

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DUSTI L. McCLUSKEY, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 03-0719  
 )  
 TRANSITIONS OPTICAL, INC., )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the administrative hearing of this case on April 23, 2003, in Clearwater, Florida, on behalf of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Dusti L. McCluskey, pro se  
5237 Coral Way, North  
St. Petersburg, Florida 33714

For Respondent: Joan M. Vecchioli, Esquire  
Stephanie T. Marquardt, Esquire  
Johnson, Pope, Bokor, Ruppel & Burns, P.A.  
911 Chestnut Street  
Clearwater, Florida 33757-1368

STATEMENT OF THE ISSUE

The issue is whether Respondent committed an unlawful employment practice in violation of the Florida Civil Rights Act of 1992, Chapter 760, Florida Statutes. (References to chapters

and sections are to Florida Statutes (2000) unless otherwise stated.)

PRELIMINARY STATEMENT

On June 3, 2002, Petitioner filed an Amended Charge of Discrimination with the Florida Commission on Human Relations (the Commission). On January 21, 2003, the Commission issued a determination of no cause. On February 25, 2003, Petitioner filed a Petition for Relief from an unlawful employment practice, and the Commission referred the matter to DOAH to conduct an administrative hearing.

On March 18, 2003, Respondent filed a Motion to Dismiss both the retaliation claim and the discrimination claim. On April 1, 2003, ALJ T. Kent Wetherell, II, granted Respondent's Motion to Dismiss without prejudice as to Petitioner's retaliation claim and allowed Petitioner the opportunity to file an amended retaliation claim. Petitioner did not file an amended retaliation claim. Thus, a hearing was held on Petitioner's remaining discrimination claim.

At the hearing, Petitioner testified on her own behalf and submitted two exhibits for admission into evidence. Respondent presented the testimony of two witnesses and submitted 15 exhibits for admission into evidence. The identity of the witnesses and exhibits, and any attendant rulings, are set forth

in the record of the administrative hearing. Neither party requested a transcript of the hearing.

Respondent filed a Proposed Recommended Order (PRO) on May 5, 2003, more than 10 days after the date of the hearing. Petitioner did not file a PRO.

#### FINDINGS OF FACT

1. Petitioner is an adult female. On October 13, 1997, Respondent hired Petitioner to work in the assembly department at a facility in Pinellas Park, Florida, where Respondent manufactures transition lenses. Transition lenses are plastic photo chromic eye lenses that activate when exposed to ultraviolet light.

2. On June 22, 2000, Dr. Jorge Rodriguez diagnosed Petitioner with carpal tunnel syndrome. Dr. Rodriguez restricted Petitioner from using her right hand at work. From June 22, 2000, through the date of the hearing, Petitioner received treatment through a workers' compensation claim.

3. After June 22, 2000, Respondent accommodated Petitioner's medical restrictions by placing Petitioner in a non-assembly position doing clerical work. Respondent created the clerical position specifically for Petitioner to accommodate her medical restrictions. Petitioner remained in the clerical position until Respondent terminated Petitioner's employment on May 28, 2001.

4. On March 22, 2001, Petitioner presented Respondent with a medical report updating her restrictions. After reviewing the restrictions, Respondent asked Petitioner to perform a production job with modifications that were within her restrictions.

5. Petitioner felt uncomfortable with the production job. Respondent allowed Petitioner to continue in the clerical position that Respondent had created to accommodate Petitioner.

6. On May 28, 2001, Petitioner submitted a copy of a Medical Disposition and Treatment Report from Dr. Rodriguez dated May 24, 2001. Petitioner submitted the medical report and her weekly time sheet to Mr. Mark James, Petitioner's supervisor. Petitioner omitted the bottom half of the medical report and replaced it with a blank, lined piece of paper below the box where "light duty" was apparently checked.

7. Mr. James informed Petitioner that he needed to see the entire Report to determine what restrictions, if any, still applied to Petitioner. Mr. James requested the full medical report from Petitioner two more times that day. Later in the day, Petitioner submitted another copy of the complete medical report without the blank, lined piece of paper covering the bottom half of the report. Once again, the "light duty" box appeared to be checked. The "full duty" box did not appear to

be checked, but certain restrictions modifying the "full duty" box were marked.

8. Mr. James called Dr. Rodriguez's office and requested the doctor's office to fax him a copy of the medical report. The medical report faxed to Mr. James did not have the "light duty" box checked. Rather, the medical report contained a check in the "full duty" box and noted additional restrictions.

9. Mr. James turned the medical reports submitted by Petitioner and faxed by Dr. Rodriguez over to Mr. Bill Fitts, Respondent's Personnel Manager, for further action. Mr. Fitts concluded that Ms. McCluskey altered and falsified the two medical reports she submitted to Mr. James.

10. Mr. Fitts made the decision to terminate Petitioner's employment based upon Mr. Fitts' determination that Petitioner falsified her medical reports. Mr. Fitts' supervisor concurred with Mr. Fitts' decision, and Respondent terminated Petitioner's employment.

11. Petitioner was not handicapped or disabled during her employment with Respondent. Even though Petitioner suffered from carpal tunnel syndrome, Petitioner was able to perform clerical jobs for Respondent. Petitioner was able to brush her own teeth, bathe and shower and take care of other personal hygiene matters. Petitioner was able to do light housework, was able to cook for her family, and was able to care for her

children with the exception that she could not lift them.

