STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DAVID RIGGINS,

Petitioner,

vs. Case No. 17-3106

HILLSBOROUGH COUNTY,

Respondent.
_____/

RECOMMENDED ORDER

The final hearing in this matter was conducted before J. Bruce Culpepper, Administrative Law Judge of the Division of Administrative Hearings, pursuant to sections 120.569 and 120.57(1), Florida Statutes (2017),[1/] on October 3, 2017, by video teleconference sites in Tallahassee and Tampa, Florida.

APPEARANCES

For Petitioner: David C. Riggins, pro se
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For Respondent: Stephen M. Todd, Esquire
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STATEMENT OF THE ISSUE

Whether Petitioner, David Riggins, was subject to an unlawful employment practice by Respondent, Hillsborough County, based on his disability (handicap) in violation of the Florida Civil Rights Act.

PRELIMINARY STATEMENT

On November 14, 2016, Petitioner filed a Charge of Discrimination with the Florida Commission on Human Relations (the "Commission") alleging that Respondent, Hillsborough County (the "County"), violated the Florida Civil Rights Act ("FCRA") by discriminating against him based on his disability (handicap) and in retaliation for his practice of an activity protected by the FCRA.

On May 12, 2017, the Commission notified Petitioner that no reasonable cause existed to believe that the County had committed an unlawful employment practice.

On May 25, 2017, Petitioner filed a Petition for Relief with the Commission alleging a discriminatory employment practice. The Commission transmitted the Petition to the Division of Administrative Hearings ("DOAH") to conduct a chapter 120 evidentiary hearing.

The County filed a Motion to Dismiss on June 19, 2017. The Motion was denied. The County also filed a Request for Judicial Notice on June 27, 2017. The Request for Judicial Notice was granted.

The final hearing was initially scheduled for July 10, 2017. Following the County's motion, the final hearing was continued to October 3, 2017, and was held on that date.[2/] At the final hearing, Petitioner testified on his own behalf. Petitioner also

called Michael Newsome, Louis Ocampo, and Mark Maples as witnesses. Petitioner's Exhibits 1 through 37 and 40 were admitted into evidence. The County called George Cassady as a witness. The County's Exhibits 2 through 8 were admitted into evidence.

A two-volume Transcript of the final hearing was filed on October 23, 2017. At the close of the hearing, the parties were advised of a ten-day timeframe following receipt of the hearing transcript at DOAH to file post-hearing submittals. Both parties timely filed Proposed Recommended Orders which were duly considered in preparing this Recommended Order.

FINDINGS OF FACT

1. Petitioner brings this action alleging that his current employer, the County's Public Utilities Department, discriminated against him based on his disability and in retaliation for his challenge to his job reassignment.

2. Petitioner started working for the County in January 2008. Petitioner was hired as an Electrician 3 in the Public Utilities Department.

3. On January 18, 2011, Petitioner was promoted to Electronic Technician III. Generally, Petitioner's job was to inspect, maintain, and repair field instrumentation related to the County's water treatment and wastewater facilities. By all

accounts, he was a competent, knowledgeable, and reliable employee without any issues in his performance.

4. In January 2014, Petitioner's position was reclassified from Electronic Technician III to Industrial Instrumentation and Controls Technician ("IIC Technician"). The job duties for Electronic Technician III and IIC Technician were substantially similar.

5. With the reclassification, Petitioner's pay was increased to $28.48 per hour (effective October 1, 2013). On October 1, 2014, Petitioner received a market equity pay increase to $29.33 per hour.

6. On March 2, 2011, Petitioner suffered a serious work-related accident. Petitioner was electrocuted while he was servicing modules at a water treatment plant.

7. The electric shock left Petitioner with two medical conditions identified as Syncope and Collapse. Syncope causes a loss of consciousness resulting from insufficient blood flow to the brain. Collapse causes an individual to fall down or become unconscious due to sickness or exhaustion.

8. At the final hearing, Petitioner explained that the shock he received caused the electrical impulses in his heart to stop functioning efficiently. Petitioner relayed that his medical condition causes him to experience episodes of dizziness and light-headedness. He also periodically suffers from blurred

vision, tunnel vision, and on several occasions, loss of consciousness. Petitioner cannot predict when he will experience the symptoms of Syncope or Collapse. An episode could happen at any time.

9. In a medical evaluation in July 2012 with his treating cardiologist, Dr. J. Thompson Sullebarger, Petitioner recounted that since his electric shock, he "had several spontaneous episoded [sic] of syncope with similar symptoms and still has dizziness sometimes when he gets up in the morning." Petitioner also complained of dizziness, paresthesia (a tingling or numbness on the skin), and vertigo.

10. Dr. Sullebarger opined that Petitioner "is unsafe to work on ladders or in buckets or high places." Dr. Sullebarger further instructed Petitioner to "[a]void ladders and working in high places."

11. On September 25, 2012, Petitioner returned to Dr. Sullebarger. Petitioner "continued to complain of dizziness and episodes of near syncope." Petitioner relayed that he "is dizzy almost every day."

12. On August 14, 2013, Petitioner submitted a "Request for Reasonable Accommodation" to the County based on his medical conditions. Petitioner relayed that he should avoid working from heights, elevated platforms, or catwalks, as well as working around open wet wells. In a follow-up letter to the County

clarifying his request, Petitioner represented that he could perform his IIC Technician duties if he was allowed to wear a safety harness and lanyard when working at heights and elevated platforms.

