STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RODERICK E. BILLUPS,

Petitioner,

vs. Case No. 15-0609

EMERALD COAST UTILITIES AUTHORITY,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, this case was heard on May 15, 2015, by video teleconference at sites in Tallahassee, Florida, and Pensacola, Florida, before E. Gary Early, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Joseph L. Hammons, Esquire
The Hammons Law Firm, P.A.
17 West Cervantes Street
Pensacola, Florida 32501

For Respondent: Bradley S. Odom, Esquire
Odom and Barlow, P.A.
1800 North E Street
Pensacola, Florida 32501

STATEMENT OF THE ISSUE

Whether the Petitioner was subject to an unlawful employment practice by Respondent, Emerald Coast Utilities

Authority, as a result of its failure to accommodate Petitioner's disability, in violation of section 760.10, Florida Statutes (2014).

PRELIMINARY STATEMENT

On September 15, 2014, Petitioner, Roderick E. Billups (Petitioner), filed a complaint of discrimination with the Florida Commission on Human Relations (FCHR) which alleged that Respondent, Emerald Coast Utilities Authority (ECUA or Respondent), violated section 760.10 by discriminating against him as a result of its failure to provide reasonable accommodation for his work-related disability.

On January 9, 2015, the FCHR issued a Determination: No Cause and a Notice of Determination: No Cause, by which the FCHR determined that reasonable cause did not exist to believe that an unlawful employment practice occurred. On January 29, 2015, Petitioner filed a Petition for Relief with the FCHR. The Petition was transmitted to the Division of Administrative Hearings to conduct a final hearing.

The final hearing was initially set for March 26, 2015, and was subsequently rescheduled for May 15, 2015.

On April 28, 2015, ECUA filed a motion to dismiss the petition for relief based upon the alleged res judicata effect of an employment termination case, DOAH Case No. 14-3100, heard

by the DOAH pursuant to a services contract for employee discipline proceedings and bid disputes. The motion was denied.

A prehearing stipulation was filed by the parties on May 6, 2015. Those facts admitted by both parties are incorporated herein.

At the final hearing, Petitioner testified on his own behalf. Petitioner's Exhibits 1-9 and 11-12 were received in evidence. Petitioner's Exhibit 4 was originally identified as a transcript of the predetermination/liberty interest hearing held prior to Petitioner's termination. After an objection as to the accuracy of the transcript, it was agreed that the transcript would be replaced by the audio recording of the hearing. The audio recording was filed on May 20, 2015, and received in evidence as Petitioner's Exhibit 4.

Petitioner's Exhibit 10, which consisted of an excerpt of the Transcript in DOAH Case No. 14-3100, was offered in evidence for the purpose of the stipulation of ECUA's counsel in that case at page 7, line 24 through page 8, line 4. The stipulation described the circumstances of the postponement of Petitioner's February 19, 2014, surgery. Petitioner argued that the stipulation was admissible as an admission of a party representative, while ECUA argued that a line of Supreme Court cases holds that a stipulation in a separate proceeding is inadmissible to establish the truth of the stipulated matter.

The undersigned reserved ruling on the admission of Petitioner's Exhibit 10, pending the briefing of the issue in the parties' post-hearing submittals. In its Proposed Recommended Order, ECUA correctly noted that "the stipulation in question, i.e., why surgery was delayed, was otherwise orally presented at the hearing, making the admissibility of that exhibit moot. It is worth noting, however, admissions made in a case are not generally admissible in another proceeding. See, e.g., rule 1.370(b), Fla. R. Civ. P." The stipulation at issue was not made in the context of a response to discovery under rule 1.370, but as an on-the-record stipulation of fact by Petitioner's counsel. Thus, the statement is admissible pursuant to section 90.803(18)(c), Florida Statutes (2014). Furthermore, the statement is entirely consistent with the explanation of the circumstances of the postponement of surgery provided by Petitioner and ECUA employee, Kimberly Scruggs. Having reviewed the arguments made, Petitioner's Exhibit 10 is received in evidence.

