

1-26-05

STATE OF FLORIDA  
COMMISSION ON HUMAN RELATIONS

FILED

2005 APR 28 P 2:13

OSWALD NORTON,

Petitioner,

AP

EEOC Case No. NONE

FCHR Case No. 2004-21029

DIVISION OF  
ADMINISTRATIVE  
HEARINGS

v.

DOAH Case No. 04-3068

RSC  
CLOSED

JOHN G'S RESTAURANT, INC.,

FCHR Order No. 05-049

Respondent.

**FINAL ORDER DISMISSING PETITION FOR  
RELIEF FROM AN UNLAWFUL EMPLOYMENT PRACTICE**

Preliminary Matters

Petitioner Oswald Norton filed a complaint of discrimination pursuant to the Florida Civil Rights Act of 1992, Sections 760.01 - 760.11, Florida Statutes (2001), alleging that Respondent John G's Restaurant, Inc., committed an unlawful employment practice on the basis of Petitioner's disability (unspecified in Complaint, but identified as diabetes in Petition for Relief) when it terminated Petitioner from his position.

The allegations set forth in the complaint were investigated, and, on July 27, 2004, the Executive Director issued his determination finding that there was no reasonable cause to believe that an unlawful employment practice had occurred.

Petitioner filed a Petition for Relief from an Unlawful Employment Practice, and the case was transmitted to the Division of Administrative Hearings for the conduct of a formal proceeding.

An evidentiary hearing was held in West Palm Beach, Florida, on November 22, 2004, before Administrative Law Judge Robert S. Cohen.

Judge Cohen issued a Recommended Order of dismissal, dated January 26, 2005.

Pursuant to notice, public deliberations were held on April 19, 2005, by means of Communications Media Technology (namely, telephone) before this panel of Commissioners. The public access point for these telephonic deliberations was the Office of the Florida Commission on Human Relations, 2009 Apalachee Parkway, Suite 100, Tallahassee, Florida, 32301. At these deliberations, the Commission panel determined the action to be taken on the Petition for Relief.

Findings of Fact

We find the Administrative Law Judge's findings of fact to be supported by competent substantial evidence.

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

### Conclusions of Law

We find the Administrative Law Judge's application of the law to the facts to result in a correct disposition of the matter.

The Administrative Law Judge concluded that in order to establish a prima facie case of disability discrimination, "a [P]etitioner must establish that (1) he is physically disabled; (2) he is a 'qualified individual,' meaning he can perform the essential functions of the job in question with or without reasonable accommodation; and (3) he was discriminated against because of his disability." Recommended Order, ¶ 29.

With regard to the third element of the above test cited by the Administrative Law Judge, the Commission has indicated that this element, establishing a causal connection between Petitioner's protected class and the adverse employment action complained about, is actually what a Petitioner is attempting to show by establishing a prima facie case of discrimination, and that this element should not, itself, be an element of the test for a prima facie case. See, Baxla v. Fleetwood Enterprises, Inc., d/b/a Fleetwood Homes of Florida, Inc., 20 F.A.L.R. 2583, at 2585 (FCHR 1998), citing Pugh v. Walt Disney World, 18 F.A.L.R. 1971, at 1972 (FCHR 1995), and Martinez v. Orange County Fleet Manager, 21 F.A.L.R. 163, at 164 (FCHR 1997). See, also, Curry v. United Parcel Service of America, 24 F.A.L.R. 3166, at 3167 (FCHR 2000) for application of this specifically to a handicap/disability discrimination case.

(Note that the test cited by the Administrative Law Judge is essentially the same as that set out in Brand v. Florida Power Corporation, 633 So. 2d 504 (Fla. 1st DCA 1994), at page 510. The Brand decision identifies three types of handicap discrimination cases: first, one in which the employer contends the employment decision was made for reasons unrelated to the person's handicap; second, one wherein the employer contests the plaintiff's claim that he or she is a qualified handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question; and three, one in which the employer asserts it is unable to provide the accommodation necessary, because it would impose an undue hardship on its operations. See Brand, at 508, footnote 5. That particular test cited by the Administrative Law Judge was applicable in the Brand case because the Brand case fell into the second category of cases listed above. The instant case falls into the first category of cases, and, thus, the test cited by the Administrative Law Judge is inappropriate for this case. Id.)

A Commission panel has indicated, "to establish a prima facie case of handicap discrimination the Petitioner must show: (1) she is handicapped; (2) that she performed or is able to perform her assigned duties satisfactorily; and (3) that despite her satisfactory performance, she was terminated. Swenson-Davis v. Orlando Partners, Inc., 16 F.A.L.R. 792, at 798 (FCHR 1993). If this burden is sustained, the Respondent must articulate some legitimate nondiscriminatory reason for its action. Hart v. Double Envelope Corporation, 15 F.A.L.R. 1664, at 1673 (FCHR 1992). Once this is articulated, the burden returns to the Petitioner to demonstrate the Respondent intentionally discriminated against the Petitioner. See St. Mary's Honor Center v. Hicks, 113 S. Ct.

