

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JACKIE GRAHAM,

Petitioner,

vs.

Case No. 17-3092

VETERAN OF FOREIGN WARS
DEPARTMENT OF FLORIDA,

Respondent.

_____ /

RECOMMENDED ORDER

On November 1, 2017, the final hearing in this case was conducted via videoconference in Tallahassee and St. Petersburg, Florida, before Administrative Law Judge Hetal Desai of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner: Jeremiah Ray Blocker, Esquire
W. Jason Odom, Esquire
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For Respondent: Jason Kenneth Smith^{1/}
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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, what is the appropriate remedy.

PRELIMINARY STATEMENT

On December 3, 2014, Petitioner Jackie Graham ("Petitioner" or "Ms. Graham") dual-filed a charge of discrimination against Veteran of Foreign Wars Department of Florida ("Respondent" or "VFW") with the Pinellas County Office of Human Rights ("Pinellas OHR") and the Equal Employment Opportunity Commission, ("EEOC") PC-1512-019/EEOC Case No. 15-H-2015-00018 or ("Charge"). In her original Charge, Ms. Graham alleged a number of claims based on gender discrimination and retaliation. In January 2015, Petitioner amended her Charge to add a disability discrimination claim. Ultimately, Petitioner alleged she was subject to sexual harassment and disparate treatment based on her gender; wrongful termination in retaliation for complaining about the gender discrimination; and denial of a reasonable accommodation for her disability.

The EEOC found it did not have jurisdiction over the Charge because Respondent did not have the minimum threshold of employees to qualify as an "employer" under any federal statute. The EEOC dismissed the Charge, transferring it to the Pinellas OHR. Pursuant to the procedures set forth in the PHRC, the Pinellas OHR conducted an investigation and found "reasonable cause" on one of the claims: VFW failed to reasonably

accommodate Petitioner's disability. Regarding the remaining claims, the Pinellas OHR found it was unreasonable to believe that VFW committed any unlawful act of gender discrimination or retaliation.

Pursuant to the procedures in the PHRC, the Pinellas OHR attempted resolving the conflict between the parties through its conciliation process. After it failed to do so, it forwarded the case to DOAH for assignment of an Administrative Law Judge ("ALJ") to conduct an evidentiary hearing solely on Petitioner's reasonable accommodation claim.^{2/}

An Initial Order was issued on May 26, 2017, but the final hearing was delayed multiple times.^{3/} A telephonic pre-hearing conference was held on October 24, 2017. The final hearing was held on November 1, 2017.

Petitioner testified on her own behalf and offered the testimony of Paul Valenti, the Pinellas OHR's director.^{4/}

Respondent presented the testimony of two witnesses:

(1) Mr. Kenneth Thie, the former VFW director for St. Petersburg and (2) Mr. Jason Smith, the current St. Petersburg VFW director.

The following exhibits were admitted into evidence: Petitioner's Exhibits B, D, E, N, and M; and Respondent's Exhibits 1 through 4.^{5/}

At the conclusion of the evidentiary hearing, each party gave a closing argument and agreed to file proposed recommended

orders (PROs) within ten days after the final hearing transcript was filed at DOAH.

The Transcript of the final hearing was filed on November 22, 2017. Petitioner timely filed a PRO; Respondent did not file a PRO. Petitioner's PRO, the Transcript of the final hearing, as well as the evidentiary record, were carefully considered in the preparation of this Recommended Order.

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. 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 employed 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 Veterans 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 Policy 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 that he did know Ms. Graham had difficulty getting to work on time, but did not know until

approximately June or July 2013 that Ms. Graham's disability was related to Petitioner's inability to wake up and come into work. 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").^{6/} 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 or her tendency to report to work late. Rather, 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.^{7/}

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) [S]he has a disability;
- (2) [S]he 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. 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 F. App'x 859, 862-63 (11th Cir. 2006); Nadler v. Harvey, 2007 U.S. App. LEXIS 20272, at *14 (11th Cir. 2007).^{8/}

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 F. App’x 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 specifically stated she needed the flexible start 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 F App'x 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 report 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, she did not suffer any pay deductions, disciplinary action or other adverse action indicating VFW did not accommodate her. See Isaac v. Wal-Mart Stores E., LP, 2017 U.S. Dist. LEXIS 201305, at *11 (S.D. Ala. Dec. 7, 2017) ("Whether 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"); cf., Davis v. Town of Lake Park, 245 F.3d 1232, 1241 (11th Cir. 2001) ("Courts 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).

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) improper use of VFW letterhead; (2) providing false information relating to a sick leave request; 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.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the charge of discrimination (PC-1512-019) by Petitioner Jackie Graham against Respondent Veteran of Foreign Wars Department of Florida, be DISMISSED with prejudice.

DONE AND ENTERED this 15th day of December, 2017, in
Tallahassee, Leon County, Florida.

Hetal Desai

HETAL DESAI
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Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of December, 2017.

ENDNOTES

^{1/} During the pre-hearing conference, the participants discussed whether Mr. Smith (who is not an attorney and had not been qualified as a representative under DOAH's rules of procedure) could serve as the representative for Respondent. This case is governed by the Pinellas Human Rights Code, which does not require a party to be represented by counsel and is silent as to who can represent a party in these proceedings. Pinellas County Office of Human Rights allowed Mr. Smith to be the point of contact for purposes of its investigation and accepted his response to the initial Charge of Discrimination. At the final hearing, Mr. Smith indicated he had authority to represent the VFW. Petitioner had no objection to Mr. Smith's role as representative. Because Mr. Smith meets the requirements of Florida Administrative Code Rule 28-106.106, he was allowed to represent VFW during these proceedings.

^{2/} Petitioner conceded at the pre-hearing conference and final hearing that the jurisdiction of DOAH was limited to the claims for which the Pinellas OHR found reasonable cause.

^{3/} Section 70-77(e) of the Pinellas County Code gives the directive that the administrative hearing shall be conducted within 60 days of the Pinellas OHR director's request, but this timeframe was waived by Petitioner's requests to continue the

hearing, emergency circumstances caused by Hurricane Irma, and the transfer of the case from one ALJ to another. Under these circumstances, the hearing was held within a reasonable time. See § 70-77(h), Pinellas Cnty. Code.

^{4/} Petitioner listed seven witnesses, including herself, but Mr. Valenti was not one of them. As there was no objection from Respondent, Mr. Valenti was allowed to testify.

^{5/} Petitioner offered a VA document relating to her disability rating, but this document was not admitted because Petitioner had not listed the document as an exhibit on her exhibit list, had not disclosed the document to Respondent, had not provided the document to DOAH prior to the hearing, and could not provide a copy of the document to the ALJ during the video hearing. Regardless, Petitioner was allowed to testify as to her disabilities at length.

^{6/} 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.

^{7/} 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.

^{8/} 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), 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).

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 10 days from the date of this Recommended Order. Any exceptions to this Recommended Order to be considered by the above-signed Administrative law Judge should be filed with the Division of Administrative Hearings, which will issue the final order in this case.