STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

KEITH SEWELL,

Petitioner,

vs. Case No. 18-6309

CITY OF FORT LAUDERDALE,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was conducted before Administrative Law Judge Mary Li Creasy in Fort Lauderdale, Florida, on March 28, 2019.

APPEARANCES

For Petitioner: Keith Sewell, pro se
Apartment 106
1103 Southwest 15th Street
Deerfield Beach, Florida 33441

For Respondent: Carmen Rodriguez, Esquire
Law Offices of Carmen Rodriguez, P.A.
15715 South Dixie Highway, Suite 411
Miami, Florida 33157

STATEMENT OF THE ISSUES

Whether Petitioner was unlawfully discriminated against by Respondent, based on his disability, in violation of chapter 760, Florida Statutes, the Florida Civil Rights Act ("FCRA"); and, if so, what is the appropriate remedy?

PRELIMINARY STATEMENT

On March 14, 2018, Petitioner, Keith Sewell ("Sewell" or "Petitioner"), filed a Charge of Discrimination ("Charge") with the Florida Commission on Human Relations ("FCHR") alleging that Respondent, City of Fort Lauderdale ("City" or "Respondent"), unlawfully terminated his employment as a Parking Enforcement Specialist ("PES") by discriminating against him based on his disability/handicap. On September 18, 2018, the FCHR issued a Notice of Determination to Sewell indicating that the FCHR found "no reasonable cause" to believe that discrimination occurred. Sewell elected to contest the decision and pursue administrative remedies by filing a Petition for Relief with the FCHR. The FCHR transmitted the Petition to the Division of Administrative Hearings ("DOAH") on November 30, 2018, and the undersigned was assigned to hear the case.

After one continuance at the request of Respondent, the final hearing was held as scheduled on March 28, 2019. At the hearing, Sewell testified on his own behalf. Respondent presented the testimony of three witnesses: Bryan Greene, Parking Enforcement Supervisor; Stephanie Sanchez, PES; and Jose Vazquez, Acting Parking Shift Coordinator. Petitioner's Exhibits 1 through 15 were admitted into evidence. Respondent's Exhibits 1, 2, 4, 7 through 10, 12, 13, and 16 were admitted into evidence.

The Transcript of the final hearing was filed April 24, 2019, and Respondent timely filed a proposed recommended order that has been carefully considered by the undersigned in the preparation of this Recommended Order.

Except as otherwise indicated, citations to Florida Statutes or Florida Administrative Code rules refer to the versions in effect at the time of the alleged violations.

FINDINGS OF FACT

1. From October 2 through December 7, 2017, Petitioner was employed by the City as a PES in its Transportation and Mobility Department ("TAM").

Nature of the Parking Enforcement Specialist Job

2. The role of a PES is to ensure that members of the public follow the City's parking ordinances and regulations. Job duties include patrolling an assigned area in a vehicle or on foot, inspecting for parking violations, issuing summonses and tickets to violators, and assisting the public by answering questions. A PES must be able to work independently with little or no supervisory assistance and deal courteously and fairly with the public.

3. The PES position is governed by the Collective Bargaining Agreement ("CBA") between the City and the Teamsters' Union. Under the CBA, assignment of work shifts is based on

seniority. A PES may be assigned to work night and weekend shifts.

4. Before being assigned a shift to work alone, a newly-hired PES participates in two phases of training. Phase one consists of familiarization with equipment, systems, parking ordinances and regulations, and typically lasts four to six weeks. Phase two is focused on hands-on training and a trainee is given more opportunity to operate the vehicles and equipment. One of the purposes of phase two is to ensure that the trainee is able to appropriately handle problems and stressful situations that may arise on the job, such as dealing with irate members of the public while immobilizing a vehicle.

5. Each phase of training is conducted by a fellow PES who is temporarily designated as a training officer under the CBA. A PES serving in the temporary designation of training officer is not considered a supervisor.

6. The City issues each PES certain take-home equipment, including a public safety police radio, keys, flashlight, and identification card, for use while on the job. A PES takes these items home when not on the job and is at all times responsible for his or her City-issued equipment.

