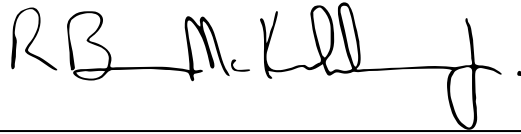
43. Section 760.10(7) states that it is unlawful for an employer to "discriminate against any person because that person has opposed any practice in which an unlawful employment practice under this section, or because that person has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section." Bristol's claim of retaliation by American Water fails because of the absence of sufficient evidence as to Bristol's alleged EEOC claim, i.e., whether it was specifically related to the actions which gave rise to the instant proceeding. There is no evidence that Bristol ever even filed such a claim.

44. As a result of the conclusions of law above, there is no reason to discuss damages or other relief for Bristol.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a Final Order be entered finding that American Water Service Company, Inc., did not discriminate against Micheal D. Bristol.

DONE AND ENTERED this 24th day of April, 2015, in
Tallahassee, Leon County, Florida.



R. BRUCE MCKIBBEN
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Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of April, 2015.

ENDNOTES

^{1/} The Proposed Recommended Order submitted by American Water based some of its findings on its exhibits 19-21, 24-26, 29, and 38. However, those exhibits were not admitted into evidence and the proposed findings supported by the exhibits were not considered in this Recommended Order.

^{2/} Unfortunately, Dr. Fletcher did not testify at final hearing nor was her deposition transcript offered into evidence. Therefore, it is difficult to determine what she specifically meant by her written comments. They were not particularly responsive to the questions asked and were somewhat general in nature.

^{3/} This finding is not meant in any way to diminish or dismiss the discomfort Mr. Bristol may be experiencing due to his lower back pain. It is obvious from his medical records that he has been dealing with the situation for a number of years. However, his demeanor and behavior during final hearing in this matter was not consistent with his statements concerning a need for hourly relief.

^{4/} Had Bristol taken a five minute break every hour of an eight-hour work day, i.e., at 9:00, 10:00, 11:00, then lunch, 2:00,

3:00, and 4:00, that would constitute only 30 minutes away from his desk. An absence was defined as over one hour in length. No one at final hearing discussed or explained why those intermittent breaks would not be sufficient for Bristol's needs.

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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.