

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MADALYNN A. SHEPLEY,)
)
 Petitioner,)
)
 vs.) Case No. 04-1019
)
 LAZY DAYS RV CENTER, INC.,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the administrative hearing in this proceeding on behalf of the Division of Administrative Hearings (DOAH), on May 7, 2004, in Tampa, Florida.

APPEARANCES

For Petitioner: Karen M. Doering, Esquire
National Center for Lesbian Rights
3708 West Swann Avenue
Tampa, Florida 33609-4522

For Respondent: Richard McCrea, Esquire
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STATEMENT OF THE ISSUE

The sole issue for determination is whether the Florida Commission on Human Relations (Commission) has jurisdiction under Chapter 760, Florida Statutes (2003), to determine if

there is reason to believe that Respondent discriminated against Petitioner on the basis of her sex or disability.

PRELIMINARY STATEMENT

By letter dated February 11, 2004, the Commission notified Petitioner that the Commission had no jurisdiction to determine if it had cause to believe that Respondent discriminated against Petitioner. Petitioner requested an administrative hearing on March 17, 2004, and the Commission referred the matter to DOAH to conduct an administrative hearing concerning the Commission's proposed denial of jurisdiction.

On April 19, 2004, Respondent filed Respondent's Motion to Dismiss for lack of jurisdiction. Petitioner filed Petitioner's Response to Motion to Dismiss on April 29, 2004. The ALJ reserved ruling on the Motion to Dismiss and scheduled an administrative hearing for May 7, 2004.

At the hearing, neither party presented any evidence. The parties requested a Transcript that was filed with DOAH on May 20, 2004.

FINDINGS OF FACT

1. It is undisputed that Petitioner is a preoperative transsexual woman. Respondent employed Petitioner as an "RV technician" from sometime in August 1999, until January 7, 2002, when Respondent terminated Petitioner's employment.

2. On October 25, 2003, Petitioner filed a Charge of Discrimination with the Commission. In relevant part, the Charge of Discrimination alleges that Respondent discriminated against Petitioner on the basis of her sex and disability.

3. On February 11, 2004, the Commission issued its Determination: No Jurisdiction (determination). The determination raises issues of law and fact.

4. The Commission determined, as a matter of law, that Petitioner's transsexualism is not a disability covered by the Americans with Disabilities Act (ADA). 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. The foregoing conclusions of law involve matters over which the Commission has substantive jurisdiction within the meaning of Subsection 120.57(1)(1), Florida Statutes (2003).

5. The Commission further determined the Charge of Discrimination was legally insufficient to allege facts showing that Petitioner's transsexuality impaired her major life activities or that Respondent regarded Petitioner as disabled. A determination of the legal sufficiency of allegations is not a matter over which the agency has substantive jurisdiction.

6. The Charge of Discrimination does not allege that Petitioner's transsexuality impaired her major life activities. The Charge of Discrimination merely alleges that Petitioner has a medical condition identified as Gender Identity Disorder (GID) and receives medical treatment for her condition.

7. The Charge of Discrimination is sufficient to allege that Respondent regarded Petitioner as disabled. In relevant part, the Charge of Discrimination alleges Petitioner informed Respondent that Petitioner had a medical condition that required medical treatment. Petitioner allegedly "took vacation at Christmas time" and returned to work in her new gender on December 29, 2001. On January 7, 2002, Respondent allegedly terminated Petitioner's employment because Petitioner was a distraction to other employees and to some customers and because "it was not good for the company."

8. The Commission may have based its determination, in part, on findings of fact. The Commission apparently found Petitioner failed to show that Respondent regarded Petitioner as disabled or that Petitioner suffered symptoms of a disability separate and apart from transsexuality; such as depression, suicide ideation, situational alcohol abuse, or other symptoms of poor health (a separate disability). In relevant part, the Commission's determination stated:

The Commission conducted an investigation of this matter, which has been reviewed and approved by the Commission's office of General Counsel.

9. The Commission's investigation appeared to be a factual investigation. The determination differentiates the Commission's investigation from matters of law. In relevant part, the determination states:

The Office of General Counsel has reviewed the case file, investigative materials, and applicable case law. . . .

* * *

. . . the file contains no evidence which substantiates the disability discrimination claim. As a result, Complainant has failed to establish a prima facie case of discrimination based on disability. . . .
(emphasis supplied)

10. The ALJ conducted the administrative hearing, in part, to provide an opportunity for Petitioner to submit evidence to support her claim that Respondent regarded her as disabled. The administrative hearing also provided an opportunity for Petitioner to submit evidence showing that Petitioner suffered from a separate disability.