At the final hearing, Respondent presented the testimony of Kimberly Scruggs, the ECUA Human Resource Generalist; Cynthia Sutherland, the ECUA Director of Human Resources and Administrative Services; and Ernest Dawson, the ECUA Director of Regional Services. Respondent's Exhibits 1-22 and 25 were received in evidence.

Respondent's Exhibits 23 and 24, consisting of the Recommended Order entered by the DOAH, and the Final Order entered by the ECUA, in Case No. 14-3100, were offered in evidence. The undersigned reserved ruling on the admission of the exhibits, pending the briefing of the use to which the orders could be put, either as a matter of official recognition or under an exception to the hearsay rule, in the parties' post-hearing submittals. Having reviewed the arguments made, Respondent's Exhibits 23 and 24 are found to be entirely hearsay. The Recommended Order, having been entered under the authority of a contract for services between the ECUA and the DOAH, and the Final Order entered by the ECUA, do not fall within any exception to the hearsay rule in section 90.803, and are not subject to official recognition under rule 28-106.213(6) or sections 90.201-.203. However, hearsay is admissible in administrative proceedings under chapter 120, and "may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." § 120.57(1)(c), Fla. Stat. Therefore, Respondent's Exhibits 23 and 24 are received in evidence subject to the limitations applicable to hearsay evidence.

A two-volume Transcript of the hearing was filed on May 26, 2015. At the request of the parties, proposed recommended

orders were to be filed on June 16, 2015, 21 days from the date of the filing of the Transcript. The parties timely filed their post-hearing Proposed Recommended Orders, which have been considered in the preparation of this Recommended Order.

References to statutes are to Florida Statutes (2014) unless otherwise noted.

FINDINGS OF FACT

1. ECUA is a local governmental body which was formed by the Florida Legislature. It provides water, wastewater (sewer), and sanitation collection services in and around defined areas of Escambia County, Florida. ECUA employs more than 15 full-time employees at any given time.

2. Petitioner began his employment with ECUA in September 1995 as a Refuse Collector/Driver in ECUA's Sanitation Department. In 1999, Petitioner transferred to ECUA's Regional Services Department. At all times relevant hereto, he held the position of Utility Service Technician II.

3. On or about June 28, 2012, Petitioner was given a copy of the ECUA's revised Human Resources Manual and Employee Handbook (Manual). The Manual contains ECUA's human resource policies, including those for discipline and termination of employees.

4. Section B-13 of the Manual establishes disciplinary guidelines, including "general examples of unacceptable employee

conduct for which the employee may be disciplined up to and including termination of employment." Section B-13 A.10. provides that "disciplinary offenses" include:

> 10. Failure to maintain job qualifications:
>
> Failure to maintain required licenses, certifications, or other similar requirements such that an employee is no longer qualified for a position or can no longer perform assigned duties.

5. Section D-16 of the Manual establishes procedures for work related injuries suffered by ECUA employees. In addition to procedures for reporting and treating injuries, the Manual establishes that "[w]hen temporary, light, or unusual duties are suggested; these will be reviewed and, if available, arranged by the Human Resources Department staff, the supervisor and/or department head." Section D-16 A.2. further provides that:

> Employees will return to work anytime they are medically able, up to six (6) months from the date of injury. At that point, if unable to return to work the employee must retire, resign, or be terminated. The department head, after consultation with the Human Resources Director, may extend this time based on evaluation of the employee's ability to return to work.

6. ECUA's Regional Services Department has 111 employees, who are responsible for the maintenance of all water and wastewater services and infrastructure for the ECUA, including, approximately, 1,200 miles of water lines; 1,000 miles of wastewater lines; 22,000 manholes; 20,000 valves; 10,000 water

hydrants; and 473 air-release valves. Many of the valves are underground, often under asphalt or concrete.