13. In January 2014, at the County's request, Petitioner's job of Electronic Technician III was analyzed to determine the essential physical requirements of his job. The study found that "climbing in [the Electronic Technician III] position is required." However, "the frequency of climbing ladders was determined to be approximately 10%."

14. On June 20, 2014, the County notified Petitioner that, in light of his medical limitations, it would no longer allow him to work as an Electronic Technician III/IIC Technician. The County determined that climbing ladders of various heights was an essential function of Petitioner's duties. Therefore, because Petitioner's medical provider had instructed him to "avoid climbing on ladders," the County determined that Petitioner could no longer perform the duties of an IIC Technician.

15. The County offered Petitioner three months to search for another job with the County. The County informed Petitioner that if he did not find another job within the allotted time, the County would proceed with a Due Process Hearing to terminate his employment.

16. Petitioner valued his IIC Technician job very much and did not want to lose it. Consequently, over the ensuing three months, Petitioner neither applied for nor requested another job with the County. Instead, Petitioner elected to challenge the County's employment decision at a Due Process Hearing.

17. The Due Process Hearing was held on February 9, 2015. Petitioner did not prevail. Thereafter, on March 20, 2015, George Cassady, the Director of the County's Public Utilities Department, formally removed Petitioner from his IIC Technician job.

18. However, rather than terminate Petitioner, Mr. Cassady offered to place him in the position of Business Analyst II. Mr. Cassady wrote in a letter to Petitioner, "I have decided to accommodate your restriction(s) by transferring you to the job of Business Analyst II in the Maintenance Planning Support Team. Your salary will be $26.00 per hour. Your transfer is effective Monday, March 23, 2015."

19. Petitioner was very disappointed to lose his IIC Technician job. He was also distressed that his salary was to be reduced from $29.33 to $26.00 per hour. Therefore, before he accepted the transfer, in June 2015, Petitioner appealed the Due Process Hearing determination to the Hillsborough County Civil Service Board. Petitioner argued that his reassignment to Business Analyst II was a "demotion."

20. The Civil Service Board held an evidentiary hearing on March 16, 2016. The Civil Service Board agreed with Petitioner that, because his salary was reduced, his placement in the Business Analyst II position should be considered a demotion. However, the Civil Service Board concluded that Petitioner failed to prove that the County "acted without just cause" to demote him to Business Analyst II.

21. Subsequent to the Civil Service Board decision, on May 4, 2016, Petitioner and the County entered into a settlement agreement to amicably resolve the issue of his reassignment. Through the settlement agreement, the County agreed to increase Petitioner's base hourly rate of pay to $28.00 per hour (up from $26.75). The County also agreed to pay Petitioner a lump sum of $5,000. For his part, Petitioner agreed to "release and/or withdraw . . . [a]ny and all claims, grievances, appeals in any forum associated with the placement of [Petitioner] in the Business Analyst II position as of March 23, 2015." Petitioner also assented that his placement as a Business Analyst II was a "transfer of his employment and not a demotion."

22. Petitioner's current action focuses, not on his placement in the Business Analyst II position, but on the County's subsequent refusal to hire him back in his previous job as an IIC Technician.

23. On two separate occasions, Petitioner applied with the County for an IIC Technician position. In February 2015, the County advertised an IIC Technician opening. The advertisement did not list any physical requirements for the position. The County did not interview Petitioner for the job.

24. In July 2016, the County advertised to fill another IIC Technician position. In this advertisement, the County expressly listed that the job specific competencies included, "[a]bility to climb ladders." Petitioner applied again.

25. In September 2016, the County notified Petitioner that he would not be considered for the IIC Technician position. Petitioner received an e-mail from the County Human Resources office stating, "[w]e were very impressed with your qualities as an applicant and even though other candidates overall Qualifications were deemed most compatible with the duties and responsibilities of this position, we hope your interest in career opportunities with Hillsborough County will continue." Petitioner asserts that, based on the County's hiring matrix, he was the most qualified candidate given his years of experience and his possession of the required certified central system technician license, which no other candidate possessed. Nevertheless, he was excluded from consideration for the position.

26. Petitioner asserts that no legitimate reason existed for the County to reject his application to fill the IIC Technician position. Petitioner disputes that his current medical restrictions prevent him from performing the essential functions of an IIC Technician.

27. At the final hearing, Petitioner expressed that he is no longer medically prohibited from climbing ladders. On September 21, 2015, following another medical examination, Dr. Sullebarger stated that Petitioner's only restriction was "Harness at Heights (otherwise no restrictions)." Petitioner's understanding is that Dr. Sullebarger will allow him to climb ladders if he wears a safety harness.

28. On March 3, 2016, Dr. Sullebarger completed a Medical Certification Form for the Commission. On this form, Dr. Sullebarger wrote that Petitioner is "at risk for dizziness or fainting." Dr. Sullebarger opined that Petitioner's use of a safety harness was reasonably necessary in order for him to perform the required functions of an IIC Technician. Dr. Sullebarger specified that "working with a harness at heights will reduce [Petitioner's] risk of injury due to falls."

29. Despite the apparent improvement of his condition, at the final hearing, Petitioner affirmed that he still suffers from Syncope and Collapse. Petitioner further acknowledged that his medical condition could make performing the IIC Technician duties

more risky. For instance, if an IIC Technician needed to climb a ladder to access a device, and the location did not support the use of a safety harness, then Petitioner would have to work at heights without the medically required safety equipment.

