STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

WILLIAM LANE,

Petitioner,

vs. Case No. 20-5354

PATIO CASUAL, LLC,

Respondent.
_____/

RECOMMENDED ORDER

Administrative Law Judge Hetal Desai of the Division of Administrative Hearings (DOAH) conducted the final hearing in this case by Zoom video conference on February 24, 2021.

APPEARANCES

For Petitioner: William David Lane, pro se
Post Office Box 276
Crystal Beach, Florida 34681

For Respondent: Anne Othen, Authorized Representative
Patio Casual, LLC
23492 US Highway 19 North
Clearwater, Florida 33765

STATEMENT OF THE ISSUE

Whether Respondent, Patio Casual, LLC (Patio Casual), discriminated against Petitioner, William Lane, based on a perceived or actual disability in

the terms of his employment in violation of section 70-53(a)(1) of the Pinellas County Code of Ordinances (Code).[1]

PRELIMINARY STATEMENT

On September 1, 2020, William Lane filed a Charge of Discrimination (Charge) with the Equal Employment Opportunity Commission (EEOC). The Charge was referred by the EEOC to the Pinellas County Office of Human Rights (PCOHR) on September 4, 2020. In his Charge, Petitioner alleges Respondent's owner made discriminatory comments about his disability, hired him at a lower rate of pay than non-disabled employees, denied him overtime that was offered to non-disabled employees, required only him to wear a mask, and terminated him out of fear for his health.

On October 12, 2020, PCOHR issued an Investigative Report finding there was reasonable cause to believe that Patio Casual had discriminated against Petitioner based on his disability. The PCOHR's efforts to mediate the matter did not succeed. On December 9, 2020, PCOHR referred the matter to DOAH to conduct an administrative hearing to resolve the matter.

At the final hearing, Petitioner testified on his own behalf and presented the testimony of Christina Cook. Petitioner's Exhibits P-1 through P-3 were admitted into evidence. Patio Casual presented the testimony of Anne Othen and Tom Othen. Patio Casual's Exhibits R-1 through R-5 were admitted into evidence.

Additionally, pursuant to section 70-77(11)(c) of the Code, the undersigned takes official recognition of the following:

[1] All citations to Florida Statutes and to the Code are to the 2019 codification unless noted otherwise.

- Various portions of the Code, including sections 70-51, 70-77, and 70-78.
- Pinellas County Ordinance 20-14, passed by the Board of County Commissioners of Pinellas County, Florida, as an emergency ordinance on June 23, 2020 (implementing a county-wide mandatory mask requirement effective June 24, 2020).
- COVID-19 related Executive Orders by the Office of the Governor for the State of Florida.

A court reporter was present at the final hearing, but neither party ordered a copy of the transcript. The parties timely filed Proposed Recommended Orders which have been duly considered.

FINDINGS OF FACT

Parties

1. Petitioner was an employee of Patio Casual, as defined by section 70-51 of the Code.

2. There is no dispute Petitioner suffers from a liver condition requiring medication and which causes him to take frequent bathroom visits. As such, Petitioner has a disability.

3. During the relevant time period, Patio Casual was an employer, as defined by section 70-51 of the Code. Patio Casual is a 1,500 square foot retail patio furniture store that is located within a flea market in Clearwater, Pinellas County, Florida.

4. Anne and Tom Othen are co-owners of Patio Casual. At all times relevant to this case, Anne Othen was Patio Casual's manager and had hiring, firing, and supervisory duties over Petitioner.

5. During the relevant time period, Patio Casual had at least three employees, not including the Othens. This included Petitioner and Christina Cook.

Petitioner's Position and Job History

6. Due to the COVID-19 pandemic, on March 1, 2020, Florida Governor Ron DeSantis declared a state of emergency for the State of Florida. *See* Off. of the Governor, Exec. Order 20-51.

