

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

THELEMAQUE COLEUS,)
)
 Petitioner,)
)
 vs.) Case No. 01-4659
)
 WALT DISNEY WORLD,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was conducted in this case on February 11, 2002, in Orlando, Florida, before Jeff B. Clark, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Thelemaque Coleus, pro se
Post Office Box 550776
Orlando, Florida 32855

For Respondent: Charles Robinson Fawsett, Esquire
Shutts & Bowen, LLP
300 South Orange Avenue, Suite 1000
Post Office Box 4956
Orlando, Florida 32802-4956

STATEMENT OF THE ISSUE

Whether or not Respondent violated the Florida Civil Rights Act of 1992, as alleged in the Petition for Relief filed by Petitioner and received by the Florida Commission on Human Relations on November 20, 2001.

PRELIMINARY STATEMENT

Petitioner, Thelemaque Coleus, filed a Charge of Discrimination with the Florida Commission on Human Relations ("FCHR") on or about May 22, 1998. In that charge he alleged that he was denied reasonable accommodation and terminated from employment by Respondent, Walt Disney World, in violation of the handicap/disability provisions of the Florida Civil Rights Act (the "FCRA"), Sections 760.10-11, Florida Statutes, and sought all relief available under the FCRA.

On October 31, 2001, the FCHR issued a Determination: No Cause ("Determination"), determining that there "is no reasonable cause to believe that an unlawful employment practice has occurred" involving Petitioner and Respondent.

November 20, 2001, the FCHR received Petitioner's Petition for Relief. On December 5, 2001, the Petition for Relief was transmitted to the Division of Administrative Hearings requesting assignment to an Administrative Law Judge to conduct all necessary proceedings. On December 18, 2001, the case was set for final hearing on February 11, 2002, in Orlando, Florida.

At the final hearing, Petitioner, who represented himself, presented his case-in-chief, which included his own sworn testimony and four exhibits which were admitted into evidence and marked Petitioner's Exhibits 1-4. Prior to Petitioner's presentation, Respondent presented one witness, Dennis Hunter,

Esquire, out of order; Respondent presented five exhibits, marked Respondent's Exhibits 1-5, which were admitted during Mr. Hunter's testimony; Mr. Hunter's testimony and Respondent's exhibits became irrelevant based on the subsequent determination that Petitioner failed to present a prima facie case. At the close of Petitioner's presentation, the parties were advised that Petitioner had failed to present a prima facie case and, consequently, Respondent, which had a number of witnesses present, did not present its case. No transcript was ordered.

FINDINGS OF FACT

Based on the testimony of Petitioner and the evidence he presented, the following findings of fact are made:

1. Petitioner was employed by Respondent in approximately 1990. Then or shortly thereafter he became a houseman at the Respondent's Grand Floridian Resort Hotel. His assigned duties included some strenuous lifting and other strenuous physical activity.

2. In 1995, Petitioner seriously injured his lower back and one hand in an off-the-job incident involving his jumping from the second story of his apartment to avoid a fire in the apartment. As a result, Respondent gave him a leave of absence for about five months from his employment.

3. After returning to work, in early 1996 Petitioner incurred what he contended was a work-related injury to his

lower back. A medical record introduced by Petitioner, casts doubt on the extent to which that injury contributed to the condition from which he thereafter suffered and which interfered with and ultimately ended his ability to work.

4. Petitioner had major back surgery in 1996. He consequently received and took additional leave from work.

5. Petitioner testified on several occasions that at no time after the 1995 injury was he able to perform the strenuous aspects of the assigned duties of his position, houseman. Based on Petitioner's testimony, this finding of fact is confirmed, i.e., Petitioner is unable to perform the assigned duties of a houseman.

6. Petitioner was placed on light duty for a period of time. Petitioner was sent to a department of Respondent called "Re-Casting" in an effort to place him in duties he could perform. As a result of his initial contact with Re-Casting, he was transferred from the Grand Floridian Resort Hotel to the Contemporary Resort Hotel, but he was unable to perform his assigned duties and accordingly was transferred back to the Grand Floridian Resort Hotel. The transfer and return took place in March and April 1997.

7. Petitioner subsequently returned to Re-Casting, and took a test to determine his qualifications for an open position as a cashier. Petitioner failed the test.

8. Petitioner last worked for Respondent in May 1997. Petitioner has not held any employment since then, and he testified that he has not applied for employment since then. He admits that the reason for not having held any employment and not applying for it is his physical inability to work.

9. Petitioner testified unequivocally that he has, since May 1997, been unable to do any kind of work. Based on Petitioner's testimony, this finding of fact is confirmed, i.e., that since May 1997, Petitioner has been unable to do any kind of work.