30. However, despite his unpredictable episodes of dizziness and his need to use a safety harness, Petitioner argued that he can competently perform the IIC Technician job. Initially, Petitioner disputed that climbing ladders is an essential function of an IIC Technician. Petitioner expressed that an IIC Technician typically programs and calibrates electronic equipment on level ground. Petitioner relayed that for the months prior to losing his IIC Technician position, he satisfactorily performed his responsibilities without climbing ladders. At the final hearing, Petitioner insisted that, at most, ten percent of the IIC Technician job involves climbing ladders.

31. Furthermore, to the extent that climbing ladders is required, reasonable accommodations exist to allow him to perform the essential functions of the job. These accommodations include hydraulic lifts, as well as the use of a safety harness at heights. Petitioner asserted that neither preventive measure would change the scope of the IIC Technician responsibilities. Consequently, his medical condition poses no safety threat.

32. Petitioner further argued that his medical restriction should not preclude him from the IIC Technician job because every IIC Technician is required to use a safety harness.[3/] Therefore, because Petitioner's need to use a "safety harness at heights" is a precaution that every IIC Technician must exercise, his medical condition should not prevent the County from hiring him as an IIC Technician.

33. Finally, Petitioner disputed the County's position that situations exist in which IIC Technicians are not able to use a safety harness to perform their duties. In particular, Petitioner argued that it is standard industry practice for technicians to wear a harness with two lanyards when transitioning at heights, such as from a ladder to a platform. Further, no County employee can perform inspections or repair work six feet or more above any work surface without a safety harness or some other approved means of fall protection, such as guardrails. Therefore, Petitioner's medical restriction would not affect his job performance in any way.

34. Petitioner pursues four results with his action. First, Petitioner seeks an immediate return to his IIC Technician position. Next, Petitioner wants his salary restored to its previous rate ($29.33 per hour) along with any lost merit increases. Third, Petitioner desires to have his seniority status restored. Prior to his demotion, he was the most senior

member of his team. He has no seniority as a Business Analyst II. Finally, Petitioner seeks the ability to renew his professional certifications. He alleged that the Business Analyst II job severely hinders his professional prospects by making it more difficult for him to renew and maintain his professional certifications.

35. Mr. Cassady testified at the final hearing regarding the County's refusal to rehire Petitioner as an IIC Technician. Mr. Cassady, as the Director of the Public Utilities Department, oversees the division in which Petitioner works. Mr. Cassady made the ultimate decision regarding Petitioner's current employment status.

36. Mr. Cassady described the County's public works facilities as an "industrial work environment." The County oversees and monitors 17 separate water treatment and water reclamation plants. Mr. Cassady commented that some chemical storage tanks "exceed 40 feet in height and have limited guardrails around them."

37. Mr. Cassady recounted that he reviewed Petitioner's situation at great length. Mr. Cassady imparted that he is constantly aware of, and watching out for, the safety of his employees. Mr. Cassady relayed that an IIC Technician is responsible for working around high voltages and in close

proximity to large machinery that includes rotating pieces of equipment motors and pumps.

38. In considering Petitioner's medical restrictions, Mr. Cassady determined that climbing ladders and working at heights to access or inspect electronic controls and components is an essential function of the IIC Technician job. Mr. Cassady explained that, although the frequency of the use of ladders might vary amongst assignments, all IIC Technicians must be able to climb and use ladders.

39. Mr. Cassady described several routine tasks in which an IIC Technician operates in or on elevated equipment that do not support the use of a safety harness. These situations include climbing ladders to service electronic instruments located on top of raised pipes. In addition, IIC Technicians regularly ascend ladders to small platforms located on top of the 40-foot-tall treatment tanks to calibrate level control devices within the tank.

40. Consequently, Mr. Cassady concluded that the responsibilities of the IIC Technician position would directly expose Petitioner to the inherent dangers associated with working at heights. Mr. Cassady did not dispute that Petitioner possesses the skills and qualifications to perform the job of ICC Technician (not considering his disability). However, he was (and is) very concerned about the possibility that Petitioner

could be injured if he were to experience a sudden or unexpected dizzy or fainting spell while climbing a ladder or accessing a high platform. Mr. Cassady adamantly believes that Petitioner's unfortunate medical condition creates unacceptable safety hazard for both Petitioner and the County should he return to the IIC Technician position.

41. Mr. Cassady admitted that the County purposely did not interview Petitioner for the IIC Technician job openings. However, he denied that the County refused to consider Petitioner just because he has a disability. Instead, the County's overriding concern was that Petitioner could not work safely at heights due to his medical condition, which causes him to experience unpredictable dizziness or loss of consciousness.

42. On the other hand, while Petitioner was unable to perform the job of IIC Technician, Mr. Cassady believed that Petitioner's analytical and practical skills remain an asset to the County. Therefore, Mr. Cassady offered Petitioner the Business Analyst II position. A Business Analyst focuses on data collecting and analyzing as opposed to operations. Not only does the Business Analyst II position provide Petitioner the opportunity to use his knowledge and training in the same field as an IIC Technician, but Petitioner can perform the job on the ground and is not required to climb ladders or work at heights.