11. Petitioner submitted no evidence to show that Respondent regarded her as disabled or that Petitioner suffers from a separate disability. The trier of fact makes no findings on either factual issue.

CONCLUSIONS OF LAW

12. Respondent's Motion to Dismiss contains factual allegations that must be resolved against Respondent. Similarly, all reasonable inferences that may arise from the factual allegations must be resolved against Respondent. Salit v. Ruden, McClosky, Smith, Schuster & Russell, P.A., 742 So. 2d 381, 383 (Fla. 4th DCA 1999). The Motion to Dismiss is denied.

13. The foregoing presumptions against Respondent are limited to a resolution of the Motion to Dismiss. They do not apply to the broader issue of whether the Commission has jurisdiction to determine if it has cause to believe that Respondent discriminated against Petitioner on the basis of her sex or disability.

14. DOAH has jurisdiction over the parties and subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2003). The parties received adequate notice of the administrative hearing.

15. The Commission does not have jurisdiction to determine if there is cause to believe that Respondent discriminated against Petitioner on the basis of her sex or her disability. The Commission determined that the prohibition in Chapter 760, Florida Statutes (2001), against discrimination on the basis of sex does not prohibit discrimination based on transsexualism. The Commission also determined that transsexualism is not a

disability under the ADA. Both determinations are conclusions of law concerning matters within the substantive jurisdiction of the Commission. § 120.57(1)(1), Fla. Stat. (2003).

16. Counsel for Petitioner submitted a thorough memorandum of law suggesting that the Commission's position conflicts with the weight of judicial decisions in federal courts and in other states. A Florida appellate court may, or may not, agree with counsel. However, DOAH is an administrative agency and is bound by the deference mandated by the legislature in Subsection 120.57(1)(1), Florida Statutes (2003).

17. The Commission may have based its determination of no jurisdiction, in part, on findings of fact. The determination issued by the Commission is ambiguous and may have included findings that Petitioner does not suffer from a separate disability; even though the Charge of Discrimination does not allege a separate disability.

18. In previous cases, the Commission has exercised jurisdiction to determine if there is cause to believe that an employer discriminated against an employee based on a separate disability. In Fishbaugh v. Brevard County Sheriff's Office, FCHR Case No. 22-02697 (2003), the Commission entered a Final Order that distinguished transsexuality from a separate disability. In holding against the employee in Fishbaugh, the Commission distinguished the facts in Fishbaugh from those in an

earlier unrelated proceeding involving a person identified in Fishbaugh as Belinda Joelle Smith (Smith). Ms. Smith suffered from a separate disability.

19. In relevant part, the Commission's Final Order in Fishbaugh explained the factual distinction between Fishbaugh and Smith by stating that the hearing officer in Smith found:

Petitioner's transexualism caused ongoing suicide ideation, situational alcohol abuse and poor health due to bleeding ulcers . . . these symptoms interfered with Petitioner's full and normal use of her mental and physical major life faculties and limited Petitioner's major life activities, i.e., life and health. The disparity between Smith's physicality and feelings about herself caused her to be at odds with the rest of . . . her world. That disparity, and her need to hide it, left her unable to merge the mental or physical aspects of her identity, manifesting in the loss of her health, depression and the will to live.

20. If it were shown that Petitioner has a separate disability and that the Commission based part of its determination on a contrary finding, the Commission may be bound by the doctrine of administrative stare decisis to accept jurisdiction in this proceeding. Plante v. Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering, 716 So. 2d 790, 792 (Fla. 4th DCA 1998); Gessler v. Department of Business and Professional Regulation, 627 So. 2d 501, 503-504 (Fla. 4th DCA 1993). The Commission previously accepted jurisdiction over such issues in Fishbaugh and Smith.

However, Petitioner submitted no evidence at the hearing to show that Petitioner has a separate disability.

21. The Charge of Discrimination alleges facts that, if they were proven, would be sufficient to show that Respondent regarded Petitioner as disabled and that Respondent discriminated against Petitioner based upon a perceived disability. However, Petitioner submitted no evidence to prove either allegation.

RECOMMENDATION

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

RECOMMENDED that the Commission enter a Final Order determining that the Commission lacks jurisdiction to determine if it has cause to believe that Respondent discriminated against Petitioner on the basis of her sex or a disability.

DONE AND ENTERED this 22nd day of June, 2004, in Tallahassee, Leon County, Florida.



DANIEL MANRY
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of June, 2004.

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.