7. To perform the job, a PES is also required to use a License Plate Reader ("LPR") and related systems. A LPR scans license plates and indicates when a car should be issued a

citation or boot. A PES is expected to drive a City vehicle and view the screens of the machine that alert when the camera scans a vehicle with outstanding citations. When a LPR alerts a PES of a vehicle with outstanding citations, the PES must carefully pull over and turn on the caution lights to advise oncoming traffic of the stopped City vehicle. Once safely pulled over, the PES may then check whether the vehicle has outstanding citations and issue tickets.

The City's Policies and Work Rules

8. Prior to commencing employment at the City, each newly-hired employee is provided with copies of the City's written policies. The City has a Policy Concerning Persons with a Disability and Procedures for Accommodation ("ADA Policy"). It prohibits discrimination against a qualified individual because of his or her disability and states that the City will provide reasonable accommodation when necessary. It also explains the procedures for requesting accommodation and that a request may be made by contacting the City's Office of Professional Standards ("OPS"). OPS handles requests for workplace accommodation and determines whether an accommodation will be provided.

9. On September 27, 2017, Petitioner was given a copy of the City's ADA Policy and executed a form acknowledging receipt of same. At no time during his employment did Petitioner

indicate that he was a qualified individual with a disability or that he needed an accommodation for a disability or handicap from the City. In fact, at final hearing, Petitioner admitted he did not believe he had a handicap or needed an accommodation to perform his role as a PES.

10. The City has General Employees' Work Rules ("General Work Rules"), which define Major Rule violations. Leaving the City premises during work hours without a supervisor's permission is listed as a Major Rule violation for which any employee can be discharged immediately without warning.

11. All newly-hired employees at the City receive training on the City's General Work Rules. Each Department is required to post the City's General Work Rules in work areas. TAM posts the City's General Work Rules document in the main security office, which is where PESs check out their parking enforcement equipment and pick up the keys to their vehicles.

12. On September 27, 2017, Petitioner was given a copy of the City's General Work Rules and executed a form acknowledging its receipt.

Petitioner's Employment with PES

13. Effective October 2, 2017, Petitioner commenced employment at the City as a probationary PES.

14. Parking Enforcement Supervisor Bryan Greene ("Mr. Greene") was involved in the process of interviewing and

hiring Petitioner for the PES position. When Mr. Greene initially contacted Petitioner to set up an interview, he asked if Petitioner would need any accommodation. Petitioner stated that he did not need any accommodation. Petitioner never told Mr. Greene that he had a disability or needed an accommodation to perform the job. Mr. Greene was not aware that Petitioner self-identified as a disabled veteran on his job application with the City.

15. For phase one of training, Petitioner was assigned to train on the day shift. For phase two, Petitioner was assigned to train on the night-shift with fellow PES and training officer, Stephanie Sanchez ("Ms. Sanchez"). Petitioner began his night-shift training with Ms. Sanchez in November 2017.

16. Acting Parking Shift Coordinator Jose Vazquez ("Mr. Vazquez") was the immediate supervisor of Petitioner and Ms. Sanchez. Mr. Vazquez's immediate supervisor was Mr. Greene. In the day-to-day performance of his job, Petitioner could communicate with Mr. Vazquez by phone or e-mail. Petitioner never told Mr. Vazquez or his coworker trainers that he had a disability or needed any accommodation.

17. From time to time, Mr. Vazquez would check in with Petitioner on his progress as a regular part of the training process. Petitioner never reported any problems with Ms. Sanchez to Mr. Vazquez or Mr. Greene.

18. On December 6, 2017, Mr. Vazquez sent Petitioner a series of routine e-mails regarding the status of various equipment and training. In one of his e-mails, Mr. Vazquez asked Petitioner if he felt comfortable with enforcement operations and procedures and to let him know if there was anything he was uncertain about. Petitioner sent a response stating, in relevant part, "Thanks Jose, I am comfortable with enforcement. Would like a little more training with the LPR and the different computer programs used in the field." Petitioner did not request to review anything else as part of training.

Events Leading to Petitioner's Termination

19. On December 7, 2017, at 12:30 p.m., Mr. Vazquez forwarded Petitioner's e-mail to Ms. Sanchez in reference to training. He instructed her to go over the LPR process and how it works with Petitioner again and told her to "[l]et him drive and control everything so that he gets a feel of it" and "[h]ave him input manual tags too so that he is aware that the LPR will not read all tags."

