

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CONNIE FISHBAUGH,)
)
 Petitioner,)
)
 vs.) Case No. 03-1139
)
 BREVARD COUNTY SHERIFF'S)
 DEPARTMENT,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

This cause came before Daniel M. Kilbride, Administrative Law Judge, Division of Administrative Hearings, in Tallahassee, Florida. In lieu of a formal hearing, the parties agreed to submit stipulated facts, expert deposition testimony, and proposed recommended orders with supporting briefs.

APPEARANCES

For Petitioner: Karen M. Doering, Esquire
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For Respondent: Linda G. Bond, Esquire
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STATEMENT OF THE ISSUES

1. Whether transsexualism is a disability that is protected by the Florida Civil Rights Act of 1992 (FCRA), Chapter 760, Florida Statutes.

2. Whether an allegation of discrimination based on transsexualism is sex discrimination, pursuant to the FCRA.

PRELIMINARY STATEMENT

Petitioner filed a Charge of Discrimination with the Florida Commission on Human Relations (FCHR) on July 5, 2002, charging Respondent with wrongful termination based on disability discrimination because she was a transsexual. On or about October 16, 2002, Petitioner amended her discrimination charge to include discrimination based on sex, principally founded on her status as a transsexual. Respondent replied that FCHR lacked jurisdiction to investigate the claim because transsexualism was not a disability pursuant to either the Americans with Disabilities Act (ADA) or the FCRA and that Respondent had a legitimate non-discriminatory business reason for the termination. Respondent replied similarly to the allegations of sex discrimination. On February 21, 2003, FCHR issued a no jurisdiction determination on both the disability and the sex discrimination allegations. Petitioner filed a Petition for Relief on March 28, 2003. The matter was transferred to the Division of Administrative Hearings on

March 28, 2003, for formal hearing de novo on the issue of jurisdiction. A final hearing was scheduled for June 17, 2003. Following a granting of Respondent's request for continuance, the hearing was scheduled for July 30 and 31, 2003. On June 24, 2003, Petitioner filed an unopposed motion to set a briefing schedule, oral argument, and to request a continuance of the final hearing. After a telephonic hearing, the matter was placed in abeyance on the need for a final hearing. A briefing schedule was established on the issues of whether transsexualism is a disability covered by the FCRA and whether transsexuals are a protected class covered against sex discrimination.

The parties filed stipulated facts, after which Petitioner filed the affidavits of two experts who offered opinions on transsexualism. Respondent also filed the deposition transcript of Dr. Pamela Hill-Epps, one of Petitioner's experts, who is a Florida-licensed psychologist and who specializes in the treatment of persons with sexual disorders. Following motions for extension of time to file their proposals and briefs, Petitioner and Respondent filed their proposals on October 8 and 7, 2003, respectively. Each party's proposal has been given careful consideration in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Respondent is an employer as defined by the FCRA.

2. Petitioner, Connie Fishbaugh, is a transsexual woman who has been diagnosed with Gender Identity Disorder (GID), also known as transsexualism.

3. Transsexualism is a recognized mental health disorder that causes a desire to live and be accepted as a member of the opposite sex. It is usually accompanied by the wish for one's body to be congruent with the preferred sex. When left untreated, persons diagnosed with transsexualism display symptoms of severe anxiety, severe depression, and dysfunction. GID is recognized as a medical condition in the Diagnostic and Statistical Manual of Mental Disabilities (4th ed.) and the International Classification of Disease (World Health Organization 10th ed.).

4. Gender identity, which is established at an early age, is an individual's internal psychological identification as male or female. A transsexual person is someone whose gender identity is in conflict with the person's anatomical sex at birth. This conflict creates emotional pain and suffering.

