

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF)
OPTICIANRY,)
)
Petitioner,)
)
vs.) Case No. 03-4028PL
)
NORMAN GOODMAN,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on January 15, 2004, before Administrative Law Judge Michael M. Parrish of the Division of Administrative Hearings in West Palm Beach, Florida.

APPEARANCES

For Petitioner: Brian J. Stabley, Esquire
Department of Legal Affairs
The Capitol, Plaza Level 01
Tallahassee, Florida 32399-1050

For Respondent: Norman Goodman, pro se
8246 Jog Road
Boynton Beach, Florida 33437

STATEMENT OF THE ISSUES

The issue in this case concerns whether Respondent violated Section 484.014(1)(f), Florida Statutes, in the manner alleged in an administrative complaint and, if so, what penalties should be imposed.

PRELIMINARY STATEMENT

At the final hearing in this case, Petitioner called Respondent as its only live witness, but also presented the testimony of two other witnesses by means of transcripts of the depositions of those witnesses. Petitioner offered a total of five exhibits, two of which were the previously mentioned deposition transcripts. All five of Petitioner's exhibits were received in evidence.

Respondent testified on his own behalf. Respondent did not call any additional witnesses and did not offer any exhibits.

At the conclusion of the hearing, the parties were allowed ten days from the filing of the transcript within which to file their respective proposed recommended orders. The transcript of the final hearing was filed on February 24, 2004. Both parties filed written post-hearing submissions which have been carefully considered during the preparation of this Recommended Order.

FINDINGS OF FACT

1. Respondent is, and at all times material has been, a licensed optician in the State of Florida, having been issued license number DO 2390 on November 29, 1984. At all times material, Respondent has operated, or has assisted in the operation of, a business named Fast Eyes Optical, located at 8246 Jog Road, Boynton Beach, Florida 33437.

2. On or about January 3, 2002, customer R.S., accompanied by a friend (L.E.), visited Fast Eyes Optical, where they were attended by Respondent. Both R.S. and L.E. decided they would each buy a pair of Oakley sunglasses. Respondent quoted an initial price of \$634.00 per pair for the Oakley sunglasses with prescription lenses. Ultimately, Respondent agreed to sell the Oakley sunglasses for \$500.00 per pair.

3. At the time in question, the Oakley sunglasses came from the manufacturer with non-prescription lenses made from a material known as polycarbonate. Polycarbonate lenses are noted for being impact resistant. Polycarbonate lenses are more impact resistant than lenses made of a plastic material known as CR-39. Polycarbonate lenses are particularly desirable for people who frequently engage in sports or otherwise lead a very active lifestyle in which they are at greater risk of some form of impact to their eyewear. Plastic lenses made from CR-39 have better optical characteristics than polycarbonate lenses, and, from a visual acuity point of view, are a better choice material than polycarbonate.

4. R.S. wanted to have prescription lenses in his new Oakley sunglasses. Respondent told R.S. that Respondent could put prescription lenses in the new Oakley sunglasses that would duplicate the prescription in the glasses R.S. was wearing when he came into the store, but that he would have to send off for

the prescription lenses for the Oakley sunglasses. It was ultimately agree that Respondent would obtain prescription lenses for the new Oakley sunglasses and that when the new sunglasses were ready, Respondent would mail them to R.S. at R.S.'s home in Ohio.¹

5. Using a device called a lensometer, Respondent examined the glasses R.S. was wearing when he came into the shop and determined the prescriptions that were in the lenses in those glasses. Respondent ordered lenses for the Oakley sunglasses that matched the prescriptions in the glasses R.S. was wearing that day. While R.S. was still in the shop, Respondent explained to him that Oakley did not (at that time) make prescription lenses for the frame model R.S. was buying, that the prescription lenses for the sunglasses would not be Oakley lenses, and that the lenses would be made from a plastic material called CR-39 because Respondent thought CR-39 was a better choice lens material in view of the purposes for which R.S. was buying the sunglasses.²