10. Petitioner has applied for disability benefits with the Social Security Administration. His disability claim indicates a continuing disability on his part.

CONCLUSIONS OF LAW

11. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter. Subsection 120.57(1), Florida Statutes.

12. While this claim arises under the FCRA, judicial precedents under the Americans With Disabilities Act ("ADA") are applicable. Greene v. Seminole Electric Cooperative, 701 So. 2d 646, 647 (Fla. 5th DCA 1997) ("Further, the Act [the FCRA] should be construed in conformity with . . . the Americans with Disabilities Act, 42 U.S.C. § 12101, et. seq., and related regulations.").

13. A person claiming under the employment discrimination provisions of the ADA must show that he is a "qualified individual with a disability." Hensley v. Punta Gorda, 686 So. 2d 724, 726 (Fla. 1st DCA 1997); Mears v. Gulfstream Aerospace Corporation, 905 F.Supp. 1075 (S.D. Ga. 1995), aff'd, 87 F.3d 1331 (11th Cir. 1996). Under the law, a qualified individual with a disability is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. Section 12111(8).

14. The United States Supreme Court has established an analytical framework within which courts should examine claims of discrimination. In cases alleging discriminatory treatment, Petitioner has the initial burden of establishing, by a preponderance of the evidence, a prima facie case of discrimination. St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993); Combs v. Plantation Patterns, 106 F.3d 1519 (11th Cir. 1997).

15. An individual with a disability must be qualified for a position in order to be entitled to the protection of anti-discrimination provisions of the ADA and the FCRA. Salmon v. Dade County School Board, 4 F.Supp.2d 1157, 1160 (S.D. Fla. 1998). Indeed, to show a prima facie case of employment discrimination under the FCRA and/or the ADA, Petitioner must

establish that he has a disability, is a qualified individual with a disability, and was subjected to unlawful discrimination because of the disability. Smith v. Avatar Properties. Inc, 714 So. 2d 1103, 1106 (Fla. 5th DCA 1998); Duckett v. Dunlop Tire Corporation, 120 F.3d 1222, 1224 (11th Cir. 1997).

16. Taking the foregoing legal principles as applicable to this case, Petitioner has admitted that, by reason of being unable to work at all since May 1997, he is not a qualified individual with a disability and has not been since May 1997. For that reason alone, regardless of whether he has a handicap or disability which qualifies under the FCRA, Petitioner conclusively has failed to establish a prima facie case of employment discrimination under the FCRA.

17. Under the ADA, it is necessary for a person to be a qualified individual with a disability before the employer has a duty to accommodate him. Smith v. Blue Cross Blue Shield of Kansas, 894 F.Supp. 1463, 1469 (D. Kansas 1995). In this case, although Respondent did not need to, it accommodated him in three different ways, by granting him at least two long leaves of absence, by assigning him to light duty, and by transferring him to a different location and position.

18. In addition to having not established any basis for a finding that he is a qualified individual with a disability, and having admitted being afforded three different accommodations,

Petitioner offered no showing that any adverse personnel action was taken against him because of his disability. Instead, it is conclusive that the reason he has not worked at Respondent's place of business or anywhere else since 1997 is that he is unable to do any work.

19. Under these circumstances, taking everything presented by Petitioner as true and evaluating everything in the light most favorable to him, no reasonable finder of fact could, on this record, find that Petitioner has established a prima facie case that Respondent has committed employment discrimination under the FCRA because of Petitioner's asserted handicap or disability.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Florida Commission on Human Relations find that Petitioner, Thelemaque Coleus, has failed to present a prima facie case of employment discrimination under the FCRA, and that, accordingly, the case is dismissed with prejudice.

DONE AND ENTERED this 27th day of February, 2002, in
Tallahassee, Leon County, Florida.

JEFF B. CLARK
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of February, 2002.

COPIES FURNISHED:

Thelemaque Coleus
Post Office Box 550776
Orlando, Florida 32855

Denise Crawford, Agency Clerk
Florida Commission on Human Relations
325 John Knox Road
Building F, Suite 240
Tallahassee, Florida 32303-4149

Charles Robinson Fawsett, Esquire
Shutts & Bowen, LLP
300 South Orange Avenue, Suite 1000
Post Office Box 4956
Orlando, Florida 32802-4956

Christie Sutherland
Walt Disney World
Post Office Box 10000
Lake Buena Vista, Florida 32830

Cecil Howard, General Counsel
Florida Commission on Human Relations
325 John Knox Road
Building F, Suite 240
Tallahassee, Florida 32303-4149

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.