5. A person's gender identity cannot be changed through psychotherapy or through any other known treatment. Based on contemporary medical knowledge and practice, sex-reassignment is the only effective, medically prescribed treatment for this

condition. The medical process of sex reassignment takes place over several years and requires life-long medical treatment and monitoring. Sex reassignment relieves the distress caused by GID for the great majority of transsexual people. Nonetheless, sex reassignment is not a cure. A person who undergoes sex-reassignment continues to carry a diagnosis and requires lifelong medical monitoring and treatment.

6. Prior to undergoing sex-reassignment, Petitioner experienced sever anxiety, depression, and distress based on her lifelong gender dysphoria. As the years progressed, Petitioner's depression, anxiety, and distress about her gender dysphoria became more acute. Although, during this period, Petitioner fathered three children.

7. Petitioner took part in the Harry Benjamin Standards of Care, the accepted medical protocol for the diagnosis and treatment of transsexual persons. As part of this protocol, Petitioner's treatment included: psychological evaluations, during which time she was diagnosed with GID; completion of the "real life experience," which required her to live full-time as a female; administration of hormone therapy to create desired secondary sex characteristics; and sex-reassignment surgery. Petitioner completed sex-reassignment surgery in July 1995. Sex-reassignment surgery is an accepted treatment for transsexualism.

8. Petitioner completed psychiatric and psychological treatment following surgery. She has been undergoing hormone therapy as part of her treatment regime since approximately 1992. Although Petitioner completed sex-reassignment surgery and is now considered medically female, she must continue to undergo hormone treatments and medical monitoring for the rest of her life. Also as a result of the irreversible medical treatment she received, Petitioner is unable to bear or produce children.

9. Several years after completing sex-reassignment, Petitioner applied for a position with the Brevard County Sheriff's Office in the spring of 2001. Petitioner notified the Sheriff's Office of her transgender status before she applied for the position. Petitioner successfully completed Respondent's required pre-employment medical and psychological testing prior to her hire. She did not have any restrictions or request any accommodations on her ability to perform the essential functions of her position. She was hired as a deputy sheriff in May 2001 and was terminated on January 27, 2002.

10. On July 5, 2002, Petitioner filed a Charge of Discrimination with the FCHR alleging employment discrimination under the applicable state and federal law. Following the Determination: No Jurisdiction, Petitioner is pursuing her

disability claim only under state law and her sex discrimination claim under both state and federal law.

11. In her Charge of Discrimination, Petitioner alleges that she was harassed based on her transsexuality. When she reported this harassment, Petitioner alleges that Respondent did not take steps to respond to the harassment. Rather, the Inspector stated that she "should have known that it would be hard" and that "because of [her] situation, no one wanted to hire [her]." It is alleged that no steps were ever taken by Respondent to respond to the complaints of harassment. Eventually, Petitioner was terminated based on allegations of insubordination.

12. On February 21, 2003, FCHR issued a determination letter stating that it lacked jurisdiction to consider Petitioner's claims of discrimination on the basis of handicap or on the basis of sex.

CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the parties thereto, pursuant to Sections 120.569, 120.57(1), and 760.11(7), Florida Statutes.

14. Petitioner contends that she was unlawfully discharged by Respondent because it discriminated against her due to her handicap and also on the basis of her sex. Petitioner relies on

the FCRA. The FCRA prohibits certain specified unlawful employment practices and provides remedies for such violations.

15. That statute provides, in pertinent part, as follows:

760.01 PURPOSES, CONSTRUCTION; TITLE

* * *

(2) The general purposes of the Florida Civil Rights Act of 1992 are to secure for all individuals within the State freedom from discrimination because of race, color, religion, sex, national origin, age, handicap, or marital status and thereby to protect their interest in personal dignity, to make available to the state their full productive capacities, to secure the state against domestic strife and unrest, to preserve the public safety, health and general welfare, and to promote the interests, rights, and privileges of individuals within the state.

(3) The Florida Civil Rights Act of 1992 shall be construed according to the fair import of its terms and shall be liberally construed to further the general purposes stated in this section and the special purposes of the particular provisions involved.