7. The ECUA position description for Utility Service Technician II (UST II) describes the requirements of the position as:

> having sufficient physical ability and mobility to work in a field environment; to walk, stand, and sit for prolonged periods of time; to frequently stoop, bend, kneel, crouch, crawl, climb, reach, twist, grasp, and make repetitive hand movement in the performance of daily duties; to lift, carry, push, and/or pull moderate to heavy amounts of weight; to operate assigned equipment and vehicles; and to verbally communicate to exchange information.

8. Lifting heavy objects is a daily component of the UST II position. Items that are routinely lifted off of the job-site truck include pumps that can range from 50 to 80 pounds, 50 to 70 pound jackhammers, ductile and friction saws that weigh 50 to 60 pounds, and sections of pipe that can weigh from 25 to 100 pounds. While the pumps, saws, and other equipment can be retrieved from the bed of the truck, lengths of pipe are frequently carried on overhead racks. In addition to lifting tools and equipment from the truck, the job requires lifting 100-pound manhole covers using a hook, cutting asphalt and concrete with saws, digging to find leaks and access valves, and loosening valves that may not have been turned for decades. Manual dexterity is necessary when a utility worker is in a

hole, where they may be called on to grab tools and items passed down to the UST, or get past items in the hole.

9. Mr. Dawson testified credibly that UST work is very strenuous, involving work conditions and positions that are "not ergonomically sound," and becomes more-so when fatigue sets in. He further testified that given the demands of the job, one cannot expect to perform while keeping his or her arms close in to their body, stating that "it's hard to short-arm a heavy pump."

10. On December 18, 2013, the Petitioner incurred an on-the-job injury to his shoulder. The injury occurred while Petitioner was bearing down to loosen a valve that had become "frozen" as a result of having not been turned for a long period of time. While pulling up, he felt something "pop" in his arm. He finished up the job as well as he could. The shoulder injury was initially described as a strain or sprain.

11. After his work injury, Petitioner was directed to Sacred Heart Medical Group to be treated. Dr. Albrecht placed initial restrictions on Petitioner to avoid stooping, kneeling, crawling, climbing, and commercial driving. He was also limited to lifting only up to 15 pounds and pushing and pulling 15 pounds.

12. As a result of the injury, Petitioner took authorized leave under the Family Medical Leave Act (FMLA) beginning

December 19, 2013. As such, Petitioner was entitled to job-protected leave for a period of twelve weeks. At that time, Petitioner became eligible for, and received, workers' compensation benefits.

13. In January 2014, when it became apparent that Petitioner was going to be out for an extended period, a temporary employee was hired. However, the temporary employee was insufficient to meet the workloads of the Regional Services department, requiring closer supervision, and being limited in the work that the employee could perform independently.

14. On January 2, 2014, Petitioner was treated by his physician and was restricted from pushing, pulling, or lifting more than 15 pounds. He was to avoid climbing and commercial driving. He was also to avoid lifting more than five pounds with his right arm. His physician further opined that he was to be kept on a light-duty status and prescribed physical therapy. The diagnosis was "revised to strain of right shoulder."

15. On January 23, 2014, Petitioner was treated by his physician, Dr. Albrecht, who opined that conservative treatment had been maximized and a referral to orthopedic physician was made. Petitioner's restrictions remained the same, namely he was restricted from pushing, pulling, or lifting more than 15 pounds. He was to avoid climbing and commercial driving. He

was also to avoid lifting more than five pounds with his right arm.

16. Petitioner was seen on February 11, 2014, by Dr. Turnage, an orthopedic specialist. Dr. Turnage's impression was that Petitioner had "probable labral pathology and/or partial rupture of the biceps." Surgery was recommended.

17. Surgery was originally scheduled for February 19, 2014, but was delayed due to a problem in the process of approving the procedure by ECUA's third-party administrator for workers' compensation claims. Approval was ultimately obtained, and Petitioner was scheduled for surgery on March 14, 2014.

18. Although Petitioner's authorized FMLA leave was exhausted on March 12, 2014, Petitioner was not terminated from employment.

