

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JACKIE GRAHAM,

Petitioner,

vs.

Case No. 17-3092

VETERAN OF FOREIGN WARS
DEPARTMENT OF FLORIDA,

Respondent.

FINAL ORDER

A Recommended Order was entered in this case on December 15, 2017. The parties were given ten days from the date of the Recommended Order to submit written exceptions pursuant to section 70-77(g)(13), Pinellas County Code. Neither party having filed such exceptions, the Findings of Fact and Conclusions of Law in the Recommended Order are adopted as set forth below.

APPEARANCES

For Petitioner: Jeremiah Ray Blocker, Esquire
W. Jason Odom, Esquire
North Florida Lawyers, PLLC
101 Northeast 1st Avenue
Ocala, Florida 34471

For Respondent: Jason Kenneth Smith
Veteran of Foreign Wars
Department of Florida
9500 Bay Pines Boulevard, No. 217
St. Petersburg, Florida 33744

STATEMENT OF THE ISSUE

Whether Respondent committed an unlawful employment practice by not providing Petitioner with a reasonable accommodation for her disability, in violation of section 70-53 of the Pinellas County Code, also known as the Pinellas Human Rights Code ("PHRC") and; if so, the appropriate remedy.

FINDINGS OF FACT

The following facts are found based on the greater weight of the competent substantial evidence and the credibility and demeanor of the witnesses presented at the final hearing.

The Parties and Jurisdiction

1. Veteran of Foreign Wars Department of Florida ("VFW") is a non-profit, tax exempt veterans' service organization. Although it works closely with the U.S. Department of Veterans Affairs ("VA"), it is not a governmental entity. VFW has branches in Ocala, Orlando, Miami, and St. Petersburg. Petitioner was employed at the branch located in St. Petersburg.

2. The primary purpose of VFW is to assist its clients, U.S. military veterans and their families, in making claims for benefits and accessing services through the VA and other veteran service providers.

3. VFW's St. Petersburg office had no more than nine employees during any time material to this action.

4. Petitioner worked for VFW from November 2012 until September 10, 2014, as a Service Officer.

5. Mr. Thie hired and supervised Ms. Graham until he retired as VFW branch director in July 2013; after that Ms. Graham reported to Mr. Smith.

Terms of Employment at VFW

6. Most, if not all, of VFW's employees at the relevant time period were military veterans and nearly all suffered from service-related disabilities.

7. VFW has in place written policies and procedures that prohibit, among other things, harassment and discrimination on the basis of race, color, religion, sex, national origin, age, or disability. At the time of her hiring, Petitioner received a copy of Respondent's employee manual setting forth this anti-discrimination policy.

8. According to its employee manual, VFW employees' expected work schedule was from 8:00 a.m. to 4:30 p.m., with 30 minutes unpaid for lunch. However, Mr. Thie's undisputed testimony at the hearing was that the VFW allowed its St. Petersburg branch employees to work a flexible schedule or "flex time." Any employee who wanted to deviate from the schedule in the Policy Manual was required to designate his or her start time and work an eight-hour day. The only restrictions were that employees were expected to report to work within

15 minutes of their designated start time, and all work must occur within the "core time" defined as 7:00 a.m. to 8:30 p.m. VFW allowed exceptions to an employee's self-designated schedule for illness and medical appointments.

9. There is no evidence VFW had a written procedure for addressing requests for reasonable accommodations for disabilities. Mr. Thie's unrefuted testimony, however, established that VFW had employees who were "severely disabled," and VFW allowed these employees to work varied schedules as long it was within the "core time."

10. Mr. Thie's uncontroverted testimony established that working a predictable schedule during the 7:00 a.m. to 8:30 p.m. window was a necessary component of the Service Officer position.

Ms. Graham's Disability and Work History

11. Ms. Graham's duties as a Service Officer included assisting veterans and widows with filing and pursuing benefits, compensation, and indemnity claims through the VA office. By all accounts, Petitioner was a good employee "when she was there."

12. Prior to being employed at VFW, Ms. Graham served in the United States Army for nine and a half years in various positions including medic, military police officer, and drill sergeant.

13. Petitioner has several service-related medical conditions. VFW had access to Petitioner's VA disability claims

file. Ms. Graham explained she had discussed with Mr. Thie and Mr. Smith the disability ratings related to her medical conditions involving her foot, shoulder, back and neck, as well as her tinnitus.

14. Petitioner takes medication for her medical conditions that make her drowsy and affect her ability to awaken. Petitioner also suffers from depression and anxiety, which affect her motivation, mood, and sleep. There is no testimony Ms. Graham specifically discussed her depression and anxiety with her supervisors.