7. On April 1, 2020, Governor DeSantis issued a "Safer at Home" executive order that had the effect of closing most retail stores such as Patio Casual. *See* Off. of the Governor, Exec. Order 20-91. The "Safer at Home" Order specifically allowed businesses to continue to service customers through non-store sales:

> E. All businesses or organizations are encouraged to provide delivery, carry-out or curbside service outside of the business or organization, of orders placed online or via telephone, to the greatest extent practicable

8. Despite the pandemic, Patio Casual saw an uptick in demand for outdoor furniture and products. As a result, on or around April 15, 2020, Anne Othen advertised on Facebook for a "Sales & Marketing Administrator – Website designer e commerce" position. The advertisement stated:

> Busy, Local & Growing
> Patio Casual – Tampa Bay's Favorite Outdoor Furniture Superstore!
>
> This Family Owned Patio Furniture Company is in need of a key person to head up our Digital Marketing and E commerce Sales Department – www.patiocasual.com
>
> You Must Have excellent organization and computer skills – Wordpress and Woocommerce experience.
>
> Furniture & Home Goods Sales a plus!
>
> With this position you CAN WORK FROM HOME-BUT MUST LIVE IN TAMPA BAY.

> Full time Position, Pay based on Experience, Full Medical Benefits available.
> Check out our website – how can you help??

9. Petitioner applied for this job and was interviewed by Anne Othen. During the interview, Petitioner emphasized his experience as a general manager at a patio store in Ohio and his 20 years of sales experience. Although Petitioner's resume indicated he had not been employed since 2016 and he did not have any web-related experience, he told Anne Othen that he could learn how to operate the Patio Casual website and conduct online sales.

10. At the interview, Petitioner also disclosed he had a liver condition and informed Anne Othen that he may have to use the bathroom frequently, but otherwise could do the job.

11. Petitioner claims that during the interview, Anne Othen seemed disappointed and "expressed her discriminatory animus" towards him because of this medical condition. Patio Casual denies any derogatory remarks or animus based on Petitioner's liver condition or request for visiting the restroom more frequently. The undersigned finds Patio Casual's witnesses' testimony more credible, primarily because there was no dispute Anne Othen hired Petitioner on the spot.

12. Petitioner was offered the job and accepted it during the interview. The evidence indicates Petitioner was hired for the website sales position on a part-time basis at $10.00 an hour. Patio Casual did not offer any medical or other benefits to Petitioner.

13. Anne Othen ordered shirts for Petitioner with the company logo and made arrangements for Ms. Cook to train Petitioner on the website and how to conduct online sales.[2]

[2] Ms. Cook had previously quit her position at Patio Casual on or about April 4, 2020, but agreed to come back to assist with the website.

14. Petitioner started at the Patio Casual store on Saturday, April 25, 2020. During his first week he asked to have limited hours because he was moving. Anne Othen granted his request.

15. Ms. Cook worked with Petitioner for approximately six shifts, before she quit on May 6, 2020. Although at the hearing Ms. Cook testified Petitioner was "just fine" on the website except for spelling issues, her testimony about his mastery of the website and ability to handle the online sales is contradictory to statements she made to the Othens, PCOHR, and in an email. The undersigned finds Ms. Cook's assessment that Petitioner had trouble with the website and was more of a "true Salesman [and] not a website designer" is credible.

16. It became apparent after Ms. Cook no longer was assisting Petitioner that Petitioner was not able to handle the online sales or operate the store's website without assistance, but Patio Casual did not fire Petitioner at this point. Rather, Tom Othen moved Petitioner to the sales floor based on Petitioner's assertions that he had previous sales experience in patio furniture.

17. On May 14, 2020, a week later, Patio Casual terminated Petitioner.

18. After being terminated, Petitioner received disability benefits; he did not qualify for unemployment benefits because of his limited work history prior to Patio Casual.

19. After Patio Casual, Petitioner applied for numerous positions. Although he was offered positions by other employers, he declined those positions because they did not offer any benefits. No evidence was offered regarding the number of offers Petitioner received or the rates of pay for the positions he declined.

20. Petitioner is currently working for a real estate agency. No evidence was provided as to his current position, start date, or current salary.

Comments Regarding Petitioner's Disability

21. Petitioner claims that during his brief employment with Patio Casual the Othens made numerous comments regarding his appearance, ability to lift furniture, and whether he could do his job with his disability.

22. There was evidence the Othens made comments that Petitioner appeared sluggish and did not meet "their standards." Even assuming these statements were made, there was no evidence these comments were related to Petitioner's condition.

23. Ms. Cook and Tom Othen also corroborated Petitioner's assertion that the Othens did not want him to carry heavy furniture. Again, there was no evidence that this comment was related to his disability. To the contrary, Tom Othen admitted he told Petitioner he did not want him to handle the furniture because he had witnessed Petitioner drag patio furniture improperly and did not want him to damage the merchandise.