* * *

760.10 Unlawful employment practices.-

(1) It is an unlawful employment practice for an employer:

(a) To discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex,

national origin, age, handicap, or marital status.

* * *

(8) Notwithstanding any other provisions of this section, it is not an unlawful employment practice under ss. 760.01-760.10 for an employer, . . . to:

(a) Take or fail to take any action on the basis of . . . handicap . . . in those certain instances in which . . . absence of a particular handicap . . . is a bona fide occupational qualification reasonably necessary for the performance of the particular employment to which such action or inaction is related.

16. FCHR has adopted federal standards for allocating the burden of proof in handicap discrimination claims, which are different from a standard Title VII analysis. To establish a prima facie case of handicap discrimination, Petitioner must prove:

1. That [she] is a handicapped person within the meaning of the Florida Civil Rights Act;
2. That [she] is otherwise qualified for the position in question; and
3. That [she] was discharged from her position solely by reason of her handicap.

Brand v. Florida Power Corporation, 633 So. 2d 504 at 507 and 510 (Fla. 1st DCA 1994). See also 29 U.S.C. Section 794 (Rehabilitation Act) and the ADA. Therefore, to determine whether transsexualism is a covered handicap pursuant to the

FCRA, the court must look to the ADA and the Rehabilitation Act to determine whether transsexualism is included or excluded from the definition of disability in those acts. See Razner v. Wellington Regional Medical Center, Inc., 837 So. 2d 437 at 440 (Fla. 4th DCA 2002).

17. The ADA is separated into three titles, each of which prohibits disability discrimination in a different context: Title I, 42 U.S.C. Section 12111-17, applies to discrimination in employment; Title II, 42 U.S.C. Section 12131-65, applies to discrimination in public services; and Title II, 42 U.S.C. Section 12181-89, applies to discrimination in public accommodations by private entities.

18. Title I of the ADA prohibits discrimination against qualified individuals with disabilities and defines disability as: (1) a physical or mental impairment that substantially limits one or more major life activities of such individual; (2) a record of such an impairment; or (3) being regarded as having a disability. 42 U.S.C. Section 12102(2)(A-C). Sutton v. United Airlines, 527 U.S. 471, 478, 119 S. Ct. 2139, 2144 (1999). Florida law is in agreement. Fla. Admin. Code R. 60Y-6.001(36); Brand v. Florida Power Corp., supra at 510; Razner v. Wellington Regional Medical Center, Inc., supra at 441; and Green v. Seminole Electric Cooperative, Inc., 701 So. 2d 646,

648 (Fla. 5th DCA 1997). The Rehabilitation Act defines disability similarly. 29 U.S.C. Section 701, et seq.

19. In addition to the language defining actual and perceived disabilities, the ADA and the Rehabilitation Act include language that specifically excludes certain conditions from the definition of a disability. Transsexualism is one such condition. 42 U.S.C. Section 12211(b)(1) states:

(b) Certain conditions

Under this chapter, the term "disability" shall not include--

(1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders. (emphasis added)

20. Prior to the specific exclusion of transsexualism from the Rehabilitation Act, some courts had recognized transsexualism as a disability. See Doe v. United States Postal Service, 1985 WL 9446 (D.D.C. 1985) (allowing a male to female transsexual to bring a handicap disability action against the United States Postal Service for withdrawing an offer of employment after learning of her intent to undergo the sex-reassignment surgery).

21. Prior to the passage of the 1992 Florida Civil Rights Act, FCHR considered whether Belinda Smith, a transsexual who had not undergone sex-reassignment at the time of the adverse

employment action, was terminated because of her handicap. Smith v. City of Jacksonville, Jacksonville Correctional Institute, DOAH Case 88-5451, 1991 WL 833882 (1991), FCHR Case No. 86-985 (1992). In 1985, when the facts arose in Smith, she was a male employed as a corrections officer for the City of Jacksonville. Because of transsexualism, Smith suffered from depression, felt intense stress and internal conflict, developed bleeding ulcers, drank heavily, and contemplated suicide. The employer terminated her after learning that she was transsexual and was found wearing women's clothing in public. Smith filed a charge of discrimination with FCHR following her termination alleging disability discrimination. FCHR issued a no cause determination that Smith challenged. Based on the specific facts that Smith presented at the hearing, FCHR determined that there was a substantial limitation on the major life functions of health and life and concluded that Smith was handicapped based on the interpretation of the Florida Human Rights Act of 1977. At the time of the Smith termination in 1986, the ADA had not become law, nor had transsexualism been excluded as a disability from the Rehabilitation Act.