6. In due course Respondent mailed a pair of Oakley sunglasses to R.S. in Ohio. Shortly after receiving the sunglasses, R.S. went on a trip to Mexico. While in Mexico, and while wearing the sunglasses he had received from Respondent, R.S. fell down at least three different times at the same place on the same set of stairs in the same Mexican restaurant. His

last fall on those stairs caused R.S. to have a bruised chin, a bruised wrist, and a broken big toe on his left foot.³

7. Shortly after returning from his trip to Mexico, R.S. went to an optician in Ohio and asked the Ohio optician to examine the Oakley sunglasses he had purchased from Respondent. Upon examining the sunglasses made by Respondent, the Ohio optician communicated the following conclusions to R.S.: The right lens in those sunglasses did not match R.S.'s prescription, the lenses were made from CR-39 plastic material, and the lenses were chipped.⁴

8. On March 14, 2002, the Ohio optician sold R.S. a pair of prescription polycarbonate lenses in his correct prescription for his Oakley frame, and replaced the plastic lenses that Respondent had originally placed in the Oakley frame. The Ohio optician charged \$321.00 for the new lenses. The polycarbonate lenses sold by the Ohio optician were not Oakley lenses.

9. Not long after his visit with the Ohio optician, R.S. communicated with Respondent and complained about the things the Ohio optician had told him were wrong with the lenses furnished by Respondent. Respondent told R.S. that R.S. should mail the sunglasses to Respondent and Respondent would correct any problems with the sunglasses. R.S. refused to send the sunglasses back to Respondent because he no longer had any confidence in Respondent. Instead, R.S. asked Respondent to

send him a refund of approximately \$300.00 to cover the cost of the lenses R.S. bought from the optician in Ohio. Respondent refused to send a refund to R.S., but repeated his offer to make any necessary corrections to the sunglasses. Respondent has a policy of not giving refunds to customers, but Respondent also has a policy of doing whatever is necessary to correct any problems with any of the products he sells.⁵

CONCLUSIONS OF LAW

10. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this case. §§ 120.569 and 120.57(1), Fla. Stat.

11. In a case of this nature, Petitioner bears the burden of proving that the licensee engaged in the conduct, and thereby committed the violations, alleged in the charging instrument. Proof greater than a mere preponderance of the evidence must be presented by Petitioner to meet its burden of proof. Clear and convincing evidence of the licensee's guilt is required. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932, 935 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292, 294 (Fla. 1987); Pou v. Department of Insurance and Treasurer, 707 So. 2d 941 (Fla. 3d DCA 1998); and Section 120.57(1)(j), Florida Statutes ("Findings of fact shall be based upon a preponderance of the evidence, except in penal or licensure

disciplinary proceedings or except as otherwise provided by statute").

12. Clear and convincing evidence "requires more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" In re Graziano, 696 So. 2d 744, 753 (Fla. 1997). It is an "intermediate standard." Id. For proof to be considered "'clear and convincing' . . . the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established." In re Davey, 645 So. 2d 398, 404 (Fla. 1994), quoting, with approval, from Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983). "Although this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous." Westinghouse Electric Corporation, Inc. v. Shuler Bros., Inc., 590 So. 2d 986, 989 (Fla. 1st DCA 1991).

13. In determining whether Petitioner has met its burden of proof, it is necessary to evaluate Petitioner's evidentiary presentation in light of the specific factual allegations made in the charging instrument. Due process prohibits an agency

from taking disciplinary action against a licensee based upon conduct not specifically alleged in the charging instrument. See Hamilton v. Department of Business and Professional Regulation, 764 So. 2d 778 (Fla. 1st DCA 2000); Luskin v. Agency for Health Care Administration, 731 So. 2d 67, 69 (Fla. 4th DCA 1999); and Cottrill v. Department of Insurance, 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996).

14. Furthermore, "the conduct proved must legally fall within the statute or rule claimed [in the charging instrument] to have been violated." Delk v. Department of Professional Regulation, 595 So. 2d 966, 967 (Fla. 5th DCA 1992). In deciding whether "the statute or rule claimed [in the charging instrument] to have been violated" was in fact violated, as alleged by Petitioner, if there is any reasonable doubt, that doubt must be resolved in favor of the licensee. See Whitaker v. Department of Insurance and Treasurer, 680 So. 2d 528, 531 (Fla. 1st DCA 1996); Elmariah v. Department of Professional Regulation, Board of Medicine, 574 So. 2d 164, 165 (Fla. 1st DCA 1990); and Lester v. Department of Professional and Occupational Regulations, 348 So. 2d 923, 925 (Fla. 1st DCA 1977).

