STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JAMES WALKER,

Petitioner,

vs. Case No. 18-2764

SUPERIOR CONSTRUCTION COMPANY SOUTHEAST, LLC, *AMENDED AS TO APPEARANCES

Respondent.
_____/

AMENDED RECOMMENDED ORDER

On October 29, 2018, Administrative Law Judge Hetal Desai of the Division of Administrative Hearings (DOAH) conducted the final hearing in this matter in Jacksonville, Florida.

APPEARANCES

For Petitioner: James Kieth Walker
18 North Terry Avenue
Orlando, Florida 32801

For Respondent: Jennifer Shoaf Richardson, Esquire
Jackson Lewis P.C.
Suite 902
501 Riverside Avenue
Jacksonville, Florida 32202

STATEMENT OF THE ISSUE

Whether Respondent, Superior Construction Company Southeast, LLC (Superior), wrongfully terminated Petitioner, James Walker, and refused to rehire him based on his disability in violation of the Florida Civil Rights Act (FCRA).

PRELIMINARY STATEMENT

On August 4, 2017, Petitioner filed an Employment Complaint of Discrimination with the Florida Commission on Human Relations (the Commission) alleging discrimination based on "Disability." Specifically, he alleged Respondent (1) terminated him after he returned from medical leave, and (2) refused to rehire him.

The Commission issued a "Determination: No Reasonable Cause" on April 19, 2018, and Petitioner filed a timely Petition for Relief to contest the Commission's determination. The Commission transmitted the Petition to DOAH, where it was assigned to the undersigned and originally noticed for a final hearing on July 30, 2018.

The hearing in this matter was rescheduled numerous times. Petitioner requested a 90-day continuance which was denied, but the hearing was rescheduled to August 30, 2018. After the parties jointly notified DOAH they had reached a tentative settlement, the file was closed on August 23, 2018. On August 29, 2018, however, the matter was re-opened and rescheduled for October 29, 2018.[1/]

At the final hearing, Petitioner presented his own testimony and offered Exhibits P1 and P2, both of which were admitted into evidence. Respondent offered the testimony of two employee witnesses: Oscar Matson Jr., a retired superintendent; and Jose Gomez, a former project manager and Superior's current Director

for Strategic Initiatives. Respondent's Exhibits R1 through R9 and R11 through R14 were admitted into evidence. Although Exhibit R10 (Petitioner's deposition with attachments) was deemed admissible, Respondent was to redact Petitioner's personal medical information and submit it to DOAH post-hearing, but R10 was never filed or submitted. As such, the undersigned did not consider Exhibit R10 or any testimony related to that exhibit.

The Transcript was filed November 11, 2018. Petitioner timely filed his proposed recommended order (PRO); Respondent was granted an extension and filed its PRO on December 7, 2018. Respondent filed a corrected/amended PRO on December 11, 2018. All PROs were duly considered in preparing this Recommended Order.

Unless otherwise indicated, all statutory references are to the 2016 version of the Florida Statutes.

FINDINGS OF FACT

Parties

1. Petitioner was hired as a laborer by Superior in March 2016. During his tenure with Superior, Petitioner also worked as a flagger and a roller machine operator (roller operator).

2. Superior is a construction company specializing in roadway and highway improvement projects. Superior was Petitioner's employer as defined by the FCRA. § 760.02(7), Fla. Stat.

3. During the relevant time period, Petitioner worked for Superior on a construction assignment known as "15901 Wekiva Project" (Wekiva Project).

4. Oscar Matson, Superior's superintendent at the relevant time, was Petitioner's ultimate supervisor and made day-to-day decisions regarding equipment and staffing. Mr. Matson made all employment decisions with regard to Petitioner, including his hiring and job assignments.

5. Jose Gomez, the project manager at the relevant time, oversaw the administrative side of Wekiva Project and supervised the engineering staff. Mr. Matson consulted with Mr. Gomez regarding the construction staff, and Mr. Gomez was familiar with all of the employees working on this project, including Petitioner.

6. The parties stipulated Petitioner suffers from a disability.

Relevant Policies

7. Although Superior offered evidence of its Equal Opportunity Policy (EOP), there is no evidence it provides protections for applicants or employees with disabilities. The EOP states in relevant part:

> A. Statement of Policy
>
> To further the provisions of equal employment opportunity to all persons without regard to their race, color, religion, sex, or national

> origin, and to promote the full realization of equal opportunity through a positive continuing program[,] it is the policy of Superior Construction Company to assure that applicants are employed and that employees are treated during employment without regard to their race, religion, sex, color or national origin.
>
> * * *
>
> N. Handicapped
>
> Relative to direct federal contracts, we shall not discriminate against any employee or applicant for employment because of a physical or mental handicap in regard to any position of which the employee or applicant for employment is qualified.