19. Petitioner presented for the scheduled surgery on March 14, 2014. As the procedure commenced, Petitioner's blood pressure fell to a degree that the surgeon terminated and postponed the surgery so that Petitioner could be evaluated by a cardiologist to determine if he could safely undergo surgery. Petitioner passed the "cardio test," and the surgery was rescheduled.

20. By letter dated March 26, 2014, Petitioner was advised that, before he could be restored to employment, he would have

to be able to perform the essential functions of his position, as evidenced by a "fitness-for-duty certificate."

21. The surgery on Petitioner's right shoulder and bicep was finally performed on April 16, 2014.

22. Petitioner next saw Dr. Turnage on April 29, 2014, approximately two weeks after surgery. Petitioner was, at that time, in a sling and an immobilizer. At that point, Dr. Turnage was of the opinion that Petitioner could not perform duties even at the sedentary level, and recommended that Petitioner undertake physical therapy.

23. On April 30, 2014, the Pensacola area experienced a 200-year rain event which caused significant damage to ECUA's water and wastewater systems. Mr. Dawson described the damage to ECUA's infrastructure as being worse than that caused by Hurricane Ivan. Repair of the water and wastewater systems was not work that could be delayed. In addition, ECUA was implementing Department of Environmental Protection requirements for its air release valves, as well as performing routine maintenance and upgrades. Due to the Regional Service department's extraordinary needs, Mr. Dawson determined that Petitioner's position needed to be filled by a person who could physically perform all of the required duties.

24. ECUA proved it was under extraordinary pressure due to the 200-year storm event of April 30, 2014, and needed "all

hands on deck" who could perform the essential functions of the job. Maintaining the UST II position open for an indefinite period while waiting for Petitioner to recover from his injury, thus necessitating the continued use of a less-capable temporary employee, would have been contrary to the interests of ECUA's customers, and an undue hardship to ECUA.

25. At some unspecified time after his surgery, Petitioner inquired as to whether he could repair water meters as a light-duty job with ECUA. He had performed that job during a period in 2005 in which he was restricted from duty due to a work-related injury. Repairing meters is not an essential function of a UST. A meter repair technician is a separate position within ECUA, with a separate job title.

26. Petitioner also requested that he be allowed to perform "cut-non-pay" work, which involves the termination of water service connections for non-paying customers. "Cut-non-pay" is performed by a service technician, which is a separate position within ECUA's Customer Service department, with a separate job title.

27. Petitioner's inquiries regarding light-duty work were forwarded to Ms. Scruggs. Ms. Scruggs testified that she made inquiry to the Regional Services department and to the Sanitation department as to the availability of light-duty work for Petitioner, but there was none. Ms. Scruggs' inquiries

continued after the expiration of Petitioner's FMLA leave, and up to the date of his termination, but there were no light duty opportunities within his restrictions and qualifications. Mr. Dawson also testified that the meter technician positions were fully staffed. There was no evidence to the contrary.

28. On May 27, 2014, Dr. Turnage executed a Workers' Compensation Uniform Medical Treatment/Status Reporting Form in which he identified Petitioner's work restrictions as sedentary duty, with a "likely" return to duty with no restrictions six weeks hence.

29. By letter dated June 3, 2014, Petitioner was advised by ECUA that, if he could not return to work by June 18, 2014, six months from the date of his injury, he would be terminated pursuant to sections B-13(10) and D-16 of ECUA's employee handbook, and that ECUA had reviewed the circumstances and determined there to be "no cause for any further extension of your inactive work status." The letter also advised Petitioner of his right to a predetermination/liberty interest hearing to contest the basis for his recommended termination, including the opportunity to "provide any documents, explanations, or comments."

30. On June 19, 2014, the predetermination/liberty interest hearing was held. Up to that date, ECUA had not received a medical clearance for Petitioner to return to full

duty. Petitioner indicated that his physical therapy was proceeding well and he believed that he would be cleared for duty on July 15, 2014. Petitioner stated that he could get a letter to that effect from Dr. Turnage on that day, since the doctor would be in his office, and asked that ECUA hold off on its decision. Petitioner also indicated that he would go to the office of his physical therapist immediately upon the conclusion of the hearing to get a current assessment of his status. In light of Petitioner's representation, he was given until June 20, 2014, to provide ECUA with medical clearance for work.