43. The Business Analyst II position includes a higher pay scale than the IIC Technician. However, Mr. Cassady set Petitioner's initial salary at a lower rate ($26 per hour) to maintain equity with the four other County employees who had been assigned to the same position for a longer period of time.

44. Mr. Cassady denied that the County refused to hire Petitioner as an IIC Technician job in retaliation for his request for a Civil Service Board review of his placement in a Business Analyst II position. On the contrary, Mr. Cassady believed that Petitioner was a valuable employee with the Public Utilities Department. Mr. Cassady offered Petitioner the Business Analyst II job specifically as a way for the County to retain his services.

45. Mr. Cassady explained that he has always been supportive of Petitioner's career development with the Public Utilities Department. In fact, he rejected Human Resources' initial recommendation to terminate Petitioner's employment when the County determined that Petitioner was unable to perform the essential functions of his IIC Technician job. Mr. Cassady has also encouraged Petitioner to improve his marketable skills by furthering his education, courtesy of a County scholarship program.

46. Finally, Mr. Cassady testified that implementing the accommodations that Petitioner suggests is unworkable.

Mr. Cassady contended that a number of the locations in which an IIC Technician must work do not support the use of a safety harness and lanyard. For example, the treatment tanks are not equipped to enable the use of a safety harness while climbing up the 40-foot-tall ladder or when transitioning from the ladder to the platform. Mr. Cassady asserted that any such modifications would be prohibitively expensive or impractical to install.

47. Several County employees who are currently employed as IIC Technicians testified at the final hearing regarding their job requirements. These witnesses discussed the role of climbing ladders and working in high places in performing their duties.

48. Mark Maples, an IIC Technician with the County, testified that he regularly climbs ladders while performing his job. Mr. Maples stated that he must use a ladder during several of his routine work responsibilities, such as checking a flow meter device at a water treatment plant. Mr. Maples estimated that he uses a ladder approximately 40 percent of the time he works.

49. Mr. Maples also remarked that he routinely climbs ladders in work settings that do not offer a mechanism to tie off a safety harness. Consequently, a safety harness would not provide an IIC Technician complete protection while working at heights.

50. Mr. Maples also expressed his discomfort with the idea of working with an IIC Technician who was not medically cleared to work on elevated equipment. As an example, Mr. Maples described how IIC Technicians are responsible for inspecting and calibrating the level control devices situated on top of each large treatment tank. Each tank is 40 feet high. To accomplish such an inspection, the IIC Technician must scale a ladder attached to the side of the tank. The tank provides no apparatus to which a safety harness may be fastened. Based on Petitioner's medical condition, which could cause sudden and unanticipated dizziness, Mr. Maples was concerned whether Petitioner could safely accomplish the required inspection. Mr. Maples would be worried that Petitioner might faint and fall down the ladder or tumble off the top of the tank. Mr. Maples declared that a "one-time fall is one time too many."

51. Michael Newsome, another IIC Technician, testified that he regularly uses a ladder to perform his job. Mr. Newsome explained that his job requires him to work in elevated places, and he has to climb a ladder to get there. Mr. Newsome estimated that he needs a ladder less than five percent of the time.

52. Louis Ocampo has worked as an IIC Technician for the County for approximately two years. Mr. Ocampo testified that he regularly uses a ladder in his job. He works at heights and elevated areas, such as treatment tanks and on video cameras.

Mr. Ocampo estimated that he needs a ladder approximately ten percent of the time.

53. Based on the competent substantial evidence in the record, the preponderance of the evidence does not establish that the County discriminated against Petitioner based on his disability (handicap). Accordingly, Petitioner failed to meet his burden of proving that the County discriminated against him in violation of the FCRA.

CONCLUSIONS OF LAW

54. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this cause pursuant to sections 120.569, 120.57(1), and 760.11(7), Florida Statutes. See also Fla. Admin. Code R. 60Y-4.016.

55. Petitioner brings this action alleging that the County discriminated against him by not hiring him back as an IIC Technician. Petitioner's cause of action against the County is based on: 1) discrimination based on a disability (handicap) that, in actuality, does not prevent him from performing the essential functions of an IIC Technician, and 2) retaliation based on his decision to challenge his "demotion" to Business Analyst II with the County's Civil Service Board.

56. The FCRA protects individuals from disability discrimination in the workplace. See §§ 760.10 and 760.11, Fla. Stat (2016). Section 760.10 states, 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, pregnancy, national origin, age, handicap, or marital status.

57. The FCRA also protects employees from certain retaliatory acts. The FCRA's anti-retaliation provision is found in section 760.10(7) and states, in pertinent part:

> (7) It is an unlawful employment practice for an employer . . . to discriminate against any person because that person has opposed any practice which is an unlawful employment practice under this section, or because that person has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section.

58. Section 760.11(7) permits a party for whom the Commission determines that there is not reasonable cause to believe that a violation of the FCRA has occurred to request an administrative hearing before DOAH. Following an administrative hearing, if the Administrative Law Judge ("ALJ") finds that a discriminatory act has occurred, the ALJ "shall issue an appropriate recommended order to the commission prohibiting the practice and recommending affirmative relief from the effects of the practice, including back pay." § 760.11(7), Fla. Stat.