15. Ms. Graham notified both Mr. Thie--and later Mr. Smith--she had trouble waking up, and needed to come to work late. Ms. Graham, however, never tied her request to come in later to her anxiety, depression, sleep disorder or any other disability.

Q. Explain how you asked for the accommodation.

Ms. Graham: I asked if I could come in later in the morning and work later in the afternoon since the guys came in early and left early. I could come in late and work late because I had trouble getting up and in the morning.

As a result of this request, Mr. Smith replied, "don't worry about it, Jackie . . . you know I'll take care of you."

16. Mr. Thie testified he knew Ms. Graham had difficulty getting to work on time, but did not know until approximately

June or July 2013 that her inability to wake up and come into work was related to a disability. Regardless, he claims Petitioner never requested to alter her work schedule as a reasonable accommodation for her disability.

Q. Okay. And from your recollection, Ms. Graham never came to you and said that she wanted reasonable accommodations to alter her work schedule even more due to her disability?

A. No.

* * *

Q. Now, at any point when you were Ms. Graham's supervisor, did you allow her to flex her work schedule due to her disability?

A. No. I let her flex her schedule because of where she physically lived.

* * *

Q. Did Ms. Graham ever ask you for reasonable accommodations to flex her schedule due to disability?

A. She asked to be flexed in her schedule but it was never clarified that it was due specifically to a disability. She claimed she had a difficulty with waking up early and she wanted to come in later, so we gave her some flexible time on that as long as she came in within that core time.

17. On June 26, 2013, Mr. Thie issued Ms. Graham a memorandum with the subject line, "Tardiness" ("Memo").^{1/} The Memo warned Ms. Graham if she came in later than her designated start time, she would be charged with unauthorized leave without

pay. Mr. Thie testified that at the time he issued the Memo, he was not aware that her disability was the reason she was reporting to work late:

Q. So you gave her a counseling statement about tardiness knowing full well that she had a disability that would interfere with her ability to show up for work on time, is that correct?

A. I don't think at that point that the disability was being discussed as the reason for her tardiness.

Q. Did you withdraw that counseling statement when you found out about her disability?

A. No, because she never told me--we had the discussion about her being late, and again, it wasn't discussed as being a service-connected disability or disability[.] [T]he comment was, "I have difficulty being able to wake up."

18. There was no evidence VFW ever reduced Ms. Graham's pay or that she suffered any discipline because of her inability to arrive to work on time.

19. In July 2013, Mr. Smith became Ms. Graham's supervisor. Ms. Graham continued to report late to work, but there is no evidence Mr. Smith disciplined her or took any adverse action against her for her tendency to report to work late. To the contrary, Ms. Graham testified about a July 2014 e-mail from a VFW employee requesting Petitioner to submit a leave request form for time missed when she came to work late. When she brought the

e-mail to Mr. Smith's attention and explained she worked late to make up the hours, he said to her "No, don't worry about it, your time is covered." Ms. Graham understood that Mr. Smith would not discipline her or deduct her pay for coming in late as long as she worked an eight-hour day.

20. Mr. Smith also testified he knew Ms. Graham arrived to work late, but he never disciplined her. He also was not aware that she was late to work because of a disability until he received the amended Charge. He testified he did not fire her for being late.

21. On or around September 2, 2014, Petitioner provided false information to VFW related to a leave request. Although she reported she needed time off for a medical appointment, Mr. Smith learned from another employee that Ms. Graham had not attended a medical appointment, but instead was not in the office because she was meeting someone she had been dating.

22. Shortly thereafter, Mr. Smith learned from a VFW employee that Petitioner used VFW letterhead to send a letter to the home of someone she had been dating. The letter gave false information regarding VFW services and was sent to disguise the relationship she was having with the individual. Petitioner's use of the letterhead and dissemination of false information in the letter violated VFW policies.

23. Around this time, Mr. Smith also received complaints from one or more VFW employees that Petitioner was not completing her work, but rather "passing it off" to other employees. Ms. Graham had been previously reprimanded about completing her work and advised she should not ask others to complete the work for her.

24. Mr. Smith terminated Ms. Graham on September 10, 2014. He did not terminate Petitioner because of her tardiness or unreliability to report to work at a certain time. Rather, he made the decision to terminate Ms. Graham after he concluded Ms. Graham had (1) provided false information regarding a leave request; (2) misused VFW letterhead; and (3) asked other employees to finish her uncompleted work.^{2/}

25. Ms. Graham could not recall whether Mr. Smith informed her that tardiness was one of the grounds for her termination at the time he fired her.

CONCLUSIONS OF LAW

26. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. § 120.65(7), Fla. Stat. (2013); §§ 70-51 and 70-77, Pinellas Cnty. Code.