24. Ms. Cook believed the Othens did not treat any of the Patio Casual employees well. For example, Anne Othen told her that she was dispensable and could easily be replaced. Ms. Cook also noted that all employees were scolded for taking breaks. One employee had been fired after taking an unauthorized lunch break. There was no evidence as to the other employees' disability status.

25. The only comments directly attributed to Petitioner's liver condition were based on Anne Othen's concern and fear about Petitioner being exposed to the coronavirus while working and becoming severely sick as a result. Anne Othen admitted at the hearing she was especially concerned about Petitioner's health given what little was known at that time about the impact of the coronavirus on people with underlying conditions. She assumed Petitioner's condition made him more vulnerable than other employees.

Differential Treatment

26. Petitioner claims he was treated differently than other employees at Patio Casual in two main ways: (1) his rate of pay and number of hours scheduled; and (2) the mask policy.

27. In early May 2020, Patio Casual hired Nicholas Ocasio at the same rate of pay as Petitioner: $10.00 an hour. There is no evidence Mr. Ocasio was disabled. As such, there is no evidence that Patio Casual paid non-disabled employees at a higher rate than disabled employees.

28. There was also no evidence of how many hours Petitioner actually worked at Patio Casual during his brief employment. Therefore, there is no evidence Patio Casual scheduled non-disabled employees for more hours or gave them more overtime than disabled employees.[3]

29. On May 14, 2020, Anne Othen texted Petitioner and asked that he come in later than usual. She also asked if he would be willing to wear a mask in the store.

> Anne Othen: Hey [Bill] because of your medical condition we think you should always wear a mask at work to protect yourself and others - you ok with that???
>
> William Lane: Ok. No problem.
>
> Anne Othen: Glad you agree - we want you and everyone safe.
>
> William Lane: Sure, I agree, I don't have it but if I got it would kill me.

[3] Although Petitioner claims he was hired as a full-time employee, the evidence establishes otherwise. Moreover, although he complained about not getting enough hours, during his first week of work, Petitioner requested to leave early so that he could move. There was also evidence the store had limited hours since it was open by appointment only due to the coronavirus pandemic lockdown.

30. At the time, there was guidance by health agencies that masks helped prevent the spread of the coronavirus, but there was no national, state, or local mandatory mask requirement in effect.[4]

31. When Petitioner came to work that day, he noticed that other employees were not wearing masks. At that point he took off his own mask. Anne Othen told Petitioner she would like him to wear the mask. Fifteen minutes after he refused to wear the mask, Ms. Othen terminated him.

32. Anne Othen testified, and the undersigned finds, that there was confusion during that point in the coronavirus pandemic regarding proper protocol and safety procedures. There was also confusion as to what questions a business could ask its employees related to their health, and whether businesses could require customers and employees to abide by certain safety protocols such as mask wearing.

33. Patio Casual claims that there was no mask requirement just for Petitioner, and that it was a suggestion for everyone. It also asserts Petitioner was fired for his performance and not his disability.

34. Although Patio Casual may have eventually fired Petitioner for his performance, based on the specificity of the text message and the temporal proximity of the discussion regarding his health to his termination, the undersigned finds Patio Casual fired Petitioner because he refused to wear a mask even though other employees were not required to wear a mask.

CONCLUSIONS OF LAW

35. Section 120.65(6), Florida Statutes (2020), and section 70-77(e) of the Code grant DOAH jurisdiction over this matter.

36. The Code provides protection from employment discrimination based on numerous classifications:

[4] Pinellas County did not implement its mask mandate ordinance until June 24, 2020.

Sec. 70-53. - Unlawful practices.

> (a) *Unlawful discrimination in employment practices.*
> (1) *Employers.* It is a discriminatory practice for an employer to:
> a. Fail or refuse to hire, discharge, or otherwise discriminate against an individual with respect to compensation or the terms, conditions, or privileges of employment because of race, color, religion, national origin, gender, sexual orientation, age, marital status, or disability; or
> b. Limit, segregate, or classify an employee in a way which would deprive or tend to deprive an individual of employment opportunities or otherwise adversely affect the status of an employee because of race, color, religion, national origin, gender, sexual orientation, age, marital status, or disability.

Sec. 70-78. - Enforcement.

> (a) The administrative law judge shall have the authority to award actual damages and reasonable costs and attorney's fees incurred by a party which were caused by a violation of this division.