59. The burden of proof in administrative proceedings, absent a statutory directive to the contrary, is on the party asserting the affirmative of the issue. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981); see also Dep't of Banking & Fin., Div. of Sec. & Investor Prot. v. Osborne Stern & Co., 670 So. 2d 932, 935 (Fla. 1996)("The general rule is that a party asserting the affirmative of an issue has the burden of presenting evidence as to that issue."). The preponderance of the evidence standard is applicable to this matter. See § 120.57(1)(j), Fla. Stat.

60. The FCRA is patterned after Title VII of the Civil Rights Act of 1964, as amended. Accordingly, Florida courts hold that federal decisions construing Title VII are applicable when considering claims under the FCRA. Harper v. Blockbuster Entm't Corp., 139 F.3d 1385, 1387 (11th Cir. 1998); Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17, 21 (Fla. 3d DCA 2009); and Fla. State Univ. v. Sondel, 685 So. 2d 923, 925 n.1 (Fla. 1st DCA 1996).

61. Specifically regarding disability discrimination, the FCRA is construed in conformity with the Americans with Disabilities Act ("ADA") found in 42 U.S.C. § 12101 et seq. Cordoba v. Dillard's, Inc., 419 F.3d 1169, 1175 (11th Cir. 2005) (citing Wimberly v. Secs. Tech. Grp., Inc., 866 So. 2d 146, 147 (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."). See also Holly v. Clairson Indus., L.L.C., 492 F.3d 1247, 1255 (11th Cir. 2007)(FCRA claims are analyzed under the same standards as the ADA.).

62. Employees may prove discrimination by direct, statistical, or circumstantial evidence. Valenzuela, 18 So. 3d at 22. Direct evidence is evidence that, if believed, would prove the existence of discriminatory intent without resorting to inference or presumption. Denney v. City of Albany, 247 F.3d 1172, 1182 (11th Cir. 2001); Holifield v. Reno, 115 F.3d 1555, 1561 (11th Cir. 1997).

63. Petitioner did not present direct evidence of disability discrimination by the County. Similarly, the record in this proceeding contains no statistical evidence of discrimination related to the County's decision not to hire Petitioner in an IIC Technician position.

64. In the absence of direct or statistical evidence of discriminatory intent, Petitioner must rely on circumstantial evidence of disability discrimination to prove his case. For discrimination claims involving circumstantial evidence, Florida courts follow the three-part, burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), and its progeny. See also Valenzuela, 18

So. 3d at 21-22; and St. Louis v. Fla. Int'l Univ., 60 So. 3d 455, 458 (Fla. 3d DCA 2011).

65. Under the McDonnell Douglas framework, Petitioner bears the initial burden of establishing, by a preponderance of the evidence, a prima facie case of discrimination. McDonnell Douglas, 411 U.S. at 802-04; see also Burke-Fowler v. Orange Cnty., 447 F.3d 1319, 1323 (11th Cir. 2006). Demonstrating a prima facie case is not "onerous," but rather only requires Petitioner "to establish facts adequate to permit an inference of discrimination." Holifield, 115 F.3d at 1562.

66. If Petitioner establishes a prima facie case of disability discrimination, he creates a presumption of discrimination. At that point, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for taking the adverse employment action. Valenzuela, 18 So. 3d at 22. The reason for the employer's decision should be clear, reasonably specific, and worthy of credence. Dep't of Corr. v. Chandler, 582 So. 2d 1183, 1186 (Fla. 1st DCA 1991). The employer has the burden of production, not persuasion, to demonstrate to the finder of fact that the decision was non-discriminatory. See Wilson v. B/E Aerospace, Inc., 376 F.3d 1079, 1087 (11th Cir. 2004). This burden of production is "exceedingly light." Holifield, 115 F.3d at 1564. The employer only needs to produce evidence of a reason for its decision. It is not required to

persuade the trier of fact that its decision was actually motivated by the reason given. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993).

67. If the employer meets its burden, the presumption of discrimination disappears. The burden then shifts back to the employee to prove that the employer's proffered reason was not the true reason but merely a "pretext" for discrimination. See Combs v. Plantation Patterns, 106 F.3d 1519, 1538 (11th Cir. 1997); Valenzuela, 18 So. 3d at 25. In order to satisfy this final step of the process, the employee must "show[] directly that a discriminatory reason more likely than not motivated the decision, or indirectly by showing that the proffered reason for the employment decision is not worthy of belief." Chandler, 582 So. 2d at 1186 (citing Tex. Dep't of Cmty. Aff. v. Burdine, 450 U.S. 248, 252-256 (1981). The proffered explanation is "not worthy of belief" if the employee demonstrates "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence." Combs, 106 F.3d at 1538; see also Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000). Petitioner "must prove that the reasons articulated were false **and** that the discrimination was the real reason" for the defendant's actions. City of Miami v.

Hervis, 65 So. 3d 1110, 1117 (Fla. 3d DCA 2011)(citing St. Mary's Honor Ctr., 509 U.S. at 515 ("[A] reason cannot be proved to be 'a pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason.")).

68. Despite the shifting burdens of proof, "the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." Burdine, 450 U.S. at 253, 101 S. Ct. at 1089, 67 L. Ed. 2d 207; Valenzuela,18 So. 3d at 22. In other words, regardless of whether a petitioner presents direct evidence or relies on the McDonnell Douglas presumption to establish a discrimination claim, the petitioner "always has the burden of demonstrating that, more probably than not, the employer took an adverse employment action against him on the basis of a protected personal characteristic." Leme v. S. Baptist Hosp. of Fla., Inc., 248 F. Supp. 3d 1319 (M.D. Fla. 2017)(citing Wright v. Southland Corp., 187 F.3d 1287, 1292 (11th Cir. 1999)).

