STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DAVE HARVEY,

Petitioner,

vs. Case No. 15-3941

MEALS ON WHEELS, ETC., INC.,

Respondent.
_____/

RECOMMENDED ORDER

On October 15, 2015, this case was heard at videoconference sites in Orlando and Tallahassee, Florida, by D. R. Alexander, the assigned Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Dave Harvey, pro se
1224 Cathcart Circle
Sanford, Florida 32771-5406

For Respondent: Richard V. Blystone, Esquire
Garganese, Weiss & D'Agresta, P.A.
Suite 2000
111 North Orange Avenue
Orlando, Florida 32801-2327

STATEMENT OF THE ISSUE

The issue is whether Petitioner was subject to an unlawful employment practice by Respondent, Meals on Wheels, Etc., Inc., on account of his race and disability, as a result of Respondent's maintenance of a hostile work environment, or as

retaliation to his opposition to an unlawful employment practice, in violation of section 760.10, Florida Statutes.

PRELIMINARY STATEMENT

On November 25, 2014, Petitioner filed an Employment Charge of Discrimination with the Florida Commission on Human Relations (FCHR) alleging that he was subjected to an unlawful employment practice by his employer, Meals on Wheels, Etc., Inc., on account of his race and disability, as a result of a hostile working environment, and in retaliation for protesting these discriminatory actions. After the FCHR determined there was no reasonable cause to believe that an unlawful employment practice occurred, Petitioner filed his Petition for Relief. The matter was then referred by the FCHR to DOAH to resolve the dispute.

At the hearing, Petitioner testified on his own behalf and presented two witnesses. Also, he pre-filed 141 pages of documents relating to a variety of topics. A ruling on their admissibility was reserved. To the very limited extent they are reasonably authentic and are relevant, and the hearsay statements therein corroborate other competent testimony, the documents have been considered.[1/] Respondent presented the testimony of two witnesses. Respondent's Exhibits 1 through 25 were accepted in evidence.

There is no transcript of the hearing. Respondent filed a proposed recommended order (PRO), while Petitioner filed a two-

page letter, with 18 pages of attachments. The PRO and letter (but not the attachments) have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. As its name implies, Respondent is a non-profit charitable organization engaged in the business of providing free meals, transportation services, and related assistance to senior citizens in the Sanford, Florida, area. Petitioner is a 64-year-old black male of Jamaican origin. He worked as a driver for Respondent from August 13, 2012, until October 23, 2014, when he was discharged for violating a company policy.

2. As a condition of employment as a driver, Petitioner was required to submit a medical fitness form regarding his current medical condition. In the form filed on July 30, 2012, he denied having any medical issues except non-insulin dependent diabetes, which is controlled by diet. See Ex. 21. An updated form was submitted on August 25, 2014, reflecting no change in his medical condition. Id. No other medical records were submitted to substantiate any other medical condition. When he interviewed for the position, Petitioner did not tell Respondent that he needed an accommodation for his diabetes or that he had any work restrictions. As such, management never considered Petitioner to have a disability.

3. Petitioner also provided a post-employment medical questionnaire on August 8, 2012, which stated that he had diabetes but that it was controlled by diet. Id. No other injuries, illnesses, or health abnormalities were reported.

4. As a driver, Petitioner was expected to adhere to Respondent's safety rules. To ensure compliance with the rules, shortly after being hired, Petitioner was required to read, and then sign a statement acknowledging that he understood, the organization's General Policies. See Ex. 1, p. 4. He was also required to acknowledge receipt of its Employee Handbook containing the Safety Policies and Procedures. See Ex. 3. In addition, Respondent's Transportation Coordinator, Mark Taylor, conducted periodic refresher training sessions with all drivers, including Respondent.

5. One of Respondent's most significant safety rules, if not the most significant, is a rule that requires drivers to provide door-to-door service. It provides in relevant part that "[u]pon arrival at a client's home, [a driver must] go to [the] door and knock. If the client needs help, you will be right there to assist." Ex. 1, p. 1, ¶ 6. This rule is intended to promote client safety and to ensure, to the extent possible, that Respondent will not face legal exposure because, for example, a client falls down while walking unassisted to or from the vehicle.

6. To comply with the above rule, drivers are required to get out of the van, go to the front door, knock, and then assist the client walking to the van. This is because the clients are elderly, some use walkers, and they need assistance from the driver while getting to and from the van. On August 21, 2014, Petitioner signed another statement acknowledging that he understood the policy, he agreed to follow it at all times, and he understood that "[t]ermination will result in not following this important safety rule." Ex. 7.

7. As a corollary to the above safety rule, drivers are instructed that they should never honk the vehicle's horn when they arrive at a client's home. Instead, they should get out of the vehicle and go to the front door of the residence. Petitioner was specifically told about the no-honking rule at two safety meetings.