27. At issue is whether Respondent violated section 70-53(a)(1), which provides it is an unlawful discriminatory employment practice for an employer to:

a. Fail or refuse to hire, discharge, or otherwise discriminate against an individual with respect to compensation or the terms, conditions, or privileges of employment because of race, color, religion, national origin, sex, sexual orientation, age, marital status, or disability.

28. Respondent provided testimony that the VFW St. Petersburg branch employed no more than nine people at any one time, and thus Respondent is an "employer" within the meaning of section 70-51, Pinellas County Code.

29. The prohibitions against employment discrimination based on a disability in section 70-53 of the Pinellas County Code mirror the prohibitions found in state and federal laws. See §§ 760.01 and 760.11, Fla. Stat. (Florida Civil Rights Act of 1992); 42 U.S.C. § 12112(a), et. seq. ("Americans with Disabilities Act" or "ADA"). As a result, section 70-53 should be construed in a manner that is consistent with those laws. See, e.g., Conway v. Vacation Break, Case No. 01-3384 (Fla. DOAH Nov. 16, 2001) (construing chapter 70 of the Pinellas County Code in accordance with the comparable state and federal laws); Blacknell v. Freight Mgmt. Servs., Inc., Case No. 04-2854 (Fla. DOAH Oct. 27, 2004) (same).

30. Petitioner claims she was discriminated when she requested a flexible start time because she had trouble waking up due to her anxiety, depression, and medication; and that VFW refused this request. VFW argues Petitioner never requested a

reasonable accommodation because of her disability, and it allowed Petitioner to have a flexible start time.

31. An employer impermissibly discriminates against a qualified individual when the employer does not reasonably accommodate the individual's disability. See Brown v. Fla. Atl. Univ., 2016 U.S. Dist. LEXIS 146853, at *1 (S.D. Fla. Oct. 24, 2016). To establish a claim for disability discrimination for failure to accommodate, Petitioner has the burden to prove:

- (1) She has a disability;
- (2) She is a qualified individual, in that she is able to perform the essential functions of her position with or without reasonable accommodation; and
- (3) Respondent unlawfully discriminated against her because of the disability.

See 42 U.S.C. § 12112(b)(5)(A); Boyle v. City of Pell City, 866 F.3d 1280, 1288 (11th Cir. 2017). In addition, Petitioner has the burden of showing she requested a reasonable accommodation, and it was not provided. See Warren v. Volusia Cnty., 188 Fed. Appx. 859, 862-63 (11th Cir. 2006); Nadler v. Harvey, 2007 U.S. App. LEXIS 20272, at *14 (11th Cir. 2007).^{3/}

32. Petitioner has satisfied her burden of establishing she was disabled and she was otherwise qualified for the Service Officer position. At issue is whether she requested and was denied a reasonable accommodation.

33. "The burden of identifying an accommodation that would allow a qualified employee to perform the essential functions of her job rests with that employee, as does the ultimate burden of persuasion with respect to showing that such accommodation is reasonable." Earl v. Mervyns, Inc., 207 F.3d 1361, 1367 (11th Cir. 2000). Ms. Graham, however, is not entitled to the accommodation of her choice, but only a reasonable accommodation --one that allows her to perform the essential functions of the job. See Banim v. Fla. Dep't of Bus. & Prof'l Reg., 689 Fed. Appx. 633, 634 (11th Cir. 2017).

34. Petitioner had difficulty coming to work at a consistent time and requested a flexible start time. Modified schedules and flexible start times can be "reasonable accommodations." See 42 U.S.C. § 12111(9)(B).

35. Respondent first counters Ms. Graham never explicitly asked for the flexible start time as an accommodation for a specific disability. Although Petitioner bears the burden of identifying a reasonable accommodation that would allow her to perform her job, she did not have to use magic words to trigger VFW's obligations to accommodate her. See U.S. v. Hialeah Hous. Auth., 418 Fed. Appx. 872, 876 (11th Cir. 2011) ("a plaintiff need not mention the ADA or use the magic word 'accommodation' or phrase 'reasonable accommodation.'"). The evidence establishes both her supervisors were aware of her numerous disabilities and

Mr. Thie admitted he eventually learned Petitioner's inability to waken was related to a disability. Thus, VFW's obligation to assess how it could accommodate Ms. Graham was triggered.