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

38. In employment discrimination cases petitioners bear the ultimate burden of proving the adverse action or treatment was intentional and based on protected status. In this case, for Petitioner to prevail he must prove by a preponderance of the evidence that Patio Casual treated him differently in the terms of his employment or terminated him because of his disability.

39. A party can prove discriminatory intent with 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). Blatant remarks, "whose intent could mean nothing other than to discriminate on the basis of some impermissible factor, constitute direct evidence of discrimination." *Rojas v. Florida*, 285 F.3d 1339, 1342 n.2 (11th Cir. 2002) (citations and quotations omitted). "For example, in an ADA case, a decisionmaker's blanket statement that people with a certain disability are not competent to perform a particular job would amount to direct evidence of discrimination." *Bennett v. Brookdale Senior Living, Inc.*, 2011 WL 13285770, at *7 (N.D. Ala. Sept. 14, 2011).

40. Here, the May 14 text message stating "[b]ecause of your medical condition we think you should always wear a mask at work" proves the unlawful discrimination. Because of this direct evidence of discrimination, the familiar framework of establishing a *prima facie* case based on circumstantial evidence and the alternating burdens of proof established by *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), do not apply. *See Leme v. S. Baptist Hosp. of Fla., Inc.,* 248 F. Supp. 3d 1319, 1339 (M.D. Fla. 2017).

41. In a direct evidence case, an unlawful motive has been deemed a determinative factor in an employment decision, and the burden is then on the respondent to prove by a preponderance of the evidence that the same decision would have been reached even absent the discriminatory motive. *See*

Schultz v. Royal Caribbean Cruises, Ltd., 465 F. Supp. 3d 1232, 1263–64 (S.D. Fla. 2020).

42. Anne Othen told Petitioner she was concerned about his health because of his medical condition. She was requiring him to wear a mask based on her belief that his condition made him more vulnerable than the other employees to coronavirus. The statement is direct evidence of discrimination. This was not a stray comment. It was a statement by the decisionmaker of the reason for treating him differently. As such, the statement is direct and compelling evidence of disability discrimination. *Tomassi v. Insignia Fin. Grp.*, 478 F.3d 111, 115 (2d Cir. 2007) ("The more a remark evinces a discriminatory state of mind, and the closer the remark's relation to the allegedly discriminatory behavior, the more probative that remark will be."), *abrogated in part on other grounds by Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 129 S.Ct. 2343, 174 L.Ed.2d 119 (2009). Concluding that Anne Othen's explanation that Petitioner's disability was directly related to his use of the mask does not require inference or presumption. *See Samson v. City of Naples*, 2019 WL 2646554, at *6 (M.D. Fla. June 27, 2019).

43. The undersigned is sympathetic to Patio Casual's position. There is no doubt Anne Othen had genuine concern for Petitioner and believed his liver condition made him more prone to the potentially deadly effects of the coronavirus. She asked him if he would wear a mask, and he said yes. At that point in the coronavirus pandemic, there was confusion about how a small business could protect its employees and customers. Although Patio Casual did not clearly articulate its concerns as a defense, what it describes is known as the "direct threat" defense.

44. A "direct threat" defense under the ADA justifies differential treatment or the lack of an accommodation for a disabled employee where there is a "significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." 29 C.F.R. § 1630.2(r). Moreover, the “direct threat” defense:

> [M]ust be based on a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence, and upon an expressly individualized assessment of the individual's present ability to safely perform the essential functions of the job, reached after considering, among other things, the imminence of the risk and the severity of the harm portended.

Lewis v. City of Union City, Georgia, 934 F.3d 1169, 1184 (11th Cir. 2019) (quoting *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 86, 122 S.Ct. 2045, 153 L.Ed.2d 82 (2002)).

45. An employer's concerns regarding an employee's safety must be based on medical evidence and be consistent with a business necessity to treat the disabled employee differently. For example, in *Samson v. Federal Express Corporation*, 746 F.3d 1196, 1199 (11th Cir. 2014), an employee who was insulin-dependent was required to go through a Department of Transportation (DOT) medical exam, whereas non-diabetic employees were not required to do so. The Court specifically remanded for a determination of whether the DOT exam was an impermissible qualification standard that discriminated against diabetics because the employer did not show the exam was job-related and a business necessity. *Id.* at 1205-06. Here, Patio Casual offered no medical evidence that would justify requiring Petitioner to wear a mask, but not require other employees to wear a mask.