Petitioner was also able to use a computer to surf the internet and was able to continue her hobby of horseback riding.

12. Petitioner made no credible showing that there was any causal relationship between her carpal tunnel syndrome and any adverse employment actions taken by Respondent. Respondent terminated Petitioner's employment for falsifying medical reports. Irrespective of whether Petitioner actually falsified the medical reports, Respondent reasonably believed that Petitioner falsified the medical reports, and there is no credible and persuasive evidence that the reasons articulated by Respondent were a pretext for discrimination.

13. Prior to the termination of Petitioner's employment, Respondent disciplined Petitioner once for failing to call in sick before her shift pursuant to Respondent's policies. This discipline was consistent with Respondent's discipline policy for all employees and was not related to Petitioner's carpal tunnel syndrome.

14. Prior to terminating Petitioner's employment, Respondent coached Petitioner once for taking breaks at inappropriate times. The coaching was not a disciplinary violation and was not related to Petitioner's carpal tunnel syndrome.

## CONCLUSIONS OF LAW

15. DOAH has jurisdiction over the parties and the subject matter of this proceeding. Sections 120.569 and 120.57(1). The parties received adequate notice of the administrative hearing.

16. Petitioner is an "aggrieved person" and Respondent is an "employer" within the meaning of Sections 760.02(10) and 760.02(7), respectively. Section 760.10 makes it unlawful for Respondent to discharge or otherwise discriminate against Petitioner based on an employee's disability.

17. No direct evidence of discrimination exists in this case. A finding of discrimination, if any, must be based on circumstantial evidence.

18. The burden of proof in discrimination cases involving circumstantial evidence is set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973). Federal discrimination law may be used for guidance in evaluating the merits of claims arising under Chapter 760. Tourville v. Securex, Inc., 769 So. 2d 491 (Fla. 4th DCA 2000); Greene v. Seminole Electric Co-op. Inc., 701 So. 2d 646 (Fla. 5th DCA 1997); Brand v. Florida Power Corp., 633 So. 2d 504 (Fla. 1st DCA 1994).

19. Petitioner has the initial burden of establishing by a preponderance of the evidence a prima facie case of unlawful discrimination. Failure to establish a prima facie case of discrimination ends the inquiry. See Ratliff v. State, 666

So. 2d 1008, 1012 n.6 (Fla. 1st DCA 1996), aff'd, 679 So. 2d 1183 (1996) (citing Arnold v. Burger Queen Systems, 509 So. 2d 958 (Fla. 2d DCA 1987)).

20. If Petitioner succeeds in making a prima facie case, the burden shifts to Respondent to articulate some legitimate, nondiscriminatory reason for its conduct. If Respondent carries this burden of rebutting Petitioner's prima facie case, Petitioner must demonstrate that the proffered reason was not the true reason, but merely a pretext for discrimination. McDonnell Douglas, 411 U.S. at 802-03.

21. Petitioner complains that the termination of her employment and prior adverse employment actions were motivated by her carpal tunnel syndrome. This is a disparate treatment claim. To present a prima facie case of disparate treatment under Chapter 760, Petitioner must first prove that she is "disabled."

22. In Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002), the Court held that carpal tunnel syndrome can only be considered a disability under the Americans with Disabilities Act (ADA) if the condition prevents or severely restricts an individual from performing activities that are of central importance to most people's daily lives. The carpal tunnel syndrome's impact must also be permanent or long term. Id. at 198. Petitioner's inability to do manual work in

a specialized assembly line job is not sufficient proof that Petitioner is substantially limited in performing manual tasks to constitute a disability under the ADA. Toyota, 534 U.S. at 201.

23. Petitioner's carpal tunnel syndrome did not prevent her from performing activities that are of central importance to most people's daily lives. Petitioner was able to care for herself and her children and engage in hobbies and other activities she enjoyed. Petitioner was able to perform clerical jobs as well as any other job that did not require repetitive hand movements. Petitioner failed to show that her condition is permanent or long term. Petitioner failed to show that she is disabled and thereby failed to establish an essential requirement for a prima facie case of discrimination.

24. If it were determined that Petitioner were disabled, Petitioner failed to show that Respondent treated similarly situated employees without disabilities more favorably. Disparate treatment of a disabled person is an essential requirement for a prima facie case of discrimination. Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997).

25. If it were determined that Petitioner established the essential requirements for a prima facie case of discrimination, Respondent articulated legitimate, non-discriminatory reasons for any adverse employment action against Petitioner.

Respondent terminated Petitioner's employment because Respondent reasonably believed Petitioner had falsified medical records. Respondent also articulated legitimate non-discriminatory reasons for allegedly adverse employment actions taken against Petitioner prior to the termination of her employment.

26. Petitioner presented no credible and persuasive evidence that Respondent's articulated reasons for its actions were a pretext for discrimination. There is no evidence to support a finding that Respondent violated Chapter 760.

RECOMMENDATION

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

RECOMMENDED that the Commission enter a final order finding that Respondent did not discriminate against Petitioner and dismissing the Petition for Relief.

DONE AND ENTERED this 5th day of June, 2003, in Tallahassee, Leon County, Florida.

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DANIEL MANRY  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 5th day of June, 2003.

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.