UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CLINTON KNOWLES,

Plaintiff,

v. CASE NO: 8:09-cv-1920-T-26AEP

THOMAS KNIGHT,

Defendant.

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O R D E R

THIS CAUSE comes before the Court on Defendant, Sarasota County Sheriff Thomas Knight's motion for summary judgment, memorandum in support, and supporting exhibits. (Dkts. 24-29.) Plaintiff filed a response to the motion with an incorporated memorandum of law and supporting exhibits. (Dkts. 32-39.)

Plaintiff's Claims & Allegations

Plaintiff, who was formerly employed as a sergeant and SWAT unit training instructor with the Sarasota County Sheriff's Office, sues Defendant Thomas Knight in his official capacity as Sheriff of Sarasota County for violating his rights under the the Americans With Disabilities Act of 1990, 42 U.S.C. § 12111 ("the ADA"), the Florida Civil Rights Act of 1992, § 760.01, et seq., Florida Statutes ("the FCRA") and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 706 ("the Rehab Act"). The three-

count complaint alleges that Defendant's failure or refusal to refer or assign Plaintiff to an available Employee Assistance Program ("the EAP")[1] for treatment of alcoholism prior to the misconduct for which his employment was terminated. Plaintiff alleges that as a result of Defendant's inaction he was deprived of benefits, privileges, and terms and conditions of employment which caused him to suffer humiliation, embarrassment, loss of enjoyment of life, emotional suffering, and mental distress. He seeks compensatory damages and other relief. Defendant moves for the entry of final summary judgment.

Summary Judgment Standard

Summary judgment is appropriate where there is no genuine issue of material fact. Fed.R.Civ.P. 56©. Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) (citation omitted). On a motion for summary judgment, the court must review the record, and all its inferences, in the light most favorable to the nonmoving party. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). Having done so, the Court finds that Defendant is entitled to the entry of final summary judgment.

[1] "EAP" refers to the "Employee Assistance Program," which is a program "that provides professional and confidential counseling assistance for members and/or their family members faced with issues on or off the job that could result in, or are resulting in, performance or behavioral problems on the job." (Knowles Depo., Ex. 5 (SCSO General Order 21.1).

Standard of Review

To establish a *prima facie* discrimination claim under the ADA standard, Plaintiff must prove: (1) that he has a statutorily covered disability; (2) that he is a qualified individual, which is to say, he is able to perform the essential functions of the employment position to be held with or without reasonable accommodation; and (3) that Defendant discriminated against him because of his disability. D'Angelo v. ConAgra Foods, Inc., 422 F.3d 1220, 1226 (11th Cir. 2005). The Eleventh Circuit has held that "[b]ecause the same standards govern discrimination claims under the Rehab Act and the ADA, we discuss those claims together and rely on cases construing those statutes interchangeably." Allmond v. Akal Sec., Inc., 558 F.3d 1312, 1316 n.3 (11th Cir. 2009). Disability claims under the FCRA are also analyzed under the ADA standard. Cordoba v. Dillard's, Inc., 419 F.3d 1169, 1175 (11th Cir. 2005).

Discussion

Plaintiff began his employment with the Sarasota County Sheriff's Office in 1995 as a patrol officer and during the course of his 12 plus years of employment he advanced to a position as a narcotics detective, then to a member of the SWAT unit, and then ultimately to sergeant and SWAT unit training instructor. (Dkt. 26, Knowles Depo., pp. 9-14.) As a member of the SWAT unit he was required to satisfy annual rigorous physical and psychological testing. (Dkt. 27, Kenney Affidavit.) Plaintiff rose in the SWAT unit to become a team leader who supervises, coordinates, and facilitates member

training and is responsible for monitoring and ensuring the well-being of his team members. (Id.)

Plaintiff had established a habit of abusing alcohol starting in his pre-teen years and continuing through his years of employment with the Sheriff's Office. (Knowles Depo., pp. 22-25.) His alcohol abuse caused him problems, including blackouts on more than one occasion. (Id. at 26-27.) He never sought treatment or counseling for his alcohol abuse. (Id. at 26.)