31. During the predetermination hearing, Petitioner made no additional request for a light-duty assignment, nor did he ask for any form of accommodation other than the additional day to provide letters from his doctor and physical therapist.

32. On June 20, 2014, Petitioner provided ECUA with a letter from his physical therapy provider. The letter stated that Petitioner's shoulder was improving and that the physical therapist anticipated Petitioner could return to work as a UST "following completion of his course of physical therapy." However, the physical therapist further stated that a medical release would ultimately be up to Dr. Turnage, and if there remained doubts regarding Petitioner's readiness to return to work, a Functional Capacity Evaluation could be administered to

identify his functional abilities. No specific dates were provided for the completion of therapy or the release for duty.

33. Upon receipt of the additional information, which suggested that Petitioner's ability to return to work as a UST II remained an unknown, ECUA determined that Petitioner still could not perform the essential duties of his job, either with or without accommodation. There were, at the time, no other jobs in the Regional Services department that could be performed by Petitioner, the only jobs not requiring strenuous activity being those of Mr. Dawson and his two assistants, all of which were filled. Thus, for a job in the Regional Services department, there were no reasonable accommodations for one who was unable to lift, carry, maneuver, and use heavy tools and equipment. Based on the information available at the time, the decision was made to terminate Petitioner's employment with ECUA.

34. On June 23, 2014, ECUA notified Petitioner that his employment with ECUA was terminated, and advised him of his right to request a formal hearing to appeal the employment action. The letter closed by stating that "[s]hould your medical condition improve, you are welcome to apply for any open position for which you are qualified and can perform the essential functions."

35. Petitioner's next appointment with Dr. Turnage was scheduled for July 8, 2014. The appointment was canceled, and rescheduled for July 22, 2014. On July 22, 2014, Petitioner was released for work involving no overhead lifting of greater than 20 pounds, and with the restriction that he keeps his arms close in to his body, i.e., no extending his arms.

36. On August 13, 2014, Petitioner was discharged from physical therapy, with the conclusion that Petitioner "[a]chieved the established therapy and RTW [return-to-work]/Functional goals." That information was not provided to ECUA.

37. In September 2014, Petitioner applied to ECUA for the position of lift-station mechanic assistant, a position that he became aware of through an ECUA on-line job posting. Petitioner did not meet the minimum qualifications for that position, and was therefore not hired. Based thereon, it is apparent that Petitioner was capable of accessing ECUA job opening announcements.

38. On October 23, 2014, Petitioner was released for duty with no restrictions. That information was not provided to ECUA.

39. From October 2014 to February 2015, at least five UST positions became available. Petitioner did not apply for any of those openings.

40. Between October 23, 2014, and January 1, 2015, ECUA hired thirty to forty sanitation truck drivers, positions for which Petitioner was qualified. Petitioner did not apply for any of those openings.

41. Petitioner did not perceive himself as disabled, and never complained to anyone at ECUA that he was disabled. He did not assert a disability at his predetermination hearing.

42. Petitioner did not report that he believed he was being discriminated against, on the basis of his disability or otherwise, to his supervisor, to Mr. Dawson, or to anyone in the Human Resources department.

CONCLUSIONS OF LAW

43. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2014).

44. The Florida Civil Rights Act of 1992 ("FCRA"), chapter 760, Florida Statutes, prohibits discrimination in the workplace.

45. 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.

46. Petitioner is a "person" as defined in section 760.02(6). Having greater than 15 full-time employees, ECUA is an "employer" as defined in section 760.02(7).

47. Section 760.11(1) provides that "[a]ny person aggrieved by a violation of ss. 760.01-760.10 may file a complaint with the [FCHR] within 365 days of the alleged violation." Petitioner timely filed his complaint.