69. To state a prima facie claim for disability discrimination, Petitioner must show that 1) he is disabled; 2) he was a "qualified individual"; and 3) he was discriminated against because of his disability. See Lucas v. W.W. Grainger, Inc., 257 F.3d 1249, 1255 (11th Cir. 2001); Frazier-White v. Gee,

818 F.3d 1249, 1255 (11th Cir. 2016); and 42 U.S.C. § 12112(a). Petitioner is "qualified" if he, with or without reasonable accommodation, can perform the essential functions and job requirements of the position he desires. Earl v. Meryns, Inc., 207 F.3d 1361, 1365 (11th Cir. 2000). If Petitioner is unable to perform an essential function of the job, even with an accommodation, then, by definition, he is not a "qualified individual" and, therefore, not covered under the ADA. Davis v. Fla. Power & Light Co., 205 F.3d 1301, 1305 (11th Cir. 2000).

70. Turning to the facts found in this matter, Petitioner failed to prove a prima facie case of disability discrimination. Petitioner did not demonstrate that he is a "qualified individual." Specifically, Petitioner did not establish that he can perform an essential function of the IIC Technician position with or without a reasonable accommodation.[4/]

71. The essential functions of a job "are the fundamental job duties of a position that an individual with a disability is actually required to perform." Holly, 492 F.3d at 1257. Whether a function is "essential" is determined on a case-by-case basis. Id. In determining what functions are deemed essential, the ADA provides that consideration shall be given to the employer's judgment as to what functions of a job are essential and the employer's written description for that job. Davis, 205 F.3d at 1305.

72. Using this standard, the County persuasively argued that an essential function of the IIC Technician position requires Petitioner to climb ladders to work at heights. Mr. Cassady persuasively attested that the County's IIC Technicians must use ladders to perform the fundamental requirements of the job. Mr. Cassady's assertion is supported by testimony from three County IIC Technicians, as well as the County's analysis in January 2014 of the physical requirements of Petitioner's job. In addition, Petitioner himself conceded that an IIC Technician will use a ladder for approximately ten percent of the job.

73. Petitioner does not dispute that he suffers from recurrent dizziness and light-headedness and still faces the possibility of losing consciousness at any time. Petitioner acknowledges that he cannot predict when or under what circumstances he will experience these afflictions. Consequently, Petitioner cannot refute the possibility that he might experience dizziness while he is working on elevated equipment or machinery. Therefore, Petitioner has not shown that he can safely perform the required responsibilities of an IIC Technician without exposing himself, or his co-workers, to the risk of injury.[5/] Accordingly, because Petitioner cannot perform an essential function of an IIC Technician by climbing ladders or working at heights, without limitations, he is not a

"qualified individual" in order to establish a prima facie claim for disability discrimination under the FCRA.

74. Despite his medical condition, Petitioner asserts that he is a "qualified individual" because he can perform the essential functions of an IIC Technician with a reasonable accommodation. To prove unlawful discrimination in a failure to accommodate claim, Petitioner must show that he was discriminated against as a result of the County's failure to provide a reasonable accommodation. An employer's failure to make reasonable accommodation for an otherwise qualified disabled employee constitutes discrimination. See D'Angelo v. Conagra Foods, 422 F.3d 1220, 1225-26 (11th Cir. 2005); and 42 U.S.C. § 12112(b); see also Lucas, 257 F.3d at 1255 ("An employer unlawfully discriminates against a qualified individual with a disability when the employer fails to provide 'reasonable accommodations' for the disability--unless doing so would impose undue hardship on the employer.").

75. Petitioner bears the burden both to identify an accommodation and show that it is "reasonable." Id. At 1255. "The duty to provide a reasonable accommodation is not triggered unless a specific demand for an accommodation has been made." Gaston v. Bellingrath Gardens & Home, Inc., 167 F.3d 1361, 1363 (11th Cir. 1999). "Whether an accommodation is reasonable

depends on specific circumstances." Terrell v. USAir, 132 F.3d 621, 626 (11th Cir. 1998).

76. Moreover, a qualified individual is not entitled to the accommodation of his choice, but rather only to a "reasonable" accommodation. Stewart v. Happy Herman's Cheshire Bridge, Inc., 117 F.3d 1278, 1286 (11th Cir. 1997). An accommodation is "reasonable" and, therefore, required under the ADA, only if it enables the employee to perform the essential functions of the job. LaChance v. Duffy's Draft House, 146 F.3d 832, 835 (11th Cir. 1998). An employer need not accommodate an employee in any manner the employee desires, nor reallocate job duties to change the essential functions of the job. Mervyns, Inc., 207 F.3d at 1367. The intent of the ADA is that "'an employer needs only to provide meaningful *equal* employment opportunities' . . . '[t]he ADA was never intended to turn nondiscrimination into discrimination' against the non-disabled." St. Joseph's Hosp., 842 F.3d at 1346 (quoting Terrell, 132 F.3d at 627).

77. Furthermore, an employer is not required to provide an employee with "the maximum accommodation or every conceivable accommodation possible." Stewart, 117 F.3d at 1285. Neither is an employer required "to transform the position into another one by eliminating functions that are essential to the nature of the job as it exists." Lucas, 257 F.3d at 1260.