36. Ms. Graham, however, fails to meet the ultimate burden of proving she was denied an accommodation. See Banim, 689 Fed. Appx. at 634 (affirming summary judgment where employee failed to show employer refused to accommodate his disability). As set forth in the findings of fact above, the totality of the more credible evidence establishes both Mr. Thie and Mr. Smith allowed Ms. Graham to set her own reporting time, and even when she failed to arrive at that time, they allowed her to make up her time as long as it was within the core working hours. Although she was provided the Memo in July 2014, this alone is not an adverse action. Cf., Davis v. Town of Lake Park, 245 F.3d 1232, 1241 (11th Cir. 2001) ("[C]ourts are wisely reluctant to treat job performance memoranda as actionable under Title VII where they do not trigger any more tangible form of adverse action such as loss in benefits, ineligibility for promotional opportunities, or more formal discipline."); Lewis v. Michaels Stores, Inc., 2007 U.S. Dist. LEXIS 56599, at *18 (M.D. Fla. Aug. 3, 2007) (finding negative job performance memoranda placed in an employee's file did not meet the statutory threshold for adverse employment action). The arrangement she had with her supervisors allowed her to perform her work duties and she did not suffer any

pay deductions, disciplinary action, or other adverse action against her because she was late. See Isaac v. Wal-Mart Stores E., LP, 2017 U.S. Dist. LEXIS 201305, at *11 (S.D. Ala. Dec. 7, 2017) (“[W]hether viewed through the prism of a disability discrimination theory or a retaliation theory [plaintiff] is unable to make out a prima facie case of discrimination or retaliation, for the simple reason that Walmart took no adverse employment action against him”).

37. VFW did not terminate Petitioner for her lack of punctuality or her disability. Although VFW mentioned Petitioner’s tardiness in its response to the Pinellas OHR’s investigation, the evidence at the hearing established VFW terminated Ms. Graham for a number of fireable offenses including: (1) providing false information relating to a sick leave request; (2) improper use of VFW letterhead; and (3) failing to complete her work.

38. Ultimately, Petitioner’s failure to establish she was denied a reasonable accommodation or that she suffered an adverse action because of her disability defeats her claim of disability discrimination.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED Petitioner’s Charge (PC 1512-019) is DISMISSED.

DONE AND ORDERED this 3rd day of January, 2018, in
Tallahassee, Leon County, Florida.



HETAL DESAI
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 3rd day of January, 2018.

ENDNOTES

^{1/} Both Mr. Thie and Mr. Smith signed the Memo because Mr. Thie was the outgoing director and Mr. Smith had already been selected as the incoming director.

^{2/} The Pinellas OHR Investigative Report also mentions other violations of VFW policy and that after her termination, VFW had discovered Petitioner had committed ethical violations, but no evidence of this behavior was presented at the hearing or corroborated by any non-hearsay testimony.

^{3/} Although the traditional McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), burden shifting framework applies to most intentional disability discrimination cases, see, e.g., Bennett v. Dominguez, 196 Fed. Appx. 785, 791 (11th Cir. 2006), in the 11th Circuit "failure to accommodate" cases are an exception to this general rule. See Holly v. Clairson, L.L.C., 492 F.3d 1247, 1262 (11th Cir. 2007) (finding McDonnell Douglas framework is not well-suited to the analysis of reasonable accommodation claims under the ADA); Moore v. Comput. Scis. Corps., 2017 U.S. Dist. LEXIS 142923, at *20 (N.D. Ala. Sep. 5, 2017) (explaining plaintiff could prove her ADA failure to accommodate claim without engaging in a burden-shifting analysis).

COPIES FURNISHED:

Brijesh Patel, Esquire
Pinellas County Attorney's Office
6th Floor
300 Court Street
Clearwater, Florida 33756-5165

Paul Valenti, Human Rights/Director EEO Officer
Pinellas County Office of Human Rights
5th Floor
400 South Fort Harrison Avenue
Clearwater, Florida 33756

Jackie Graham
5906 60th Place East
Palmetto, Florida 34221

Jason Kenneth Smith
Veteran of Foreign Wars Department of Florida
No. 217
9500 Bay Pines Boulevard
St. Petersburg, Florida 33744
(eServed)

Jeremiah Ray Blocker, Esquire
North Florida Lawyers, PLLC
101 Northeast 1st Avenue
Ocala, Florida 34471
(eServed)

W. Jason Odom, Esquire
North Florida Lawyers, PLLC
101 Northeast 1st Avenue
Ocala, Florida 34471

Paul J. Genova, Jr.
Senior Equal Opportunity Coordinator
Pinellas County Office of Human Rights
Fifth Floor
400 South Fort Harrison Avenue
Clearwater, Florida 33756

NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to seek judicial review by filing a petition for writ of certiorari in the circuit court of the Sixth Judicial Circuit in and for Pinellas County, Florida, within 30 calendar days of the date of this Final Order. § 70-77(14), Pinellas Cnty. Code.