11-21-03

STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

FILED
2004 AUG 23 P 1:35

CONNIE FISHBAUGH,

Petitioner,

v.

BREVARD COUNTY SHERIFF'S DEPARTMENT,

Respondent.
_____/

EEOC Case No. NONE

FCHR Case No. 22-02697

DOAH Case No. 03-1139 DMK-CWS

FCHR Order No. 04-103

ORDER DISMISSING PETITION FOR RELIEF FROM AN UNLAWFUL EMPLOYMENT PRACTICE ON DISABILITY BASIS AND REMANDING FOR INVESTIGATION ON GENDER (SEX) BASIS

Petitioner, CONNIE FISHBAUGH, filed a complaint of discrimination pursuant to Florida Civil Rights Act of 1992, Sections 760.01-760.11, Florida Statutes, alleging that the Respondent, BREVARD COUNTY SHERIFF'S DEPARTMENT, committed an unlawful employment practice causing her to terminate her employment because of disability and gender (sex). The allegations set forth in the complaint were determined to be outside the jurisdiction of the Commission and on February 21, 2003, the Executive Director issued his determination of no jurisdiction. The Petitioner filed a Petition for Relief. The final hearing was placed in abeyance following a telephonic hearing in which the parties agreed to file stipulated facts, briefs and proposals on the issue of whether transsexualism is a disability under the Florida Civil Rights Act of 1992 and whether transsexuals may maintain an action for sex discrimination under said Act.

Administrative Law Judge Daniel M. Kilbride, having considered the filed materials, issued his Recommended Order of Dismissal dated March 21, 2003.

The Commission panel designated below considered the record of this matter and determined the action to be taken on the Recommended Order.

Findings of Fact

The ALJ found that the Petitioner suffered from a Gender Identity Disorder (GID), also know as transsexualism, which is a recognized mental health disorder under both the Diagnostic and Statistical Manual of Mental Disabilities (4th ed.) and the International Classification of Disease (World Health Organization, 10th ed.). The ALJ further goes into the method of treatment and impact of the disorder on the Petitioner, including sex-reassignment therapy. He found that, several years following her surgery, Petitioner applied for a position with the Respondent and successfully completed the required pre-employment medical and psychological testing. She informed them of her transgender status before she applied, and was hired as a

deputy sheriff with no restrictions nor accommodations on her ability to perform the essential functions of her position.

We adopt the Administrative Law Judge's findings of fact.

Conclusions of Law

As to disability basis

The ALJ concluded that there is no basis for a finding that transsexualism is a disability pursuant to FCRA because the underlying federal law and the regulations that construe the ADA and the Rehabilitation Act specifically exclude the condition of transsexualism as a disability. He concluded that Florida should follow those interpretations. He limited the application of the prior FCHR case of Smith v. City of Jacksonville, Jacksonville Correctional Institute, DOAH # 88-5451, 1991 WL 833882 (1991); FCHR # 86-985 (1992), because it involved a pre-operative transsexual with significant medical disabilities and the facts in the case occurred under the Florida Human Rights Act of 1977 and was prior to the enactment of the Florida Civil Rights Act of 1992 and the federal ADA and the amendments to the Rehabilitation Act. The Panel agreed with his analysis.

Since the Panel determined that transsexualism was not a covered disability under FCRA, it did not need to find that Petitioner established a *prima facie* case of disability discrimination. The Petitioner must establish that (s)he is handicapped within the meaning of the ADA or the Florida Civil Rights Act of 1992 (§760.10, *Florida Statutes* (2000)). *Milton v. Scrivner, Inc.*, 53 F.3d 1118, 1123 (10th Cir.1995); *Brand v. Florida Power Corp.*, 633 So.2d 504, 509-10 (Fla. 1st DCA 1994). This can be shown either by demonstrating a physical impairment that substantially limits one or more of the major life activities and presenting a record of such an impairment; or being regarded as having such impairment. 42 U.S.C. § 12102(2); 29 C.F.R. §§ 1630.2(g), (i).

In the instant case, however, it should be noted that there was no showing that the Petitioner is currently suffering from a disability that is an impairment that substantially limits one or more of the major life activities. In fact, the ALJ specifically found that, prior to undergoing sex-reassignment, Petitioner experienced many of the same impairments found in the Smith case, but that, after undergoing sex-reassignment, Petitioner successfully completed Respondent's required pre-employment medical and psychological testing. She did not have any restrictions or request any accommodations on her ability to perform the essential requirements of her position.

As to sexual discrimination basis

Although Title VII does not contain the specific prohibition found in the ADA and Rehabilitation Acts, it does have a significant case history that is instructive.

The ALJ concluded that Petitioner has alleged that Respondent discriminated against her because she is a transsexual and not because she is a woman. He concluded that the reasoning in Ulane v. Eastern Airlines, Inc. 742 F2d 1081 (7th Cir. 1984) applies in which the court rejected transsexualism as being protected by Title VII and, thus the FCRA. The ALJ further concluded that, although some states have adopted "more liberal definitions of 'sex' to include sexual orientation," there is no statutory nor case law to suggest that Florida is one of those states that has recognized transsexualism as a class protected from discrimination.