46. The circumstantial evidence corroborates the direct evidence that Patio Casual based its decisions regarding Petitioner based on his disability. Where a petitioner seeks to establish circumstantial proof of discrimination through a disparate treatment theory, he must establish the elements of a *prima facie* case: (1) he is a member of a protected class; (2) he was subjected to adverse employment action; (3) the employer treated similarly-situated employees outside of the petitioner's protected class more favorably than petitioner; and (4) he was qualified for the position. *City of W. Palm Bch. v. McCray*, 91 So. 3d 165, 171 (Fla. 4th DCA 2012).

47. All four elements are proven. First, Petitioner suffers from a disability and, therefore, is a member of a protected class as defined in the Code. Second, termination is an adverse employment action.

48. Next, as an employer, Patio Casual could require their employees to adhere to certain safety protocols, and could fire an employee for refusing to do so. Patio Casual, however, admits that only Petitioner was told he should wear the mask; none of the other employees who refused to wear a mask were terminated. As such, it treated similarly-situated non-disabled employees differently.

49. Finally, although there is a dispute about whether Petitioner was qualified for the website sales position, there is no question Patio Casual found him qualified to be a salesperson. They hired him based on his previous sales experience, they bought him a shirt so he could wear it on the sales floor, they even asked him to wear a mask while he was on the sales floor. Tom Othen testified that when it was clear Petitioner was not going to be able to handle the website sales, he moved Petitioner to the sales floor. Although the Othens may have been disappointed with his performance, their actions did not indicate Petitioner was going to be fired on May 14, 2020. Therefore, the undersigned finds Petitioner has proven he was qualified for a salesperson position.

50. These facts support an inference of discrimination and confirm that Petitioner was discharged because of his disability and not his job performance.

51. Section 70-78 of the Code provides that "[t]he administrative law judge shall have the authority to award actual damages and reasonable costs and attorney's fees incurred by a party which were caused by a violation of this division [sic]." Successful disability discrimination petitioners may recover certain statutory damages, like back pay. *See Lathem v. Dep't of Child. and Youth Servs.*, 172 F.3d 786, 794 (11th Cir. 1999) (applying Title VII provisions).

52. As the party seeking relief, however, Petitioner was required to mitigate his damages "through reasonably diligent efforts to seek employment that is substantially equivalent." *Id.* A substantially equivalent position "affords virtually identical promotional opportunities, compensation, job responsibilities, working conditions, and status" as the job from which the petitioner was terminated. *See Munoz v. Oceanside Resorts*, Inc., 223 F.3d 1340, 1347 (11th Cir. 2000).

53. Petitioner did make efforts to secure alternative employment, but claims he rejected offers for positions that did not offer health insurance and other benefits. The Patio Casual position, however, also did not offer health insurance. Thus, Petitioner failed to mitigate his damages when he could have done so.

54. In his proposed recommended order, Petitioner seeks $30,000 in damages. There was no evidence of how these damages were calculated or evidence of Petitioner's lost wages through the date of the hearing. Petitioner also was not forthcoming with his current employment status, dates of employment, or rate of pay.

55. Therefore, the undersigned finds there is insufficient evidence in the record to award Petitioner any monetary damages. *See Armstrong v. Charlotte Cty Bd. of Cty Comm'rs*, 273 F. Supp. 2d 1312 (M.D. Fla. 2003).

56. Furthermore, Petitioner indicated he was not interested in reinstatement to his former position at Patio Casual due to the working conditions, low wages, and lack of benefits. The undersigned finds reinstatement is not a viable remedy under the facts of this case.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned recommends entry of a final order finding that Respondent, Patio Casual, LLC, treated Petitioner, William Lane, differently in the terms of its mask policy and terminated him because of his disability. Patio Casual

should no longer discriminate against those with a disability and must enforce any safety protocols equally among its employees.

As both parties were self-represented, there is no basis to award reasonable costs and attorney's fees. Jurisdiction to award reasonable costs as provided in section 70-78 of the Pinellas County Code of Ordinances will be reserved. If the parties are unable to agree upon costs they may file a motion seeking resolution of the disagreement.

DONE AND ENTERED this 29th day of March, 2021, 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 29th day of March, 2021.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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