20. On December 7, 2017, at 5:00 p.m., Petitioner started his shift. Ms. Sanchez let Petitioner drive the City vehicle in the parking garage while she sat in the back. They stopped, parked behind another vehicle, and turned the caution lights on so that Ms. Sanchez could review the LPR process with Petitioner as he had requested. Ms. Sanchez encouraged Petitioner to

review his notes on the LPR from the night before and asked him to replicate the process to check if a vehicle was eligible for immobilization.

21. Petitioner became angry that rather than verbally reviewing the instructions over and over with him, Ms. Sanchez directed him to review his notes. Ms. Sanchez explained that she previously had repeated the verbal instruction and wanted to be sure that Petitioner could understand his own notes because he was nearing the end of his training and would soon be on his own with nothing to rely on but his notes.

22. At that point, Petitioner burst out at Ms. Sanchez in a raised voice, "You're aggravating me, I can't stand working with you--you just want me to fail. I'm going home."

23. Sanchez calmly explained that she was trying to help him and reiterated that they would have to go through the steps to learn the process. Petitioner did not listen. He immediately put the City vehicle into drive and sped off to the other side of the garage with Ms. Sanchez still in the vehicle. Petitioner then parked, got out of the vehicle, and went into the main security office with his belongings.

24. Because of Petitioner's outburst and behavior, Ms. Sanchez did not feel that it was safe for her to approach him and waited in the vehicle. After approximately five minutes, Petitioner exited the main security office. He went

towards the parking elevator and left. Petitioner left his City-issued take-home equipment, including police radio, keys to access the building, and identification, inside the main security office which was unsecured. Prior to leaving, Petitioner had only been at work for about one hour.

25. Ms. Sanchez immediately contacted Mr. Vazquez. She notified him that Petitioner left work without permission and sent him an e-mail detailing the incident that occurred while training Petitioner on use of LPR systems. Mr. Vazquez advised Mr. Greene of the incident and forwarded him Ms. Sanchez's e-mail. At no time during his December 7, 2017, shift did Petitioner communicate to any supervisor that he was leaving work or not returning that night.

26. Mr. Greene recommended through chain-of-command that Petitioner, as a probationary employee, be terminated from City employment. He felt that Petitioner would not be a good fit for the PES position because he left work without a supervisor's permission in violation of a Major Rule and left his City-issued take-home equipment unattended in an unsecured building. This raised serious safety concerns given the sensitive nature of the equipment, which included a police radio. Additionally, Petitioner's rude, disrespectful, and troubling behavior towards Ms. Sanchez raised concerns as to his ability to appropriately deal with coworkers and members of the public.

27. The City determined that Petitioner voluntarily resigned when he left work without contacting a supervisor and left his City-issued take-home equipment unsecured in the security office. Accordingly, the City accepted Petitioner's voluntary resignation from employment, effective December 7, 2017.

Petitioner's Argument

28. Petitioner claims that he had no intention of resigning and that his separation from employment was a termination based upon his disability or handicap. Petitioner believes that his training by Ms. Sanchez should have conformed to his preference on how to learn (repeated verbal instructions without reference to notes or the guide book) and that he was justifiably upset with her.

29. Petitioner explained that his interaction with Ms. Sanchez triggered intestinal distress, necessitating his need to go home and change clothing. He intended to return to work that night but claims he saw an e-mail from management that if Petitioner returned to work, he was to be told to go back home.

30. Petitioner was not copied on that e-mail nor could he explain at final hearing how he saw that e-mail prior to the initiation of his administrative complaint. Petitioner's testimony on this point is not credible.

31. Further, Petitioner admits he did not contact a supervisor prior to leaving his shift. Despite receiving and reviewing the General Work Rules, Petitioner irrationally assumed it was management's responsibility to reach out to him to find out what was going on, rather than him requesting time off. After going home, Petitioner made no effort that evening to contact a supervisor to explain why he left the job.

32. Petitioner's suggestion, that leaving his work equipment was not an indication of quitting, is also not credible. Petitioner claims that he left the keys and equipment in what he believed was his own mailbox, assumed no one would touch it, and that the building was secure. Petitioner cross-examined the City witnesses at final hearing in detail about where his equipment was actually left (on a desk or in his mailbox) but, ultimately, he provided no rational explanation why he left everything in an unsecured building on December 7, 2017, when after every other shift, he previously took those things home.