Both sides have cited cases where sex discrimination has been found, or not found, involving sexual orientation and gender based harassment. Each side seems to rely upon a major case which is immediately distinguished or not followed in significant cases later heard.

For example, the ALJ relies upon Holloway v Arthur Andersen & Co., 566 F2d 659 (9th Cir. 1977) to support his reliance upon Ulane, supra. The Petitioner points out that the same court, in Schwenk v. Hartford, 204 F.3d 1187, at 1201 (9th Cir. 2000) overruled its holding in Holloway by adopting "the logic and language of Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)." Similarly, the reliance of the Petitioner on the expansion of actionable items under Oncale v. Sundowner Offshore Oil Services, Inc., 523 U.S. 75 (1998), is somewhat misplaced by the failure of a number of courts to extend it and often restricting it solely to the facts before the Oncale court; thereby, "distinguishing" that case and its holdings from theirs. See, Simonton v. Runyon, 232 F3d 33 (2nd Cir. 2000); see also, Valdez v. Clayton Industries, 107 Cal Rptr2d 15 (Cal.App.2nd DCA 2001), EEOC v. Harbert-Yeargin, Inc., 266 F3d 498 (6th Cir. 2001); Johnson v. Fresh Mark et al., 2004 WL 1166553 (6th Cir. 2004).

The Price Waterhouse case, however, deals with discrimination of a woman and does not set out a separate "protected class" for transsexuals. Therefore, the issue as posed by the ALJ is somewhat misleading. It would be better stated, "Can a transsexual maintain a case of sex discrimination in the workplace?" The ALJ failed to consider under what conditions may a transsexual, as a woman or man, maintain an action for discrimination based on sex.

Petitioner argues in her exceptions that the ALJ mischaracterizes Petitioner's claim. The ALJ stated that Petitioner has alleged that Respondent discriminated against her because she is a transsexual and not because she is a woman. Petitioner states that her claim is based on a claim of sex (gender) discrimination as a woman where the complainant is perceived not to conform to sex stereotypes or because the complainant has changed sex. The Commission concludes that the reasoning in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), applies where the court found that a claim of discrimination could be found where a perception that a person failed to conform to stereotyped expectations of how a "woman" should look and behave. See, also, Oncale v. Sundowner Offshore Oil Services, Inc., 523 U.S. 75 (1998) to show that evils not specifically contemplated by Congress when it enacted Title VII can still be found discriminatory. Therefore, a transsexual, as a man or woman, may maintain an action for discrimination based on sex.

We modify the conclusions of law accordingly.

In modifying these conclusions of law of the Administrative Law Judge, we conclude: (1) that the conclusions of law being modified are conclusions of law over which the Commission has substantive jurisdiction, namely conclusions of law stating what must be demonstrated to establish a prima facie case of unlawful discrimination under the Florida Civil Rights Act of 1992; (2) that the reason the modification is being made by the Commission is that the conclusions of law as stated run contrary to previous Commission decisions on the issue; and (3) that in making these modifications the conclusions of law we are substituting are as or more reasonable than the conclusions of law which have been rejected. See, Section 120.57(1)(l), Florida Statutes (2001).

We adopt the Administrative Law Judge's conclusions of law as modified.

Exceptions

Petitioner filed exceptions to the Administrative Law Judge's Recommended Order in an eleven page document entitled, "Petitioner's Exceptions to Recommended Order of Dismissal." Exceptions one through three dealt with the claim for discrimination based on disability and are stricken. Exceptions four and five relate to the claim for discrimination based on sex and are accepted to the extent they support the conclusions of the Commission that, as a man or woman, transsexuals may maintain an action for sexual discrimination.

Dismissal

The Request for Relief and Complaint of Discrimination on the basis of disability is DISMISSED with prejudice.

Remand

The Complaint of Discrimination on the basis of sex is hereby reinstated and a finding is made that the Commission has jurisdiction to investigate said complaint consistent this order.

The parties have the right to seek judicial review of this Order. The Commission and the appropriate District Court of Appeal must receive notice of appeal within 30 days of the date this Order is filed with the Clerk of the Commission. Explanation of the right to appeal is found in Section 120.68, Florida Statutes, and in the Florida Rules of Appellate Procedure 9.110.

DONE AND ORDERED this 20th day of August, 2004.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS

Commissioner Gayle Cannon, Panel Chairperson
Commissioner Keith A. Roberts
Commissioner Aletta Shutes

Filed this 20th day of August, 2004
in Tallahassee, Florida.

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Honorable Daniel M. Kilbride, Administrative Law Judge (DOAH)

Jim Tait, Legal Advisor for Commission Panel

I HEREBY CERTIFY that a copy of the foregoing has been mailed to the above listed addressees this 20th day of August, 2004.

BY: Violet Crawford
Clerk of the Commission
Florida Commission on Human Relations