6-22-04

STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

FILED
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DIVISION OF ADMINISTRATIVE HEARINGS

MADALYNN A. SHEPLEY,

Petitioner,

v.

LAZY DAYS RV CENTER, INC.,

Respondent.
_____/

EEOC Case No. NONE

FCHR Case No. 23-00302

DOAH Case No. 04-1019 DSM

FCHR Order No. 04-140 Clos

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

Petitioner, MADALYNN A. SHEPLEY, filed a Complaint of Discrimination pursuant to Florida Civil Rights Act of 1992, Sections 760.01-760.11, Florida Statutes, alleging that the Respondent, LAZY DAYS RV CENTER, INC., committed an unlawful employment practice resulting in termination of her employment because of her disability and gender (sex). The allegations set forth in the complaint were determined to be outside the jurisdiction of the Commission and on February 11, 2004, the Executive Director issued his determination of No Jurisdiction. Subsequently, the Petitioner filed a Petition for Relief and a hearing was held May 7, 2004, in Tampa, Florida. The substance of the hearing was placing into the record the results of a telephone conference call held between counsel for both parties and the ALJ on May 6, 2004. Their joint stipulations were also placed into the record.

Administrative Law Judge Daniel Manry, having considered the filed materials, issued his Recommended Order of Dismissal dated June 22, 2004.

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 and Conclusions of Law

The ALJ found that the Petitioner was a preoperative transsexual woman. Respondent employed Petitioner as an "RV technician" from August 1999 until January 7, 2002, when Respondent terminated Petitioner's employment. We adopt these findings of fact.

The ALJ concluded that there is no basis for concluding that transsexualism is a disability pursuant to FCRA and specifically recognized that the underlying federal law and the regulations that construe the ADA do not recognize transsexualism as a disability. 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 he found no allegation, nor did the Petitioner offer evidence, of a "separate disability" affecting one or

more of her major life functions; nor was there evidence that the Respondent perceived her as disabled.

The ALJ further concluded that "the Commission also determined, as a matter of law, that the prohibition in Chapter 760, Florida Statutes (2001), against discrimination on the basis of sex does not prohibit discrimination on the basis of sexual identity or transsexuality" and gave deference to that determination. However, in a recent case, a Commission panel determined that a transsexual, as a man or woman, may maintain an action for discrimination based on sex. Fishbaugh v. Brevard County Sheriff's Office, FCHR Order # 04-103 (FCHR August 20, 2004).

We should note that the ALJ mistakenly cited the Recommended Order in that case as a Final Order of the Commission. We would also like to note that the ALJ mistakenly asserted that the Commission had no substantive jurisdiction to make a determination of the legal sufficiency of allegations. These are errors; albeit, harmless errors in light of the Commission action taken herein.

We modify the conclusions of law accordingly.

In modifying the 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 the jurisdiction of the Commission 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

Both Parties filed exceptions to the Administrative Law Judge's Recommended Order.

Petitioner filed nine (9) exceptions to the Administrative Law Judge's Recommended Order in a document entitled, "Petitioner's Exceptions to Recommended Order of Dismissal and Petitioner's Motion for Stay Pending Decision in Similar Matter."

Exceptions 1, 4, 5, 6, 7, 8 & 9 refer basically to the creation of a factual record for both the Commission determination and the Recommended Order. The Parties stipulated that the facts alleged in the pleadings were sufficient to raise the questions of law at issue here: whether the Commission had jurisdiction over a matter involving 1) a disability claim by a transsexual; or 2) a sexual discrimination claim by a transsexual. The ALJ's denial of the Motion to Dismiss and his ruling on the questions of law moot these points. The exceptions are rejected.

Exception 2 challenges the ALJ's statement of characterizing the Commission's determination to be based on a complaint pursuant to the Americans with Disabilities Act ("ADA"). The ALJ clearly delineated the issue to be whether the Commission had jurisdiction under Chapter 760, FS, to determine if the Respondent discriminated against the Petitioner on the basis of her sex or disability. Since he ruled directly on those issues, this exception is moot and is rejected.

Exception 3 challenges the ALJ's characterization of the Petitioner's sex discrimination claim. The Commission accepts this exception to the extent it supports its conclusions that, as a man or woman, transsexuals may maintain an action for sexual discrimination.

Respondent filed three (3) exceptions to the Administrative Law Judge's Recommended Order in a document entitled, "Respondent's Exceptions to Recommended Order of Dismissal."

Respondent's first two exceptions (to Paragraphs Nos. 8, 9 & 17 and 7 & 21) raise similar concerns to the Petitioner's exceptions as to the creation of a factual record. Since both Parties stipulated that the facts alleged in the pleadings were sufficient to raise the questions of law involved and the ALJ ruled on them, the exceptions are mooted and are rejected.

Respondent's third exception (to Paragraph 16) challenges the ALJ's discussion of the law and the Commission's position. The arguing of the weight of the case law is best left to review, appellate arguments and statements of supplemental authorities. The Commission is aware of the case law and, as an exception, this exception is rejected.

Dismissal as to basis of disability

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

Remand as to basis of sex (gender)

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

The parties have the right to seek judicial review of the Final Order of Dismissal. 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 10th day of November, 2004.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS

Commissioner Mario M. Valle, Panel Chairperson
Commissioner Roosevelt Paige
Commissioner Aletta Shutes

Filed this 10th day of November, 2004
in Tallahassee, Florida.

Violet Crawford, Clerk
Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301
(850) 488-7082

Copies furnished to:

For Petitioner:

Karen M. Doering, Esquire
National Center for Lesbian Rights
3708 West Swann Avenue
Tampa, Florida 33609-4452

For Respondent:

Richard McCrea, Esquire
ZINOBER AND McCREA, P.A.
PO Box 1378
201 East Kennedy Boulevard, Suite 800
Tampa, Florida 33601-1378

Honorable Daniel Manry, 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 10th day of November, 2004.

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