There was no evidence whether the Wekiva Project was federally funded or part of a federal contract.

8. Although there was no evidence of a written policy, there was testimony that Superior had a reasonable accommodation process that allows an employee who requires an accommodation to request one through his or her supervisor or through a Human Resources hotline. This process was followed by Petitioner.

Petitioner's Accommodations

9. Petitioner began working for Superior as a laborer with the primary duties of shoveling dirt and cleaning roads. The laborer position was physically demanding and required standing, climbing, crawling, and lifting up to 40 pounds. The position also required constant walking and moving within the project site.

10. Petitioner worked ten-hour shifts on weekdays and eight-hour shifts on weekend days.

11. In April 2016, approximately a month after he was hired, Petitioner was hospitalized for a toe injury incurred at work. Although he was injured on the job and knew he was obligated to report the injury to his supervisors, Petitioner did not. He failed to report the incident to Mr. Matson or anyone else because he did not want "a workman's comp" issue.

12. On or around April 19, 2016, Petitioner brought medical documentation titled "Work/School Status" to Superior indicating that his work duties should be modified until May 10, 2016. The medical documentation indicated Petitioner should be limited to "light duty." It also indicated Petitioner could perform the following activities: "Limit[ed] standing/walking" and "Light weight activity."

13. As a result, Mr. Matson initially placed him in a "flagger" position. This position involved directing traffic in one place, and was considered "light duty" because it did not involve heavy lifting or continuous walking.

14. Although the timing is unclear, Mr. Matson later placed Petitioner in the position of roller operator, where he operated a large piece of equipment. As a roller operator, Petitioner was not required to stand, walk or lift.

15. There was no evidence Petitioner complained to Mr. Matson regarding the assignment to either the flagger or roller operator position, nor did he request further accommodation. The undersigned finds Superior accommodated Petitioner's request for "light duty."

16. Petitioner had no attendance, disciplinary, or other issues from April 2016 through the summer of 2016 in the flagger or roller operator position.

17. On August 12, 2016, Petitioner was admitted into a medical facility and was out of work.

18. Upon his return on or about August 18, 2016, Petitioner gave Mr. Matson medical documentation titled "Disability Certificate." That document certified that Petitioner was "unable to return to work" and was "not able to work until further notice."

19. As a result of the August 18, 2016, meeting, Mr. Matson prepared Petitioner's termination paperwork.

20. What triggered the termination paperwork on August 18, 2016, is in dispute. Petitioner asserts when he returned to Superior, Mr. Matson told him he was concerned about his health and fired him. Superior counters that Petitioner informed Mr. Matson he had to quit because he was unable to work due to his medical condition, and Superior advised Petitioner to reapply when he was ready. For the reasons below, the undersigned finds

Superior's version of the facts is more consistent with the credible evidence and testimony.

21. First, Superior's version of events is corroborated by Petitioner's own sworn statements made in his Charge and Amended Charge of Discrimination, in which he states Superior "advised me to come back to work when I was ready."

22. Second, Mr. Matson's testimony that Petitioner told him he was unable to work is consistent with the Disability Certificate provided by Petitioner and with Mr. Matson's work notes made on August 18, 2016. Those notes indicate Petitioner "said he had to quit because he has austioprosis [sic]. We filled out a termination paper for him." Although Petitioner challenges the reliability of these notes because he actually had "osteomyelitis," it is plausible that Mr. Matson mislabeled or misspelled the illness given his unfamiliarity with it and the phonetic similarity between the two terms.

23. Third, Petitioner's assertion that he was fired is inconsistent with statements he made on subsequent applications when asked the "reason for leaving" Superior. In one application he answers "no work"; in another he lists "medical reasons." Nowhere does he disclose or state that he was fired or terminated.

24. Finally, based on Petitioner's demeanor and the inaccuracies and inconsistencies between his testimony and the

other evidence, the undersigned finds Petitioner's testimony less credible than that of Mr. Gomez and Mr. Matson. Petitioner was unable to recall specific dates or details about alleged conversations or his work/medical status. Petitioner admitted he lied to Superior about the injury causing him to go out on leave in April 2016. He blamed discrepancies between his hearing testimony and sworn statements in the documents submitted to the Commission on his attorney; he blamed inconsistencies in the statements made in his disability benefits paperwork on the insurance company; and he explained misleading statements in subsequent job applications as necessary white lies.

25. The undersigned finds Superior's explanation that it processed Petitioner's termination after it was clear he could not work and there was no date certain as to when he could return, and its version of facts surrounding Petitioner's separation more credible.

26. Regardless, however, of whether he quit or was fired, Petitioner was not qualified to work on August 18, 2016. He offered no evidence, nor is there anything in the record, indicating that his inability to work had ever changed, or that the restrictions and limitations set forth in the Disability Certificate were ever lifted. As such, the undersigned finds Petitioner could not perform his job duties and could not work as of August 18, 2016.