Plaintiff did have a disciplinary history during his employment which included alcohol-related incidents. (Id. at 27-31; Dkt. 27, Brief Affidavit, Ex. C.) One incident was a traffic stop in 1997 where Charlotte County law enforcement officers observed that Plaintiff was "borderline DUI," for which Plaintiff was reprimanded. (Knowles Depo., pp. 28-29.) The next three disciplinary incidents were not alcohol-related. (Id. at 29-31.) Then, in October 2007, Plaintiff failed to report for duty on two separate occasions because, as he told Captain Rick Mottola, he "had been drinking for several days and was hungover and didn't go, started drinking again, and missed the second day as a result also." (Id. at 31-32; 48-51.) He failed to report on these two occasions because he had "burned up" all his sick leave time. (Id. at 32.) His discipline was a 50 hour suspension, without pay, and removal from the SWAT unit. (Id. at 31.) Plaintiff testified that he had a discussion with Mottola about whether he would be willing to get counseling for his alcohol problem, that he expressed to Mottola he needed it, but he did

not voluntarily enter counseling because he believed after speaking with Mottola that he was being "directed to go to the EAP program" as part of his discipline. (Id. at 31; 51-54.)

Plaintiff served his 50 hour suspension and returned to duty, but was not permitted to resume participation in the SWAT unit. (Id. at 57.) Captain Mottola had issued a memorandum placing Plaintiff on probation for one year, prohibiting off-duty employment for six months, and removing Plaintiff from the SWAT unit for three months or "completion of EAP - whichever occurs later." (Id.) Plaintiff understood this to mean that if he completed EAP within three months, he would be reinstated to the SWAT unit or that if three months passed, he would "be required to continue in the EAP program until it is completed." (Id. at 58.)

In November 2007, Plaintiff failed to respond to a call and was given a one day demotion from sergeant to deputy. (Id. at 60-61.) His reinstatement followed a brief meeting with Defendant and a captain where they discussed whether Plaintiff "still wanted to get into the EAP program." (Id.) Plaintiff indicated his interest in the program, but there was no discussion of his alcohol abuse. (Id.) He resumed his regular duties as a sergeant, with the exception of SWAT duties. (Id. at 63-64.) Plaintiff testified that in December 2007 or January 2008, he asked Lieutenant Kimball what was going on with respect to the EAP program, but he did not discuss his alcohol abuse . (Id. at 64-65.)

Plaintiff acknowledges that during his employment with the Sheriff's Office he never consumed alcohol while on duty, reported for duty intoxicated, or experienced any blackouts while on duty. (Id. at 41-42.) During his deposition, Plaintiff was unable to identify any on-duty job requirements that he was unable to perform because of his alcohol dependence. (Id. at 41.) Throughout his employment, he was aware of the EAP program and that it included counseling services for alcohol-related issues, but he never voluntarily sought counseling or asked a counselor to refer him to the EAP. (Id. at 44-45; 54.) Although others at the Sheriff's Office knew of Plaintiff's drinking habits, Plaintiff can only recall one discussion of his alcohol dependence with a supervisory officer prior to February 28, 2008, which was the discussion with Captain Mottola in October 2007. (Id. at 33-34; 47-48; see also Dkt. 37, Kenney Depo., p. 26; Dkt. 34, Hayes Depo., pp. 15-16.)

On February 27, 2008, Plaintiff was informed by telephone that he was being reinstated into the SWAT unit. (Id. at 67-68.) At the time he received the call, he was at a Chili's restaurant consuming alcohol. (Id. at 68.) The next evening, he was the subject of a police investigation arising from his actions at an Applebee's restaurant in North Port, Sarasota County, Florida. (Id. at Ex. 5.) A server and a patron filed criminal charges for battery against Plaintiff for inappropriately touching and groping them without their permission. (Id.) Plaintiff does not dispute their recollection of his behavior. (Id. at 20-21.) On March 4, 2008, Plaintiff entered a residential treatment

facility where he completed treatment for his dependence. (Dkt. 38, Werner Depo., Ex. 1, pp. 1-2.) However, a Sheriff's Office investigation of the February 28, 2008, incident resulted in Plaintiff's termination from employment on April 21, 2008, the basis for which was one of Plaintiff's non-alcohol-related incidents in 2006 where he failed to take corrective action when a female deputy was at his residence with her department vehicle, the two 2007 incidents of Plaintiff failing to report for duty, and the 2008 incident at Applebee's involving use of alcohol off-duty and two counts of battery. (See Dkt 28, Transcript of the Career Services Board hearing on May 13, 2008, pp. 4; 7-8; 14-18.)