22. With the knowledge that transsexualism had previously been recognized as a disability, Congress expressed a clear intent to exclude transsexualism as a disability under federal law. See 29 U.S.C. Section 706(8)(F)(i). While acknowledging

that the American Psychiatric Association included transsexualism as a diagnosis in the third and fourth editions of the Diagnostic and Statistical Manual of Mental Disorders (DSM-III & IV), Congress still decided to exclude transsexualism from the ADA. In accepting the amendment that eventually excluded transsexualism, Congress considered that this narrow exclusion of mental conditions would not undermine the overall purpose and intent of the ADA, but would curtail litigation from some of the more egregious employment lawsuits. 101 CONG.REC. S11173 (daily ed. Sept. 14, 1989) (statement of Senator Armstrong).

23. Despite the fact that transsexualism is a recognized mental health diagnosis, the scope of the ADA does not encompass every physical and mental discomfort or ailment. Toyota Motor Mfg., Kentucky, Inc. v. Williams, 534 U.S. 184, 198 (2002). The ADA only protects individuals that have an impairment that falls within the meaning of the term "disability" as it is defined in the ADA and interpreted by the courts. Toyota, 534 U.S. at 197.

24. Other states, whose civil and human rights acts are based on the ADA and the Rehabilitation Act, also reject transsexualism as a disability. Holt v. Northwest Training Partnership Consortium, Inc., 694 A.2d 1134 (Pa. Common Ct. 1997) (recognizing transsexualism as a medical condition but one not covered by state and federal law as a disability). But see

Rentos v. Oce-Office Systems, 1996 WL 737215 (S.D.N.Y. 1996) (finding transsexualism to be a disability under New York state law because interpretation and analysis under state law is independent of the federal law analysis). As such, any judicial or administrative determination relying upon the ADA and/or the Rehabilitation Act dictates a finding that transsexualism must be excluded from the definition of a disability.

25. Despite the finding in Smith, supra, by FCHR, which is limited to its facts which occurred prior to the enactment of the ADA and the amendments to the Rehabilitation Act, there is no basis for a finding that transsexualism is a disability pursuant to the FCRA. Both the underlying federal law and the regulations that construe the ADA and the Rehabilitation Act specifically exclude the condition from the definition of a disability, and Florida follows those interpretations. Razner, supra at 440.

26. In matters of employment discrimination based on sex, the FCRA is patterned after Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e-2. Brand, supra at 507. School Board of Leon County v. Weaver, 556 So. 2d 443 (Fla. 1st DCA 1990). In Florida, there is a long-standing rule of statutory construction which recognizes that if a state law is patterned after a federal law on the same subject, the Florida law will be accorded the same construction as in the federal courts to the

extent the construction is harmonious with the spirit and policy of the Florida legislation. Brand, supra at 509; O'Loughlin v. Pinchback, 579 So. 2d 788 (Fla. 1st DCA 1991).