2742 (1993).” O’Neill v. Sarasota County School Board, 18 F.A.L.R. 1129, at 1130 (FCHR 1994) as cited in Curry v. United Parcel Service of America, 24 F.A.L.R. 3166, at 3167 (FCHR 2000).

We modify accordingly the Administrative Law Judge’s conclusions of law regarding the establishment of a prima facie case of handicap discrimination.

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 modifications are 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 being substituted are as or more reasonable than the conclusions of law which have been rejected. See, Section 120.57(1)(1), Florida Statutes (2003).

We further note that the error in the test used to establish a prima facie case by the Administrative Law Judge is harmless since in both that test and the appropriate test Petitioner must establish that he is disabled/handicapped within the meaning of the statute, and the Administrative Law Judge concluded that Petitioner failed to establish this (See Recommended Order, ¶ 36). Further, even if a prima facie case of discrimination had been established, the Administrative Law Judge concluded that Respondent articulated nondiscriminatory reasons for terminating Petitioner, namely another in a history of emotional outbursts followed by three days of not appearing for work or calling to say he was ill (See Recommended Order, ¶ 38), and there was no credible and persuasive evidence that Respondent’s articulated reasons for its actions were a pretext for discrimination (See Recommended Order, ¶ 39).

With the indicated correction, we adopt the Administrative Law Judge’s conclusions of law.

### Exceptions

Petitioner filed exceptions to the Administrative Law Judge’s Recommended Order in a document entitled, “Petitioner’s Exceptions to the Recommended Proposed Final Order.”

Petitioner’s exception document appears to be a proposed order from the Petitioner’s perspective as opposed to actual exceptions to the Administrative Law Judge’s Recommended Order. As such the document takes issue with the facts found, and not found, and inferences drawn from the evidence presented by the Administrative Law Judge.

The Commission has stated, “It is well settled that it is the Administrative Law Judge’s function ‘to consider all of the evidence presented and reach ultimate conclusions of fact based on competent substantial evidence by resolving conflicts, judging the credibility of witnesses and drawing permissible inferences therefrom. If the evidence

presented supports two inconsistent findings, it is the Administrative Law Judge's role to decide between them.' Beckton v. Department of Children and Family Services, 21 F.A.L.R. 1735, at 1736 (FCHR 1998), citing Maggio v. Martin Marietta Aerospace, 9 F.A.L.R. 2168, at 2171 (FCHR 1986)." Barr v. Columbia Ocala Regional Medical Center, 22 F.A.L.R. 1729, at 1730 (FCHR 1999).

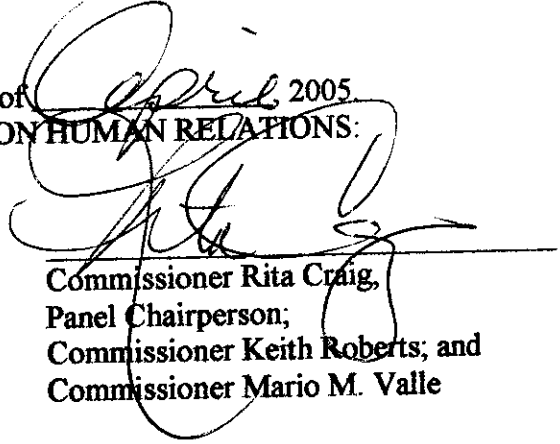
We reject Petitioner's exceptions.

Dismissal

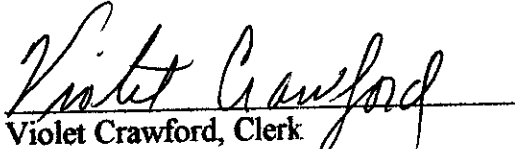
The Petition for Relief and Complaint of Discrimination are DISMISSED with prejudice.

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 9 day of April, 2005  
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

  
Commissioner Rita Craig,  
Panel Chairperson;  
Commissioner Keith Roberts; and  
Commissioner Mario M. Valle

Filed this 26<sup>th</sup> day of April, 2005,  
in Tallahassee, Florida.

  
Violet Crawford, Clerk  
Commission on Human Relations  
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Robert S. Cohen, Administrative Law Judge, DOAH

James Mallue, Legal Advisor for Commission Panel

I HEREBY CERTIFY that a copy of the foregoing has been mailed to the above listed addressees this 26<sup>th</sup> day of April, 2005.

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