Petitioner's Reapplication

27. Petitioner claims he reapplied for a position with Superior numerous times after August 2016. Other than a July 2017 application, it is unclear how often or what other times he reapplied.

28. Petitioner claims Superior did not rehire him because of his disability. As proof, he states Mr. Matson and Mr. Gomez made comments inquiring about his health. The undersigned finds these comments were innocuous and were expressions of concern for his well-being, rather than related to his specific disability.

29. Petitioner's attempt at reemployment with Superior is also suspect. There was no admissible evidence to prove that Superior was actually hiring in July 2017. In fact, there was evidence Petitioner only reapplied for work at Superior to better his legal position for future litigation; Petitioner admitted he reapplied for a position at Superior "because my attorney said to reapply to see how they would react." Petitioner also made statements in disability insurance applications that he was unable to work at the time he reapplied for work at Superior. Specifically, as of July 17, 2017, the date of Petitioner's Social Security Application for Disability Insurance, Petitioner indicated he could not work and had been unable to work since September 1, 2016.

30. Irrespective of Petitioner's motives, Superior asserts it did not consider his disability when Petitioner reapplied, but rather that it did not rehire Petitioner because it had no vacancies. Mr. Matson credibly testified that in July 2017, the Wekiva Project was coming to an end and he was struggling to keep the staff occupied until the next assignment. Mr. Matson explained, "we were long on help at that time."

31. Mr. Gomez also met with Petitioner in July 2017 regarding his reapplication. At the time Superior was working on another project, Project 16903. Mr. Gomez told Petitioner that he would be eligible for the next project, Project 17904, but that project was not starting until late 2017 or early 2018. This is consistent with Petitioner's application dated July 5, 2017, which has a handwritten notation: "Consider Rehire for 16903 per Jose G. till 17904 Ready."

32. Mr. Gomez was not responsible for Project 17904, nor was there any evidence that the person hiring for Project 17904 was aware of Petitioner's disability.

33. Superior never rehired Petitioner.

34. The undersigned finds Superior did not consider Petitioner's disability, but rather, based its decision not to rehire Petitioner on the fact it did not have any vacancies.

CONCLUSIONS OF LAW

35. 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 Fla. Admin. Code R. 60Y-4.016.

36. The FCRA protects individuals from discrimination in the workplace. See §§ 760.10 and 760.11, Fla. Stat. 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. (emphasis added).

37. Because the FCRA is patterned after federal anti-discrimination laws, such as the Americans with Disabilities Act (ADA), courts rely on ADA cases when analyzing disability discrimination claims brought pursuant to the FCRA.

38. The burden of proof in an administrative proceeding is on Petitioner as the complainant. See 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."). To show a violation of the FCRA, Petitioner

must establish, by a preponderance of the evidence, a prima facie case of discrimination. See St. Louis v. Fla. Int'l Univ., 60 So. 3d 455, 458-59 (Fla. 3d DCA 2011)(reversing jury verdict awarding damages on FCRA racial discrimination and retaliation claims where employee failed to show similarly situated employees outside his protected class were treated more favorably; finding prima facie case not established).

39. "Preponderance of the evidence" is the "greater weight" of the evidence, or evidence that "more likely than not" tends to prove the fact at issue. This means that if the undersigned found the parties presented equally competent substantial evidence, Petitioner would not have proved his claims by the "greater weight" of the evidence, and would not prevail in this proceeding. See Gross v. Lyons, 763 So. 2d 276, 289 n.1 (Fla. 2000).

40. Courts follow the framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), for establishing an FCRA disability discrimination claim. See Gonzalez v. Wells Fargo Bank, N.A., 2013 WL 5435789, at *7 (S.D. Fla. Sept. 27, 2013)(citing Albra v. Advan, Inc., 490 F.3d 826, 835 (11th Cir. 2007)); Byrd v. BT Foods, Inc., 948 So. 2d 921, 925 (Fla. 4th DCA 2007).

41. In this case, the framework involves a three-step process. First, Petitioner must establish a prima facie case of disability discrimination; if Petitioner does so, a presumption of

discrimination arises against Respondent. If Petitioner completes step one, Respondent has the burden to present a legitimate, non-discriminatory reason for its employment actions; if Respondent can put forth such a reason, Petitioner's presumption of discrimination evaporates. Finally, if Respondent can complete the second step, Petitioner has the burden of proving the reason established by Respondent was a pretext for discrimination. A "pretext" is a reason given in justification for conduct that is not the real reason. McDonnell Douglas Corp., 411 U.S. at 802; Scholz v. RDV Sports, Inc., 710 So. 2d 618, 624 (Fla. 5th DCA 1998)(evaluating a race discrimination claim under FCRA).