48. Section 760.11(7) provides that upon a determination by the FCHR that there is no probable cause to believe that a violation of the Florida Civil Rights Act of 1992 has occurred, "[t]he aggrieved person may request an administrative hearing under ss. 120.569 and 120.57, but any such request must be made within 35 days of the date of determination of reasonable cause." Following the FCHR determination of no cause, Petitioner timely filed his Petition for Relief requesting this hearing.

49. Petitioner has the burden of proving by a preponderance of the evidence that the ECUA committed an unlawful employment practice. See St. Louis v. Fla. Int'l Univ., 60 So. 3d 455 (Fla. 3rd DCA 2011); Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981).

50. Chapter 760, Part I, is patterned after Title VII of the Civil Rights Act of 1964, as amended. When "a Florida statute 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. Fla. Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994); see also Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17 (Fla. 3rd DCA 2009); Byrd v. BT Foods, Inc., 948 So. 2d 921, 925 (Fla. 4th DCA 2007); Fla. State Univ. v. Sondel, 685 So. 2d 923 (Fla. 1st DCA 1996); Fla. Dep't of Cmty. Aff. v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991).

51. In addition, "because FCRA is patterned after Title VII and related federal statutes and regulations, courts construe FCRA in conformity with Title VII and the Americans with Disabilities Act (ADA)." Byrd v. BT Foods, Inc., 26 So. 3d 600, 605 (Fla. 4th DCA 2009); see also Wimberly v. Sec. Tech. Group, Inc., 866 So. 2d 146 (Fla. 4th DCA 2004)("Because Florida courts construe the FCRA in conformity with the ADA, a disability discrimination cause of action is analyzed under the ADA.").

52. Chapter 760, Part I, does not contain a definition of "handicap." However, its ADA counterpart provides the following definitions applicable to whether Petitioner has a disability:

> (1) Disability
>
> The term "disability" means, with respect to an individual—
>
> (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
>
> * * *
>
> (2) Major life activities
>
> (A) In general
>
> For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

42 U.S.C § 12102.

53. The ADA was amended in 2008 to broaden the range of those covered by the ADA. Thus, 42 U.S.C § 12102(4) provides that "[t]he definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter."

54. Given the limitations imposed on Petitioner as a result of his injury, and the period of time that those limitations were imposed, Petitioner had a handicap as that term is used in chapter 760, Part I, Florida Statutes.

55. Chapter 760, Part I, does not contain an explicit provision establishing an employer's duty to provide reasonable accommodations for an employee's handicap, but by application of the principles of the ADA, such a duty is reasonably implied. Brand v. Fla. Power Corp., 633 So. 2d at 511, n.12.

56. In applying the ADA, Florida courts recognize that:

> The ADA provides that a "qualified individual" is an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the job. 42 U.S.C.A. § 12111(8). If a qualified individual with a disability can perform the essential functions of the job with reasonable accommodation, then the employer is required to provide the accommodation unless doing so would constitute an undue hardship for the employer. 42 U.S.C.A. § 12112(b)(5)(A). Reasonable accommodations to the employee may include, but are not limited to, additional unpaid leave, job restructuring, a modified work schedule, or reassignment. 42 U.S.C.A. § 12111(9)(B).

McCaw Cellular Commc'ns v. Kwiatek, 763 So. 2d 1063, 1065-1066 (Fla. 4th DCA 1999).

57. Petitioner has not claimed that he was subject to disparate treatment by ECUA on the basis of his handicap. Rather, Petitioner claims that ECUA's alleged act of discrimination arose from its failure to provide reasonable accommodation for his handicap.