33. Petitioner did not identify any handicap or disability either while employed with the City or at final hearing. Nor did he request any accommodation that would have enabled him to perform the essential functions of the PES job.

CONCLUSIONS OF LAW

34. The Division of Administrative Hearings has jurisdiction over the parties and subject matter in this case. §§ 120.569 and 120.57, Fla. Stat.

35. Section 760.10(1) states that it is an unlawful employment practice for an employer to fail or refuse to hire or otherwise discriminate against an individual on the basis of handicap.

36. The FCHR and Florida courts have determined that federal discrimination laws should be used as guidance when construing provisions of section 760.10. See Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17 (Fla. 3d DCA 2009); Brand v. Fla. Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994).

37. In the instant case, Petitioner alleges that he was unlawfully terminated by the City as a PES on the basis of his handicap.

Establishing Discrimination

38. Discriminatory intent can be established through direct or circumstantial evidence. Schoenfeld v. Babbitt, 168 F.3d 1257, 1266 (11th Cir. 1999). Direct evidence of discrimination is evidence that, if believed, establishes the existence of discriminatory intent behind an employment decision without inference or presumption. Maynard v. Bd. of Regents, 342 F.3d 1281, 1289 (11th Cir. 2003).

39. "Direct evidence is composed of 'only the most blatant remarks, whose intent could be nothing other than to discriminate' on the basis of some impermissible factor." Schoenfeld v. Babbitt, 168 F.3d at 1257, 1266. Petitioner presented no direct evidence of handicap discrimination or retaliation.

40. "[D]irect evidence of intent is often unavailable." Shealy v. City of Albany, Ga., 89 F.3d 804, 806 (11th Cir. 1996). For this reason, those who claim to be victims of intentional discrimination "are permitted to establish their cases through inferential and circumstantial proof." Kline v. Tenn. Valley Auth., 128 F.3d 337, 348 (6th Cir. 1997).

41. Where a complainant attempts to prove intentional discrimination using circumstantial evidence, the shifting burden analysis established by the United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), is applied. Under this well-established model of proof, the complainant bears the initial burden of establishing a prima facie case of discrimination.

42. When the charging party is able to make out a prima facie case, the burden to go forward shifts to the employer to articulate a legitimate, non-discriminatory explanation for the employment action. See Dep't of Corr. v. Chandler, 582 So. 2d

1183 (Fla. 1st DCA 1991)(court discusses shifting burdens of proof in discrimination cases). The employer has the burden of production, not persuasion. Id.; Alexander v. Fulton Cty., Ga., 207 F.3d 1303, 1336 (11th Cir. 2000).

43. The employee must then come forward with specific evidence demonstrating that the reasons given by the employer are a pretext for discrimination. Schoenfeld v. Babbitt, 168 F.3d at 1267. The employee must satisfy this burden by showing 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. Dep't of Corr. v. Chandler, 582 So. 2d at 1186; Alexander v. Fulton Cty., Ga., 207 F.3d at 1303. Petitioner has not met this burden.

44. "Although the intermediate burdens of production shift back and forth, the ultimate burden of persuading the trier of fact that the employer intentionally discriminated against the [Petitioner] remains at all times with the [Petitioner]." EEOC v. Joe's Stone Crabs, Inc., 296 F.3d 1265 (11th Cir. 2002); see also Byrd v. RT Foods, Inc., 948 So. 2d 921, 927 (Fla. 4th DCA 2007)("The ultimate burden of proving intentional discrimination against the plaintiff remains with the plaintiff at all times.").

Proving Handicap[1/] Discrimination

45. Handicap discrimination claims under the FCRA are analyzed under the same framework as federal disability claims. D'Angelo v. Conagra Foods, Inc., 422 F.3d 1220, 1224 n.2 (11th Cir. 2005).

46. In order to demonstrate a prima facie case, under the ADA, plaintiff must show that: (1) he has a disability; (2) he is a "qualified" individual; and (3) defendant discriminated against him because of his disability. Greenberg v. BellSouth Telecomm., Inc., 498 F.3d 1258, 1263 (11th Cir. 2007); Ellis v. England, 432 F.3d 1321, 1326 (11th Cir. 2005).