27. In Department of Corrections v. Chandler, 582 So. 2d 1183 (Fla. 1st DCA 1991), the court analyzed the types of claims under the FCRA. In that case, the court noted as follows:

Pertinent federal case law discloses two means by which a discriminatory employment claim may be tried. The first, . . . , by showing disparate treatment, and the second, by showing discriminatory impact. When employing the former, a claimant must establish and employer's intentional discrimination, however, as to the latter, intentional discrimination is not required, and the claimant essentially challenges practices which are fair in form but discriminatory in operation . (Citations omitted)

Id. at 1183 n.2

28. Petitioner in this case is seeking to establish a disparate treatment claim of sex discrimination. In order for Petitioner to prevail in a disparate treatment case and obtain the relief she seeks, Petitioner must establish that Respondent's employment decision was based on a protected status, i.e., Petitioner's sex. In this case, Petitioner has the burden of presenting evidence sufficient to establish that her sex was a determining factor in the employment decision made to discharge her. See U.S. Postal Service Board of Governors v. Aikens, 460 U.S. 711, 715 (1983). Sex discrimination claims

pursuant to the FCRA, like claims under Title VII, must be evaluated in light of the test formulated by the United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). Harris v. Shelby County Board of Education, 99 F.3d 1078, 1082-83 (11th Cir. 1996). Under that test, the Plaintiff has the burden of establishing a prima facie case of discrimination. In order to satisfy that burden, the Plaintiff must prove that: (1) she was a member of a protected group; (2) an adverse employment action took place; (3) Plaintiff was similarly situated to non-protected persons who received dissimilar treatment; and (4) Plaintiff was qualified for the position. Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997); Coutu v. Martin County Board of County Commissioners, 47 F.3d 1068, 1073 (11th Cir. 1995).

29. Petitioner has alleged that Respondent discriminated against her because she is a transsexual and not because she is a woman. Federal courts considering the issue of whether transsexualism constitutes sex discrimination pursuant to Title VII follow the reasoning in Ulane v. Eastern Airlines, Inc., 742 F.2d 1081 (7th Cir. 1984) and reject transsexualism as being protected by Title VII and, thus, the FCRA. Ulane explains that:

The phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men . . . a prohibition against discrimination based on sex is not synonymous with a prohibition against discrimination based on an individual's sexual identity disorder or discontent with the sex into which they were born.

Id. at 1085.

30. Petitioner argues that some states have adopted more liberal definitions of "sex" to include sexual orientation and that "sex" means more than anatomical sex. See, e.g., Rentos v. Oce-Office Systems, supra; Maffei v. Kolaeton Industry, Inc., 626 N.Y.S.2d 391 (N.Y. 1995); and Enriquez v. West Jersey Health Systems, 777 A.2d 365 (N.J. 2001). 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. Ulane, supra at 1085. See Holloway v. Arthur Andersen & Co., 566 F.2d 659, 664 (9th Cir. 1977); Powell v. Read's Inc., 436 F.Supp. 369 (D. Md. 1977); Voyles v. Ralph K. Davies Medical Center, 403 F.Supp. 456 (N.D. Cal. 1975); Smith v. Liberty Mut. Ins. Co., 569 F.2d 325, 327 (11th Cir. 1978).

31. Based on the foregoing, transsexualism is not a disability within the meaning of the FCRA and an individual's status as a transsexual is not covered as a protected class within the meaning of sex discrimination pursuant to the FCRA.

32. Florida Administrative Code Rules 60Y-5004(2) and 60Y-5005(11) authorize the Executive Director, on behalf of FCHR, to dismiss charges of discrimination based on the lack of jurisdiction over the subject matter where there are no disputed issues of fact. FCHR had the authority to delegate particular actions to the Executive Director, including the authority to dismiss a complaint of discrimination based on the lack of subject matter jurisdiction if the investigation does not reveal any disputed issues of material fact. See Florida Commission on Human Relations v. Parrish Management, 682 So. 2d 159, 160 (Fla. 1st DCA 1996).

RECOMMENDATION

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

RECOMMENDED that the Florida Commission on Human Relations enter a final order dismissing Petitioner's Charge of Discrimination with prejudice because there is no basis to conclude that transsexualism is included in the class of persons protected by the FCRA, under either handicap or sex discrimination.

DONE AND ENTERED this 21st day of November, 2003, in
Tallahassee, Leon County, Florida.



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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.