8. The incident underlying Petitioner's discharge occurred on the morning of October 23, 2014. Petitioner was told to pick up Angelo Rosario and transport him to an appointment. The client is in his 80s, suffers from Alzheimer's disease, and uses a walker. He resides in a mobile home-type community with his daughter; and the driveway in front of the mobile home is unpaved with exposed roots making it easy to trip or fall. Although Mr. Rosario was not one of his regular clients, Petitioner had picked him up at least 12 times in the previous

30 days and was familiar with his condition and the area in which he lived.

9. The testimony describing the incident is conflicting. However, the accepted testimony shows that Petitioner arrived at the Rosario residence while Petitioner was on a personal cell phone call to his sister. When he finished the call, Petitioner blew the horn to alert the client that he was there. The honking was loud enough to annoy Rosario's neighbor who approached Petitioner's vehicle complaining about the noise. Suspecting that the neighbor's concern might cause a problem, Petitioner immediately telephoned Mr. Taylor and told him that he had blown the horn and anticipated that someone might be calling him with a complaint. Mr. Taylor told Petitioner that honking the horn was inappropriate, it violated an important safety rule, and he could not just sit in the van waiting for the client. Petitioner admits that during the telephone call, he shouted at Mr. Taylor and claimed he was unaware of the rule. After Mr. Taylor instructed Petitioner to go to the front door to pick up the client, Petitioner exited the vehicle and escorted the client to the van.

10. After speaking with Petitioner, Mr. Taylor immediately telephoned the client's daughter to get her version of events. Mr. Taylor learned that honking had recently occurred rather frequently at the client's home, and he believed that Petitioner

was the responsible driver, as Petitioner had transported the client at least 12 times during the previous 30 days.

11. Mr. Taylor immediately reported the incident to the Executive Director, Sherry Fincher, who evaluated the matter, and then decided to terminate Petitioner for violating the organization's most important safety rule. Notwithstanding Petitioner's claim to the contrary, it is the Executive Director alone, and not Mr. Taylor, who makes the decision to terminate an employee. A memorandum was prepared by Ms. Fincher that day indicating that Petitioner was being terminated "due to not following agency policies regarding door-to-door pick up of clients[,] . . . one of the most important policies to ensure the safety of all clients." Ex. 20. This was consistent with Respondent's policy, and one that Petitioner clearly understood. Petitioner's race and diabetic condition played no role in the decision.

12. Petitioner's Employment Charge of Discrimination was filed one month later. Prior to that time, there is no competent evidence that Petitioner had ever complained to Taylor or Fincher about any discriminatory practices by the organization.

13. Since the inception of this case, Petitioner has contended that he has a disability within the meaning of the law. At hearing, however, he acknowledged that his diabetic

condition does not affect any major life activity. To support his disability discrimination claim, he testified that on an undisclosed date in 2014, he asked Mr. Taylor if he could eat meals or snacks at designated times because of his diabetic condition but was told he could not. The accepted testimony shows, however, that Mr. Taylor advised him that he could eat whenever necessary, as lunch and break hours are not set in stone. To avoid a drop in his blood sugar, Petitioner was told that he was free to eat or drink something at any time, or even bring a bag lunch with him while driving his routes. Even assuming arguendo that Petitioner had a disability, which he does not, the contention that a disability formed the basis for an unlawful employment practice must fail.

14. Petitioner also contended that Belinda Stum, a white female lead driver, was treated differently than he and was given more "leeway" when she violated a rule. However, the only evidence concerning a rule violation by Ms. Stum involved a different rule. After a client accidentally slipped while being assisted out of the van, Ms. Stum immediately reported the incident to Mr. Taylor and then filed a completed incident report. Other than Ms. Stum, Petitioner was unable to specifically identify any other similarly-situated employees outside his protected class (or even ones within his own class) who were allegedly treated differently than he.

15. Although a client testified at hearing that on several occasions she had observed Ms. Stum sitting in her van when picking up clients, even if this is true, the client admitted that she never reported this to anyone at Respondent's organization so that the alleged violation could be investigated and disciplinary action taken, if appropriate.

16. Petitioner also contends he was subjected to a hostile working environment due to his race and disability. He claimed that Mr. Taylor, a white male, called him "boy," required him to answer "yes sir," and would gesture a "cut throat" sign towards him, threatening him to keep his mouth shut. This assertion was not corroborated by any other evidence, and Mr. Taylor denied the charge. The testimony of Mr. Taylor is accepted as being more credible on this issue. Assuming arguendo that he had a disability, there is no evidence whatsoever that Petitioner was subjected to a hostile working environment due to his diabetic condition.