58. While discrimination based on disparate treatment requires a showing of some discriminatory intent, disability

discrimination based upon an employer's failure to provide an employee with a reasonable accommodation does not. In that regard:

> Unlike other types of discrimination claims, however, a "failure to accommodate" claim under the ADA does not require a showing of discriminatory intent . . . . "Rather, the failure to provide reasonable accommodations is a per se violation of the ADA, regardless of intentions." . . . "In other words, a claim that an employer failed to . . . provide reasonable accommodations to qualified employees, does not involve a determination of whether that employer acted, or failed to act, with discriminatory intent." . . . Such claims require only a showing that the employer failed "to fulfill its affirmative duty to 'make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability' without demonstrating that 'the accommodation would impose an undue hardship on the operation of the business.'" Accordingly, . . . the McDonnell Douglas burden-shifting framework, "while appropriate for determining the existence of disability discrimination in disparate treatment cases, is not necessary or useful in determining whether a defendant has discriminated by failing to provide a reasonable accommodation." (citations omitted).

Wright v. Hosp. Auth. of Houston Cnty., 2009 U.S. Dist. LEXIS 7504 *18-19 (M.D. Ga. Feb. 2, 2009); accord Nadler v. Harvey, No. 06-12692, 2007 U.S. App. LEXIS 20272 *10-11 (11th Cir. Aug. 24, 2007); Frazier-White v. Gee, No. 8:13-cv-1854-T-36TBM, 2015 U.S. Dist. LEXIS 48923 *18 (M.D. Fla. 2015); Jones v. Ga.

Dep't of Corr., No. 1:07-CV-1228-RLV, 2008 U.S. Dist. LEXIS 22142 *14-15 (N.D. Ga. Mar. 18, 2008).

59. In order to demonstrate that he has been the subject of workplace discrimination as a result of his handicap, Petitioner must prove that he was "qualified" to hold the position that led to the alleged discrimination. The rules adopted to implement the ADA provide that:

> The term "qualified," with respect to an individual with a disability, means that the individual satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires and, with or without reasonable accommodation, can perform the essential functions of such position.

29 C.F.R. § 1630.2(m).

60. The ADA rules further provide that "[t]he term essential functions means the fundamental job duties of the employment position the individual with a disability holds or desires. The term 'essential functions' does not include the marginal functions of the position." 29 C.F.R. § 1630(n).

61. In order to prevail in his claim as a qualified individual, Petitioner "must show either that he can perform the essential functions of his job without accommodation, or, failing that, show that he can perform the essential functions of his job with a reasonable accommodation." Davis v. Fla. Power & Light Co., 205 F.3d 1301, 1305 (11th Cir. 2000).

62. It is well-recognized that:

> The employee bears the burden of identifying an accommodation that would allow [the employee] to perform the essential functions of [the employee's] job . . . . Where the employee fails to identify a reasonable accommodation, the employer has no affirmative duty to engage in an "interactive process" or to show undue hardship . . . . We have likewise held that "the duty to provide a reasonable accommodation is not triggered unless a specific demand for an accommodation has been made." (citations omitted).

Spears v. Creel, No. 14-12261, 2015 U.S. App. LEXIS 6095 *12 (11th Cir. 2015).

63. In this case, the only accommodations specifically requested by Petitioner were that he be placed in a position as a meter repair technician or as a "cut-non-pay" service technician. However, there were no openings for either position. An employer is not required to create a new position, or transfer another employee from a position, as a reasonable accommodation for a disabled employee. See Davis v. Fla. Power & Light Co., 205 F.3d at 1305. Furthermore, the ADA

> does not require an employer to accommodate an employee in the manner she desires, so long as the accommodation it provides is reasonable. . . . An employer also is "not required to transform the position into another one by eliminating functions that are essential to the nature of the job as it exists." (citations omitted).

Rabb v. Sch. Bd. of Orange Cnty., 590 Fed. Appx. 849, 851 (11th Cir. 2014).

64. Despite considerable argument that ECUA should have offered to hold Petitioner's job open for an extended period, that request was not specifically made at the predetermination hearing or at any other time prior to Petitioner's termination. The only request for additional time was that made by Petitioner for one day from the date of the predetermination hearing to obtain a letter of clearance from his physician and/or his physical therapist. That request was granted, but the letter provided fell far short of demonstrating that Petitioner was ready to resume work. However, even if a request for extended leave had been made, under the facts of this case, Petitioner's termination would not have constituted a violation of the ADA, and thus the FCRA.