15. Paragraph 13 of the Amended Administrative Complaint asserts the following:

13. Respondent's opticianry license is subject to discipline by this Board as Respondent violated § 484.014(1)(f), Fla.

Stat., by committing fraud or deception, negligence, incompetence, or misconduct, in the authorized practice of opticianry when he charged R.S. \$500.00 for prescription Oakley sunglasses with a [sic] polycarbonate lenses and provided R.S. Oakley sunglasses that contained the wrong prescription lenses and did not provide R.S. with polycarbonate lenses.

16. Pursuant to Section 484.014(1)(f), Florida Statutes, the following acts constitute grounds for disciplinary action, as specified in Section 456.072(2), Florida Statutes: "(f) Fraud or deceit, or negligence, incompetency, or misconduct, in the authorized practice of opticianry."

17. Petitioner has failed to present clear and convincing evidence of all of the elements of the violations charged in the Administrative Complaint. Specifically, there is no clear and convincing evidence that Respondent engaged in fraud or deceit, there is no clear and convincing evidence that Respondent was negligent or incompetent, and there is no clear and convincing evidence of any other misconduct by Respondent in the authorized practice of opticianry. In the absence of such evidence, the charges must be dismissed.

RECOMMENDATION

On the basis of the foregoing findings of fact and conclusions of law, it is RECOMMENDED that the Board of Opticianry enter a Final Order concluding that the violations charged in the Administrative Complaint should be dismissed

because the evidence is insufficient to prove the violations alleged by clear and convincing evidence.

DONE AND ENTERED this 1st day of April, 2004, in Tallahassee, Leon County, Florida.



MICHAEL M. PARRISH
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of April, 2004.

ENDNOTES

1/ Respondent also made similar arrangements with the friend (L.E.) who came into the shop with R.S. This case does not involve any issues regarding the sale to L.E.

2/ There was conflicting testimony regarding some of the findings of fact in this paragraph. The conflicts have been resolved in favor of Respondent's version of the facts, which version has been found to be more credible than the conflicting testimony of R.S.

3/ In his testimony R.S. suggests that his falls on the stairs were caused, at least in part, by distorted vision resulting from an incorrect prescription in one of the lenses of the glasses he purchased from Respondent. The fact that R.S. fell at least three times at the same place on the same set of stairs in the same restaurant, but did not fall anywhere else, suggests

that it is more likely that the falls were due to some defect in the design of the stairs than to a defect in the sunglasses.

4/ Only one of the conclusions reached by the Ohio optician is supported by clear and convincing evidence. That is the conclusion that the lenses were made from CR-39 plastic material. The conclusion that the prescription in one of the lenses provided by Respondent did not match R.S.'s prescription is not supported by clear and convincing evidence for several reasons. First, the Ohio optician did not write down the results of her examination of the lenses provided by Respondent, so she cannot say whether any difference was a slight difference or a large difference. Second, it is not clear from the testimony of the Ohio optician whether she compared the sunglasses provided by Respondent to the glasses R.S. was wearing when R.S. bought the Oakley sunglasses. That is the only comparison that is relevant to whether Respondent provided the correct prescriptions. The conclusion that the lenses in the Oakley sunglasses were chipped is not supported by clear and convincing evidence because it is inconsistent with the testimony of R.S. (R.S. contends he saw a chip on the inside of one lens, but the Ohio optician claims to have seen chips on the outside of the lenses.) Further, in view of R.S.'s mishaps on the Mexican stairs, it is more likely that any chips on the lenses of the sunglasses were caused by the falls than by any act or omission of Respondent.

5/ Respondent's willingness to make good on the products he sells is reflected in the fact that L.E., the friend who bought Oakley sunglasses at the same time as R.S., was unhappy with his sunglasses and Respondent provided L.E. with a new frame and new lenses with no additional charge to L.E.

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.