42. To meet the first step, Petitioner must establish a prima facie case of wrongful termination or failure to hire based on disability: 1) he has a disability; 2) he was qualified for the job with or without an accommodation; and 3) Superior took adverse action against him on the basis of his disability. See Winnie v. Infectious Disease Assocs., P.A., 2018 U.S. App. LEXIS 31609, at *13 (11th Cir. Nov. 8, 2018)(citing Williams v. Motorola, Inc., 303 F.3d 1284, 1290 (11th Cir. 2002)).

43. Regarding the first element, the parties stipulated Petitioner suffers from a medical condition that would qualify as a disability under the FCRA.

44. Nonetheless, Petitioner has not shown the second element by proving he was qualified for his position of laborer, flagger,

or roller operator either in August 2016 (when he separated from Superior) or in July 2017 (when he reapplied for a position). To be qualified, Petitioner must show that he could perform the essential functions of the job, either with or without reasonable accommodation. See 42 U.S.C. § 12111(8)(providing a "qualified individual" is an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of a job). He failed to do so.

45. With regard to his wrongful termination claim, Petitioner's testimony and the medical documentation he provided to Superior indicated that he was unable to work until further notice. There is no competent evidence of when this work restriction was lifted or if he reported to Superior that he was able to work again. Regarding his failure to rehire claim, as explained in the Findings of Fact, there was no credible evidence Petitioner's medical restrictions had been lifted and that he was able to work in July 2017. Thus, based on the record evidence, Petitioner was unable to perform any position starting August 18 2016, until a date unknown. Therefore, he was not qualified. See Winnie, 2018 U.S. App. LEXIS 31609, at *16 (affirming summary judgment against employee where doctor had not released her to return to work; finding employee could not perform her duties).

46. Nor did Petitioner establish the third element for his wrongful termination claim. As explained in the Findings of

Fact, Superior did not terminate or fire Petitioner. He resigned or quit because he could no longer work. A resignation is not an "adverse action" in most employment discrimination contexts. As explained recently in Waite v. Board of Trustees of the University of Alabama, 2018 U.S. Dist. LEXIS 187933, at *34 (N.D. Ala. Nov. 2, 2018):

> Generally speaking, an employee's decision to resign is presumed to be voluntary, in which case it does not give rise to an adverse employment action. It is true that, under some circumstances, a plaintiff's resignation may be treated as involuntary and thus tantamount to an actual discharge. However, such a "constructive discharge" claim requires the plaintiff to establish that the employer has discriminated against her to the point such that her working conditions became so intolerable that a reasonable person in the employee's position would have felt compelled to resign. (citations and quotations omitted).

Here, there is no assertion Petitioner was constructively discharged or evidence that Petitioner's working conditions rose to the level of feeling forced to resign. To the contrary, Superior allowed him to take time off when necessary, and told him to reapply when he was cleared to return to work.

47. Regarding his failure to rehire claim, assuming Petitioner was qualified (which he was not) and could establish a prima facie case, Superior has fulfilled step two in the shifting McDonnell Douglas process by articulating a legitimate non-discriminatory reason for its actions. Superior more than

meets this burden by establishing it had no vacancies in July 2017.[2/]

48. Completing the McDonnell Douglas burden-shifting analysis, Petitioner did not prove that Superior's reason for not rehiring Petitioner was merely a "pretext" for discrimination. The evidentiary record does not support a finding or conclusion that Superior's explanation is false or not worthy of credence.

49. Consequently, Petitioner did not meet his ultimate burden of proving by a preponderance of the evidence that Superior's actions were discriminatory or in violation of the FCRA. 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, James Walker, did not prove that Respondent, Superior Construction Company Southeast, LLC, committed an unlawful employment practice against him; and dismissing his Petition for Relief from an unlawful employment practice.

DONE AND ENTERED this 7th day of January, 2019, in Tallahassee, Leon County, Florida.

HETAL DESAI
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of January, 2019.

ENDNOTES

[1/] The unusual procedural history regarding the Joint Notice of Settlement, Motion to Set Aside Joint Notice of Settlement, and Petitioner's Motion to Withdraw is detailed in the Order Granting Motion to Set Aside Joint Notice of Settlement and Re-opening File, rendered August 29, 2018.

[2/] In evaluating the employer's reason for its actions, the reason should be clear, reasonably specific, and worthy of credence. See Dep't of Corr. v. Chandler, 582 So. 2d 1183, 1186 (Fla. 1st DCA 1991). The employer has the burden of production, not the burden of persuasion, to demonstrate to the finder of fact that the decision was non-discriminatory. See Flowers v. Troup Cnty., 803 F.3d 1327, 1336 (11th Cir. 2015). 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).

COPIES FURNISHED:

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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.