65. As of the date of Petitioner's termination, neither Petitioner's physical therapist nor his physician could provide a date on which Petitioner would be released for duty without restriction. Rather, the best that could be said was that Petitioner would be able to work "following completion of his course of physical therapy" -- for which no date was provided -- but that a medical release would ultimately be up to Dr. Turnage. With regard to a request for an indefinite leave

of absence to provide a period of recovery from a debilitating condition, it is established that:

> While a leave of absence may be a reasonable accommodation, the ADA does not require an employer to provide leave for an indefinite period of time because an employee is uncertain about the duration of his condition. (citations omitted).

Santandreu v. Miami-Dade Cnty., 513 Fed. Appx. 902, 905 (11th Cir. 2013).

66. It was a necessary element of Petitioner's job that he be capable of performing the strenuous physical activities required of a UST II, including lifting and carrying heavy equipment, digging, reaching to grasp heavy objects, pulling manhole covers, and turning tight and "frozen" valves. At the time the decision was made to terminate Petitioner's employment, Petitioner could not perform the essential functions of his job without accommodation, and could not perform the essential functions of his job with a reasonable accommodation other than assigning him marginal duties of a UST II, assigning him duties for other positions for which there were no openings, or holding his position open for an indeterminate period of time.

67. ECUA held Petitioner's position open well after his FMLA leave expired. However, by June 20, 2014, Petitioner was unable to provide ECUA with any definitive date on which he

would be cleared for work. As it turned out, Petitioner was not cleared to return to work until October 23, 2014.

68. The facts in this case are similar to those considered by the Fourth District Court of Appeal in Tourville v. Securex, Inc., 769 So. 2d 491 (Fla. 4th DCA 2000). In that case, the Court affirmed the lower court's final summary judgment upholding the employer's termination of an injured employee, holding that:

> Assuming that Donald Tourville was discharged from his job on February 20, 1993, the evidence was that he was totally disabled at that time and unable to work for an indefinite period. Although Tourville was cleared to return to work in April, 1993, he never sought reemployment with appellee.
>
> If appellee terminated Tourville's employment, such a discharge of Tourville was not unlawful under section 760.10(8)(a), Florida Statutes (1993), since his hospitalization and illness prevented him from performing the physical requirements of his job as an on-site security guard, even with reasonable accommodation.

Tourville v. Securex, Inc., 769 So. 2d at 492.

69. Since Petitioner could not perform the essential functions of the position of a UST II, and could provide no definitive date on which he would be able to do so, Petitioner was not a "qualified individual" on June 23, 2014, the date on which ECUA terminated his employment.

70. Petitioner did not prove by a preponderance of the evidence that ECUA discriminated against him by failing to provide reasonable accommodation for his disability in violation of the Florida Civil Rights Act, section 760.10, Florida Statutes.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations issue a final order finding that Respondent, Emerald Coast Utilities Authority, did not commit an unlawful employment practice in its actions towards Petitioner, Roderick Billups, and dismissing the Petition for Relief filed in FCHR No. 2014-01582.

DONE AND ENTERED this 19th day of June, 2015, in Tallahassee, Leon County, Florida.

E. GARY EARLY
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of June, 2015.

COPIES FURNISHED:

Joseph L. Hammons, Esquire
The Hammons Law Firm, P.A.
17 West Cervantes Street
Pensacola, Florida 32501-3125
(eServed)

Bradley S. Odom, Esquire
Odom and Barlow, P.A.
1800 North E Street
Pensacola, Florida 32501
(eServed)

Tammy Scott Barton, Agency Clerk
Florida Commission on Human Relations
4075 Esplanade Way, Room 110
Tallahassee, Florida 32399

Cheyanne Costilla, General Counsel
Florida Commission on Human Relations
4075 Esplanade Way, Room 110
Tallahassee, Florida 32399

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.