The basis for Plaintiff's claims in this action is not his termination, but rather the alleged failure of Defendant to "refer the Plaintiff to the EAP program as he had requested and the [Defendant] had agreed to do on several occasions" for treatment of his disability, alcoholism, prior to he misconduct for which he was terminated. (Dkt. 1, Complaint, ¶¶ 22, 24-25, 30-31, 36-37.) Under the ADA, "disability" is defined as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual" and "a record of such impairment" or "being regarded as having such an impairment." 42 U.S.C. § 12112(a); see also D'Angelo, 422 F.3d at 1225. Establishing an actual disability under the ADA involves a three-step analysis. The plaintiff must: (1) demonstrate that he suffers from a physical or mental impairment; (2) identify one or more life activities that are impaired by the physical or mental impairment and demonstrate that they qualify as a "major life activity" under the ADA; and (3) "show

that the impairment 'substantially limits' that life activity." Rossbach v. City of Miami, 371 F.3d 1354, 1357 (11th Cir. 2004). A "major life activity" includes "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 45 C.F.R. § 84.3(j)(2)(iii); see also Rossbach, 371 F.3d at 1357. "Substantially limits" is defined by governing regulations as:

> unable to perform a major life activity that the average person in the general population can perform; or significantly restricted as to the condition, manner, or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform the same major life activity.

29 C.F.R. § 1630.2(j).

The following factors are considered in assessing whether an individual is substantially limited in a major life activity: "(I) the nature and severity of the impairment; (ii) the duration or expected duration of the impairment; and (iii) the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment." 29 C.F.R. § 1630.2(j)(2). "Substantially limits" is a "severe standard and must include permanent and long term restrictions on performance of the life activity." Roig v. Miami Federal Credit Union, 353 F. Supp. 2d 1213, 1216 (S.D. Fla. 2005).

Alcoholism is not a *per se* disability, but rather must be shown to be an impairment that substantially limits on or more of a plaintiff's major life activities. Goldsmith v. Jackson Memorial Hospital Public Health Trust, 33 F. Supp. 2d 2336, 1341-42 (S.D. Fla.

1998) (citing Burch v. Coca-Cola Co., 19 F.3d 305, 315-16 (5th Cir. 1997)). Alcoholism does not substantially limit a major life activity when the abuse, although frequent, is only temporarily incapacitating. Burch, 19 F.3d at 316; Goldsmith, 33 F. Supp. 2d at 1342. "Permanency, not frequency, is the touchstone of a substantially limiting impairment." Burch, 19 F.3d at 316.

Here, the facts reveal that despite Plaintiff's alcohol dependence, which began in his pre-teen years, he was not only able to secure employment with the Sarasota County Sheriff's Office, but was also able to excel and advance during the 12 plus years of his employment. (See Dkt. 27, Brief Affidavit, Exs. A & B.) He consistently received performance evaluations of above average to excellent and was specifically commended for his analytical skills, decision-making skills, and leadership potential. (Brief Affidavit, Ex. A.) Plaintiff even earned a bachelor's degree in criminology while he was employed with Defendant. (Id. at Ex. B.) A few days prior to the February 2008 incident that resulted in his termination, he received praise from his supervisor for his leadership in keeping his shift on track in adjusting to a new shift assignment. (Id. at Ex. A.) Furthermore, only one of Plaintiff's 13 annual evaluations ever rated his attendance lower than satisfactory. (Id.) The comments in Plaintiff's evaluations do not support his contention that his alcoholism impaired his work. (Id.)

With respect to any social difficulties Plaintiff may have had during his employment, he admitted that his divorce in 2005 was not related to his alcohol

dependence and he does not refer to any other social difficulties in his deposition or psychiatric evaluation. (Knowles Depo., pp. 69-70.) In fact, his deposition reveals that he was present at social functions, employment-related and otherwise (id. at 49-50), and his employment history describes his interactions with peers and the public as "professional" and marked by "respect" (see Brief Affidavit, Ex. A.) In sum, while Plaintiff's alcohol dependence may have caused him intermittent periods of temporary incapacity, these periodic issues did not rise to the level of establishing a permanent impairment and, thus, did not constitute a disability under the ADA.