78. The accommodation Petitioner identifies is the use a safety harness while working at heights. However, the evidence in the record does not support Petitioner's requested accommodation as "reasonable" under the specific circumstances and job responsibilities of an IIC Technician.

79. The evidence in the record clearly establishes that IIC Technicians must access elevated equipment and machinery to perform their duties. While there is some divergence regarding the exact percentage of the job that requires the climbing of ladders, every witness, including Petitioner, testified that an IIC Technician must use a ladder to reach such equipment. Petitioner insisted that a safety harness would enable him to perform all IIC Technician responsibilities. However, the testimony from Mr. Cassady, as well as the other County employees, persuasively represented that IIC Technicians will work in certain elevated locations that do not support the use of a safety harness in all circumstances.[6/]

80. Therefore, while Petitioner is physically capable of climbing ladders, his medical condition prevents him from doing so safely in all work environments. Consequently, Petitioner did not establish that he could perform the essential functions of the IIC Technician job with a "reasonable" accommodation. Therefore, Petitioner failed to meet his burden of proving that he is a "qualified individual" who can perform the essential

functions of his job, with or without a reasonable accommodation. Accordingly, Petitioner failed to establish a prima facie case of discrimination based on his disability.[7/]

81. Furthermore, Petitioner did not meet his burden of proving that the County retaliated against him based on his decision to appeal his "demotion" to the Civil Service Board.

82. The ADA (and the FCRA) provides that no person shall discriminate against any individual because such individual has opposed an act or practice made unlawful by the ADA. See Stewart, 117 F.3d at 1287; see also 42 U.S.C. § 12203(a) and § 760.10(7) Fla. Stat. To establish a prima facie case of retaliation, Petitioner must demonstrate that: (1) he engaged in statutorily protected activity; (2) he suffered a materially adverse employment action; and (3) there was a causal connection between the protected activity and the adverse employment action. Kidd v. Mando Am. Corp., 731 F.3d 1196, 1211 (11th Cir. 2013); Webb-Edwards v. Orange Cnty. Sheriff's Off., 525 F.3d 1013, 1028 (11th Cir. 2008).

83. Retaliation claims under the FCRA use the same evidentiary framework as Title VII retaliation claims. Stewart, 117 F.3d at 1287; Harper, 139 F.3d at 1389. As such, Petitioner bears the ultimate burden of persuading the trier of fact that the County intentionally discriminated against him. See Burdine, 450 U.S. at 253, 101 S. Ct. at 1089, 67 L. Ed. 2d 207.

84. Petitioner did not prove that his appeal to the Civil Service Board in June 2015 caused the County to decide not to rehire him as an IIC Technician in July 2016. In June 2014, a year before Petitioner appealed to the Civil Service Board, Mr. Cassady determined that Petitioner could not safely work as an IIC Technician due to his medical condition (a legitimate non-discriminatory reason). The County has unwaveringly maintained this position both prior to and after Petitioner's application for the IIC Technician job. Petitioner has not demonstrated that the County's stated reason for refusing to rehire him as an IIC Technician was based on a retaliatory animus. Accordingly, Petitioner did not meet his ultimate burden of proving that the County's decision not to consider Petitioner for an IIC Technician position was motivated by unlawful discrimination.

85. At the final hearing, Petitioner expressed his extreme frustration with the County's refusal to consider him for an IIC Technician position (despite his current medical restriction). It should be noted, however, that in a proceeding under the FCRA, the court is "not in the business of adjudging whether employment decisions are prudent or fair. Instead, [the court's] sole concern is whether unlawful discriminatory animus motivates a challenged employment decision." Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d 1354, 1361 (11th Cir. 1999). Not everything that makes an employee unhappy is an actionable

adverse action. Davis v. Town of Lake Park, 245 F.3d 1232, 1238 (11th Cir. 2001). For example, an employer may fire an employee "for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason." Nix v. WLCY Radio/Rahall Commc'ns, 738 F.2d 1181, 1187 (11th Cir. 1984). An employee cannot succeed by simply quarreling with the wisdom of the employer's reasons. Chapman v. AI Transp., 229 F.3d 1012 (l1th Cir. 2000); see also Alexander v. Fulton Cnty., Ga., 207 F.3d 1303, 1341 (11th Cir. 2000)("[I]t is not the court's role to second-guess the wisdom of an employer's decisions as long as the decisions are not racially motivated.").

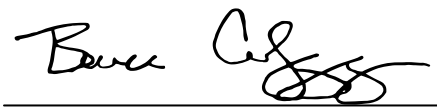
86. In sum, the evidence on record does not support Petitioner's claim that the County discriminated against him based on his disability. Petitioner did not show that the County's stated reason for not hiring him as an IIC Technician (that Petitioner could not safely perform the job) was false and that discrimination was the real reason for the County's decision. In addition, Petitioner did not establish that he was a "qualified individual" who could perform the essential functions of the IIC Technician position with a "reasonable" accommodation (a safety harness). (The evidence in the record persuasively establishes that IIC Technicians must climb ladders and work at heights in locations that do not support the use of a

safety harness.) Finally, Petitioner did not prove that the County's refusal to consider him for the open IIC Technician position in 2016 was in retaliation for his appeal to the Civil Service Board. Accordingly, Petitioner's Petition for Relief must be dismissed.