17. Finally, there is no evidence regarding the charge that Petitioner was terminated in retaliation for engaging in a protected activity. Indeed, Petitioner submitted no credible proof that he complained to management regarding any discriminatory practices that precipitated the alleged retaliation, other than "standing up for his rights" on the day he was terminated, and Taylor and Fincher credibly testified

that they were unaware of any such complaints. Complaints made at hearing that he is still owed money and was never paid for training are not germane to this dispute.

18. Petitioner is now working part-time as a driver for a retirement center in the Sanford area. He says he is also employed as a substitute teacher for the Seminole County School Board. Both jobs equate to full-time employment. According to evaluations and testimony at hearing, Petitioner was considered a "good worker," "likeable," and someone who "did a pretty good job." While his evaluations showed he met expectations, his last evaluation noted that he needed improvement in following orders. Except for being "written up" one time for being late to work, Petitioner had no other disciplinary action.

CONCLUSIONS OF LAW

19. Petitioner has the burden of proving by a preponderance of the evidence that Respondent committed an unlawful employment practice. See § 120.57(1)(j), Fla. Stat. In his Employment Charge of Discrimination, Petitioner alleges that as a black male with a disability, he "was discriminated against on the bases or [sic] race, disability and retaliation by [his] former employer."

20. Discrimination by an employer against an individual because of race or disability, or in retaliation for engaging in

a protected activity, are unlawful employment practices under the law. See §§ 760.10(1)(a) and (7), Fla. Stat.

21. Petitioner can establish a prima facie case for discrimination based on race or disability through the use of direct evidence, which requires actual proof that the employer acted with a discriminatory motive when making the employment decision in question, or by circumstantial evidence, which typically requires a plaintiff to satisfy the four-prong test established in McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973). Here, because no direct proof was shown, Petitioner's claim is based solely on circumstantial evidence. Johnson v. Great Expressions Dental Ctrs. of Fla., 132 So. 3d 1174 (Fla. 3d DCA 2014). Under this burden-shifting framework, once a plaintiff makes out a prima facie case, the burden shifts to the defendant to articulate a non-discriminatory explanation for the employment action, and if the defendant does so, the burden shifts back to the plaintiff to prove that the defendant's explanation is pretextual.

22. Petitioner seeks to prove race discrimination circumstantially through a disparate treatment theory. Accordingly, Petitioner must prove the following to establish a prima facie case: (1) Petitioner is a member of a protected group; (2) Petitioner was subjected to adverse employment action; (3) Respondent treated similarly-situated employees

outside of the protected class more favorably than Petitioner; and (4) Petitioner was qualified for the position. City of West Palm Bch. v. McCray, 91 So. 3d 165, 171 (Fla. 4th DCA 2012).

23. Petitioner has failed to prove discrimination by indirect or circumstantial evidence. More specifically, he failed to provide sufficient evidence that any other similarly-situated employees outside his protected group were treated more favorably than he. Even if a prima facie case were made, there is evidence to show that Petitioner's termination was due solely to his violating an established work rule.

24. Petitioner also alleges that he was subject to discrimination on account of his disability. As a threshold issue to substantiate this charge, Petitioner must first prove that he has a disability.

25. An impairment's minor interference in major life activities does not quality as a disability. Toyota Motor Mfg., Kentucky, Inc. v. Williams, 534 U.S. 184, 198 (2002). An impairment's impact must be permanent or long-term. Id. If an impairment is readily corrected by medication or other measures such as a diet, it is not an impairment that substantially limits a major life activity. Vande Zande v. Wisc. Dep't of Admin., 44 F.3d 538, 544 (7th Cir. 1995). On this issue, the evidence shows clearly that Petitioner's impairment was not permanent, and that it could be controlled by medication or

diet. Accordingly, Petitioner has failed to prove that he has a physical impairment that substantially limits a major life activity. The disability complaint must fail.

26. Finally, to establish a prima facie case of retaliation, Petitioner must show that: (1) he was engaged in an activity protected by chapter 760; (2) he suffered an adverse employment action by his employer; and (3) there was a causal connection between the protected activity and the adverse employment action. See Pennington v. City of Huntsville, 261 F.3d 1262, 1266 (11th Cir. 2001).

27. Petitioner has failed to satisfy the first prong of the test. His Employment Charge of Discrimination was not filed until one month after he was discharged. Though he asserts in that document that he was terminated for protesting Respondent's "discriminatory employment practices," no record evidence was submitted to support this claim. Indeed, there is no evidence whatsoever that Petitioner engaged in a protected activity within the meaning of the law, or that Respondent had any knowledge of such an activity. Accordingly, the charge of retaliation must fail.

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 Petition for Relief, with prejudice.

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

D. R. ALEXANDER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of November, 2015.

ENDNOTE

[1/] For purposes of the record, the undersigned has designated the 141 pages as Petitioner's Composite Exhibit 1.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days of the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will render a final order in this matter.