Even if Plaintiff could demonstrate that his alcoholism constituted a "disability," Defendant's alleged failure to force Plaintiff into counseling or treatment upon being notified of his alcoholism cannot form the basis of a discrimination claim. Plaintiff is solely responsible for the misconduct that led to his termination from employment. An employee who commits misconduct and then blames that misconduct on his alcoholism is not entitled to a reprieve in the form of an accommodation that is not available to the remaining employees who do not abuse alcohol. Peyton v. Otis Elevator Co., 72 F. Supp. 2d 915 (N.D. Ill. 1999); Adamczyk v. Chief, Baltimore County Police Dep't, 952 F. Supp. 259 (D. Md. 1997).

In Peyton, the court determined that the ADA does not require an employer to give any special concessions for misconduct caused by alcohol or drug use . 72 F. Supp. 2d at 920-21. The district court specifically found that an employer "was not obligated under

the ADA to offer [the employee] treatment instead of termination just because it learned, after it had already reached a legitimate decision to fire him, that [the employee's] alcoholism was the cause of his problems. Id. at 921. The district court, in Adamczyk, similarly rejected an employee's argument that an alcoholic cannot be punished for off duty misconduct but must be referred for treatment, finding that such a conclusion was contrary to the established view that an employer "may hold a drug addict or alcoholic to the same standard of performance and behavior to which it holds others, even if any unsatisfactory performance or behavior is related to the person's drug addiction or alcoholism." 952 F. Supp. at 265. Further, it was the express intent of Congress when it originally enacted the ADA that there is no legal obligation under the ADA to provide rehabilitation for an employee who is using alcohol. See 135 Cong. Rec. S10777 (daily ed. Sept. 7, 1989); Senate Committee on Labor and Human Resources, S. Rep. 101-116 (Aug. 30, 1989) at 41-42. As Defendant points out, the undisputed facts are that the Sarasota County Sheriff's Office had an employee assistance program available to Plaintiff at any time throughout his employment and that voluntary access to this assistance could be obtained by making a telephone call.

Essentially, Plaintiff's claim is that he should not have been terminated for his off-duty misconduct because Defendant previously knew he was an alcoholic and the misconduct would have presumably been prevented had Defendant forced Plaintiff into counseling or treatment. Federal courts have noted that the results of treatment are

uncertain and do not conclude that treatment presumes successful treatment. Myers v. Hose, 50 F.3d 278, 283 (4th Cir. 1995); Fuller v. Frank, 916 F.2d 558, 562 (9th Cir. 1990). The Seventh Circuit has cautioned against considering an ADA claim through the speculative approach suggested by Plaintiff, that is, that if the Defendant had forced him into counseling or treatment two things would have happened: (1) that the Plaintiff would have successfully completed treatment and (2) that the Plaintiff's later misconduct would not have occurred. Nawrot v. CPC Intern., 277 F.3d 896, 904 (7th Cir. 2002) (citing Sutton v. United Air Lines, Inc., 527 U.S. 471, 482-84 (1999)). Employers are to consider only the measures actually taken and the consequences that actually follow. Nawrot, 277 F.3d at 904. Following this instruction, it is undisputed that Plaintiff was but a phone call away from receiving counseling or treatment for his alcoholism during the course of his 12 plus years of employment with Defendant and that he always knew of the Sheriff's Office's disciplinary rules. He is solely responsible for, and was properly held accountable for, his misconduct on February 28, 2008. The ADA expressly provides that an employer may hold an employee to the same disciplinary standards as all other employees even if the employee's unsatisfactory performance or behavior is related to drug use or alcoholism. 42 U.S.C. § 12114(c)(4). The ADA simply does not shift the responsibility for an employee with an alcohol problem to seek assistance to the employer upon learning of that problem.

ACCORDINGLY, it is **ORDERED AND ADJUDGED**:

Defendant Sarasota County Sheriff Thomas Knight's motion for summary judgment (Dkt. 24) is granted. The Clerk is directed to enter judgment in favor of Defendant, terminate any pending motions, and close this case.

DONE AND ORDERED at Tampa, Florida, on July 8, 2011.

s/*Richard A. Lazzara*
RICHARD A. LAZZARA
UNITED STATES DISTRICT JUDGE

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Counsel of Record