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 Petitioner, David Riggins, did not prove that Respondent, Hillsborough County, committed an unlawful employment practice against him; and dismissing his Petition for Relief from an unlawful employment practice.

DONE AND ENTERED this 29th day of November, 2017, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of November, 2017.

ENDNOTES

[1/] All statutory references are to Florida Statutes (2017), unless otherwise noted.

[2/] The final hearing was initially scheduled for July 10, 2017. The final hearing was continued based on good cause as described in the Order Canceling Hearing issued on July 10, 2017. This matter was transferred to the undersigned on September 27, 2017.

[3/] See Hillsborough County Public Utility Safety Manual, dated March 7, 2012, which states that:

> 4. PERSONAL LIFE SAVING EQUIPMENT
>
> g. Fall Protection Equipment
>
> i. Safety Harnesses, Lifelines & Lanyards
>
> 1. Safety harnesses, lanyards, lifelines or guardrails are required when employees are doing construction work, repairing, or painting 6 feet or more above any work surface.
>
> 2. Body harnesses and lanyards shall be worn when working Ariel platforms, bucket trucks, or forklift platforms.
>
> 3. Lifelines shall be secured above the point of operation to an anchorage or structural member capable of supporting a dead weight of 5,400 pounds.
>
> 4. If a safety harness/lanyard or lifeline is subject to in-service loading, it shall be replaced and not used.
>
> 5. Body harnesses shall be used for fall arresting and safety belts shall be used as positioning devices.
>
> 6. Safety belts or equipment shall be used by employees placing or tying reinforcement steel more than 6 feet above any adjacent working surface.
>
> 7. Only locking-type snap hooks shall be used for harnesses, lifelines and lanyards.

[4/] The County does not dispute that Petitioner currently suffers from a disability.

[5/] Further, under the ADA, an individual who presents a "direct threat" which reasonable accommodations cannot resolve, does not qualify as a "qualified individual" able to perform the essential functions of the job. See 42 U.S.C. § 12111(3)("The term 'direct threat' means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." See also Waddell v. Valley Forge Dental Assocs., Inc., 276 F.3d 1275, 1280 (11th Cir. 2001)(finding that a dental hygienist who was HIV-positive was not a "qualified individual" under the ADA and commenting that the plaintiff "carries the burden of establishing that 'he was not a direct threat or that reasonable accommodations were available.'"); LaChance v. Duffy's Draft House, 146 F.3d 832, 834-35 (11th Cir. 1998)(affirming that an employee who had seizures at work "was not a qualified individual because he could not perform the essential functions of the job without threat of harm to himself or others."); Moses v. Am. Nonwovens, Inc., 97 F.3d 446, 447 (11th Cir. 1996)("The employee retains at all times the burden of persuading the jury either that he was not a direct threat or that reasonable accommodations were available."); and Leme, 248 F. Supp. 3d at 1319 n.34 (ruling that the plaintiff, who was removed from a position as an anesthesia technician, bore the burden of "proving that [he] is a 'qualified individual with a disability'—that is, a person 'who, with or without reasonable accommodation, can perform the essential functions' of [his] job" without jeopardizing patient safety).

[6/] Furthermore, Petitioner's use of a safety harness will only reduce the risk of injury, not eliminate it. Petitioner admits that he remains susceptible to dizziness or fainting "at unpredictable times."

[7/] Even if Petitioner did establish a prima facie case of disability discrimination, the County articulated a legitimate, non-discriminatory reason for not rehiring Petitioner in the position of IIC Technician. Mr. Cassady testified convincingly that the reason the County did not consider Petitioner for the IIC Technician opening was not the fact that he is disabled, but because Petitioner's medical restrictions impair his ability to safely perform the IIC Technician job duties.

Further, Petitioner did not prove that the County's proffered reason for its decision not to hire Petitioner as an IIC Technician was a "pretext" for discrimination. In other words, Petitioner did not show that discrimination more likely

than not motivated the County's employment decision. Neither did Petitioner demonstrate that Mr. Cassady's explanation was "not worthy of belief."

In addition, the undersigned notes that, even assuming, arguendo, that Petitioner met his burden of proving that a "reasonable" accommodation exists that allows him to perform the IIC Technician job, the County may present evidence that the requested accommodation imposes an "undue hardship." The ADA requires an employer to make a reasonable accommodation to an otherwise qualified employee with a disability, "unless doing so would impose undue hardship on the employer." Lucas, 257 F.3d at 1255; Frazier-White, 818 F.3d at 1255. Undue hardship is a complete defense to ADA liability. United States EEOC v. St. Joseph's Hosp., Inc., 842 F.3d 1333, 1349 (11th Cir. 2016).

The County makes a cogent point that modifying the County's public utility's work environment to support the use of a safety harness in every location where an IIC Technician must climb a ladder would impose an "undue hardship." As Mr. Cassady expressed, such remodeling would likely prove extremely expensive or impractical to effectuate. (The undersigned notes that the County "has no affirmative duty to show undue hardship" unless and until the employee identifies an accommodation and demonstrates that it is reasonable. Mervyns, Inc., 207 F.3d at 1367.)

Accordingly, Petitioner failed to carry his ultimate burden of proving, by a preponderance of the evidence, that the County took an adverse employment action against him on the basis of his disability.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.