47. The burden then shifts to defendant to articulate a legitimate, non-discriminatory reason for plaintiff's termination. If defendant is able to do so, the burden then returns to plaintiff, who must show that defendant's reason is unworthy of credence and a mere pretext for discrimination. See Cleveland v. Home Shopping Network, Inc., 369 F.3d 1189, 1193 (11th Cir. 2004).

48. In this case, Petitioner provided no direct evidence of discrimination. Accordingly, the burden-shifting analysis is appropriate. Petitioner failed to demonstrate two prongs of the prima facie case--that he has a "disability" and that he was discriminated against "because of" his disability.

49. Petitioner apparently assumes that he is handicapped or disabled within the meaning of the FCRA because he is a "disabled veteran." However, Petitioner introduced no evidence of his alleged handicap or disability at final hearing.

50. The ADA defines a person with a disability as a person who has a physical or mental impairment that substantially limits one or more major life activities. This includes people who have a record of such impairment, even if they do not currently have a disability. It also includes individuals who do not have a disability but are regarded as having a disability. See 42 U.S.C. § 12102 (1).

51. The closest Petitioner came at final hearing to explaining his situation was to state that on the night in question, he was forced to go home prematurely before the end of his shift due to stress-induced intestinal issues. Petitioner did not explain the nature of his alleged handicap or disability, any record of being disabled, or the manner in which his condition affects his major life activities.

52. Even assuming arguendo that Petitioner is disabled or handicapped within the meaning of the FCRA, Petitioner failed to demonstrate his termination was "because of" his handicap. Petitioner cannot meet this prong of the prima facie case because there is no evidence that any decision-maker involved

with Petitioner's separation had any information about his alleged handicap.

53. Further, Petitioner fails to satisfy his initial burden because he never requested any accommodation. The City has a written ADA Policy that sets forth procedures for requesting a workplace accommodation. It is undisputed that Petitioner received a copy of the City's ADA Policy prior to starting employment in his PES position. Petitioner admits he never made a request for an accommodation to perform the job to any supervisor or management personnel. Moreover, Petitioner's own testimony is that he never felt that he needed an accommodation. To the extent that Petitioner claims he asked for additional training, the City provided him with additional training on the LPR systems precisely as he requested.

54. If Petitioner met the prongs of the prima facie case, his case would still fail because the City offered a legitimate, non-discriminatory reason for Petitioner's separation. Petitioner's outburst against a coworker, leaving his shift without prior authorization, and leaving his PES equipment unsecured, constitute Major Rule violations and are legitimate reasons to assume Petitioner voluntarily walked off the job with no intent to return.

55. The PES position requires the employee to work independently, frequently interacting with upset parkers in

stressful situations. In light of the events of December 7, 2017, the City properly determined that placing Petitioner in the position of PES was not in its best interest. No rational employer would chose to retain a probationary employee under these circumstances.

56. Petitioner offered no evidence that any of the City's reasons for his separation from employment were a pretext for discrimination.

57. Regardless of whether Petitioner's separation is categorized as a resignation or termination, Petitioner failed to demonstrate that he was discriminated on the basis of his handicap. Therefore, the employment discrimination charge should be dismissed, and none of the damages claimed by Petitioner should be awarded to him.

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 dismissing the FCHR Petition 2018-04710.

DONE AND ENTERED this 13th day of May, 2019, in Tallahassee, Leon County, Florida.

MARY LI CREASY
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of May, 2019.

ENDNOTE

[1/] The FCRA prohibits discrimination in employment on the basis of "handicap." The ADA prohibits discrimination on the basis of "disability." For purposes of this Recommended Order, the terms are used interchangeably.

COPIES FURNISHED:

Tammy S. Barton, Agency Clerk
Florida Commission on Human Relations
4075 Esplanade Way, Room 110
Tallahassee, Florida 32399-7020
(eServed)

Carmen Rodriguez, Esquire
Law Offices of Carmen Rodriguez, P.A.
15715 South Dixie Highway, Suite 411
Miami, Florida 33157
(eServed)

Keith Sewell
Apartment 106
1103 Southwest 15th Street
Deerfield Beach, Florida 33441

Cheyanne Costilla, General Counsel
Florida Commission on Human Relations
4075 Esplanade Way, Room 110
Tallahassee, Florida 32399-7020
(eServed)

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.